UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

Electronically filed

RICHARD BARTON, *et al.*,

Plaintiffs;

COMMONWEALTH OF KENTUCKY,

STATE OF ALABAMA,

STATE OF OHIO,

STATE OF WEST VIRGINIA,

Intervening Plaintiffs

v.

U.S. DEPARTMENT OF LABOR;

JULIE SU, in her official capacity as Secretary of the Department of Labor;

JOSE JAVIER RODRIGUEZ, in his official capacity as Assistant Secretary for Employment and Training; and

JESSICA LOOMAN, in her official capacity as Administrator of the Wage and Hour Division,

Defendants

Civil Action No. 5-24-cv-00249-DCR

INTERVENING COMPLAINT

1. In what has seemingly become the *modus operandi* of the Biden-Harris Administration, the Department of Labor has issued regulations that exceed its authority.

2. Earlier this year, the Department of Labor promulgated a final rule entitled, "*Improving Protections for Workers in Temporary Agricultural Employment in the United States*," 89 Fed. Reg. 33898 (Apr. 29, 2024) ("Final Rule") [Exhibit 1]. According to the Agency, the Final Rule "focus[es] on strengthening protections for temporary agricultural workers and enhancing the Department's capabilities to monitor program compliance and take necessary enforcement actions against program violators." 89 Fed. Reg. at 33,898. In reality, the Final Rule confers rights on foreign agricultural workers that Congress explicitly said did not extend to them—and it demands that State agencies discontinue employment services to farmers who refuse to comply with the unlawful rule.

3. The Final Rule should be vacated and enjoined because it violates the Administrative Procedure Act ("APA") and the U.S. Constitution.

PARTIES

4. Intervening Plaintiff Commonwealth of Kentucky is a sovereign State of the United States of America. Russell Coleman is the duly elected Attorney General of the Commonwealth. He has constitutional, statutory, and common-law authority to bring suit on behalf of the Commonwealth and its citizens. *See* Ky. Rev. Stat. § 15.020; *see also Commonwealth ex rel. Beshear v. Commonwealth ex rel. Bevin*, 498 S.W.3d 355, 362–65 (Ky. 2016).

5. Intervening Plaintiff State of Alabama is a sovereign State of the United States of America. Steve Marshall is the duly elected Attorney General of Alabama. He has constitutional, statutory, and common-law authority to bring suit on behalf of Alabama and its citizens. *See* Ala. Code § 36-15-21.

6. Intervening Plaintiff State of Ohio is a sovereign State of the United States of America. Dave Yost, the Attorney General of Ohio, is "the chief law officer for the state and all its departments." Oh. Rev. Code § 109.02. He is authorized to represent the State of Ohio "in any court or tribunal in a cause . . . in which the state is directly interested." *Id.*

7. Intervening Plaintiff State of West Virginia is a sovereign State of the United States of America. Patrick Morrisey is the Attorney General of the State of West Virginia. The Attorney General "is the State's chief legal officer," *State ex rel. McGraw v. Burton*, 569 S.E.2d 99, 107 (W. Va. 2002), and his express statutory duties include "appear[ing] as counsel for the state in all causes pending . . . in any federal court[ ] in which the state is interested," W. Va. Code § 5-3-2.

8. Defendant United States Department of Labor (the "Department") is a federal agency within the meaning of the APA, 5 U.S.C. § 551(1). The Department of Labor is tasked with aiding the United States Attorney General in determining whether to import any alien as a nonimmigrant under 8 U.S.C. § 1101(a)(15)(H)(ii)(a) ("H-2A"). Specifically, the Attorney General cannot approve a petition to import any alien under H-2A unless the Secretary of the Department of Labor issues a certification to the petitioner that (1) "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 (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. Defendant Julie Su is the Secretary of the Department of Labor (the "Secretary").

9. The Secretary "has delegated the authority to issue temporary agricultural labor certifications to the Assistant Secretary for Employment and Training." 89 Fed. Reg. at 33,899. Defendant Jose Javier Rodriguez is the Assistant Secretary for Employment and Training.

10. The Secretary has delegated to the Wage and Hour Division the responsibility to "assure employer compliance with the terms and conditions of employment under the H-2A program." *Id.* Defendant Jessica Looman is the Administrator of the Wage and Hour Division.

JURISDICTION AND VENUE

11. This case arises under the APA, 5 U.S.C. §§ 701–706, and under the Constitution and laws of the United States.

12. This Court has federal question jurisdiction under 28 U.S.C. § 1331.

13. The Court may award declaratory and injunctive relief under the APA, 5 U.S.C. §§ 705–706; 28 U.S.C. §§ 2201–2202; and Federal Rules of Civil Procedure 57 and 65.

14. Venue is proper under 28 U.S.C. § 1391(e)(1)(C). The Intervening Plaintiff the Commonwealth of Kentucky is located in this judicial district, and the

Defendants are officers or an agency of the United States exercising authority in this district.

