UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

FLORIDA GROWERS ASSOCIATION, INC., *et al.*, Plaintiffs, v. JULIE A. SU, *in her official capacity*, *et al.*, Defendants.	)	Case No. 8:23-cv-889-CEH-CPT

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON ALL CLAIMS

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INTRODUCTION

Defendants are entitled to summary judgment on all remaining Counts of the Amended Complaint. The Department of Labor's ("DOL") Final Rule, 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"), which amends the methodology for determining the Adverse Effect Wage Rate ("AEWR") for the H-2A program, implements DOL's congressional mandate to protect the wages and working conditions of similarly employed workers in the United States. The Final Rule is consistent with the text of the statute, 8 U.S.C. § 1188(a), is based on DOL's longstanding expertise in setting AEWRs for the program, and is the product of DOL's reasoned decision-making process.

Plaintiffs allege that the Final Rule violates the Administrative Procedure Act ("APA"). They allege in Count I that the Final Rule is *ultra vires* under 5 U.S.C. § 706(2)(C) because it uses Occupational Employment and Wage Statistics ("OEWS") data from the Bureau of Labor Statistics that is not limited to agricultural worker wages; and that it violates equal protection because state workforce agencies assign the appropriate code to a job certification first and DOL reviews that assignment. They allege in Count II that the Final Rule is arbitrary and capricious under 5 U.S.C. § 706(2)(A) because it applies a "single duty" test when assigning a wage rate for a mixed-duty job, is vague, has an improper effective date and is impermissibly retroactive. In Count III they allege that DOL's use of the U.S. Department of

Agriculture's ("USDA") Farm Labor Survey ("FLS") data to set the AEWR for most H-2A jobs is arbitrary and capricious and *ultra vires* because the data is flawed and DOL sets an attractive wage. In their request for relief and factual allegations Plaintiffs also allege that DOL's use of FLS data is arbitrary and capricious and *ultra vires* because DOL did not measure adverse effects.

Many of these allegations were rejected at the preliminary injunction stage when this Court found that plaintiffs were not likely to succeed on the merits. The best reading of § 1188(a) is that it delegates broad discretion to DOL to determine how best to prevent adverse effects. DOL's choices of dataset and methodology are policy determinations within that statutory delegation, and both are reasonable and reasonably explained in the Final Rule. The statute does not require DOL to test for adverse effects, as the D.C. Circuit has previously held. Nor is the Final Rule retroactive, and it took effect within the time specified by the APA. There is nothing arbitrary, capricious, or *ultra vires* about the Final Rule or DOL's FLS-based methodology. Summary judgment should be granted to the Defendants on all Counts.

BACKGROUND

I. Statutory and Regulatory Background

The H-2A visa program enables 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). It was created through the Immigration Reform and Control Act (IRCA) of 1986 and was designed to provide a lawful source of workers to agricultural businesses in the United States while ensuring 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).

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.* One of the primary ways that DOL meets its statutory obligation to certify that the employment of H-2A workers will not have an adverse effect on the wages of similarly employed agricultural workers is by setting the AEWR as the minimum wage an H-2A worker must be paid. 88 Fed. Reg. at 12761.

The AEWR predates the H-2A program created in 1986. The Immigration and Nationality Act of 1952 ("INA") created a single program for all temporary foreign workers 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 are able, willing, and qualified are available at the time … and place … to perform such skilled or unskilled labor," or "the employment of such aliens will *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). DOL implemented an AEWR under the 1952 Act, and when Congress later created the H-2A program, it recognized that DOL had an "existing practice of determining adverse effect wage rates on a State-by-State basis"; a practice Congress did not intend to change. *See* Senate Rep. No. 99-132 (1985) at 38.

