Appeal No. 22-1198

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MAINE FOREST PRODUCTS COUNCIL; PEPIN LUMBER, INC.;
STÉPHANE AUDET,

Plaintiffs-Appellees

v.

PATTY CORMIER, in her official capacity as
Director of the Maine Bureau of Forestry;
AARON M. FREY, in his official capacity as
Attorney General for the State of Maine,

Defendants-Appellants

On Appeal from The United States District Court for the District of Maine

BRIEF OF APPELLEES

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CORPORATE DISCLOSURE STATEMENT
MAINE FOREST PRODUCTS COUNSEL

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellee Maine Forest Products Council, discloses that it is a Maine non-profit corporation of which there is no parent corporation and no persons, association of persons, firm, partnership, limited liability company, joint venture, corporation (including parent or affiliated corporations), or any similar entity that owns a ten percent or greater ownership interest in the Maine Forest Products Council.

CORPORATE DISCLOSURE STATEMENT
PEPIN LUMBER, INC.

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellee Pepin Lumber, Inc., discloses that it is a Maine corporation. Pepin Lumber, Inc. has no parent corporation and the only persons, associations of persons, firms, partnerships, limited liability companies, joint ventures, corporations (including parent or affiliated corporations), or any similar entity who holds a ten percent or greater ownership interest in Pepin Lumber, Inc. is Maurice Pepin.

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

This case presents the following questions:

1. Did the District Court abuse its discretion when it preliminarily enjoined the enforcement of Maine Public Law 280 (the "Act") after holding it is preempted by the federal Immigration and Nationality Act ("INA") because the Act impermissibly "strikes a different balance between the dual goals of protecting employers and protecting the local workforce in a way that inherently conflicts with congressional intent"?

2. Did the District Court abuse its discretion when it preliminarily enjoined the enforcement of the Act on the additional grounds the Act violates the equal protection clauses of the United States and Maine constitutions because it discriminates solely on the basis of alienage, in furtherance of alleged state interests which not only are not compelling, but, indeed, are of dubious legitimacy, and does so in a way not narrowly tailored to advance those interests?

Appellees respectfully state the answer to each question is no. The District Court properly found Appellees likely to succeed on the merits of their preemption and equal protection challenges to the Act and, accordingly, did not err when it preliminary enjoined the enforcement of the law.

STATEMENT OF THE CASE

The Act permanently and in blanket fashion prohibits all persons lawfully present in the United States by virtue of federally granted H-2A immigration status from hauling forest products point-to-point within the State of Maine and, similarly, prohibits landowners from hiring or contracting with lawful H-2A workers for this purpose. The Act does so in direct contravention of long-standing provisions of the INA and its implementing regulations, which authorize federal authorities to admit persons into the United States for the purpose of performing this specific work.

The INA. The INA and its implementing regulations establish a "comprehensive and complete code" for lawful immigration to the United States and create different categories of noncitizens with differing degrees of rights to lawfully live and work in this country. *Toll v. Moreno*, 458 U.S. 1, 13-14 (1982). This framework sets forth a precise taxonomy of immigration statuses and corresponding benefits. As the State avoids using the INA's definitions of relevant immigration statuses in favor of distinctions it has devised on its own,[1] some discussion of these statuses is merited.

[1] Consistent with the Act's intention to displace federal immigration law within Maine, the State frequently employs contrived immigration terminology that does not correspond to any federal immigration definitions. *See, e.g.*, State Brief at 2 n.2 (using the terms "domestic worker" and "work visa" without citation to federal law) and 18 (using the term "foreigners").

The INA first distinguishes between (a) citizens and nationals of the United States and (b) noncitizens, defined in the statute as "aliens." *See* 8 U.S.C. § 1101(a)(3) (defining "alien" as "any person not a citizen or national of the United States"). The statute then divides "aliens" into two separate groups: "immigrants" and "nonimmigrants." The category of "immigrant" most notably includes Lawful Permanent Residents ("LPRs"). LPRs—known commonly as "green card" holders—may reside permanently in the United States as immigrants. *See id.* § 1101(a)(20). The category of "nonimmigrant" includes those who seek temporary entry into the United States for specific, time-limited purposes, such as ambassadorships, tourism for pleasure, or the performance of specific employment services, such as through the H-2A program discussed herein. *See id.* § 1101(a)(15)(A)-(V).

The INA and its implementing regulations establish different pathways by which immigrants and nonimmigrants can work lawfully in the United States. The regulations establish three basic categories of aliens eligible for lawful work authorization. *See generally* 8 C.F.R. § 274a.12. The first category consists of aliens generally authorized for employment incident to status, such as LPRs. *See id.* § 274a.12(a). The second category consists of aliens authorized for employment with a specific employer incident to their status, such as the H-2A workers. *See id.* § 274a.12(b)(9). The third category consists of aliens who are eligible for and must

apply for a separate employment authorization document, such as individuals who have been granted deferred action from removal or asylum applicants. *See id.* §§ 274a(c)(9) and (14).[2]

H-2A Temporary Agricultural Workers. H-2A workers are one category of nonimmigrants, defined to include a person "having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services. . . ." 8 U.S.C. § 1101(a)(15)(H)(ii)(a).[3] For purposes of H-2A status, federal regulations define "agriculture" to include "logging employment," which the regulations in turn define to include "moving trees and logs from the stump to the point of delivery"—*e.g.*, driving log trucks. *See* 20 C.F.R. §§ 655.103(c) and (c)(4); 29 C.F.R. § 501.3(b) (same). Federal law thus expressly authorizes the executive branch to admit foreign nationals into the United States on a temporary basis specifically to drive log trucks.

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[2] The Court should note how the concept of a "visa" operates within immigration law. Put simply, a "visa" is a physical document, not an immigration status. For instance, an eligible nonimmigrant may apply for a "nonimmigrant visa" to travel to the United States." 8 U.S.C. § 1101(a)(26). Not all nonimmigrants require visas to be lawfully admitted to the United States, however. For example, Canadian citizens generally do not require visas to be admitted to the United States in lawful nonimmigrant statuses, including H-2A status. *See* 8 C.F.R. § 212.1(a). Accordingly, this brief uses the term "H-2A status" rather than "H-2A visa" and refers to "H-2A workers" to describe persons lawfully present in the United States pursuant to the H-2A program.

[3] The letters assigned to the last three subsections of this statute—"(H)(ii)(a)"—give rise to the term "H-2A."

The H-2A program aims to decrease agricultural employers' reliance on undocumented labor by providing an avenue to lawfully employ temporary agricultural workers. *See, e.g.*, 73 Fed. Reg. 76891, 76891 (Dec. 18, 2008). At the same time, the program protects U.S. workers by requiring employers to confirm there are no sufficient workers available to perform the work that the H-2A employee will perform and that employment of H-2A workers will not impact the wages and working conditions of U.S. workers. *See* 8 U.S.C. §§ 1188(a)(1)(A)-(B); *see also* 8 C.F.R. § 655.103(a).

United States Citizenship and Immigration Services ("USCIS")—the benefits granting arm of the United States Department of Homeland Security ("DHS")—may generally approve petitions for H-2A workers only for nationals of countries that DHS, in consultation with the State Department, has designated as participating H-2A countries. *See* 8 C.F.R. § 214.2(h)(5)(i)(F)(1)(i). H-2A employment, therefore, is open to nationals of all countries designated on the H-2A list as well as nationals of other countries whose employment is deemed in the national interest.[4]

[4] *See Identification of Foreign Countries Whose Nationals Are Eligible to Participate in the H-2A and H-2B Nonimmigrant Worker Programs*, 86 Fed. Reg. 215, 62562 (November 10, 2021) (designating the list of countries whose nationals are eligible to participate in the H-2A nonimmigrant worker program). USCIS may approve H-2A petitions for nationals of countries not on the list on a case-by-case basis. *See* 8 C.F.R. § 214.2(h)(5)(i)(F)(1)(ii).

In contrast with other employment-based nonimmigrant categories where a labor market test is not required, a U.S. employer may petition for H-2A nonimmigrant workers only if the Secretary of Labor certifies that: (a) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition; and (b) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed. *See* 8 U.S.C. §§ 1188(a)(1)(A)-(B); *see also* 8 C.F.R. § 655.103(a).

Obtaining United States Department of Labor ("DOL") certification requires navigating a painstaking process that tests the employer's need for H-2A workers in real time, reflecting changing circumstances in the labor market. *See* 20 C.F.R. §§ 655.121, 655.143. While this process includes a ministerial role for the state where the employer seeks to employ H-2A workers, as described below, all discretionary decisions concerning the approval of a petition for H-2A workers are expressly reserved to the DOL, which has "has the ultimate responsibility for all labor certification determinations," and USCIS, which makes final determinations regarding qualifications for H-2A status. *See* 75 Fed. Reg. 6883, 6903 (February 12, 2010); *see also* 20 C.F.R. § 655.160 (identifying DOL as the entity authorized to grant H-2A temporary labor certifications) and § 655.100 (identifying DOL as the entity authorized to make factual determinations required for labor certification as

to whether there are sufficient able, willing, and qualified U.S. workers available to perform the work and whether the employment of H-2A workers will adversely affect the wages and working conditions of U.S. workers); 8 C.F.R. § 214.2(h)(1)(i) (identifying USCIS as the entity authorized to make final determination on noncitizen's eligibility for H-2A status).