BACKGROUND

I. The H-2A Visa Program

15. In 1986, Congress passed the Immigration Reform and Control Act (IRCA), which amended the earlier-enacted Immigration and Nationality Act (INA). IRCA created a class of migrant workers that could "com[e] temporarily to the United States to perform agricultural labor or services." 8 U.S.C. § 1101(a)(15)(H)(ii)(a); *see also* 8 U.S.C. § 1184(c)(1); 8 U.S.C. § 1188.

16. The admission to the U.S. of any such workers "shall be for such time and under such conditions as the [U.S.] Attorney General may by regulations prescribe[.]" 8 U.S.C. § 1184(a)(1). Employers wishing to "import[ ]" any alien as a nonimmigrant under subparagraph (H) . . . of section 1101(a)(15)" must petition the Attorney General for approval. *Id.* at § 1184(c)(1). The Attorney General then determines whether to grant the petition "after consultation with appropriate agencies," which for immigrants described under Section 1101(a)(15)(H)(ii)(a)—that is, H-2A workers—"means the Department of Labor and includes the Department of Agriculture." *Id.*

17. Under 8 U.S.C. § 1188(a), a petition may not be approved by the Attorney General unless the petitioner has applied to the Secretary for a certification that confirms (1) "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 (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."

18. Prior to filing an application for the certification, an employer must submit a completed job order between 60 and 75 days before the employer's "first date of need." *See* 20 C.F.R. § 655.121((b). The State Workforce Agency ("SWA") serving the area where the job is to be performed reviews the job order for compliance with related regulations. 20 C.F.R. § 655.121(e)(2). If the SWA approves the job order, "the SWA must promptly place the job order in intrastate clearance and commence recruitment of U.S. workers." 20 C.F.R. § 655.121(f). "The SWA . . . must refer each U.S. worker who applies" to the employer. 20 C.F.R. § 655.121(g).

19. This is the SWA's responsibility under the Wagner-Peyser Act, 29 U.S.C. § 49 *et seq*., which "develop[ed] a national system of employment offices" to "connect the unemployed worker with a job." *See Flores v. Rios*, 36 F.3d 507, 512 (6th Cir. 1994) (citation omitted); 89 Fed. Reg. at 33,899.

20. However, the SWA is estopped from offering employment services to employers who have violated employment-related laws or regulations. 29 C.F.R. § 500.1(f) ("The facilities and services of the U.S. Employment Service, including State agencies, authorized by the Wagner-Peyser Act may be denied to any person found . . . to have violated any employment-related laws[.]").

21. The employer is also obligated to engage in its own recruitment of American workers as part of demonstrating it needs the H-2A workers. *See* 8 U.S.C. § 1188(b)(4). If the employer fails to make such efforts, the "Secretary of Labor may

not issue a certification." 8 U.S.C. § 1188(b). Likewise, the Secretary cannot issue the certification if there is a strike or lockout in the course of a labor dispute, the H-2A employer violated a material term or condition of labor certification during the previous two-year period, or the employer has not provided the Secretary with assurances that it will provide insurance at least equal to what is covered under State workers' compensation law. *See id.*

II. The National Labor Relations Act

22. Enacted in 1935, the National Labor Relations Act (NLRA) established statutorily protected rights to collective bargaining for certain employees. Under the NLRA, "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. The NLRA also provides that it is an "unfair labor practice" for an employer to "dominate or interfere with the formation or administration of any labor organization" and "to encourage or discourage membership in any labor organization" by "discriminat[ing] in regard to hire or tenure of employment or any term or condition of employment . . . ." *Id.* at § 158(a)(2)–(3).

23. When it passed the NLRA, Congress expressly chose not to extend these rights to agricultural workers. Congress defined "employee" to include "any employee . . . unless the Act explicitly states otherwise." *Id.* at § 152. The NLRA explicitly excludes agricultural workers: "The term 'employee' . . . shall not include any individual employed as an agricultural laborer." *Id.* at § 152(3). Therefore, Congress

made it abundantly clear the law does not extend collective bargaining rights to H-2A workers.

III. The Final Rule

24. On April 29, 2024, the Department's Employment and Training and Wage and Hour Divisions promulgated the Final Rule.

25. According to the Department, with the Final Rule, the Department is "exercising its long-recognized authority to establish the minimum terms and conditions of employment (i.e., the 'baseline' of working conditions) necessary to 'neutralize any adverse effect resultant from the influx of temporary foreign workers.'" 89 Fed. Reg. at 33,992 (quoting *Williams v. Usery*, 531 F.2d 305, 306–07 (5th Cir. 1976)).