DOL has revised its AEWR methodology over the years. Relevant here, in 2010 DOL resumed using FLS data after a brief hiatus during which it had relied exclusively on OEWS data. *See* 20 C.F.R. § 655.103(b); *see also* 75 Fed. Reg. 6884, 6891 (Feb. 12, 2010). DOL observed that the FLS "uses information sourced directly from farmers," while the OEWS "includes data from employers who operate farm support operations, including contract suppliers of temporary farm labor." 75 Fed. Reg. at 6898.

II. The 2023 Final Rule

In February 2023, after notice-and-comment rulemaking, DOL published the Final Rule which set forth a revised method for determining the AEWR. 88 Fed. Reg. 12760 (Feb. 28, 2023). Consistent with the APA, the Final Rule took effect 30 days later, on March 30, 2023. *Id.* The Final Rule continued to use FLS data to set the AEWR for the vast majority of occupations. It opted to use OEWS data for geographic areas where the FLS does not report a wage finding and for those occupations not consistently surveyed by the Farm Labor Survey. *Id.* at 12767. DOL explained that this new method was needed to adequately protect wages in certain circumstances. *Id.* at 12761. In particular, FLS data does not include wage data for certain occupations

including "supervisors, construction, logging, [and] tractor-trailer truck drivers." *Id.* Without such data, "an AEWR determined using FLS … data does not adequately guard against adverse effect on the wages of agricultural workers similarly employed in the United States in these [occupations]." *Id.* DOL explained that not only was an AEWR based entirely on the FLS 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.*

DOL explained that for most H-2A occupations, the FLS continued to be the best source of wage data and would continue to be used to determine the AEWR. 88 Fed. Reg. at 12768. Thus, the revised AEWR methodology would *not* apply to *all* occupations for which an employer might hire a temporary foreign agricultural worker and the great majority of occupations—those that qualify as field or livestock workers—would not be affected at all. *Id.* For certain occupations, DOL turned to wage data from the OEWS survey, which reports wage data for over 800 occupations. *See* CAR Index No. 22, 28, 29 (discussing OEWS coverage). DOL explained the relevance of the data: "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. Contractors have been participating 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 explained that the OEWS survey provides an accurate source of wage data for H-2A occupations not reflected in the FLS, such as supervisors, and

for H-2A occupations often contracted for, such as construction work. *Id.* at 12771.

DOL also explained how the Final Rule would be implemented, including that it would continue to rely on "Standard Occupational Classification" ("SOC")[1] codes to categorize job opportunities and 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 SOC code assignments under the Final Rule, since the SOC code determines whether the AEWR is set using FLS or OEWS data. *Id.* at 12779-81. For job opportunities falling within the SOC codes covered by the FLS "field and livestock workers (combined)" category, the statewide AEWR would be determined based on FLS data. *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 would be subject to the FLS-based AEWR. *Id.* For job opportunities "that do not fall within the FLS field and livestock workers (combined) category," the AEWR would be based on OEWS data in each State or equivalent district or territory and be SOC-specific. *Id.* at 12770. If an employer chose to combine responsibilities into a single job such that both FLS and OEWS SOC codes were implicated (e.g., a worker whose duties included hand-harvesting and supervising others), 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

[1] 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/.

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. v. Su*, 2023 WL 6283333, *10 (W.D.N.C. 2024) (summarizing DOL's reasoning and justification).

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." 88 Fed Reg. 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 it recognized 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.'" *Id.* 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. *Id.* at 12775, 12786.

III. Procedural History

Plaintiffs filed the Complaint on April 21, 2023, and moved for a preliminary injunction on May 11, 2023. Defendants moved to dismiss the Complaint on June 27, 2023. The Magistrate Judge issued a Report and Recommendation on the motions on January 5, 2024, *Fla. Growers Ass'n, Inc. v. Su*, No. 8:23-CV-889-CEH-CPT, 2024 WL 670464 (M.D. Fla. Jan. 5, 2024), which was adopted in full by the court. *Fla. Growers Ass'n, Inc. v. Su*, No. 8:23-CV-889-CEH-CPT, 2024 WL 1343021 (M.D. Fla. Mar. 29,

2024). The court denied Plaintiffs' preliminary injunction motion because they had not shown a likelihood of success on the merits and granted Defendants' motion to dismiss as to Count IV. Plaintiffs were given leave to amend Count IV and filed an Amended Complaint on April 12, 2024. Defendants moved to dismiss the amended Count IV, which Plaintiffs ultimately did not oppose, and the Court dismissed Count IV on June 7, 2024.

