IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

USA FARM LABOR, INC., *et al.*, Plaintiffs, v. JULIE SU, in her official capacity as Acting Secretary of Labor, *et al.*, Defendants.	)	Civil Action No. 1:23-cv-96

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON ALL CLAIMS

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INTRODUCTION

Twenty-four Plaintiffs (twenty-three farms or agricultural businesses and one H-2A filing agent) challenge the 2023 Final Rule promulgated by the Department of Labor ("DOL") titled *Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States*, 88 Fed. Reg. 12760 (Feb. 28, 2023) (the "Final Rule"). Plaintiffs allege the Final Rule is *ultra vires*, arbitrary and capricious, and not the product of reasoned decision-making. All of Plaintiffs' claims fail as a matter of law.

Congress has expressly delegated to DOL the authority to certify that a U.S. employer's hiring of H-2A temporary foreign agricultural workers will not adversely affect the wages and working conditions of similarly employed workers in the United States. 8 U.S.C. § 1188(a). One of the primary ways DOL exercises this express authority is by setting the Adverse Effect Wage Rate ("AEWR"), which is "the minimum hourly wage rate[] that must be paid under the H-2A program" to both H-2A workers and non-H-2A workers in corresponding employment.[1] *North Carolina Growers' Ass'n v. United Farm Workers (NCGA)*, 702 F.3d 755, 759 (4th

[1] Corresponding employment is "[t]he employment of workers who are not H–2A workers by an employer who has an approved Application for Temporary Employment Certification in any work included in the job order, or in any agricultural work performed by the H–2A workers. To qualify as corresponding employment, the work must be performed during the validity period of the job order, including any approved extension thereof." 20 C.F.R. § 655.103(b); *see Overdevest Nurseries, L.P. v. Walsh*, 2 F.4th 977 (D.C. Cir. 2021).

Cir. 2012). DOL's Final Rule amending the methodology for determining the AEWR comports with the plain language of the H-2A program statute, is based on the Department's longstanding expertise in setting wages for the H-2A program, and is the product of DOL's reasoned decision-making process. Accordingly, and for the reasons fully set forth below, the Court should uphold the Final Rule and enter summary judgment in its entirety in favor of DOL.

FACTUAL BACKGROUND

A. Statutory and Regulatory Background.

The H-2A visa program permits employers in the United States to hire foreign workers "to perform agricultural labor or services ... of a temporary or seasonal nature." 8 U.S.C. § 1101(a)(15)(H)(ii)(a).

The H-2A program was created through the Immigration Reform and Control Act (IRCA) of 1986. Congress recognized that the agricultural sector relied heavily on unauthorized foreign workers. *See* Senate Rep. No. 99-132 (1985) at 2; House Rep. No. 99-682, pt. 1 (Judiciary Committee) at 106. The H-2A program, 8 U.S.C. § 1188, was designed to provide a lawful source of workers to agricultural businesses in the United States even as other parts of the IRCA sought to increase enforcement by the legacy Immigration and Naturalization Service ("INS") and impose penalties on employers that hired unauthorized workers. *Id.*; *see also* Pub. Law 99-603 at §§ 111-115, 121 (enforcement provisions). In creating the H-2A program, however,

Congress sought to ensure that the employment of H-2A workers would not depress the wages and working conditions of similarly employed workers in the United States. 8 U.S.C. § 1188(a)(1)(B). In accordance with section 1188, DOL sets the AEWR, the minimum wage an H-2A worker must be paid to avoid depressing wages of those similarly employed in the United States. 8 C.F.R. § 214.2(h)(5)(i)(A); *see NCGA*, 702 F.3d at 759.

The concept of an AEWR was not created in 1986. Before Congress created the H-2A program specific to temporary agricultural workers (and the H-2B program for temporary non-agricultural workers), Congress had created a more generalized program through the Immigration and Nationality Act of 1952 for all temporary foreign workers, which was simply called the H-2 program. Pub. L. No. 82-414, § 101(a)(15)(H)(ii), 66 Stat. 163, 168. Section 212(a)(14) of the 1952 Act made those "seeking to enter" the United States to "perform skilled or unskilled labor" ineligible for worker visas if the Secretary of Labor certified that "sufficient workers in the United States who [were] able, willing, and qualified [were] available at the time … and place … to perform such skilled or unskilled labor," or if "the employment of such aliens [would] *adversely affect* the wages and working conditions of the workers in the United States similarly employed." Pub. L. No. 82-414, § 212(a)(14), 66 Stat. 163, 183 (Jun. 27, 1952) (emphasis added).