26. In fact, the Final Rule is a radical departure from any "long-recognized authority" of the Department. Specifically, the Final Rule expands such minimum terms and conditions to include, *inter alia*, that an employer (1) cannot retaliate against an H-2A worker for engaging in "collective action and concerted activity," *see* 89 Fed. Reg. at 33,901, 33,992, 34,062; (2) must not operate or allow anyone else to operate employer-provided transportation unless all passengers are wearing seat belts, *see id.* at 34,060; (3) must permit workers "to designate a representative to attend any investigatory interview that the worker believes might result in disciplinary action," *id.* at 34,063; and (5) must allow workers residing in employer-furnished housing "to invite, or accept at their discretion, guests" subject only to "reasonable restrictions designed to protect worker safety or prevent interference with other workers' enjoyment of these areas," *id.*

27. Under the Final Rule, SWAs "must initiate procedures for discontinuation of [employment] services to employers who" do not comply with these—and all other—conditions for employment as set out in the Final Rule. *Id*. at 34,065–66.

IV. Legal Challenges to the Final Rule

28. After the Final Rule was published, 17 states, a Georgia farm, and a Georgia trade association filed a challenge to the Final Rule in a federal district court in Georgia. *See Kansas v. U.S. Dep't of Labor*, No. 2:24-cv-00076, 2024 WL 3938839 (S.D. Ga. Aug. 26, 2024).

29. On August 26, 2024, the district court in Georgia granted the plaintiffs' motion for a preliminary injunction, "find[ing] that the Final Rule violates federal law and that the Plaintiffs are likely to succeed on the merits of their claim." *Id*. at *9. Specifically, the court held that, "by implementing the Final Rule, the DOL has exceeded the general authority constitutionally afforded to agencies." *Id*. at *7.

30. The district court in the Georgia case only extended its grant of injunctive relief to the plaintiffs in that case. *See id*. at *13.

31. The Commonwealth of Kentucky and the States of Alabama, Ohio, and West Virginia were not plaintiffs in *Kansas v. U.S. Department of Labor*. Therefore, the Department is not enjoined from applying the Final Rule to them.

32. Indeed, on September 10, 2024, the Department announced it would begin applying and enforcing the Final Rule against all States not covered by the

injunction on September 12, 2024.[1] As of September 12, 2024, the Agency began operating a two-prong system for H-2A applications. If the work to be performed will be located in one or more states subject to the *Kansas* injunction, the applicant will use an old job order form.[2] For any work to be performed in any state not covered by the *Kansas* injunction, the employer will use the new form that went into effect June 28, 2024.[3]

33. Farmers in Kentucky, Alabama, Ohio, and West Virginia, which are not covered by the *Kansas* injunction, must now use the new form and comply with all the requirements of the Final Rule.

34. SWAs in States not covered by the Kansas injunction, including Kentucky, Alabama, Ohio, and West Virginia, must adhere to the requirements of the Final Rule.

35. Private plaintiffs in Kentucky, including individual farmers and associations of farmers, filed this action on September 16, 2024.

36. The Commonwealth of Kentucky and the States of Alabama, Ohio, and West Virginia (collectively, "the States") now seek to bring this intervening complaint.

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[1] *The Department of Labor's Office of Foreign Labor Certification Announces Revised Transition Schedule and Technical Guidance for Implementing H-2A Job Orders and Applications Associated with the 2024 Farmworker Protection Final Rule; Compliance with District Court Order* (Sept. 10, 2024), *available at* https://www.dol.gov/agencies/eta/foreign-labor/news.

[2] *Id.*

[3] *Id.*

STANDING

37. As the object of some of the Final Rule's requirements, and because of the compliance costs the States will incur as a result of the Final Rule, the States have standing to bring the claims set forth herein.

38. Where a State is "'the object of' [the rule's] requirement[s]," "there can be 'little question' that the rule does injure the State[ ]." *W. Va. v. Envtl. Prot. Agency,* 597 U.S. 697, 719 (2022) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561–62 (1992)); *see also Rice v. Vill. of Johnstown, Ohio*, 30 F.4th 584, 592 (6th Cir. 2022) ("When the plaintiff is an object of the challenged action there is ordinarily little question that the action or inaction has caused him injury." (citation omitted)); *Kentucky v. Fed. Highway Admin.,* No. 5:23-CV-162-BJB, 2024 WL 1402443, at *3 (W.D. Ky. Apr. 1, 2024) ("The Final Rule operates on State Departments of Transportation directly; they are the "object" of the emissions target-and-reporting requirements. So they have standing to complain that the Administrator overstepped his authority in imposing those requirements." (internal citation omitted)).