STANDARD OF REVIEW

In an APA case, "the standard in Rule 56 does not apply." *Brinklys v. Johnson,* 175 F. Supp. 3d 1338, 1349-50 (M.D. Fla. 2016). Rather, "'when a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal,' and '[t]he entire case on review is a question of law.'" *Id.* (quoting *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001)). Thus, "summary judgment is the mechanism for deciding whether as a matter of law the agency action is supported by the administrative record and is otherwise consistent with the APA standard of review." *Id.* (quotations/citations omitted). The focal point for judicial review is the administrative record. *Camp v. Pitts,* 411 U.S. 138, 142 (1973); *Defs. of Wildlife v. U.S. Dep't of the Navy*, 733 F.3d 1106, 1120 (11th Cir. 2013).

Under the APA, a court may set aside agency action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). A decision is arbitrary and capricious if the agency "relied on factors which Congress has not intended 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." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*"). The standard of review is "exceedingly deferential." *Fund for Animals v. Rice,* 85 F.3d 535, 541 (11th Cir. 1996). "[T]he reviewing court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. This inquiry must be searching and careful, but the ultimate standard of review is a narrow one." *Id*. (quotations/citations omitted). A court will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *State Farm,* 463 U.S. at 43.

ARGUMENT

I. DOL IS ENTITLED TO SUMMARY JUDGMENT ON COUNT I OF THE AMENDED COMPLAINT

A. The Final Rule's Use of OEWS Wages Is Not *Ultra Vires*

Plaintiffs allege that DOL's choice of the OEWS dataset for setting the AEWR in certain circumstances exceeds DOL's statutory authority. Am. Compl. ¶¶ 11-12, 47, 57-58; *see also Mot. Prelim. Inj.*, ECF 16, at 15. According to Plaintiffs, 8 U.S.C. § 1188(a)(1)(B)'s use of "similarly employed" requires DOL to use seasonal farm wages only when setting an AEWR, making DOL's use of OEWS data impermissible. *See id.* "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)). Plaintiffs cannot make that showing.

Congress tasked DOL with the responsibility to certify whether the two conditions set forth in 8 U.S.C. § 1188(a)(1) are satisfied: (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 [H-2A workers] in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed." DOL's responsibility to decide whether to issue this certification necessarily entails a degree of discretion to determine whether these statutory conditions are satisfied.

Congress "often enact[s]" statutes in which "the agency is authorized to exercise a degree of discretion." *Loper Bright Enter. v. Raimondo*, 144 S. Ct. 2244, 2263 (2024). "[S]ome statutes 'expressly delegate[]' to an agency the authority to give meaning to a particular statutory term." *Id.* (citation omitted). "Others empower an agency to prescribe rules to 'fill up the details' of a statutory scheme, or to regulate subject to the limits imposed by a term or phrase that 'leaves agencies with flexibility.'" *Id.* (citation omitted). "When the best reading of a statute is that it delegates discretionary authority to an agency," the Court's role is to "recogniz[e] constitutional delegations, 'fix[ ] the boundaries of [the] delegated authority' …, and ensur[e] the agency has engaged in 'reasoned decisionmaking' within those boundaries." *Id.* (internal citations omitted).

Section 1188(a) is one such statute in that it "delegates discretionary authority" to DOL on how best to determine whether H-2A employment will adversely affect the wages and working conditions of workers in the U.S. similarly employed. As the D.C.