In creating the H-2A program, Congress recognized that DOL already had an "existing practice of determining adverse effect wage rates on a State-by-State basis" and Congress did not intend to change that practice. *See* Senate Rep. No. 99-132 (1985) at 38. Thus, DOL had been setting an AEWR for many years prior to enactment of the IRCA, and Congress allowed DOL to continue that practice under the H-2A program.

Before an employer can petition the Department of Homeland Security for a visa to hire an H-2A temporary foreign agricultural worker, the employer must apply to DOL for a temporary labor certification. 8 U.S.C. § 1188(a)(1). Congress authorized the Secretary of Labor to certify such an application only if "(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, of particular import here, "(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." *Id.* Courts have long recognized that Congress did not specify how DOL was to achieve its statutory objectives, leaving these questions "entirely to [DOL's] discretion." *AFL-CIO v. Brock*, 835 F.2d 912, 915 (D.C. Cir. 1987); *see Rowland v. Marshall*, 650 F.2d 28, 30 (4th Cir. 1981) (recognizing DOL's discretion to set the methodology to establish the AEWR); *USA Farm Lab., Inc. v. Su*, No. 1:23-CV-00096-MR-WCM,

— F. Supp. 3d. —, 2023 WL 6283333, at * 8 (W.D.N.C. Sept. 26, 2023) (indicating that DOL has "broad discretionary authority to choose any reasonable formula to compute" the AEWR (citing *Rowland*, 650 F.2d at 30 and *Brock*, 835 F.2d at 914)).

In February 2023, DOL published the Final Rule in the Federal Register, promulgated after notice-and-comment rulemaking,[2] setting forth a revised method for determining the AEWR. 88 Fed. Reg. 12760. The Final Rule adopted the proposal to continue to use the Farm Labor Survey to set the AEWR for the vast majority of occupations and to use the Bureau of Labor Statistics Occupational Employment and Wage Statistics (OEWS) survey for geographic areas where the Farm Labor Survey does not report a wage finding and for those occupations not consistently surveyed by the Farm Labor Survey. *Id*. at 12767. DOL reasoned that this new method was needed because the previous method failed to adequately protect wages in certain circumstances. *Id.* at 12761. The previous method relied entirely on the Farm Labor Survey to determine the AEWR. As relevant here, the Farm Labor Survey "does not include in the…data collection" wage data for certain occupations including "supervisors, construction, logging, [and] tractor-trailer truck drivers." *Id.* at 12761. Because the Farm Labor Survey lacks data for those occupations, "an AEWR using the [Farm Labor Survey]…data does not adequately

[2] DOL's Notice of Proposed Rulemaking was published on December 1, 2021. 86 Fed. Reg. 68174. It received 92 public comments in response, which the Department addressed in the Final Rule. 88 Fed. Reg. at 12765-84.

guard against adverse effect on the wages of agricultural workers similarly employed in the United States in these [occupations].” *Id.* DOL explained in the Final Rule that not only was an AEWR based entirely on the Farm Labor Survey data “not reflective of the wages of workers performing similar work in those [other occupations] but the [other occupations] generally account for more specialized or higher paid job opportunities.” *Id.*

For most occupations, DOL explained that the Farm Labor Survey continued to be the best source of wages and would continue to be used in calculating the AEWR. 88 Fed. Reg. at 12768 (“The Department continues to believe the [Farm Labor Survey] is the best available wage source for establishing AEWRs covering the vast majority of H–2A job opportunities (*i.e.*, the field and livestock workers (combined) category), whenever such data is available.”). Thus, the revised AEWR methodology would *not* apply to *all* occupations for which an employer might hire a temporary foreign agricultural worker. Indeed, the great majority of occupations—those that qualify as field or livestock workers—would not be affected at all. *Id.*

To address the concern that the prior method did not adequately protect the wages of certain agricultural workers, such as managers, construction workers, and tractor-trailer truck drivers, DOL turned to wage data from the OEWS survey, which reports wage data for over 800 occupations. *See* https://www.bls.gov/oes/oes_ques.htm at OEWS Data Overview (last visited Mar.