As the following process demonstrates, the DOL certification process goes to great lengths to ensure that the hiring of H-2A workers will not displace willing and available U.S. workers.

First, the employer must file a federal Form ETA-790A job order with the "State Workforce Agency" ("SWA") in the area where it seeks to employ H-2A workers, which form requires the employer to accept and/or certify various requirements, including: (1) a prohibition against preferential treatment of aliens; (2) the job qualifications and requirements; and (3) the minimum benefit, wage, and working conditions for the position. *See* 20 C.F.R. §§ 655.121, 655.122.[5] The wage advertised, offered, and paid must be the higher of a specific DOL-defined wage, the prevailing hourly wage or piece rate, any applicable collective bargaining agreement rate, or the federal or state minimum wage. *See id*. § 655.120.

[5] In Maine, the SWA is the Bureau of Maine Employment Services, within the Maine Department of Labor. *See* U.S. Dep't of Labor, State Contacts for H-2A and H-2B Visas, https://www.dol.gov/agencies/eta/foreign-labor/contact (last visited June 6, 2022).

The SWA reviews the job order for compliance with 20 C.F.R. § 653, Subpart F[6] and 20 C.F.R. § 655.122, and must notify the employer of any deficiencies no later than 7 calendar days after submission of the job order. *See id*. § 655.121(b)(1). If approved, the SWA places the job order into intrastate clearance where it remains active until 50% of the period of employment certified by DOL is completed.[7] *See id.* §§ 655.121(c), 655.135(d). The SWA then refers qualified U.S. workers to the employer and the employer may reject any such workers only for bona fide and lawful job related reasons, but, otherwise, must employ the worker in lieu of any prospective H-2A worker. *See id*. §§ 655.121(d), 655.135(a).

In short, the SWA serves as a job posting service, advertising the relevant job opportunity to workers within the SWA's jurisdiction, but making no decisions concerning the grant or approval of the labor certification or the grant of H-2A status, authority expressly reserved to DOL and USCIS, respectively. *See* 20 C.F.R. § 655.100 (identifying DOL, not the SWA, as the entity authorized to make factual

[6] 20 C.F.R. § 653, Subpart F states that no Wagner-Peyser Act Employment Service ("ES") or SWA official may place a job order seeking workers to perform farmwork into intrastate or interstate clearance unless the ES office and employer have attempted and have failed to obtain sufficient workers within the local labor market area or the ES office anticipates a shortage of local workers, reflecting the SWA's role in implementing federal policy with respect to the case-by-case determination concerning the availability of U.S. workers. *See* 20 C.F.R. §§ 653.501(a)(1)-(2).

[7] As explained below, employers must hire U.S. workers to fill jobs identified for H-2A workers up until 50% of the period of employment certified by DOL, even if that means displacing an H-2A worker already present and doing the job.

determinations required for labor certification as to whether there are sufficient able, willing, and qualified U.S. workers available to perform the work); *see also id.* § 655.160 (identifying DOL, not the SWA, as the entity authorized to grant H-2A temporary labor certifications); *see also* 8 C.F.R. § 214.2(h)(1)(i) (identifying USCIS, not the SWA, as the entity authorized to make final determination on noncitizen's eligibility for classification in H-2A status).

Second, the employer files Form ETA-9142A, "H-2A Application for Temporary Employment Certification," with DOL. *See* 20 C.F.R. § 655.130(a). In the application, the employer must agree that it will not discriminate in hiring, that it has not laid or will not lay off similarly employed U.S. workers, and that it will continue to accept referrals of U.S. workers from the SWA until 50% of the period of employment certified by DOL is completed, including, if necessary, terminating the employment of H-2A workers to accommodate them. *See id*. § 655.135; *see also* DOL, Employment and Training Administration, *H-2A Temporary Agricultural Foreign Labor Certification Program 2010 Final Rule: Clarification of the Fifty Percent Rule* (October 1, 2020), available at https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/h2A_Temporary_Agri_Clarification_fiftyPercentRule_2010.pdf (last visited June 17, 2022).

Third, if DOL finds Form ETA-9142A meets all applicable requirements, it will issue a Notice of Acceptance which directs the SWA to take the following steps:

(1) circulate the job order to other states where there are potential sources of workers, and (2) provide notice of the job opportunity to organizations that provide employment and training services to workers likely to apply for the job and/or written notice of the job opportunity in other physical locations where such workers are likely to gather. *See* 20 C.F.R. §§ 655.143(b)(1), 655.143(b)(5). The DOL Notice of Acceptance also directs the employer to engage in specific recruitment steps which must be confirmed to DOL in a recruitment report. *See id*. § 655.143(b)(2). As part of its recruitment efforts, the employer must contact its former U.S. workers employed in the occupation at the same place of employment and solicit their return to employment. *See id*. § 655.153.

Fourth, once DOL has received all the required documents, such as the recruitment report, DOL will grant or deny the Application for Temporary Employment Certification. *See* 20 C.F.R. § 655.160. In order to certify the application, DOL must determine that the employer has established the need for the agricultural services or labor to be performed, counting as available any U.S. workers referred by the SWA or U.S. workers who applied directly to the employer in determining whether there are insufficient U.S. workers to fill the employer's available positions. *See* 20 C.F.R. §§ 655.161(a)–(b). If DOL determines that certification is appropriate, DOL will grant temporary labor certification and send the employer a certified Application for Temporary Employment Authorization,

Form ETA-9142A, Final Determination: H-2A Temporary Labor Certification Approval. *See id*. § 655.162; *see also* Appendix ("App.") 60.

Fifth, after DOL issues the labor certification, the employer must file Form I-129, Petition for a Nonimmigrant Worker, with USCIS, accompanied by the H-2A certification issued by DOL. *See* 8 C.F.R. § 214.2(h)(5)(i)(A); *see also* App.67-78. The petition must show "that the proposed employment qualifies as a basis for H-2A status." 8 C.F.R. §§ 214.2(h)(5)(i)(A), (D). If the H-2A beneficiaries are outside the United States, the I-129 Form should designate the number of certified unnamed beneficiaries, whereas beneficiaries located in the United States (such as through a previously approved immigration status) must be named on the petition. *See* 8 C.F.R. § 214.2(h)(2)(iii). Once the petition is approved on USCIS Form I-797B, Notice of Action, the related H-2A nonimmigrants are eligible to be admitted to the U.S. in H-2A status for the term of the approved petition. *See id*. § 214.2(h)(5)(vii)(B); *see* App.80-81.

Recipients of H-2A status may work in the United States, but only for the petitioning employer and may perform only the specific agricultural duties detailed on the H-2A petition. *See id*. § 274a.12(b)(9); *see also id.* § 214.2(h)(5)(iii)(A). USCIS will revoke an approved petition for an H-2A worker if the worker "is no longer employed by the petitioner in the capacity specified in the petition." *Id.* § 214.2(h)(11)(iii)(A)(1). *See also* App.60 (DOL certification to Appellee Pepin

Lumber, Inc. to hire log truck drivers was "valid only for … the job classification and specific services or labor to be performed") (alteration added).

Public Law 280. The Maine Legislature considered the Act over the course of the 2021 legislative session after Senate President Troy Jackson drafted and presented it. *See* https://legislature.maine.gov/LawMakerWeb/summary.asp?paper=SP0076&SessionID=14 (legislative bill tracking). In his testimony to the Legislature's Joint Standing Committee on Taxation in support of the bill, Senator Jackson connected the H-2A program to his concerns over federal law concerning so-called "cabotage." *See* App.37-39. The relationship, or lack thereof, between the H-2A program and cabotage significantly informs the legislative history of the Act.

As originally established by the North American Free Trade Agreement, truck drivers from Mexico or Canada can enter the United States under a B-1 business visitor status with cargo, drop that cargo in the United States, and return to Mexico or Canada with new cargo or without any cargo at all, so long as that B-1 driver does not also engage in "cabotage"—*i.e.*, hauling any cargo point-to-point within the United States after entering the country. *See* 8 C.F.R. §§ 214.2(b)(4) and 214.2(b)(4)(i)(E) (explaining cabotage rules). *See also Robert v. Reno*, 25 Fed. Appx. 378 (6th Cir. 2002) (discussing cabotage). As discussed above, however, the H-2A program separately authorizes foreign workers to enter the United States and

perform work within this country's borders, including hauling logs point-to-point within the United States. In short, cabotage and the H-2A program do not relate to one another: a truck driver who has H-2A status may work within the United States hauling logs, regardless of any B-1 authorization to haul logs cross-border. *See* Addendum ("Add.") 65 n.29 ("any argument that H-2A visa holders are in fact *unauthorized* because they are in violation of cabotage rules fails").