Circuit explained, "Section 1188(a)(1) establishes the INA's general mission," but "Congress left it to [DOL] to implement that mission through the creation of specific substantive provisions." *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014); *see also id.* at 1021-22 ("The statute explicitly envisions implementing regulations that will clarify the meaning and application of its provisions." (citing 8 U.S.C. § 1188(b)(1), subsections of (c)(3), and (c)(4)))*; Fla. Sugar Cane League, Inc. v. Usery*, 531 F.2d 299, 300-01 (5th Cir. 1976)[2] ("it is the Secretary of Labor who is responsible for whatever fact finding and evaluation are necessary to effectuate the statutory purpose of protecting domestic workers' right to work."); *Dole*, 923 F.2d at 187 (DOL must "balance the competing goals of the statute - providing an adequate labor supply and protecting the jobs of domestic workers."); *Shoreham Coop. Apple Produc. Assoc. v. Donovan*, 764 F.2d 135, 141 (2d Cir. 1985) (DOL "enjoys considerable discretion in ensuring that importation of H-2 workers does not adversely affect domestic jobs.")

Pursuant to DOL's delegated discretionary authority under § 1188(a)(1)(B), DOL's regulations implementing that provision have always conditioned certification on the employer's agreement to offer, advertise, and pay the highest of several enumerated wages, including the AEWR. *See* 1987 H-2A IFR, 52 Fed. Reg. 20496 (June 1, 1987) at 20502, 20521; 20 C.F.R. §§ 655.120(a), 655.122(*l*). This requirement is one of the primary means by which DOL ensures that the employment of H-2A

[2] "Cases decided by the Court of Appeals for the Fifth Circuit before 1981 are binding precedent in the Eleventh Circuit today." *Hope v. Pelzer*, 536 U.S. 730, 742 (2002), citing *Bonner* v. *Prichard,* 661 F.2d 1206 (11th Cir. 1981).

workers "will not adversely affect" the wages and working conditions of workers in the United States. 88 Fed. Reg. 12760, 61, 65, 66. As DOL has explained, the AEWR "reflects a longstanding concern that there is a potential for the entry of foreign workers to depress the wages and working conditions of domestic agricultural workers," and "is designed to prevent the potential wage-depressive impact of foreign workers on the domestic agricultural workforce," 75 Fed. Reg. at 6891. Indeed, when Congress enacted § 1188, it cited with approval DOL's use of an AEWR. *See, e.g.,* Senate Report 99-132 (1985) at 38 (stating statute was not intended to change DOL's practice of setting an AEWR).

Plaintiffs agree that "Congress did not dictate a particular methodology for [DOL] to use to avoid adverse effects," Am. Compl. ¶¶ 57. Plaintiffs instead claim that despite § 1188's broad delegation, DOL contravened the "clear and mandatory statutory language" of "similarly employed." *Pac. Mar. Ass'n*, 827 F.3d at 1208; Am. Compl. ¶¶ 12, 47. Plaintiffs claim "similarly employed" must be construed to limit the *dataset* DOL uses to one comprising only wages of temporary agricultural workers. *See* Am. Compl. ¶ 47.

But this argument is flawed. First, even setting aside that the statute broadly delegates authority to DOL to assess adverse effects, a plain reading of the statute does not support Plaintiffs' argument. The natural reading of "similarly employed" is employed in ways that have a general – but not exact – resemblance. Two individuals who perform the exact same job are certainly "similarly employed," even if one performs the job year-round and the other seasonally. And nothing in the statue