13, 2024). In the Final Rule, DOL explained: "Within the agricultural sector of the U.S. economy, the OEWS survey collects employment and hourly gross wage data from farm labor contractors that support fixed-site agricultural employers." 88 Fed. Reg. at 12770. Such contractors participate in the H-2A program at an increasing rate, rising from about 33% of H-2A positions certified in Fiscal Year 2016 to over 43% in Fiscal Year 2022. *Id.* at 12770 n.60. DOL further explained that the OEWS survey provides an accurate source of wage data for H-2A occupations not specifically reflected in the Farm Labor Survey, such as supervisors, and for H-2A occupations more often contracted for, such as construction work. *Id*. at 12771.

DOL explained how its new rule would be implemented. Relevant here, DOL explained that it would continue to rely on "Standard Occupational Classification" ("SOC") codes to categorize job opportunities.[3] DOL explained that "the evaluation of tasks associated with an employer's job opportunity and SOC code assignment is not new in the H-2A program." 88 Fed. Reg. at 12779. It provided an explanation and examples of how SOC codes would be assigned, since, under the Final Rule, the SOC code determines whether the AEWR is set using Farm Labor Survey or OEWS data. *Id.* at 12779-81. For the job opportunities falling within the SOC codes covered by the Farm Labor Survey "field and livestock workers (combined)" category, the

[3] SOC codes are "used by federal agencies to classify workers into occupational categories for the purpose of collecting, calculating, or disseminating data." *See* https://www.bls.gov/soc/ (last visited Mar. 15, 2024).

Final Rule requires use of the Farm Labor Survey data to determine the statewide AEWR. *Id*. at 12766. DOL estimated that 98% of H-2A job opportunities fall within the six SOC codes encompassed by the "field and livestock workers (combined)" category and thus will be subject to a Farm Labor Survey-based AEWR. *Id.* For job opportunities "that do not fall within the [Farm Labor Survey] field and livestock workers (combined) category," the AEWR will be based on OEWS data in each State or equivalent district or territory and be SOC-specific. *Id.* at 12770.[4] In addition, if an employer chooses to combine job responsibilities into a single job, some of which fall under the six SOC codes covered by the Farm Labor Survey and some under an SOC code that would be assigned an OEWS wage (for example, a worker whose duties included hand-harvesting and supervising other workers), DOL would apply the higher applicable AEWR. *Id.* at 12778, 12780-81. DOL concluded that using the higher applicable AEWR would better guard against adverse effects and reasoned that because employers structure their own job opportunities, they could structure them in a way to avoid combinations of duties. *Id.* at 12778-79; *see USA Farm Lab., Inc.*, 2023 WL 6283333 at *10 (summarizing DOL's explanation, reasoning, and justification).

[4] DOL recognized that, in some cases, an SOC code not included in the field and livestock workers (combined) data collection may have a lower statewide OEWS survey result than the Farm Labor Survey result for field and livestock workers (combined). 88 Fed. Reg. at 12778.

In creating the new methodology, DOL was cognizant of "its purpose to guard against adverse impacts on the wages of agricultural workers in the United States similarly employed." *Id.* at 12761. But it also recognized that "[t]he INA 'requires that the Department serve the interests of both farmworkers and growers—which are often in tension'" (*id.* at 12761, quoting *AFL-CIO v. Dole*, 923 F.2d 182, 187 (D.C. Cir. 1991)) and that the "'clear congressional intent was to make the H-2A program usable, not to make U.S. producers non-competitive' and that '[u]nreasonably high AEWRs could endanger the total U.S. domestic agribusiness, because the international competitive position of U.S. agriculture is quite fragile.'" 88 Fed. Reg. at 12772 (quoting 54 Fed. Reg. 28037, 28046 (July 5, 1989)). DOL estimated that approximately 2% of job opportunities would be affected by the Final Rule and estimated employer costs. 88 Fed. Reg. at 12775, 12786.

B. Procedural Background.

On May 24, 2023, Plaintiffs filed their Second Amended Complaint ("SAC") asserting challenges to the Final Rule under the Administrative Procedure Act ("APA"). *See* ECF No. 10. Two days later, on May 26, 2023, Plaintiffs requested a preliminary injunction ("PI"). ECF No. 13. The government opposed Plaintiffs' PI motion and moved to dismiss the SAC for lack of subject matter jurisdiction. ECF Nos. 35, 37 and 38. On September 26, 2023, the Court denied Plaintiffs' PI motion and denied the government's motion to dismiss. ECF No. 50; *USA Farm Lab., Inc.*,

2023 WL 6283333 at *1. Plaintiffs appealed the denial of their PI motion to the Fourth Circuit. ECF No. 52; *USA Farm Lab., Inc.*, 2023 WL 6283333 at *1, *appeal docketed*, No. 23-2108 (4th Cir. Oct. 24, 2023). Plaintiffs' appeal is fully briefed and pending before the Fourth Circuit.