39. SWAs are the object of some provisions of the Final Rule. Specifically, the Department requires SWAs to discontinue employment services to employers who do not comply with the applicable regulations. *See* 89 Fed. Reg. at 34,058 (amending 20 C.F.R. § 653.501 by adding a paragraph that says, "If the employer requesting access to the clearance system is currently debarred from participating in the H-2A or H-2B foreign labor certification programs, the SWA must initiate discontinuation of services. . . "); *Id*. at 34,065 (revising 20 C.F.R. § 658.501 to establish new bases for

when "SWA officials must initiate procedures for discontinuation of services to employers").

40. A discontinuation of employment services means the SWA cannot post the employer's job orders into the intrastate or interstate clearance systems used to recruit American workers. If an employer has not attempted to recruit American workers, it cannot participate in the H-2A program. Therefore, the discontinuation of employment services effectively means the employer will not be able to hire foreign workers and will have to do all its own recruitment to hire American workers.

41. The new requirements on employers in the Final Rule mean there are more triggers for discontinuation of employment services. Under the new section 658.501, as revised and republished in the Final Rule, SWAs must now initiate procedures to discontinue employment services if, for example, an employer:

- does not allow H-2A workers to engage in "collective action and concerted activity," *see, e.g., id*. at 33,901, 34,062–3;
- does not ensure all passengers in employer-provided transportation are wearing seat belts, *see id*. at 33,903, 34,060;
- does not allow workers to designate a representative to attend any investigatory interview that the worker believes might result in disciplinary action, *see id*. at 34,011, 34,063;
- does not allow workers living in employer-provided housing to "invite, or accept at their discretion, guests" to such housing, *id*. at 34,021. 34,063.

42. Kentucky's SWA is the Kentucky Career Center.[4] It is operated under the auspices of the Education and Labor Cabinet, which under Kentucky law is tasked with performing the duties imposed by the Wagner-Peyser Act. Ky. Rev. Stat. § 336.045(1); *see also id.* at § 336.045(2) (designating the Education and Labor Cabinet as "the agency of this state for the purposes of the Wagner-Peyser Act").

43. The SWA in Alabama is the Alabama Department of Labor. Under Alabama law, the duties of the Alabama Department of Labor include cooperating with all authorities of the United States having powers and duties under the Wagner-Peyser Act. Ala. Code § 25-2-2(5).

44. In Ohio, the Office of Workforce Development in the Ohio Department of Job & Family Services is the SWA. Ohio law directs the director of job and family services to administer the Wagner-Peyser Act. Oh. Rev. Code § 6301.02.

45. West Virginia's SWA is WorkForce West Virginia. WorkForce West Virginia is a state agency that oversees the state unemployment insurance program as well as a network of workforce development services. W.Va. Code § 21A-1-4(a). It is part of the West Virginia Department of Commerce which, under West Virginia law, is tasked with enforcing the duties imposed by the Wagner-Peyser Act. *See* W.Va. Code § 21-2-2.

46. These States' SWAs are the object of some of the requirements of the Final Rule. *See, e.g.*, 89 Fed. Reg. at 34,058, 34,065. This alone is sufficient to

[4] *See* U.S. DEPARTMENT OF LABOR, *State Workforce Agencies*, https://www.dol.gov/agencies/eta/wotc/contact/state-workforce-agencies (last accessed Sept. 20, 2024) (linking to Kentucky Career Center website).

establish standing. *See Kentucky v. Fed. Highway Admin.,* 2024 WL 1402443, at *3 ("No additional proof is necessary when a rule purports to impose legal obligations directly on a state plaintiff.").

47. Additionally, the compliance costs of complying with the Final Rule are sufficient to establish standing. *See Carman v. Yellen*, 112 F.4th 386, 407 (6th Cir. 2024) ("Because plaintiffs have pleaded facts showing that they will indeed be subject to the reporting requirements in some form or another and pay compliance costs, the district court should have proceeded to the merits on these claims."); *Kentucky v. Yellen*, 54 F.4th 325, 342–43 (6th Cir. 2022) (citing a string of cases finding "compliance costs are a recognized harm for purposes of Article III").

48. Here, the Department acknowledges there will be "quantifiable" costs "associated with rule familiarization." 89 Fed. Reg. at 34,044; *see also id.* at 33,904 (explaining the Department allowed for a transition period "to provide training and technical assistance to . . . State workforce agencies (SWAs) . . . in order to familiarize them with changes required by this final rule"). SWAs are mandated to initiate discontinuation of employment services if certain new requirements imposed by the Final Rule are not met. Additionally, SWAs must collect complaints from H-2A visa holders who believe employers are not complying with the regulation. There necessarily will be some time and manpower spent on rule familiarization by SWAs in order to comply with these duties. These are compliance costs. Therefore, because these compliance costs "result from being regulated by the [rule]," they are a sufficient injury for standing. *See Carman*, 112 F.4th at 409.

COUNT ONE

The Final Rule exceeds agency authority.

49. The Plaintiff States incorporate by reference the preceding allegations of this Intervening Complaint as if fully set forth herein.