defines "similarly employed" in a manner that would support Plaintiffs' argument. Had Congress wanted to place limits on the particular dataset DOL could use, through the term "similarly employed" or elsewhere, it would have done so. "Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion." *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 296 (2013). Second, at least one court has long held that the phrase "workers in the United States similarly employed" reflects a Congressional intent to protect the interests of the American workforce more broadly. *See, e.g., Int'l Union of Bricklayers & Allied Craftsmen v. Meese*, 761 F.2d 798, 804-05 (D.C. Cir. 1985); *Overdevest Nurseries L.P. v. Walsh*, 2 F.4th 977, 982-83 (D.C. Cir. 2021) (finding statute was intended to "protect all U.S. workers who would be hurt by an influx of foreign workers performing unskilled work" and rejecting argument that statutory text required limiting "similarly employed" to workers able, willing, and qualified to perform H-2A work). Finally, even if "similarly employed" were construed to limit DOL's discretion to choose an AEWR methodology, the term implicates a factual matter within the agency's expertise, and statutory construction should include "the agency's body of experience and informed judgment." *Loper Bright,* 144 S.Ct. at 2267 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). "Such expertise has always been one of the factors which may give an Executive Branch interpretation particular 'power to persuade, if lacking power to control.'" *Id.* (quoting *Skidmore*, 323 U.S. at 140).

When reviewing DOL's rulemaking pursuant to its delegated authority, the court must ensure the agency engaged in "reasoned decisionmaking" within the bounds of

its delegation. *Loper Bright,* 144 S. Ct. at 2263 (citations omitted). DOL engaged in reasoned decisionmaking in its 2023 AEWR methodology. As the Magistrate Judge previously noted, DOL explained its use of OEWS data at length, and nothing in that explanation was inconsistent with its delegated authority under the INA or with the APA. *Fla. Growers Ass'n*, 2024 WL 670464 at *20-26. DOL explained, for example, that OEWS data would better guard against adverse effects for certain occupations not surveyed in the FLS and that the OEWS data included wage data from farm labor contractors who increasingly employ H-2A workers but who are excluded from the FLS data. *See id.*; *see also* 88 Fed. Reg. at 12769-72. Though the court relied on *Chevron*, the result is the same under the plain reading of the statute because DOL was given discretion to make the determination to use OEWS wages in some circumstances, and the Final Rule shows that it engaged in reasoned decisionmaking in promulgating the Final Rule. *See Loper Bright*, 144 S. Ct. at 2263.

Ultimately, Plaintiffs' challenge to the OEWS wage survey amounts to little more than a disagreement with DOL's methodology and choice of dataset to prevent adverse effects, both of which concern technical matters Congress assigned to the agency's judgment. *See, e.g., Mourning v. Family Publ'ns Serv.*, 411 U.S. 356, 371-72 (1973) ("where reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority"); *Kennecott v. U.S. Envtl. Prot. Agency,* 780 F.2d 445, 450 (4th Cir. 1985) (choice of dataset entitled to deference); *St. Johns Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 462 F. Supp. 3d 1256, 1289 (M.D.

Fla. 2020) (agency methodology entitled to deference); *Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Eng'rs*, 702 F.3d 1156, 1177-78 (10th Cir. 2012). The Final Rule explains that DOL adopted the OEWS wage survey to better protect wages for certain H-2A jobs. 88 Fed. Reg. at 12761-62. DOL explained that the OEWS wage survey is a better data source for those job opportunities because it is a reliable and consistent wage survey, its data is more accurate for SOC codes not surveyed by the FLS, and it captures farm contractor wages.[3] *Id*. at 12770-71. Plaintiffs' disagreement with DOL's dataset and methodology does not show that the Final Rule violates the APA.

B. The Final Rule Does Not Violate Equal Protection

Plaintiffs allege that because the state workforce agency assigns an SOC code to an H-2A certification first, which DOL then reviews, "there is a tremendous potential" for wage rates to be assigned inconsistently based on the employer's State, and that "potential" creates "equal protection violations" for employers from one State to the next. Am. Compl. ¶ 59. This claim fails at every stage of the analysis.