On December 12, 2023, this Court entered a Pretrial Order and Case Management Plan setting the parties' summary judgment briefing deadlines. ECF No. 61.

STANDARD OF REVIEW

"[W]hen a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001). "The entire case on review is a question of law." *Id.* (quotations/citations omitted). As a result, "the ordinary summary judgment standard does not apply" because "the facts are all set forth in the administrative record." *LivinRite, Inc. v. Azar*, 386 F. Supp. 3d 644, 650 (E.D. Va. 2019). This standard of review renders judicial oversight "highly deferential, with a presumption in favor of finding the agency action valid." *Friends of Back Bay v. U.S. Army Corps of Eng'rs*, 681 F.3d 581, 587 (4th Cir. 2012).

While the APA does not permit a court to substitute its judgment for that of an expert agency, *see Sanitary Bd. of Charleston v. Wheeler*, 918 F.3d 324, 333 (4th Cir. 2019), a court will set aside an agency action if it is "arbitrary, capricious, an

abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also Defenders of Wildlife v. N.C. Dept. of Transp.*, 762 F.3d 374, 393 (4th Cir. 2014). In accordance with Section 706(2)(A) of the APA, an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Deference is due when the agency makes this rational connection. *See Ohio Valley Envtl. Coal., Inc. v. U.S. Army Corps of Eng'rs*, 828 F.3d 316, 321 (4th Cir. 2016).

ARGUMENT

Plaintiffs do not contest DOL's authority to set the AEWR for the H-2A program. *See, e.g.*, SAC ¶¶ 3, 7. Instead, Plaintiffs assert that the AEWR methodology adopted in the Final Rule and the accompanying cost analysis violated the APA. These claims lack merit. The Final Rule is the product of DOL's reasoned decision-making through the notice and comment rulemaking process and is based on the Department's longstanding expertise in setting H-2A wage rates that protect the wages of similarly employed workers in the United States. Accordingly, the Court should uphold the Final Rule and enter summary judgment in its entirety for DOL.

I. DOL May Use the OEWS Survey as a Wage Source for the AEWR.

Plaintiffs allege that DOL exceeded its statutory authority in adopting, and failed to explain why it adopted, the OEWS survey as a wage source for the AEWR. Neither contention has merit.

A. DOL Acted Within its Statutory Authority in Adopting the OEWS as a Wage Source for the AEWR.

"An agency's action is *ultra vires* if it contravenes 'clear and mandatory' statutory language." *Pac. Mar. Ass'n v. NLRB*, 827 F.3d 1203, 1208 (9th Cir. 2016) (quoting *Leedom v. Kyne*, 358 U.S. 184, 188 (1958)). Here, that is simply not the case. This is because the Final Rule furthers DOL's express mandate under 8 U.S.C. § 1188.

Congress delegated to DOL the statutory responsibility to certify an employer's application to hire a foreign temporary agricultural worker only if: 1) "there are not sufficient [U.S.] workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services" needed; and 2) "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." 8 U.S.C. §§ 1188(a)(1)(A), (B). Congress did not specify exactly how DOL must carry out that mandate. Instead, it expressly delegated to DOL the authority to determine how to implement that directive. *See* Pub. Law 99-603, § 301(e), as amended by Pub. Law 100-525, § 2(l)(4) (delegating to the

Attorney General, in consultation with the Secretary of Labor and the Secretary of Agriculture, the approval of "all regulations to be issued implementing sections 101(a)(15)(H)(ii)(a) and 218" of the INA) (codified at 8 U.S.C. § 1188, notes); *see also United Farm Workers v. Solis*, 697 F. Supp. 2d 5, 6 (D.D.C. 2010) ("Congress delegated the certification of H–2A [applications] to the Secretary of Labor."). For decades, DOL has exercised its statutory authority to prevent the employment of temporary foreign workers performing agricultural services or labor from adversely affecting the wages of workers similarly employed in the United States primarily by setting the AEWR. *See Rowland,* 650 F.2d at 30 (discussing DOL's broad authority and discretion to set the AEWR); *Dole*, 923 F.2d at 187 (similar); *Florida Sugar Cane League v. Usery*, 531 F.2d 299 (5th Cir. 1976) (similar);[5] *USA Farm Lab., Inc.*, 2023 WL 6283333 at *8 (similar).