50. The Administrative Procedure Act requires courts to hold unlawful and set aside agency action that is "not in accordance with law" or that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706.

51. "[A]n agency literally has no power to act . . . unless and until Congress confers power upon it." *La. Public Serv. Comm'n, v. FCC.*, 476 U.S. 355, 374 (1986). Indeed, "[m]erely because an agency has rulemaking power does not mean that it has . . . authority to adopt a particular regulation." *Kentucky v. Fed. Highway Admin.*, 2024 WL 1402443, at *10 (quoting *N.Y. Stock Exchange LLC v. SEC*, 962 F.3d 541, 554 (D.C. Cir. 2020)).

52. Congress conferred general rulemaking authority to carry out the H-2A visa program on two agencies: the Department of Homeland Security and the U.S. Attorney General. 8 U.S.C. § 1103(a)(3), (g)(2).

53. The Department is not given the same general rulemaking authority. Rather, Congress gave the Department limited and specific rulemaking authority.

54. First, the statute allows the Secretary to "require by regulation, as a condition of issuing the certification, the payment of a fee to recover the reasonable costs of processing applications for certification." 8 U.S.C. § 1188(a)(2).

55. Later in the same section, Congress gave the Secretary authority to "issue regulations which address the specific requirements of housing for employees principally engaged in the range production of livestock." 8 U.S.C. § 1188(c)(4).

56. Congress also directs the Secretary to grant the certification necessary for an employer to hire H-2A workers if the "employer has complied with criteria for certification (including criteria for the recruitment of eligible individuals as prescribed by the Secretary). 8 U.S.C. § 1188(c)(3)(A)(i).

57. There are at least some requirements that the Final Rule imposes on employers—and on SWAs that must enforce them with respect to the provision of employment services—that clearly do not fall within these limited grants of authority. For instance, requiring employers to mandate that all individuals riding in employer-provided transportation wear seat belts is not related to fees for certification applications, to housing requirements, or to criteria for recruitment. Similarly, the Department does not—and cannot—explain how requiring employers to permit an H-2A worker to designate a representative to attend any interview related to potential discipline could be justified by the limited grant of authority to require by regulation a fee for certification applications, issue regulations to address housing requirements, or set criteria for recruitment.

58. Moreover, nothing in the statutory language relating to the certification responsibilities Congress assigned to the Department gives it authority to regulate in the manner it attempts with the Final Rule.

59. The statute says that a petition to import H-2A workers "may not be approved by the Attorney General unless the petitioner has applied to the Secretary of Labor for a certification 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." 8 U.S.C. § 1188(a)(1).

60. While this provision certainly requires the Secretary to know about the available workforce and what will adversely affect the wages and working conditions of American agricultural workers, nothing in this language gives the Defendants authority to promulgate regulations establishing requirements on employers as conditions to issuing the certification. This is true even if the Department believes the requirements would help avoid adversely affecting the wages or conditions of American agricultural workers. The Department simply does not have that kind of legislative authority. *See W.Va. v. EPA*, 597 U.S. at 723 ("Agencies have only those powers given to them by Congress, and 'enabling legislation' is generally not an 'open book to which the agency may add pages and change the plot line.'" (cleaned up, citation omitted)).

61. Indeed, immediately following this language, Congress granted the Secretary the very limited authority to issue, "by regulation," just *one* condition to issuing certification: the "payment of a fee to recover the reasonable costs of processing applications for certification." 8 U.S.C. § 1188(a)(2).

62. Congress itself established the other conditions for denial of the certification. *See* 8 U.S.C. § 1188(b). And by doing so, it is clear Congress did not delegate generally the job to establish conditions to the Department. Rather, it identified just one condition for denial for which the Department could issue regulations. *See* 8 U.S.C. § 1188(a)(2).

63. There is no basis then to assume the Department has authority to impose additional conditions like the ones in the Final Rule. "The preeminent canon of statutory interpretation requires [the court] to presume that the legislature says in a statute what it means and means in a statute what it says there." *BedRoc Ltd., LLC v. United States,* 541 U.S. 176, 183 (2004) (cleaned up and quotations omitted). "Thus, [the court's] inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *Id.* The text of the statute here is unambiguous, and this Court need go no further to determine the Department has exceeded its statutory authority.[5]