Senator Jackson's legislative testimony reflects his disagreement with the H-2A program, in part because of his incorrect view that the program cannot coexist alongside federal cabotage rules. Senator Jackson described the H-2A program as an "injustice to Maine workers" and suggested the program itself violates federal law because "H-2A visas were not intended for this purpose, and to allow this practice is completely at odds with Homeland Security rules on cabotage." *See* App.37-38. Senator Jackson continued: "Allowing drivers in this industry to misuse the H-2A program also flies in the face of one of the overarching principles of allowing H-2A visas—to protect the wages and conditions of U.S. workers." App.38. Senator Jackson's legislative testimony followed previous public statements where he expressed similar disagreement with granting H-2A status to Canadian truck drivers. App.101-112.

Consistent with Senator Jackson's disagreement with federal immigration law, the Act prohibits the federally-authorized employment of H-2A workers as log

truck drivers within Maine. To do so, the Act amends two titles of the Maine code: Title 10 ("Commerce and Trade") and Title 12 ("Conservation"). Add.77 at §§ 1-4 (amending Title 10) and 78 at §§ 5-6 (amending Title 12).

With respect to Title 12, the Act creates a new section of the Maine code, codified at 12 M.R.S. § 8806, which prohibits a person who owns more than 50,000 acres of Maine forest land from hiring, or contracting with another person to hire, a motor carrier to transport forest products between points within Maine unless the motor carrier is operated by a "resident of the United States." Add.78 at § 6. The Act expressly excludes "a person eligible to be in the United States under the United States H-2A visa program" from the definition of "resident of the United States." *Id*. The Act similarly prohibits a motor carrier from transporting forest products from point to point in Maine unless the motor carrier is operated by a resident of the United States, again defined to exclude H-2A visa holders. *Id*. In short, the Act prohibits H-2A workers from operating motor vehicles in the State of Maine for the purpose of transporting forest products point-to-point within Maine, and prohibits a landowner from contracting with such a motor carrier for the same purpose. The Act imposes fines for violating its terms. *Id*.

With respect to Title 10, the Act amends 10 M.R.S. § 2364-B, a section of the Maine code within Maine's "Weights and Measures" law. Add.77 at §§ 1-4. The current code section requires a person transporting wood to carry a "trip ticket"

containing certain information concerning the load, including, among other things, the name of the landowner and the origin and destination of the load. *See* 10 M.R.S. § 2364-B. The Act amends this code section to require the trip ticket to include an affirmation by the "owner of the land from which the wood was harvested" that the load "is being transported in a legal manner consistent with state law." Add.78 at § 3. Whereas the existing code section requires truck drivers to present a trip ticket when asked by a forest ranger, the Act adds the requirement that "an owner or manager of any log yard or mill site" present a trip ticket as well. *Id*. at § 4. This provision ensures that the required affirmation encompasses compliance with the provisions of the Act that amend Title 12—*i.e.*, the prohibition on the use of H-2A workers to transport forest products.

Finally, the Act contains two enforcement sections, one in Section 5 and one in Section 6. The legislative history of L.D. 188, the first draft of which sought to penalize forest products landowners for using H-2A workers through the loss of certain tax incentives, suggests the Legislature included the enforcement provisions related to tax matters in Section 6 by mistake, as its language makes sense only when read alongside an earlier version of the bill that contains different terms. Add.78 at § 6. *See also* http://www.mainelegislature.org/legis/bills/display_ps.asp?ld=188&PID=1456&snum=130&sec3 (reflecting evolution of bill text). The enforcement provisions of

Section 5, however, state the Director of the Bureau of Forestry "shall enforce" violations of the Act. Add.77-78 at § 5. Existing general enforcement provisions of Title 12 also grant the Bureau authority to enforce the Act's new provisions. *See* 12 M.R.S. § 9701 (granting Attorney General authority to seek civil penalties against violators of any statute within Maine's forestry code).

Despite an analysis by the Office of the Maine Attorney General finding both that federal immigration law preempted the Act and that the Act violated the equal protection clause of the United States Constitution, the Act became law on June 19, 2021, after Governor Janet Mills neither signed nor vetoed. By operation of the Maine Constitution, the Act was to become effective on October 18, 2021. *See* App.117-120 (Attorney General analysis); Add.77 (stating Act became law on June 19, 2021, without the Governor's signature); Me. Const. art. IV, pt. 3, §§ 2, 16 (governor's failure to sign bill; effective date of legislation).

District Court Litigation. Appellees Maine Forest Products Council, Pepin Lumber, Inc., and Stéphane Audet filed a complaint in the District of Maine seeking a permanent injunction and declaratory relief against Patty Cormier, in her official capacity as Director of the Maine Bureau of Forestry, and Aaron Frey, in his official capacity as Attorney General of the State of Maine. The complaint advanced three counts, each seeking permanent injunctive relief, declaratory judgment, and attorneys' fees: Count I asserting a preemption claim under the Supremacy Clause;

Count II advancing an equal protection claim under the Fourteenth Amendment; and Count III advancing an equal protection claim under the Maine Constitution. App.6-16.

With their complaint, Appellees filed a motion for preliminary injunction, seeking to bar the State from enforcing the Act during the pendency of the litigation. The District Court granted Appellees' motion, issuing a lengthy and thorough opinion finding Appellees likely to prevail on the merits of both their preemption claim and their equal protection claim. Add.1-76. The State brought this interlocutory appeal from the District Court's order granting the preliminary injunction on March 18, 2022, and the District Court stayed all proceedings below pending the outcome here. App.4.

SUMMARY OF THE ARGUMENT

The District Court properly granted Appellees' motion for preliminary injunction, and the Court should affirm that order, for the following reasons:

The INA preempts the Act. Maine legislation flatly and forever banning lawfully present H-2A workers from hauling forest products in the State of Maine not only stands as an impermissible obstacle to the H-2A program set forth in the INA and its implementing regulations, it directly contravenes federal immigration law by design. The Act seeks and serves to override federal immigration law,

impermissibly rendering the INA as merely advisory within the State of Maine in violation of the Supremacy Clause of the United States Constitution.

The Act violates the guarantees of equal protection under the law. The District Court properly applied strict scrutiny to the Act because the Act discriminates solely on the basis of a suspect classification, alienage. The Act cannot survive strict scrutiny because it does not advance any compelling government interest; indeed, the State's asserted interest is of dubious legitimacy. Even if it were legitimate, the Act does not meaningfully advance that interest. Finally, even if the Act advanced a compelling government interest, it fails to do so through narrowly tailored means as it is both overinclusive, in its permanent ban on the use of H-2A workers regardless of labor market conditions, and underinclusive, in its failure to address other forms of labor market competition.

ARGUMENT

This appeal calls on the Court to review the District Court's order granting Appellees' motion for preliminary injunction. As the State correctly outlines, such motions must establish the movant's likelihood of success on the merits, irreparable harm, and that the balance of hardships and the public interest favors the movant. *See* Appellant's Brief ("Aplt. Br.") at 13. In assessing the District Court's application of this standard, the Court reviews the District Court's order for abuse of discretion. *Corporate Technologies, Inc. v. Harnett*, 731 F.3d 6, 10 (1st Cir.

2013). Under this standard, the Court reviews the District Court's relevant legal conclusions on a de novo basis and any factual findings for clear error. *Id*.

The State has not appealed from or discussed any of the District Court's conclusions of law or findings of fact concerning irreparable harm, the balance of hardships, or the public interest, and, accordingly, has waived any argument that the District Court erred when ruling in Appellee's favor on these elements of the standard. *Sparkle Hill, Inc. v. Interstate Mat Corp.*, 788 F.3d 25, 29 (1st Cir. 2015); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 299 (1st Cir. 2000). The State thus concedes Appellees will suffer irreparable harm in the absence of a preliminary injunction, that the balance of hardships tilts in Appellees' favor, and that the public interest supports the District Court's order. These concessions alone weigh heavily in favor of affirming the District Court's order.

The State pins its appeal on the argument that the District Court abused its discretion when holding Appellees likely will succeed on the merits of their preemption and equal protection claims. But the District Court's thorough and well-reasoned opinion explains why Appellees demonstrated substantial likelihood of success on the merits of their preemption and equal protection claims.

With respect to preemption, the District Court correctly declined to apply the presumption against preemption because the Act regulates in an area traditionally committed to the broad authority of the federal government, and correctly found the

Act preempted by the INA because "the goals of the Act conflict with the INA, the Act allows the state of Maine to make final H-2A visa decisions, and the Act permits Maine to make its own determination of employers' need for foreign workers in contradiction to the requirements of the federal H-2A program." Add.46.