Thus, the Final Rule is not *ultra vires* because it does not exceed the broad authority that Congress has provided to DOL to prevent the employment of H-2A workers from adversely affecting the wages of workers in the United States similarly

[5] *Rowland* and *Florida Sugar Cane* both involved the H-2 program under the 1952 INA. *See Rowland*, 650 F.2d at 30; *Florida Sugar Cane*, 531 F.2d at 300. As noted, the 1952 Act contained nearly identical language that foreign temporary workers not "adversely affect the wages and working conditions of the workers in the United States similarly employed." *See* Pub. L. No. 82-414, § 212(a)(14), 66 Stat. 163, 183 (Jun. 27, 1952). Both *Rowland* and *Florida Sugar Cane* involved interpretations of this language and the regulations implementing it. *See Rowland,* 650 F.2d at 30; *Florida Sugar Cane*, 531 F.2d at 300-01.

employed. *See, e.g.*, *Ancient Coin Collectors Guild v. U.S. Customs & Border Prot.*, 698 F.3d 171, 179 (4th Cir. 2012) ("Government action is *ultra vires* if the agency … is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden").

B. DOL Explained its Reasoning for Adopting the OEWS as a Wage Source for the AEWR.

DOL's reasoned explanation for its decision to change the AEWR methodology to better carry out its statutory mandate complies with the APA.

DOL explained that the Final Rule maintains its prior methodology to set the AEWR for field and livestock workers (combined) and introduces a new methodology to set the AEWR for other agricultural occupations. Prior to the 2023 Final Rule, all H-2A workers in the same state or region were subject to the same AEWR rate as field and livestock workers (combined) based on the Farm Labor Survey. 88 Fed. Reg. at 12761. In the Final Rule, DOL continued to use the Farm Labor Survey to determine the AEWR for field and livestock workers (combined), while adopting the OEWS to determine the AEWR for other workers. 88 Fed. Reg. at 12761, 12799 (the Final Rule "allows specific OEWS wages for workers in higher paid SOC codes, such as supervisors of farmworkers, tractor trailer truck drivers, logging workers, and construction laborers on farms while maintaining the use of [Farm Labor Survey] data for SOC codes with the majority of H-2A workers."). Both surveys are longstanding nationwide surveys conducted by government

entities. *See* Certified Administrative Record ("CAR") Index Nos. 10, 11, 23, 24, (FLS); 22, 28, 29 (OEWS).

DOL explained in the Final Rule that it decided to use the OEWS survey to set the AEWR for certain job opportunities because the OEWS survey fills gaps left by the Farm Labor Survey as to certain agricultural occupations and would therefore better protect against adverse effects in those occupations. 88 Fed. Reg. at 12761, 12764; *see also USA Farm Lab., Inc.*, 2023 WL 6283333 at *9 ("the Agency, in its discretion, determined that failing to consider the wages of employees working outside of the agricultural industry—or within the industry and simply not captured by the FLS because they work for contractors—depressed the wages of workers in some occupations."). It explained that the OEWS survey collects data from contractors, who employ over 40% of H-2A workers and who are more likely to employ workers in occupations outside the six SOC codes that comprise the field and livestock workers (combined) category. *Id.* at 12770 & n.60, *see also* CAR at Index Nos. 22, 28, 29 (discussing OEWS data coverage).

As an example, an employer under the Final Rule in North Carolina in January 2024 would have to pay an hourly rate of at least $25.52 to an H-2A heavy truck driver (SOC Code 53-3032), rather than the $15.81 paid to an H-2A worker working in an occupation covered by the FLS. *See* https://flag.dol.gov/wage-data/adverse-effect-wage-rates#allother (last visited Mar. 13, 2024); *see also*

https://flag.dol.gov/sites/default/files/2023-06/BLS-OEWS_National_State_Data_May%202022_Release.xlsx (last visited Mar. 13, 2024). That higher rate is comparable to the rate that heavy truck drivers in North Carolina receive. Thus, the Final Rule imposes a mandate of equal minimum pay for equal work; the nature of a heavy truck driver's job does not change depending on whether the goods being transported are agricultural. *Cf. Overdevest Nurseries, L.P. v. Walsh*, 2 F.4th 977, 984 (D.C. Cir. 2021) (it is "eminently reasonable" to interpret § 1188(a)(1)(B) to require employers to pay H-2A workers and non-H-2A workers in "corresponding employment" the same amount for the same work).