[5] The district court in Georgia found that "the 'best reading' of § 1188, in its entirety, is that Congress granted the DOL authority to issue regulations to ensure that any certification it issues for H-2A visas do not 'adversely affect' American agricultural workers." 2024 WL 3938839 at *5. To do so, the court relied on a D.C. Circuit case that found the Department's methodology for computing the adverse effect wage rate (which is the minimum wage that employers must offer American and foreign workers) was a valid exercise of the Department's authority under § 1188. *Id*. at *6; *AFL-CIO v. Dole*, 923 F.2d 182, 183 (D.C. Cir. 1991). While the D.C. Circuit does not explain its reasoning by identifying a particular provision that gave the Department authority, it makes sense that wage setting would fall within the Department's authority under 8 U.S.C. § 1188(c)(3)(A)(i), which allows the Secretary to prescribe criteria for recruitment. That *Dole* may be correct in the fact-specific context of that case does not mean that the Department has authority to issue any regulation it wants so long as there is some connection to ensuring the H-2A visas do not "adversely affect" American agricultural workers. Indeed, here, where requirements of the Final Rule cannot be shown to have similar connections to the statutory text, *Dole*'s rationale does not apply. And just because the D.C. Circuit described the authority given to the Department as a "rather broad congressional delegation" does not mean that the D.C. Circuit's interpretative language should override long-recognized statutory interpretation principles.

64. Indeed, it would be odd to think that Congress would use language conditioning certification for use of H-2A workers on a determination of no adverse effect on American workers to allow the Department to act in ways it elsewhere in the law clearly disallowed. With the NLRA, Congress explicitly decided not to extend collective bargaining rights to agricultural workers. *See* 29 U.S.C. § 152(a)(3). Yet, through the Final Rule, the Department attempts to give H-2A workers collective bargaining rights.

65. The NLRA protects covered employees' right to "engage[ ] in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. It also makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the[ir] rights," 29 U.S.C. § 158(a)(1), "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," 29 U.S.C. § 157.

66. In strikingly similar language, the Final Rule protects "concerted activity for mutual aid and protection which encompasses numerous ways that workers can engage, individually or collectively, to enforce their rights." 89 Fed. Reg. at 34,005. And it prohibits employers from "discharg[ing], or in any manner discriminat[ing] against . . . any person who has . . . engaged in activities related to self-organization, including any effort to form, join, or assist a labor organization; or

has engaged in other concerted activities for the purpose of mutual aid or protection." *Id*. at 34,062.

67. In doing so, the Final Rule creates a right for H-2A workers "not previously bestowed by Congress." *See Kansas*, 2024 WL 3938839 at *8 (finding the Final Rule "provides for agricultural workers' right to participate in concerted activity to further their interests. That is a right that Congress has not created by statute."). Indeed, it is not just that Congress has not *yet* bestowed such rights on H-2A workers, but that Congress has already explicitly said it is not bestowing such rights on H-2A workers as agricultural laborers. *See* 29 U.S.C. § 152(3). The Department cannot take such action.

68. First, to do so conflicts with Congress' intent and explicit restriction in the NLRA. *Id.; see also Kansas*, 2024 WL 3938839 at *8. ("[T]he NLRA exhibits Congress's intent to refrain from affording agricultural workers the right to participate in such concerted activity." (emphasis omitted)).

69. Second, the Department has no authority to make law. *See Gonzaga Univ. v. Doe,* 536 U.S. 273, 283 (2002) (explaining that to determine whether a federal right exists, courts must "determine whether Congress intended to create a federal right" (emphasis omitted)); *Dixon v. United States*, 381 U.S. 68, 74 (1965) ("The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law." (citation omitted)); *United States v. Grimaud*, 220 U.S. 506, 517 (1911) (explaining that statutes

conferring power on executive officers to make rules and regulations cannot "confer legislative power").

70. And it would not matter if the Department had general rulemaking authority with respect to the H-2A visa program like the U.S. Attorney General and the Department of Homeland Security, *see* 8 U.S.C. § 1103(a)(3), (g)(2). An agency cannot contradict Congress' policy decisions and directions. *See W.Va. v. EPA*, 597 U.S. at 723 ("Agencies have only those powers given to them by Congress, and 'enabling legislation' is generally not an 'open book to which the agency may add pages and change the plot line.'" (cleaned up, citation omitted)); *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001) ("Agencies may play the sorcerer's apprentice but not the sorcerer himself."). Courts "must reject administrative constructions of the statute . . . that are inconsistent with the statutory mandate or frustrate the policy that Congress sought to implement." *Fed. Election Comm'n v. Democratic Senatorial Campaign Comm.,* 454 U.S. 27, 32 (1981); *see also Flores*, 36 F.3d at 514 ("'[T]he clear meaning of statutes as written' ultimately trumps the policy of 'judicial deference to a reasonable statutory interpretation by an administering agency.'" (quoting *Estate of Cowart v. Nicklos Drilling Co.,* 505 U.S. 469, 476 (1992)).

71. The Final Rule's extension of collective bargaining rights to agricultural workers when Congress excluded agricultural workers from the employees given such rights is clearly not in accordance with law as required by the APA. *See FCC v. Nextwave Pers. Commc'ns Inc.*, 537 U.S. 293, 300 (2003) (explaining that when the APA requires courts to set aside federal agency action that is not in accordance with

law, it "means, of course, *any* law, and not merely those laws that the agency itself is charged with administering"). Because the Final Rule violates the NLRA, it must be vacated.