With respect to equal protection, the District Court correctly applied strict scrutiny because "of the Supreme Court's well-established principle that alienage is a suspect class." Add.60 (footnote omitted). From there, the District Court found the State could not show a compelling government interest in discriminating against H-2A workers, noting that the State's own evidence actually demonstrated the need for H-2A workers. *See* Add.67. The District Court also found the Act to be both overinclusive, in its permanent ban on H-2A workers regardless of labor market conditions, and underinclusive, because it targets only one type of job in one industry, inconsistent with the State's claim that foreign workers are harming the Maine job market generally. Add.68-69.

The District Court's reasoning was sound and the Court accordingly should affirm the grant of the preliminary injunction.

I. The District Court correctly held the INA preempts the Act because of the irreconcilable conflict between the Act and federal H-2A program.

In the United States' system of dual federal-state sovereignty, the Supremacy Clause provides a rule of decision to resolve conflicts between federal and state laws governing the same subject matter: the Constitution and federal statutes "shall be the

supreme Law of the Land." U.S. Const. art. VI, cl. 2. The Supremacy Clause thus gives Congress the power to preempt state law, which it may do either expressly or impliedly. *See Capron v. Office of the Attorney General of Massachusetts*, 944 F.3d 9, 21 (1st Cir. 2019) (citing *Arizona v. United States*, 567 U.S. 387, 399 (2012)). Congress may impliedly preempt state laws where the state law presents an "obstacle to the accomplishment and execution" of the federal scheme—*i.e.*, "conflict preemption." *Id.* at 26 (internal quotations omitted).

Congress has exercised its authority to regulate immigration and alien status through the INA, which "represents a comprehensive and complete code covering all aspects of admission of aliens to this country, whether for business or pleasure, or as immigrants seeking to become permanent residents." *Toll*, 458 U.S. at 13 (internal quotation marks omitted). Accordingly, federal courts long have relied on preemption to invalidate state laws that conflict with federal immigration law, a subject of traditionally federal concern where the federal government enjoys broad authority. *See, Arizona*, 567 U.S. at 394 ("The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens."); *Toll*, 458 U.S. at 10 ("Our cases have long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders.").

Application of these principles requires affirmance of the District Court's order.

A. The presumption against preemption does not apply because the Act plainly regulates immigration, rather than any subject of traditional state concern.

The State argues the Court should presume federal law does not preempt the Act because it serves as the sort of "worker protection" law states historically have had the power to enact. Aplt. Br. at 16. But the presumption against preemption does not apply "when the State regulates in an area where there has been a history of significant federal presence," *United States v. Locke*, 529 U.S. 89, 108 (2000), and the State's halfhearted effort, *see infra* n.10, to cast the Act as something akin to a generally applicable workplace safety or minimum wage law[8] reflects precisely the sort of empty semantics rejected by preemption doctrine. *See Wos v. E.M.A. ex rel. Johnson*, 568 U.S. 627, 636 (2013) ("Pre-emption is not a matter of semantics."). "A State may not evade the pre-emptive force of federal law by resorting to creative statutory interpretation or description at odds with the statute's intended operation and effect." *Id*.

[8] For instance, the State likens the Act to a Maine law requiring commercial driver's licenses. *See* Aplt. Br. at 2. Any such comparison fails generally for the reasons set forth herein—*i.e.*, the Act is not a law of general applicability that furthers health and safety concerns—but the comparison fails specifically as well, at least with respect to Canadian truck drivers, because the United States honors Canadian commercial driver's licenses by virtue of international agreements between the United States and Canada. *See Commercial Driver's License Reciprocity with Canada*, 54 Fed. Reg. 22392 (May 23, 1989). In other words, even the State's example of a law reserved solely to the State's traditional authority fails, consistent with the power of the federal government to regulate matters of cross-border activity such as immigration and international commerce.

Put simply: The Act regulates immigration by prohibiting persons from hauling forest products in Maine in accordance with their lawful H-2A status. Unlike the state legislation in *Capron*, where the Massachusetts employment laws at issue were "generally applicable to all domestic workers" and did not target the federal regulations at issue, 944 F.3d at 23, the Act expressly impacts H-2A workers and the operation of the H-2A program in Maine, consistent with the drafter of the Act's objection to federal immigration policy.[9] While the State argues the Act aims to "protect the competitiveness of Maine's domestic workforce,"[10] Aplt. Br. at 16,

[9] As the District Court noted, *see* Add.32, the Court ultimately did not apply the presumption against preemption even in *Capron*, notwithstanding the neutral nature of the state laws at issue. The State's reliance on *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), *Metropolitan Life Insurance Company v. Massachusetts*, 471 U.S. 724 (1985), and *Rhode Island Hospitality Association v. City of Providence ex rel. Lombardi*, 667 F.3d 17 (1st Cir. 2011), is similarly unavailing, as the state laws in all of those cases involved generally applicable labor and employment statutes, not statutes specifically designed to contravene federal law in areas of traditional federal concern. The Court identified the distinction between laws of general applicability and targeted efforts to undermine federal policy as crucial in *Rhode Island Hospitality Association*. 667 F.3d at 33 n.15 (state law "did not require us to assess a state law that applies to only one occupation … in one industry … in one county") (internal quotation marks omitted).

[10] Although the moniker "worker protection law" seeks to cast the Act as a workplace safety or wage law, the State drops that facade by arguing the Act serves as a form of labor market protectionism. Aplt. Br. at 16 (stating the Act "aims to protect the competitiveness of Maine workers"). "Protection" (*i.e.*, safety) and "protection*ism*" (*i.e.*, economic favoritism) are not the same thing, however, and the State cites no authority for the proposition that protectionist measures are ones our federalist structure traditionally have reserved to state authority. Indeed, much authority suggests the opposite is true. *See, e.g.*, *City of Phila. v. New Jersey*, 437 U.S. 617, 624 (1978) ("where simple economic protectionism is effected by state legislation,

its "intended operation and effect" serves to ban foreign nationals from entering Maine for the purpose of obtaining employment as log truck drivers, just as any federal immigration statute might.

As described above, and as the State agrees, a person enjoys H-2A status only by virtue of a specific employment opportunity with a specific employer in a specific job, and may not enter into the United States without that opportunity. *See* 8 C.F.R. § 214.2(h)(5)(iii)(A) (to obtain H-2A status, employer must show each beneficiary will be employed within the scope of DOL certification); Add.43 ("termination of the underlying job … necessarily means termination of the H-2A visa itself"); Aplt. Br. at 25 (application of the Act "causes the federal government not to issue the visas in the first place"); App.60 (Pepin lumber labor certification "valid only for … the job classification and specific services and labor to be performed"). Accordingly, contrary to the California legislation at issue in *DeCanas v. Bica*, 424 U.S. 361 (1976), which, as observed in *Capron*, did not regulate "'who should or should not be admitted into the country and the conditions under which a legal entrant may remain,'" the unavoidable effect of the Act is to bars persons from entering the United States when otherwise authorized to do so under the H-2A program. *Capron*, 944 F.3d at 22 (quoting *DeCanas*, 424 U.S. at 355).

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a virtually *per se* rule of invalidity has been erected"). In short, protectionist measures do not serve as laws traditionally reserved to the states and with respect to which the presumption against preemption would apply.

The Court should adopt the reasoning of the District Court, which correctly held the Act cannot reasonably be described as anything other than an immigration measure and thus enjoys no presumption against preemption. "[T]he Act at its core regulates immigration." Add.30.

B. The Act not only stands as an immovable obstacle to the execution of federal immigration law under the H-2A program, it directly and purposefully frustrates it.

Under the theory of conflict preemption, federal law preempts state statutes which pose an "obstacle to the accomplishment and execution" of the federal scheme. *Capron*, 944 F.3d at 26 (internal quotations omitted). Such preemption will be "more easily found" where, as in the case of immigration, "states legislate in areas traditionally reserved to the federal government." *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 73 (1st Cir. 1999). Here, the Act not only poses an "obstacle" to federal immigration law, it directly contravenes federal immigration law by design.

The H-2A program assists U.S. employers in filling their labor needs where the available supply of U.S. workers is insufficient, while at the same time balancing the potential negative effects of such hiring by employing a variety of measures to ensure employers hire H-2A workers only after exhausting opportunities to hire U.S. workers. The structure of the H-2A program's implementing regulations reflects the balance federal law seeks to strike in this regard, by instituting a rigorous process

whereby the United States government grants employers the right to hire H-2A workers and foreign nationals the right to enter and work in the United States, but only after imposing procedures designed to ensure that U.S. workers receive priority over prospective H-2A recipients with respect to each specific job opportunity. *See* 73 Fed. Reg. at 76891 (stating goals of H-2A regulations); *see also* 8 U.S.C. §§ 1188(a)(1)(A)-(B) (prohibiting approval of a petition for H-2A workers unless DOL certifies that there are not sufficient U.S. workers who are able, willing, and qualified to do the work and that the employment of H-2A workers will not adversely affect the wages and working conditions of U.S. workers); 20 C.F.R. § 655.103(a) (stating that employer must demonstrate to DOL that its H2A labor certification requirements have been satisfied).