DOL further explained that when an employer chooses to file a single H-2A application requiring workers to perform a variety of duties, some of which are consistent with higher paid SOC codes in the State, an AEWR determined using the lower-paid SOC code would not adequately guard against adverse effect on the wages of workers in the U.S. similarly employed. *Id.* at 12778, 12781. And as this Court previously found, DOL "has articulated its reasoning and determined that the totality of the circumstances test and policy of assigning the highest applicable AEWR best accomplished its statutory mandate to protect against adverse effects to workers." *USA Farm Lab., Inc.*, 2023 WL 6283333, at *11.

Finally, DOL acknowledged that it must "balance the competing goals of the statute—providing an adequate labor supply and protecting the jobs of domestic

workers." 88 Fed. Reg. at 12774 (quoting *Dole*, 923 F.2d at 187). DOL therefore considered the costs of the Final Rule to H-2A employers, to ensure that the program would remain useful despite the always-present tension between employer costs and employee wages. *See id.* at 12786-93. DOL determined that fewer than 3% of all labor certifications in fiscal years 2020 and 2021 would have been affected by the Final Rule and predicted that 98% of job opportunities would be subject to Farm Labor Survey-based AEWRs under the Final Rule. *Id*. at 12785, 12789 n.106. Additionally, DOL estimated that approximately 98% of small employers would see impacts amounting to less than one percent of their revenue. *Id.* at 12799. The Department based its predictions on an analysis of H-2A labor certifications in FY 2020 and 2021. *Id.* at 12799, 12785, 12789 & nn. 106, 107.

In promulgating the Final Rule, DOL explained its policy choices and the reasons for its decision to use the OEWS survey for occupations other than those falling within the six SOC codes for field and livestock workers (combined), while leaving intact the Farm Labor Survey data for field and livestock workers (combined). It also evaluated the costs to employers to ensure that the H-2A program would not become too costly for U.S. employers to use. DOL's Final Rule sufficiently explains its policy decision and is therefore not arbitrary and capricious. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43; *Ohio Valley Envtl. Coal.*, 828 F.3d at 321; *Dole*, 923 F.2d at 187 ("The government's choice of methodology is really a

policy decision taken within the bounds of a rather broad congressional delegation"). And, as this Court previously held, Plaintiffs' complaint about use of OEWS data "is a policy disagreement with the Agency, not a meaningful argument that the Agency's construction is unreasonable or otherwise impermissible." *USA Farm Lab., Inc.*, 2023 WL 6283333, at *9.

II. Plaintiffs Fail to Assert Any Viable Claims Against DOL.

A. DOL Was Not Statutorily Required to Consider Whether the AEWR Will Control Illegal Immigration.

To the extent that Plaintiffs contend that DOL was statutorily required to consider the effect of the Final Rule and the AEWR methodology on the control of illegal immigration, they are incorrect.[6] Section 1188(a) requires DOL to balance the competing goals of providing an adequate authorized labor supply for the U.S. agricultural sector with the need to protect wages and working conditions of similarly employed workers in the United States. *See Dole*, 923 F.2d at 187. Nothing in the text of 8 U.S.C. § 1188(a) suggests that as part of that balancing, DOL was required to consider whether the AEWR would affect illegal immigration.

Moreover, the structure of IRCA shows that controlling illegal immigration was only one of IRCA's many purposes and that IRCA did not task DOL with

[6] Plaintiffs' TRO brief includes a perfunctory statement that the "impact" of the Final Rule on "illegal immigration" is a "relevant factor" under the IRCA that DOL should have considered. ECF No. 47 at 9.

achieving this objective as part of the H-2A program. Statutory provisions for controlling illegal immigration were contained in Title I of the IRCA, entitled "Control of Illegal Immigration." *See* Pub. Law 99-603 at Title I. Title I sought to control illegal immigration through new penalties on employers who used unauthorized workers, a system to verify employment authorization, new penalties for bringing unauthorized workers into the United States, and greater enforcement efforts. *See* Pub. Law 99-603 at §§ 111-115, 121. It delegated those tasks primarily to the former INS. *See* Pub. L. 99-603 § 111(a) (1986), codified at 8 U.S.C. § 1101 note ("It is the sense of Congress that two essential elements of the program of immigration control established by this Act are—(1) an increase in the border patrol and other inspection and enforcement activities of the Immigration and Naturalization Service… (2) an increase in examinations and other service activities of the Immigration and Naturalization Service…."); *see also* Pub. L. 99-603 § 111(b) (providing appropriations to the INS and immigration courts). Title II of the IRCA, entitled "Legalization," related to a second purpose of the statutory scheme: to provide a pathway to lawful status for those already present in the United States. *Id.* at §§ 201-203. Title III of the IRCA, entitled "Reform of Legal Immigration," addressed a third purpose of the IRCA, which was to improve certain aspects of the legal immigration system. *Id.* at §§ 301-315. Title III contains the H-2A program (in Subpart A) and the H-2B program (in Subpart B). The Attorney General, in

consultation with the Secretaries of Labor and Agriculture, was given regulatory authority to implement the H-2A program. *Id.* § 301(e), as amended by Pub. Law 100-525, § 2(l)(4).