COUNT TWO

The Final Rule impermissibly commandeers State SWAs.

72. The Plaintiff States incorporate by reference the preceding allegations of this Intervening Complaint as if fully set forth herein.

73. Under the anti-commandeering doctrine, the Federal Government may not compel the States or the officers of the States to implement, administer, or enforce federal regulatory programs. *See Printz v. United States,* 521 U.S. 898, 925–6, 935 (1997).

74. "It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority." *Id.* at 928. And this sovereignty cannot be intruded upon by requiring the States either to enact policy or to enforce policy. *See id.* Indeed, where the Federal Government "reduc[es the States] to puppets of a ventriloquist" by requiring them to administer and enforce federal laws and regulations, the "preservation of the States as independent and autonomous political entities" is even more undermined than when the Federal Government requires the States to make policy. *See id.* "Neither the Constitution nor the Administrative Procedure Act authorizes administrative ventriloquism." *Kentucky v. Fed. Highway Admin.,* 2024 WL 1402443, at *2.

75. The Final Rule amounts to administrative ventriloquism. The Department has determined requirements for employers seeking H-2A workers and

demands that States, through their SWAs, enforce those requirements by mandating SWAs initiate discontinuation of employment services if employers fail to comply with the requirements of the Final Rule. *See* 89 Fed. Reg. at 34,065.

76. The federalist system of government established in the Constitution bars such commandeering. Therefore, the Final Rule should be invalidated. *See Printz*, 521 U.S. at 933 ("Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear 'formalistic' in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." (quoting *New York v. United States*, 505 U.S. 144, 187 (1992))).

77. Similarly, the Federal Government cannot direct the States to do what it could not do—including violating constitutionally-protected rights like due process.

78. "The basic elements of procedural due process are notice and opportunity to be heard." *Arch of Ky., Inc. v. Dir., OWCP*, 556 F.3d 472, 478 (6th Cir. 2009). To satisfy constitutional due process requirements, a person who the government seeks to deprive of liberty, property, or privileges is entitled, at a minimum, to notice of the Government's evidence and an opportunity to rebut it. *See Hicks v. Comm'r of Soc. Sec.,* 909 F.3d 786, 797 (6th Cir. 2018). The Sixth Circuit has

determined that "some form of hearing is required before an individual is finally deprived of a property interest." *Id*. at 800 (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)).

79. The Final Rule eliminates the opportunity for a hearing prior to the SWAs discontinuing employment services for violations of the regulatory requirements. 89 Fed. Reg. at 33,928. Under the Final Rule, the SWA will issue its final decision to discontinue services and notify the employer "that the discontinuation of services is effective 20 working days from the date of the determination." *Id*. The decision must notify employers they may request reinstatement or appeal the discontinuation determination by requesting a hearing. *Id*. A request for a hearing will automatically stay the discontinuation pending the outcome. *Id*.

80. According to the Department, this process "provides sufficient due process," *id*., and in particular, the Department asserts that the automatic stay means the process "provides the same due process rights available in the current H-2A debarment procedures," *id*. at 33,929.

81. To the extent this process results in deprivation by governmental action without a hearing first, it violates due process. *See Hicks,* 909 F.3d at 800; *see also Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 609 (1982) (discussing the "interests" of residents in the federal employment service scheme established pursuant to the Wagner-Peyser Act and the Immigration and Nationality Act of 1952").

82. Just as the Federal Government cannot violate due process, neither can the States. And the Federal Government cannot commandeer the SWAs to do its unlawful work.

83. The States cannot be mandated to enforce the Final Rule—and certainly cannot be mandated to violate the due process rights of farmers within its borders. The anti-commandeering doctrine dictates that the Final Rule should be invalidated.

COUNT THREE

The Final Rule is arbitrary and capricious.

84. The Plaintiff States incorporate by reference the preceding allegations of this Intervening Complaint as if fully set forth herein.

85. An agency decision is arbitrary and capricious when the agency has relied on factors which Congress did not intend for it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *See Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983); *Kentucky Waterways Alliance v. Johnson*, 540 F.3d 466, 474 (6th Cir. 2008).

86. The Final Rule is arbitrary and capricious first because the Department relied on factors Congress did not intend it to consider. When Congress enacted protections for collective bargaining rights for most employees, it explicitly said it was not extending such rights to agricultural workers. *See* 29 U.S.C. § 152(3). Yet, the Department now attempts to use the Final Rule to enable collective action by H-2A

workers. While that may be policy supported by the Biden-Harris Administration, it clearly conflicts with Congressional intent and explicit statutory restrictions.[6] And it is indeed Congress, not any federal agency or the Biden-Harris Administration, that makes law. Attempting to establish collective bargaining rights for H-2A workers is beyond the scope of what Congress has intended for the Department to consider. As such, the Final Rule is arbitrary and capricious.