"[T]he Equal Protection Clause requires government entities to treat similarly situated people alike." *Campbell v. Rainbow City, Ala.*, 434 F.3d 1306, 1313 (11th Cir. 2006). Here, Plaintiffs have not shown that a single similarly situated person has been treated differently under the regulation. Moreover, DOL's regulations protect against

[3] As to farm contractors, Plaintiffs criticize DOL's use of OEWS wage data—which contains farm contractor data—as *ultra vires*, but also criticize DOL's use of FLS data, because *it does not* include farm contractor data. Am. Compl. ¶ 40. There appears to be no available dataset or combination of datasets that Plaintiffs find satisfactory.

the disparate treatment Plaintiffs fear: DOL reviews each State workforce agency's initial determination. *See* 20 CFR § 655.141. If DOL disagrees with the State agency, it will allow the employer to accept DOL's SOC classification or challenge DOL's finding, which can be appealed. 20 CFR §§ 655.142, 655.171. Plaintiffs have not shown any disparate treatment under the law.

II. DOL IS ENTITLED TO SUMMARY JUDGMENT ON COUNT II OF THE AMENDED COMPLAINT

A. DOL Adequately Responded to Comments about use of OEWS Wages and Explained its Reasons for Using OEWS Data

Plaintiffs allege that the Final Rule is arbitrary and capricious because DOL failed to respond sufficiently to comments about the use of OEWS data. *See* Am. Compl. ¶ 63. This Court already found that, "[a]s also evidenced in the rule itself, the DOL arrived at this conclusion [to use OEWS data] only after a robust consideration of the input it received from various commentators, as well as its own experience in administering the H-2A program." *Fla. Growers Ass'n*, 2024 WL 670464, at *25. Indeed, DOL specifically responded to comments about the use of OEWS data, explaining that OEWS data was the best comprehensive wage data source outside of the FLS data, that OEWS data also used SOC codes like the FLS data, that OEWS surveys farm labor contractors which represent an increasing share of H-2A employers, and that for certain job opportunities, OEWS data is more comprehensive than FLS data. 88 Fed. Reg. at 12769-12772; *see also Fla. Growers Ass'n*, 2024 WL 670464 at *25. Not only did DOL respond to the comments, as noted *supra*, it reasonably explained its decision to use OEWS data in a limited set of circumstances. *See* 88 Fed. Reg. at

12771-72. The Final Rule is not arbitrary and capricious in its use of OEWS data or DOL's response to comments on that issue. *See State Farm,* 463 U.S. at 43.

B. DOL Adequately Responded to Comments about SOC Code Assignment and Reasonably Explained its Decision

Plaintiffs allege DOL improperly adopted a single duty test for assigning SOC codes rather than using a method "that looks at the specific work being performed or, at least, considering the 'primary duty' of the position." Am. Compl. ¶ 63. First, DOL did not adopt a "single duty" test. As explained in the Final Rule, where DOL determines that a job opportunity requires the assignment of more than one SOC code "to appropriately reflect the job offered," if the SOC codes assigned generate different AEWRs, the higher AEWR applies. 88 Fed. Reg. at 12779-80. Further, as this Court previously found in its extensive discussion of the issue, DOL reasonably explained why it adopted that test and responded to comments on the issue. *Fla. Growers Ass'n*, 2024 WL 670464 at *20. DOL explained that the drawbacks to the proposed "primary duty" test, based on the percentage of time spent on the various duties within a job opportunity, were that it could be subject to manipulation by employers,[4] would be administratively burdensome for employers to document the time workers spent on each of the various duties performed, could undermine DOL's goals of consistency, predictability, accuracy, and efficiency in AEWR determinations, and may adversely affecting the wages of workers in the United States similarly employed in the higher-

[4] Employers could combine work from various SOC codes, interspersing higher-paid, higher-skilled work among many workers so that the higher-paying work is never performed by any one employee more than the specified percentage, thus allowing the employer to gain the benefit of work in a higher-paid SOC code while paying less than the applicable AEWR for that work. 88 Fed. Reg. at 12781.

paid SOC codes. *See* 88 Fed. Reg. 12781-82. DOL explained that employers may file as many H-2A applications as they wish to avoid combining duties into a single job opportunity. *Id.* at 12778-79. Thus, the Final Rule shows that DOL considered comments about the so-called "single duty" test, considered the alternatives raised by the commentors, including the "primary duty" test, and reasonably explained the reasons for its decision. The Final Rule is therefore not arbitrary and capricious.