The legislative history confirms these purposes of the IRCA. The Senate Judiciary Committee Report explained that the IRCA (1) sought to reduce the availability of job opportunities for unauthorized workers through enforcement and employer penalties, (2) sought to amend the legal immigration system by providing special benefits to certain categories of persons, (3) sought to amend the law relating to nonimmigrant H-2 workers, and (4) provided an opportunity to adjust status for those already present in the U.S. without authorization. *See* S. Rep. 99-132 (1985) at 1-2. Similarly, the House Judiciary Committee Report explained that the purposes of the IRCA were to "control illegal immigration to the U.S., make limited changes in the system for legal immigration, and provide a controlled legalization program for certain undocumented aliens who have entered this country prior to 1982." *See* H. Rep. 99-682, Part I, at 45 (1986). And as the text of Title I makes clear, controlling illegal immigration through enforcement and penalties was primarily assigned to the former INS.

In contrast, Congress did not intend the H-2A program to control illegal immigration. The legislative history of Title III makes no mention of controlling illegal immigration through labor certifications or the H-2A program. Rather, it

explains that the H-2A program was designed to ensure employers had access to sufficient authorized workers once the enforcement provisions took effect and to protect the wages of workers in the United States. *See* Senate Rep. No. 99-132 (1985) at 2 ("The H-2 temporary worker program is revised in order to assist agricultural employers in adjusting to the reduced availability of illegal foreign workers."); *id.* at 5 ("Such adverse impacts [to similarly employed workers] include both unemployment and less favorable wages and working conditions."); House Rep. No. 99-682, pt. 1 (Judiciary Committee) at 106 (views of Department of Justice) (noting that the agricultural sector relied on unauthorized workers and "it is important that we also provide a legal mechanism for agricultural employers to hire temporary foreign workers when they are unable to find American workers."). Congress created the H-2A program to provide the agricultural industry with the adequate supply of authorized temporary and seasonal workers that the prior H-2 program had failed to provide. The H-2A program was designed not as a separate enforcement mechanism, but rather to fill the gap that the IRCA's enforcement provisions was intended to create. Thus, the pertinent legislative history—that of the H-2A program itself—is consistent with the plain text of section 1188(a): It makes clear that the purpose of the H-2A program was to provide an adequate source of authorized workers to the agricultural industry in the absence of willing and able U.S. workers, while ensuring

that the employment of foreign workers would not adversely affect the wages and working conditions of workers similarly employed in the United States.

As demonstrated, to the extent Plaintiffs assert that the Final Rule is arbitrary and capricious because DOL did not consider its effect on illegal immigration, their position lacks merit.

B. DOL Adequately Explained its Decision-Making Process in the Final Rule.

In the Final Rule, DOL determined that for jobs that include multiple responsibilities across multiple SOC codes, the highest AEWR will apply. If Plaintiffs assert that this renders the Final Rule arbitrary and capricious, *see*, *e.g.*, SAC ¶ 69; ECF No. 13 at 18-20, their argument should be rejected. As discussed above, DOL provided detailed reasoning, explaining that applying the highest wage would best protect wages. *See* 88 Fed. Reg. at 12778-79. DOL further explained that because employers structure and define their own H-2A job opportunities, employers are free to separate job duties subject to different AEWRs into separate H-2A applications. 88 Fed. Reg. at 12778. This is exactly the type of policy judgment an agency is permitted to make, *Dole*, 923 F.2d at 187, which does not—and cannot—render the Department's AEWR methodology arbitrary and capricious.