87. Further, the result of allowing the Department to provide protections for collective bargaining actions to H-2A workers under the Final Rule would produce a result so implausible it could not be ascribed to a difference in view. The Final Rule requires employers to allow H-2A workers to engage in collective action under the auspices of doing so "to better protect against adverse effects on similarly employed workers in the United States." *See* 89 Fed. Reg. at 33,901. But the consequence of failing to allow H-2A workers to engage in collective action is the discontinuation of employment services through the SWAs. *See id*. at 34,065 (requiring SWAs to initiate procedures for discontinuation of services to employers). The employment services the SWAs offer are to help provide the farmers with *American* workers. This means the result of the Final Rule would be to stop SWAs from connecting American workers with employers who need workers.

[6] The Department is fully aware that Congress declined to give collective bargaining rights to agricultural workers. *See* 89 Fed. Reg. at 34,003 (explaining that the "new protected activity [in the Final Rule] relating to self-organization and concerted activity [ ] would be limited to persons engaged in FLSA agriculture, namely those workers who are not eligible for protection under sec. 7 of the NLRA, 29 U.S.C. 157, because they are not "employees" as defined in 29 U.S.C. 152(3)").

88. American workers are the group the Department is tasked with protecting. *See* 8 U.S.C. § 1188(a)(1). Therefore, that the Final Rule's result is to require SWAs to no longer connect American agricultural workers with available work is an implausible—not to mention harmful[7] —result. The Final Rule should be invalidated as arbitrary and capricious.

89. The Final Rule is also arbitrary and capricious because the Department fails to articulate a rational connection between the facts and the Final Rule. *See Motor Vehicle*, 463 U.S. at 43 ("[T]he 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.").

90. The Department attempts to justify requiring the recognition of collective bargaining rights for H-2A workers by asserting that H-2A workers are more vulnerable than American workers. Therefore, according to the Department, H-2A workers need greater protections because without the additional protections, employers will choose to hire the vulnerable H-2A workers rather than American workers. *See* 89 Fed. Reg. at 33,987. But the Department offers no evidence for this bald assertion. *See id.* at 33,987 (saying the Department "*believed* that this vulnerability of the H-2A workforce, and the ability of employers to hire this vulnerable workforce, *may* suppress or undermine the ability of farmworkers in the

[7] Doing so will have serious consequences for American workers who need jobs. It will also have serious consequences for farmers. One commenter to the proposed rule informed the Department that if, due to non-compliance with the Final Rule's requirements, the farm was "subsequently not able to hire U.S. workers via the SWA, [it] would need to go out of business." 89 Fed. Reg. at 33,923.

United States to negotiate with employers and advocate on their own behalf[.]" (emphasis added)).

91. There can be no "rational connection between the facts found and the choice made," *see Motor Vehicles,* 463 U.S. at 42, that would justify the Department's decision when there were no facts found. The Final Rule is therefore arbitrary and capricious.

92. Moreover, while the Department does not have authority to provide collective bargaining rights for H-2A workers, federal law clearly directs the Department to certify, for *every* request for H-2A workers, that there are insufficient American workers. 8 U.S.C. § 1188. If there are, in fact, American workers who could be hired by the employer—that is, workers the employers are declining to choose in favor of the foreign workers—then the Department's statutorily-mandated responsibility is to not issue the certification so the U.S. Attorney General can disapprove the petition. *See id*. Yet, the Department seems to completely ignore that it has this explicit authority that could—and should—be used to address any problem there may be with employers choosing foreign workers over American ones because of the alleged vulnerability of the foreign workers. Instead, the Department attempts to use the Final Rule to expand collective bargaining rights for H-2A workers. This is arbitrary and capricious.

93. The Department has acted arbitrarily and capriciously in promulgating the Final Rule. The Rule should be vacated.

PRAYER FOR RELIEF

WHEREFORE, Intervening Plaintiff States respectfully ask this Court to:

A. Declare the Final Rule is unlawful because it: (1) exceeds the Agencies' authority, (2) commandeers State agencies to enforce federal policy, and (3) is arbitrary and capricious;

B. Vacate and set aside the Final Rule in its entirety;

C. Issue preliminary and permanent injunctive relief prohibiting the Department from implementing, applying, enforcing, or otherwise proceeding under the Final Rule;

D. Award the States reasonable costs and fees, including attorney's fees, pursuant to any applicable statute or authority; and

E. Grant the States such additional legal and equitable relief that the Court deems appropriate.

Respectfully submitted,

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* *Pro Hac Vice* application forthcoming

CERTIFICATE OF SERVICE

I certify that on September 20, 2024, the above document was filed with the CM/ECF filing system, which electronically served a copy to all counsel of record.

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