Notably, federal law strikes this balance on a case-by-case basis, requiring each and every job opportunity to be made available to U.S. workers before they can be extended to prospective H-2A status recipients. *See* 20 C.F.R. §§ 655.121 (requiring H-2A employers to first submit a job order to the SWA serving the area of intended employment to advertise to and recruit potential U.S. workers), 655.135 (requiring employer to agree to not lay off similarly employed U.S. workers to employ H-2A workers and to accept referrals of the U.S. workers from the SWA until 50% of the period of employment is completed to obtain labor certification), and 655.156(a) (requiring DOL to review employer's recruitment report identifying

each U.S. worker who responded to recruitment, confirming those workers were contacted, and confirming the lawful job-related reasons for not hiring those workers, if applicable, before issuing labor certification). Accordingly, whether any specific foreign national may enter Maine and perform work driving a logging truck pursuant to the H-2A program results from decisions made by federal authorities applying federal law to fulfill federal policy objectives.

The Act, however, "strikes a different balance between the dual goals of protecting employers and protecting the local workforce in a way that inherently conflicts with congressional intent." Add.31. The legislator who drafted the Act intended it to favor U.S. workers in a way the H-2A program does not, reflecting his view that the H-2A program is an "injustice to Maine workers" and his erroneous view that "H-2A visas were not intended" to allow foreign nationals to haul forest products point-to-point in Maine. App.37-38. Indeed, as the State concedes, the Act strikes no balance between foreign and domestic workers at all because it "signals that the employment of *any* foreign logging truck drivers constitute too great an impact on domestic workers to be tolerable." Aplt. Br. at 18 (emphasis in original). Notwithstanding this admission, the State nevertheless tries to square the circle with various erroneous arguments that the Act proceeds in accord with federal immigration law, each of which Appellees address in turn.

1. The role of SWAs in the H-2A process does not grant states an effective veto over of the H-2A program.

The State points to the involvement of the relevant SWA in the labor certification process—here, the Maine Bureau of Maine Employment Services — for the proposition that state law serves as a "key input" in the H-2A "decision-making process," whereby federal law entrusts states with "overseeing important eligibility requirements" for the granting of H-2A status. Aplt. Br. at 18-19 (citing 20 C.F.R. §§ 655.121(a)(1) and 653.501(c)) and 26-27 (citing similar regulations). While the State's argument in this regard seeks to leave the impression that the relevant federal regulations grant SWAs some form of discretion or autonomy with respect to deciding who may enter the country with H-2A status, they do no such thing. Instead, SWAs play a ministerial role in ensuring that employers' applications for H-2A workers comply with federal law and that job opportunities are properly advertised to U.S. workers. These functions are strictly administrative ones employed in furtherance of federal policy, granting no authority to the states to inject their own policy determinations. Throughout the H-2A application process, SWAs act solely as an arm of the federal government, implementing federal law, with no corresponding discretion or authority to change federal eligibility requirements or make any decisions concerning whether to grant or deny any request to employ an H-2A worker. *See* 20 C.F.R. § 655.100 (identifying DOL, not the SWA, as the entity authorized to make factual determinations required for labor certification); *see also*

id. § 655.160 (identifying DOL, not the SWA, as the entity authorized to grant H-2A temporary labor certifications); *see also* 8 C.F.R. § 214.2(h)(1)(i) (identifying USCIS, not the SWA, as the entity authorized to make final determination on noncitizen's eligibility for classification in H-2A status). The State cites no authority—and none exists—for the proposition that relying on state agencies to perform these sorts of ministerial duties reflects a congressional intent to invite any state to effectively ban the use of H-2A workers for certain job functions within that state's borders.[11]

2. The Third Circuit's decision in *Rogers v. Larson* provides highly persuasive authority.

The State attempts, but fails, to avoid the implications of the holding in *Rogers v. Larson*, 563 F.2d 617 (3rd Cir. 1977), where the Court of Appeals for the Third Circuit struck down a Virgin Islands law that required employers to terminate the employment of H-2A workers in certain circumstances not contemplated by federal immigration law. Aplt Br. at 19-20. The Third Circuit held that the INA and its regulations preempted the Virgin Islands law because, just like the Act, it struck a

[11] The State argues "there is no evidence Congress intended to insulate a rigid judgment about the labor market from changing circumstances on the ground." Aplt. Br. at 18. But it is the Act which, by imposing a permanent ban on the use of H-2A workers to haul forest products in Maine, seeks to "insulate a rigid judgment" about labor market requirements, in contrast with the H-2A program, which, with its careful, case-by-case assessment of each job opportunity, accounts for existing labor market conditions.

fundamentally different balance between the interests of employers seeking access to a larger labor pool and the interests of domestic workers in obtaining primary access to job opportunities. *See Rogers*, 563 F.2d at 626.

The State first seeks to distinguish *Rogers* on the grounds that, while the Virgin Islands law required the termination of H-2A workers who already had received status, the Act applies only prospectively and thus does not serve to terminate the status of current H-2A workers. Aplt. Br. at 20. The State cites no language in the Act stating it does not apply to H-2A workers present in Maine at the time it becomes effective, however, and no such language exists. The State relegates to a brief footnote the apparent basis for this argument, *see id*. at 6 n.5, where it cites Maine state law stating the cannon of constitutional avoidance as well as the administrative law principle that agency interpretations of ambiguous statutes require deference. But neither principle applies: the Act unambiguously prohibits the use of H-2A workers in the hauling of forest products, without any temporal conditions or limitations. *See Nielsen v. Preap*, 139 S. Ct. 954, 972 (2019) (canon of constitutional avoidance applied only if statute is ambiguous); *Cobb v. Bd. of Counseling Prof'ls Licensure*, 2006 ME 48, ¶ 13, 896 A.2d 271 (deference is owed to state agency's interpretation of state law only if the law is ambiguous).

In any event, the State's argument ultimately misses the point: permanently prohibiting prospective H-2A workers present outside of Maine from ever entering

the state to perform lawful agricultural work does not pose a lesser preemption concern than requiring the termination of present H-2A workers. In both instances, the state law stands as an obstacle to the implementation of the federal law because it prohibits the use of H-2A workers for agricultural work otherwise allowed by federal law. If anything, the Act cuts deeper into federal authority than does the legislation in *Rogers*: whereas the law preempted in *Rogers* allowed the H-2A program to continue in the Virgin Islands in some form, the Act forever bans the use of the H-2A program in Maine with respect to logging truck drivers.

The State concludes its discussion of *Rogers* by arguing that the "existence of the H-2A visa program does not require that, in every industry and in every position, the balancing of interests dictates that some number of foreign workers be hired" and, accordingly, that it is permissible for the State to bar the use of such workers in the logging industry. Aplt. Br. at 20. The State thus appears to argue that, because the H-2A program contemplates some H-2A applications will be denied, the State is free to step in and completely terminate the program "as to a particular position in one of Maine's most important industries." *Id.* The State cites no authority in support of this argument and, again, it misses the point: Congress has assigned to the federal executive branch the authority to determine whether and under what terms

nonimmigrants may enter the United States under the H-2A program.[12] That this process necessarily will involve federal authorities denying certain applications does not reflect congressional intent to invite states to impose their own judgment with respect to the scope of the H-2A program within their borders.

3. The Court's preemption analysis in *Natsios* controls.

This Court's preemption decision in *Natsios* governs here. There, the Court assessed the conflict between a federal law imposing sanctions on Burma and a Massachusetts state law that imposed its own sanction on Burma by prohibiting state agencies from contracting with parties who did business in that country. *Natsios*, 181 F.3d at 76. The Court noted that the federal law balanced a variety of competing concerns to arrive at an overall policy, while the Massachusetts law impermissibly served as a "blunt instrument to further only a single goal." *Id*. The same is true here: while the H-2A program carefully balances the needs of domestic employers and workers on a case-by-case basis, the Act furthers only the "single goal" of favoring domestic workers through the "blunt instrument" of a complete and permanent ban on the use of H-2A workers to haul forest products in Maine.

[12] Notably, federal law prohibits U.S. employers from discriminating against persons lawfully present in the United States on the basis of their citizenship, immigration status, or national origin. *See* 8 U.S.C. § 1324b(1). The State thus seeks to make state law what, in the private sphere, would serve as impermissible discrimination in violation of federal law.

The State attempts to distinguish *Natsios* on the grounds that, unlike the anti-Burma statute at issue there, the Act "does not undermine the goals of the relevant federal policy," "advances the INA's goal of protecting the domestic workforce," and reflects the State's role in "determining the availability of state workers and enforcing state law employment requirements." Aplt. Br. at 21-22. Each point fails. First, the Act plainly undermines the goals of the H-2A program by flatly prohibiting its implementation in Maine with respect to log truck drivers. Second, while the Act may "protect[] the domestic workforce," that is not the unalloyed goal of the H-2A program, which serves to admit foreign workers into the United States, thereby permitting U.S. employers to obtain needed workers, while mitigating the negative impacts on domestic workers. If federal law sought solely to privilege the domestic workforce to the extent contemplated by the Act, the H-2A program would not exist. Third, as discussed above, the H-2A program gives no meaningful role to the State in making decisions concerning the admittance of prospective H-2A workers. The same conflict that led this Court to find preemption in *Natsios* exists here.