C. The Final Rule is Not Impermissibly Vague

Plaintiffs allege the Final Rule is impermissibly vague because farmers cannot predict which job opportunities will be subject to OEWS wages and because if farmers use multiple job orders, it will be more difficult to determine corresponding employment payment rates. Am. Comp. ¶¶ 65-66. These arguments also fail.

"[E]conomic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. *Hoffman Estates v. Flipside*, 455 U.S. 489, 498 (1982). That is particularly true where "the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process." *Id.*

Here, farmers can plan ahead by reviewing the SOC codes relevant to the work they anticipate H-2A workers will perform, they can tailor their job orders to their businesses and decide whether to combine or separate job duties, and if they disagree with the SOC code determination by the state workforce agency or DOL, they can appeal. Nothing about the regulation suggests it is impermissibly vague. *See id.*

D. The Final Rule's Effective Date was Not Arbitrary and Capricious

The APA provides that a final rule must be published not less than 30 days prior to its effective date. 5 U.S.C. § 553(d). "When the statute authorizing agency action fails to specify a timetable for effectiveness of decisions, the agency normally retains considerable discretion to choose an effective date." *Recording Indus. Ass'n of Am. v. Copyright Royalty Tribunal,* 662 F.2d 1, 14 (D.C. Cir. 1981). Here, DOL complied with the statute: the Final Rule published on February 28, 2023, and became effective 30 days later, on March 30, 2023. 88 Fed. Reg. at 12760.

Plaintiffs argue that the Final Rule is a "complete[] overhaul" of the H-2A program and more time should have been allowed for implementation, but that is incorrect. Am. Compl. ¶ 67. To the contrary, as this Court has already noted, DOL anticipates that the Final Rule will be implicated in a relatively small number of H-2A applications. *Fla. Growers Ass'n*, 2024 WL 670464, at *23 ("it is important to highlight at the outset the relative infrequency with which the DOL expects that OEWS data will come into play under the 2023 Rule."). Plaintiffs' allegation that the entire program has been overhauled is overblown. Further, DOL took steps to ensure that employers could comply with the Final Rule upon the effective date. It published AEWR rates and provided the URL for an AEWR search tool. 88 Fed. Reg. at 12763. There is nothing arbitrary and capricious about an effective date that complies with the statute and applies to a limited number of H-2A certifications, particularly when DOL took steps to ensure employers had access to the information they needed. Summary judgment on this claim should be grated to Defendants.

E. The Final Rule is Not Retroactive

Defendants are entitled to summary judgment on Plaintiffs' claim that the Final Rule is retroactive. As noted, the Final Rule took effect 30 days after publication. 88 Fed. Reg. at 12760. The Final Rule specifically stated that any job order submitted "before the effective date of this final rule will be processed using the 2010 Final Rule methodology" while "[t]he methodology established by this final rule will apply to any job orders…submitted…on or after the effective date of this final rule[.]" *Id.*

Plaintiffs argue that during a contract period, they would have to increase pay to the higher AEWR to someone hired pursuant to a job order coded with an SOC code subject to the higher rates. Am. Compl. ¶ 68. But to have a retroactive effect, a statute or regulation must "'impair rights a party possessed when [it] acted, [must] increase [its] liability for past conduct, or [must] impose new duties with respect to transactions already completed.'" *Fla. Growers Ass'n*, 2024 WL 670464 at *31 (quoting *Ga. Power Co. v. Teleport Comms. Atlanta, Inc.*, 346 F.3d 1033, 1042 (11th Cir. 2003) (*quoting Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994) and *citing Resol. Trust Corp. v. Ford Motor Credit Corp.*, 30 F.3d 1384, 1388 (11th Cir. 1994)).