C. DOL's Rulemaking Properly Considered Potential Costs to Employers.

Plaintiffs also challenge DOL's analysis of the cost of the Final Rule to

employers. *See, e.g.*, SAC ¶ 81; ECF No. 13 at 8, 16. This challenge fails as a matter of law because DOL acknowledged that employer costs were a relevant consideration and calculated costs to employers by using actual wage data from fiscal years 2020 and 2021 "to determine the most accurate impact of the revised AEWR structure in the final rule." 88 Fed. Reg. at 12772, 12785; *see also USA Farm Lab., Inc.*, 2023 WL 6283333, at *11 (summarizing DOL's cost analysis, rejecting Plaintiffs' challenge to it, and concluding that Plaintiffs' "argument that the Agency failed to consider cost at all is unsupported by the record.").

In particular, DOL analyzed 25,150 certifications from those fiscal years to determine what SOC codes had been assigned. *Id.* For each labor certification it issues, DOL assigns an SOC code or codes to the job opportunity based on the facts contained within the employer's application. *Id.* at 12779. DOL has long used SOC codes in its labor certification process. *Id.* at 12761. DOL's review of those 25,150 labor certifications showed that only 732 certifications (or 2.91%) had been classified under SOC codes that would be subject to the higher OEWS wage rates for skilled labor. *Id.* at 12785. For those 732 certifications, the average cost per worker was determined to be $5,117. *Id.* DOL acknowledged the limitations of its cost estimates and identified reasons that the number could be higher or lower than the estimate under the 2023 AEWR Final Rule, including (1) SOC code reassignment based on mixed job duties (*see id.* at 12785 & n.95); (2) H-2A positions

that are certified but left unfilled, which typically is about 20% of positions and would lead to an overestimation of costs (*Id*. at 12795-96); and (3) employer changes to job opportunities to avoid combining job duties that might result in higher wage rates (*Id*. at 12779). DOL provided other cost estimates, including a 10-year cost to employers. *Id.* at 12786. It also addressed the effect of the Final Rule on small businesses, finding that most small businesses would not be affected at all, and only 2.5-3.5% would have an impact to their revenues of greater than 3%. *Id.* at 12799-12801. Thus, in accordance with the APA, DOL conducted a reasonable cost analysis that explained the dataset used, the analysis conducted, and the results found, to show that the Final Rule's cost to employers was reasonable. *See Michigan v. EPA*, 576 U.S. 743, 759 (2015) ("[i]t will be up to the Agency to decide (as always, within the limits of reasonable interpretation) how to account for cost"); *see also State Farm*, 463 U.S. at 43. And as this Court previously recognized, "Plaintiffs' argument appears to be that they *disagree* with the Agency's cost analysis…." *USA Farm Lab., Inc.*, 2023 WL 6283333, at *11. Mere disagreement does not render DOL's analysis arbitrary and capricious. The Court should not second-guess DOL's "predictive judgments about the likely economic effects of a rule." *Newspaper Ass'n of Am. v. Postal Regul. Comm'n*, 734 F.3d 1208, 1216 (D.C. Cir. 2013).

Plaintiffs have also disputed DOL's choice of dataset for the cost analysis. *See* ECF No. 13 at 17. But the Court should afford "great deference" to DOL's choice

of dataset to predict cost so long as its selection is reasonable. *Kennecott v. U.S. Envtl. Prot. Agency*, 780 F.2d 445, 450 (4th Cir. 1985). Here, DOL's reliance on SOC codes applied to labor certifications in the prior two fiscal years was reasonable because it was the most recent data available at the time of DOL's analysis. *See* 88 Fed. Reg. at 12785.

Plaintiffs may disagree with DOL's cost analysis in the Final Rule, *see* ECF No. 13 at 17, but agencies have broad discretion on how to account for cost. *See Michigan v. EPA*, 576 U.S. at 759*; see also Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012) (quoting *Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 563 (D.C. Cir. 2002)). As a result, Plaintiffs' arguments regarding cost fail as a matter of law.

CONCLUSION

For these reasons, the Court should uphold the Final Rule and enter summary judgment in its entirety in favor of the Department of Labor.

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

WILLIAM C. PEACHEY
Director

GLENN M. GIRDHARRY
Assistant Director

AARON S. GOLDSMITH
Senior Litigation Counsel

/s/ Alexandra McTague
ALEXANDRA MCTAGUE
Trial Attorney
United States Department of Justice
Civil Division
Office of Immigration Litigation
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
Phone: (202) 718-0483
alexandra.mctague2@usdoj.gov
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2024, I electronically filed the foregoing document with the Clerk of the Court by using the CM/ECF system, which will provide electronic notice and an electronic link to this document to all attorneys of record.

By: */s/ Alexandra McTague*
ALEXANDRA MCTAGUE
Trial Attorney
United States Department of Justice Civil Division