4. The H-2A program's general requirement that employers follow state employment laws does not invite states to override federal law.

The State attempts to liken the Act to the Massachusetts law upheld in *Capron*, notwithstanding that the law at issue in *Capron* applied generally and did not intentionally counteract federal policy. Aplt. Br. at 22-23. In *Capron*, the Court

assessed whether federal law governing the employment of foreign national au pairs through a State Department administered program preempted Massachusetts state laws of general applicability governing the working conditions and wages of household domestic workers, including nannies and au pairs. 944 F.3d 9. *Capron* considered whether the federal regulations governing the au pair program set forth a floor *and* a ceiling with respect to regulation of au pair employment conditions or, rather, whether federal law set forth only a floor, thus leaving the states free to impose more generous worker protections. The Court found the latter to be the case, and accordingly upheld the Massachusetts law. *Id*. at 26-40

The State argues the H-2A program's general requirement that employers comply with "state wage and employment laws" similarly leaves the State free to implement its own employment laws governing H-2A workers, up to and including banning them entirely. Aplt. Br. at 23. The Second Circuit correctly rejected a similar argument in *Dandamudi v. Tisch*, 686 F.3d 66 (2d Cir. 2012), however, where New York argued that federal immigration provisions preserving the right of states to impose professional licensure requirements on H-1B workers allowed the state to create pharmacist licensure requirements that simply excluded H-1B workers entirely from the class of persons eligible to obtain licensure. As the Second Circuit put it, the argument "makes no sense" because the preservation of a state's "traditional police power cannot morph into a determination that a certain subclass

of immigrants" is ineligible for employment. *Dandamudi*, 686 F.3d at 80. The same is true here, where there exists no evidence that, in promulgating rules requiring H-2A employers to adhere to general state employment laws, federal authorities invited states to nullify the application of the H-2A program to whatever extent they wish.

Unlike the state legislation at issue in *Capron*, the Act does not apply generally to all workers within Maine; it applies specifically and by design only to H-2A recipients. The Act is therefore not a general exercise of the State's power to regulate employment in the State, but is rather a clear regulation of immigration at odds with federal law.

5. The Fifth Circuit's decision in *LeClerc v. Webb* does not control.

The State erroneously seeks to analogize the Act to the legislation at issue in *LeClerc v. Webb*, 419 F.3d 405 (5th Cir. 2005), where the Court of Appeals for the Fifth Circuit upheld a Louisiana law that barred nonimmigrant aliens from obtaining attorney licensure in that state. The Fifth Circuit reasoned that, with respect to the F-1, J-1, and H-1B visas issued to the plaintiffs in the case, the Louisiana law was not preempted because it did not make it impossible for the recipients of lawful immigration status to maintain that status. *See LeClerc*, 419 F.3d at 424-25. As the State summarizes the holding in *LeClerc*, "state law may not proscribe what Congress expressly permits by federal statute." Aplt. Br. at 24 (citing *LeClerc*, 419

F.3d at 424-25) (internal alterations omitted). And yet the Act does precisely that: proscribing the employment of certain H-2A workers in Maine in the teeth of a specific federal program authorizing workers to enter into Maine for the purpose of hauling forest products. Unlike the nonimmigrant aliens at issue in *LeClerc*, the H-2A recipients who come to Maine lawfully to operate logging trucks cannot maintain their immigration status so long as the Act applies. [13] The District Court correctly reasoned that the Act's operation in this fashion impermissibly rendered federal law "advisory." Add.39.

* * * *

The Supremacy Clause requires the Court to affirm the District Court's decision that Appellees are likely to succeed on the merits of their preemption claim. The Court should apply the reasoning of *Natsios* and *Rogers* and find the Act preempted under the theory of conflict preemption. In each case, the Court of Appeals held the relevant state or territorial law preempted because each jurisdiction enacted a statute squarely aimed at regulating within a sphere traditionally

[13] As in its discussion of *Rogers*, the State seeks to avoid the clear implication of the rule outlined in *LeClerc* by again arguing the Act should not be applied to H-2A workers with legal status at the time the Act becomes effective, but, instead, should apply only prospectively so as to prevent federal authorities ever from granting H-2A status in the future. Aplt. Br. at 25. As discussed above, the plain terms of the Act do not support this interpretation and, in any event, forever prohibiting the implementation of the H-2A program to employ non-U.S. log truck drivers in Maine merely underscores why federal law preempts the Act.

committed to federal authority—foreign affairs or immigration—and created a policy outcome at odds with that intended by the governing federal law. The same is true here, where the Act prohibits what the H-2A program expressly grants: the right of domestic employers to hire nonimmigrant aliens to haul logs point-to-point within Maine. The District Court did not abuse its discretion when it held "federal law preempts Public Law 280 because the goals of the Act conflict with the INA, the Act allows the state of Maine to make final H-2A visa decisions, and the Act permits Maine to make its own determination of employers' need for foreign workers in contradiction to the requirements of the federal H-2A program." Add.46.

II. The District Court correctly held that Plaintiffs have demonstrated a substantial likelihood of success on their equal protection claims.

As the District Court correctly concluded, Plaintiffs have established a substantial likelihood of success on their equal protection claims. Add.46-69. The Fourteenth Amendment provides that "[n]o State shall . . . deny any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Maine Constitution provides a similar guarantee. *See* Me. Const. art. I, § 6-A. "It is established, of course, that an alien is entitled to the shelter of the Equal Protection Clause." *Sugarman v. Dougall*, 413 U.S. 634, 641 (1973). The Act violates these

equal protection rights by discriminating against nonimmigrant H-2A workers on the basis of their alienage without any legitimate, much less compelling, basis.[14]

The Act expressly discriminates against nonimmigrants legally authorized under federal law to engage in agricultural work in the United States, *i.e.*, nonimmigrant H-2A workers, by prohibiting them from operating log trucks within Maine while allowing others lawfully present in the United States (including other aliens) to perform the same work. The State does not contest that the Act creates disparate outcomes for two groups of people who are similarly situated, namely: (1) U.S. citizens and immigrants authorized to work in the United States under federal law, and (2) nonimmigrants authorized to work in the United States under federal law. Because it discriminates between nonimmigrants and other similarly situated persons, the Act triggers equal protection scrutiny. *See Bruns v. Mayhew*, 750 F.3d 61, 65 (1st Cir. 2014).

Thus, the only question before this Court is whether the District Court erred by (1) applying strict scrutiny to the Act's alienage-based classification and (2) concluding that the Act was not narrowly tailored to serve a compelling state interest. It did not.

[14] Because Maine's equal protection guarantees are "coextensive with the Fourteenth Amendment," *State v. Bennett*, 2015 ME 46, ¶ 17, 114 A.3d 994, this brief will focus on federal precedent regarding equal protection.

A. The District Court properly applied strict scrutiny.

The Supreme Court has consistently required strict scrutiny of state laws based on alienage, which is a suspect classification. The District Court properly followed this precedent in finding that strict scrutiny applies in this case.

Aliens constitute a suspect class under the Fourteenth Amendment because they serve as a "a prime example of a discrete and insular minority[.]" *Bruns*, 750 F.3d at 66 (quoting *Graham v. Richardson*, 403 U.S. 365, 372 (1971)). A state law that treats "aliens as a class" disparately thus "inherently raise[s] concerns of invidious discrimination and [is] therefore generally subject to strict judicial scrutiny." *Id.*; *see Graham*, 403 U.S. at 372 ("[C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny."); *Dandamudi*, 686 F.3d at 74.

The Supreme Court routinely has applied strict scrutiny to state statutes discriminating on the basis of alienage. *See Nyquist v. Mauclet*, 432 U.S. 1, 7-12 (1977) (applying strict scrutiny to a New York law requiring immigrants to pledge to become citizens before they could receive financial aid); *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 601-06 (1976) (applying strict scrutiny to a Puerto Rico law that denied licenses to immigrant engineers); *In re Griffiths*, 413 U.S. 717, 721-22 (1973) (applying strict scrutiny to a Connecticut statute barring immigrants from sitting for the bar); *Sugarman*, 413 U.S. at 642-43

(applying strict scrutiny to a New York statute prohibiting immigrants from working in the civil service); *Graham*, 403 U.S. at 372-76 (applying strict scrutiny to state laws restricting eligibility of immigrants for public assistance).[15] This Court has followed suit. *See Rivas Tenorio v. Liga Atletica Interuniversitaria*, 554 F.2d 492, 497 (1st Cir. 1977) (applying strict scrutiny, observing that "[i]t is now familiar doctrine that the presence of either a 'fundamental right' or a 'suspect classification' is sufficient to invoke the stricter standard of equal protection scrutiny," including "classifications based on alienage grounds").

The District Court therefore did not err in applying strict scrutiny. As the court concluded, there is no basis to apply a more lenient standard of review.

First, the District Court properly concluded, and the State does not dispute on appeal, that a person's nonimmigrant status does not affect the level of scrutiny to be applied.[16] Add.52-64. The Second Circuit's reasoning on this point in

[15] When the Supreme Court has applied lesser scrutiny, it has done so in the context of aliens who were not lawfully admitted to the country. *Plyler v. Doe*, 457 U.S. 202, 223-24 (1982) (stating that "[u]ndocumented aliens cannot be treated as a suspect class because their presence in this country [is] in violation of federal law," but applying heightened rational basis scrutiny).

[16] Although the District Court carefully analyzed whether laws discriminating against nonimmigrant aliens are subject to less stringent scrutiny than laws discriminating against LPRs, *see* Add.52-64, the State did not address this issue at all in its opening brief. Having failed to argue that the District Court's conclusion on this point was error, the State has waived the argument. *See Sparkle Hill, Inc.*, 788 F.3d at 29; *Waste Mgmt. Holdings, Inc.*, 208 F.3d at 299.

Dandamudi is instructive. 686 F.3d at 72-79. In that case, noting that the Fourteenth Amendment applies to all aliens, 686 F.3d at 72, the Second Circuit concluded that nonimmigrants are, like aliens generally, a suspect class because they are a "discrete and insular minority without significant political clout," *id.* at 75. In fact, as the Second Circuit recognized, nonimmigrants are even "more powerless and vulnerable to state predations—more discrete an insular"—than LPRs. *Id.* at 77 (quotation marks omitted).[17] As the Second Circuit observed, "[t]he Supreme Court has repeatedly announced a general rule that classifications based on alienage are suspect and subject to strict scrutiny review. . . . [W]e should take the Supreme Court at its word." *Dandamudi*, 686 F.3d at 78 (quotation marks omitted).

Second, the District Court correctly determined that the "uniform rule" doctrine does not apply. Add.48-52. As the court recognized, because Congress has plenary authority over immigration, "congressional disparate treatment of aliens is presumed to rest on national immigration policy rather than invidious discrimination." *Bruns*, 750 F.3d at 66; *see Kandamar v. Gonzales*, 464 F.3d 65, 72 (1st Cir. 2006). Congressional acts containing alienage-based classifications are

[17] The Second Circuit observed that, if rational basis review applied, then nonimmigrants lawfully present in the United States would have less protection than individuals present without authorization. *Dandamudi*, 686 F.3d at 78 (discussing *Plyler* and rejecting the reasoning of *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 537-43 (6th Cir. 2007), and *LeClerc v. Webb*, 419 F.3d 405, 418-19 (5th Cir. 2005)).

therefore afforded rational basis review and, by extension, States may adopt Congress' alienage classifications in carrying out federal policy without triggering strict scrutiny. *Bruns*, 750 F.3d at 66. Although "States do not share th[e] plenary federal power" over immigration, "'if the Federal Government has by uniform rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass, the States may, of course, follow the federal direction.'" *Id.* (quoting *Plyler*, 457 U.S at 219 n.19). The State argues that the Act falls within this uniform rule doctrine because it "codified" the alienage distinctions employed by federal law. Aplt. Br. at 30. The Act, however, does no such thing.

As the District Court concluded, the critical flaw in the State's argument is that it "casts the issue of 'uniformity' too broadly." App.51. Certainly, federal law treats nonimmigrant aliens differently than U.S. citizens with regard to employment opportunities; by definition, nonimmigrant aliens must be approved under the H-2A visa program to work in the United States, while U.S. citizens do not. *See* 8 U.S.C. § 1188. But that level of abstraction obscures the relevant difference between federal and state law. Federal law created a category of aliens under the H-2A program in order to *allow*, under certain conditions, nonimmigrants to fill U.S. employers' need for agricultural workers. The Act, by contrast, categorizes nonimmigrant aliens for purposes of *excluding* those persons from participating in a segment of the U.S. job market. The H-2A visa program authorizes nonimmigrants to obtain agricultural

employment as log truck drivers under certain circumstances, *see* 20 C.F.R. § 655.103(c), (c)(4); 29 C.F.R. § 501.3(b), while the Act flatly prohibits nonimmigrants from obtaining such employment. There is no meaningful way, then, in which the Act "follow[s] the federal direction." *See Plyler*, 457 U.S. at 219 n.19; *Bruns*, 750 F.3d at 66. Instead, it defies that federal direction.

Relatedly, the uniform rule doctrine does not apply to the Act because it was not enacted in response to a congressional directive to implement uniform national immigration objectives. *See* Jenny-Brooke Condon, *The Preempting of Equal Protection for Immigrants?*, 73 Wash. & Lee. L. Rev. 77, 127 (2016) (the uniform rule doctrine applies "if Congress has specifically directed 'the States to implement national immigration objectives' in a uniform manner" (quoting *Aliessa ex rel. Fayad v. Novello*, 754 N.E.2d 1085, 1096 (N.Y. 2001))). In *Plyler*, the Supreme Court recognized that States have no independent power over immigration issues, and can act only pursuant to "federal direction." 457 U.S. at 219 n.19. Here, however, Congress did not direct any State to assess the need for nonimmigrant alien workers in the logging industry, a determination that is reserved to the federal government. *See* 8 U.S.C. § 1188. Further, in *Plyler*, the Supreme Court noted that states must act pursuant to a "uniform rule" in order for less stringent scrutiny to apply. 457 U.S. at 219 n.19. The Act, however, does not further a uniform federal policy—to the contrary, if the Act is allowed to stand, it will foreshadow a patchwork

quilt of state laws regulating the agricultural activities in which nonimmigrants may participate. *See Aliessa*, 754 N.E.2d at 1098 (uniform rule doctrine did not apply because the state was not carrying out a uniform immigration policy).[18]

The State's reliance on *Bruns* is unavailing. In that case, plaintiffs alleged that Maine violated the Equal Protection Clause by terminating medical assistance benefits for certain aliens not eligible for Medicaid. 750 F.3d at 63. Medicaid, unlike the INA, "is a cooperative federal-state program." *Id.* Federal law excluded aliens who had resided in the United States for less than 5 years from receiving federal benefits, but permitted states to provide state benefits such persons. *Id.* at 63-64. Maine chose this path for a period of time, but eventually terminated those benefits. *Id.* at 64. The Court declined to reach the uniform rule doctrine because plaintiffs' equal protection claim failed at the outset: because "the state drew no distinctions based on alienage," there was no "disparate treatment." *Id.* at 171. The Court did note, in dicta, that—if the State had discriminated against aliens—the uniform rule doctrine might apply because Congress had left state benefit determinations to the states. *Id.* at 171 n.3. No similar cooperative scheme or federal delegation exists here, however, where, as discussed above, the H-2A program

[18] *Compare Sudomir v. McMahon*, 767 F.2d 1456, 1464-66 (9th Cir. 1985) (acknowledging that state law classifications based on alienage are typically subject to strict scrutiny, but applying a rational basis scrutiny to state law denying certain benefits to persons unlawfully present in the United States because federal law required states to do so).

grants states no discretionary authority concerning the admission of prospective H-2A recipients. As the District Court concluded, "there is nothing in the INA or related federal regulations to suggest Congress delegated to states the discretion to craft their own visa eligibility requirements." App.51.

B. The District Court correctly concluded that the Act is not narrowly tailored to serve a compelling government interest.

Because the Act discriminates on the basis of a suspect classification and is subject to strict scrutiny, the Act must be narrowly tailored to serve a compelling government interest. *See Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 310 (2013); *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). The Act cannot clear that daunting hurdle. There is no compelling government interest in prohibiting H-2A workers from transporting forest products within the State of Maine and, even if there were, it is not narrowly tailored to accomplish the State's purported interest.

1. The Act does not serve a compelling state interest.

a. The State cannot identify a compelling interest.

The State argues that it has a "compelling interest in protecting its domestic workforce" against competition. Aplt. Br. at 32. But the State does not have a compelling interest in labor market protectionism, which the law strongly disfavors. Indeed, other circuits have found that economic protectionism is not even a *legitimate* state interest satisfying rational basis review. *See, e.g.*, *St. Joseph Abbey*

v. Castille, 712 F.3d 215, 222 (5th Cir. 2013) (observing that "neither precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose," and finding that the law failed the rational basis test); *Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008); *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002). If even the *legitimacy* of protectionism as a state interest is in doubt, protectionism cannot possibly be a compelling state interest. If it were a compelling interest, then many state laws discriminating against suspect classes would survive. The Act thus fails strict scrutiny at the threshold.[19]

b. The Act does not advance the State's asserted interest.

While the State may have the authority generally to regulate employment, *see* Aplt. Br. at 32 (citing cases concerning police powers),[20] that point does nothing to

[19] Because strict scrutiny applies, the Court need not decide whether protectionism could satisfy rational basis review. Even if the Court applied a rational basis test, however, the Court should follow the Fifth, Sixth, and Ninth Circuit's holding that economic protectionism is not a legitimate state interest, and decline to follow the Tenth Circuit's highly deferential approach to protectionist laws. *See Powers v. Harris*, 379 F.3d 1208, 1221-23 (10th Cir. 2004). This Court has already acknowledged that economic protectionism likely does not constitute a legitimate state interest. *See Piper v. Supreme Court of N.H.*, 723 F.2d 110, 116 n.6, 119 (1st Cir. 1983) (four members of *en banc* panel agreeing, in split opinion, that protectionism is not a legitimate state interest).

[20] As discussed above, the Act does not truly regulate employment but instead regulates immigration. As the District Court observed, the Act "ultimately determines admission to the United States and the conditions for remaining in the country by prohibiting logging truck drivers from being employed in the position they have been authorized to fill by the federal government." App.65-66.

illuminate whether the Act has any particular relation to the State's asserted interest. The State suggests that the Act is necessary to prevent "nonimmigrant, nonresident aliens" from "depriving the domestic workforce of good jobs," *id*. at 33, but the Act does not advance this interest. As discussed above, employers can hire H-2A workers *only after* the federal government has found that there would be no harm to domestic workers. The Secretary of Labor cannot issue H-2A certifications if there are sufficient U.S. workers or if employment of nonimmigrant aliens will adversely affect U.S. wages and work conditions. *See* 8 U.S.C. § 1188(a)(1). The Act therefore does not advance the State's asserted interest: if the Secretary of Labor determines that H-2A certifications should issue, there is necessarily no impact on Maine workers. Eliminating the H-2A program for log truck drivers in Maine thus does not protect Maine workers; it simply harms Maine employers.

Even if the State asserted a compelling interest and even if the Act could theoretically advance that interest, the State has provided no support for its factual assertions relating to the alleged need to protect the Maine logging industry. The State cites only a PowerPoint presentation from the Maine Department of Labor addressing workforce conditions in Maine through September 2021.[21] Aplt. Br. at

[21] To the extent the State continues to rely on an unsigned 2009 press release from the Maine Department of Labor to suggest that the H-2A visa program has failed to adequately protect Maine workers, *see* App.124-25, that press release fails to provide support for the State's purported interest in this case for the reasons identified by the District Court, *see* Add.67. The press release identifies that rule changes were

33 (citing App.126-41). As the District Court observed, "[t]he document explains that 'job openings are historically high, quits are up, and wages are surging in a very competitive environment for attracting and retaining labor.'" Add.66 (quoting App.131). Accordingly, the State's "own evidence shows that there are more jobs in Maine than workers willing to take them." *Id.* at 67. [22] In any event, this "economic data summarizes workforce conditions across Maine without differentiating among sectors or industries" and "[i]t is therefore inappropriate for the Court to extrapolate the conclusion that this data is representative of the logging industry and working conditions of the logging industry in all parts of the state." *Id.* Accordingly, the State's assertion that "Maine's forest industry has left good jobs—point-to-point log trucking—functionally inaccessible to domestic workers" finds no factual support in the record. Aplt. Br. at 28.[23]

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adopted to address the purported concerns, and there is no evidence that any issues remain more than twelve years later. *See also infra* n.22.

[22] The State's brief does not make any sustained argument that the District Court's findings in this regard constituted clear error and thus concedes them for purposes of appeal. *Sparkle Hill, Inc.*, 788 F.3d at 29; *Waste Mgmt. Holdings, Inc.*, 208 F.3d at 299.

[23] Contrary to the State's assertion, the Maine Legislature never "determined" that the logging industry requires protection "given Maine's proximity to Canada." Aplt. Br. at 33. The Act's legislative history contains no findings at all, but rather the uncorroborated rhetoric of the bill's sponsor. App.37-39.

2. The Act is not narrowly tailored.

Even if the Act served a compelling state interest, it is not narrowly tailored. "As part of [the] narrow tailoring analysis, [the Court] consider[s] whether the rule is either under- or overinclusive." *Doe v. Mills*, 16 F.4th 20, 33 (1st Cir. 2021). The State argues that the Act is narrowly tailored because it addresses only one specific employment position (logging truckers). Aplt. Br. at 32-33. To the contrary, as the District Court found, the Act is not narrowly tailored because it is both overinclusive and under-inclusive. App.68-69.

The Act is overinclusive because, to the extent that the Act serves a compelling state interest by protecting Maine workers "during times of high unemployment,"[24] Aplt. Br. at 33, the Act is not tied to employment conditions. Instead, the law forever bans the use of any H-2A workers as log truck drivers regardless of employment conditions. As the District Court concluded, "[a] blanket ban is overbroad because it does not account for the possibility that the employee market and employer demands are not consistent in all parts of the state and across years." App.69. To be narrowly tailored, the Act would need to take account of real-time employer demands and labor availability, as well as variations in different

[24] As discussed *supra*, the State's PowerPoint does not support the conclusion that Maine is suffering from high unemployment; even if it did, it does not include any information concerning the current unemployment rate relative to historical averages. App.126-41. *See also supra* n.22.

parts of the state. *Id.* The H-2A program itself serves as a useful contrast: whereas the DOL makes case-by-case determinations concerning the availability of domestic workers to perform specific jobs and the impact of employing nonimmigrant workers on the U.S. labor market, the Act permanently bans nonimmigrant aliens from driving logging trucks without regard to current local circumstances. If the State wanted to ensure that the employment of nonimmigrants would not harm Maine workers, it could have adopted a regime that made similarly individualized determinations about the use of nonimmigrant labor or a regime that tied the use of such labor to specific labor market conditions.[25] It adopted no such scheme.

The Act is also under-inclusive. As the District Court noted, if the State's goal is to "protect[] its domestic workforce" and the "logging industry," Aplt. Br. at 32, the Act is under-inclusive because it only targets one job within the logging industry, Add.68. The State has not "demonstrated why [its] concerns about H-2A abuse are limited to logging truck drivers so as to justify singling out these workers." *Id.* Moreover, if protection of Maine's "domestic workers" is the goal, Aplt. Br. at 32, then the Act is also under-inclusive because it bars only H-2A workers—not other lawfully present foreign nationals, or, for that matter, other out-of-state competition from other U.S. citizens. Other immigrant or out-of-state workers

[25] Such a scheme still would run afoul of the Supremacy Clause and the preemptive scope of the INA but at least would better serve the State's claimed interest in enacting protectionist measures for the benefit of Maine workers.

similarly "risk[] depriving the domestic workforce of good jobs," Aplt. Br. at 33, but the Act does not concern itself with them at all. The Act's specific targeting of nonimmigrant truckers belies the State's asserted interest.

* * * *

The Act's ban on transportation of forest products by H-2A workers lawfully present in the United States discriminates against nonimmigrant aliens in violation of the equal protection guarantees of the United States and Maine Constitutions. This conclusion is strongly supported by the Second Circuit's decision in *Dandamudi*. As noted above, *Dandamudi* involved a New York statute restricting access to pharmacist licensure to U.S. citizens or LPRs, excluding nonimmigrant visa holders. 686 F.3d at 69. Applying strict scrutiny, the Court of Appeals found no compelling interest supporting the licensing requirement because there was no evidence that nonimmigrant pharmacists posed a greater risk to the public than citizens or LPRs. *Id.* at 79. The Second Circuit also found the law to be "far from narrowly tailored," as there were "other ways (i.e., malpractice insurance) to limit the dangers of potentially transient professionals." *Id.* Similarly, the Act targets nonimmigrant aliens, but without serving a compelling state interest and despite the existence of other more narrowly tailored means of advancing such interests if they

existed.[26] The District Court did not abuse its discretion in holding Appellees are likely to succeed on the merits of their equal protection claims.

CONCLUSION

The Court should affirm the order of the District Court.

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[26] The Court should reject the State's suggestion that the Court ignore *Dandamudi*. Indeed, the Office of the Attorney General previously cited to and relied on *Dandamudi* in analyzing the equal protection issues posed by the Act. *See* App.52. While the State now attempts to distinguish *Dandamudi* by pointing out New York conceded there it had no compelling government interest in discriminating against nonimmigrant aliens, this concession simply highlights the State's extreme position here in attempting to assert a compelling state interest in labor market protectionism.

CERTIFICATE OF COMPLIANCE WITH RULE 32

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), as it contains 13,000 words, excluding the parts of the brief exempted by Fed. R. App. 32(f).

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CERTIFICATE OF SERVICE

I certify that the within brief has been electronically filed with the Clerk of the Court on June 22, 2022. All attorneys listed below are ECF filers and will receive service by electronic means pursuant to Rule 4 of this Court's Rules Governing Electronic Filing:

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