Plaintiffs cannot meet that standard here because pursuant to the H-2A agreement that defined their rights and duties, Plaintiffs expressly agreed:

> [I]f the applicable AEWR or prevailing wage is adjusted during the contract period, and that new rate is higher than the highest of the AEWR, the prevailing wage, the CBA, the Federal minimum wage, or the State minimum wage, the employer will increase the pay of all employees in the same occupation to at least the higher rate no later than the effective date of the adjustment...

See ETA Form 9142A, App'x A (ECF 22-2). Plaintiffs have not shown that the Final

Rule is retroactive and Defendants are entitled to summary judgment on this claim.

III. DOL IS ENTITLED TO SUMMARY JUDGMENT ON COUNT III OF THE AMENDED COMPLAINT

A. DOL's use of FLS Data is Reasonable and Reasonably Explained

Plaintiffs challenge DOL's use of FLS data as arbitrary and capricious, alleging that the survey suffers from "fatal flaws" and was not intended to be used to set wages. Am. Compl. ¶¶ 75-76. The Court should sustain DOL's choice of dataset if DOL's selection was reasonable. *Fla. Fruit & Vegetable Assoc. v. Brock,* 771 F.2d 1455, 1460 (11th Cir. 1985); *Kennecott*, 780 F.2d at 450. Here, DOL explained the benefits of the FLS while also recognizing its limitations. DOL explained that it sought to use the best available source of actual wage data, and the FLS was the most comprehensive survey of wages paid by farmers and ranchers and had the advantage of a broad geographic scope. 88 Fed. Reg. at 12767-68. DOL responded at length to comments regarding the FLS data. *Id.* at 12768-69. It explained that contrary to claims that USDA said FLS data should not be used to set the AEWR, a 2019 Memorandum of Understanding between USDA and DOL explicitly acknowledged DOL's need for access to FLS data to set the AEWR and USDA's National Agricultural Statistics Service (NASS) website notes the use of the data in setting the AEWR. *Id.*; *see United Farm Workers v. DOL*, 509 F. Supp. 3d 1225, 1231-32 (E.D. Ca. 2020); *see also* CAR at 24-34; CAR 94. It explained that USDA has conducted the survey since 1910 and has extensive expertise in analyzing, assessing, and measuring the accuracy and reliability of annual wage estimates. *Id.* at 12768. DOL's choice of dataset is reasonable and

reasonably explained, and Defendants should be granted summary judgment on Plaintiffs' challenge to the use of FLS data.

B. DOL's AEWR Methodology does Not Set an Attractive Wage

DOL explained in the Final Rule that the AEWR methodology was designed to balance the competing goals of providing an adequate labor supply while protecting the jobs of domestic workers in a manner that allows for the sound and efficient administration of the H-2A program. 88 Fed. Reg. at 12761, 12777. *See also Fla. Growers Ass'n*, 2024 WL 670464, at *20. The Final Rule explains that the AEWR is meant to set a wage floor. 88 Fed. Reg. at 12761. It explains that there is no statutory requirement to set the AEWR at the highest or lowest conceivable point so long as it guards against adverse effects. *Id.* DOL expressly acknowledged that the AEWR is not meant to set an attractive wage. *Id.* 12761 n.7. Nothing in the Final Rule suggests that DOL is setting a wage impermissibly high to attract workers into agricultural jobs. And while Plaintiffs allege that use of FLS data is intended to "replicate a rate at which enough U.S. workers would be attracted into seasonal agricultural jobs to make the H-2A program unnecessary" (Am. Compl. ¶ 77) DOL's FLS methodology has been in effect since at least 2010, and in that timeframe use of H-2A workers has increased. 88 Fed. Reg. at 12763, 12766, 12771 n.71, 12775.

C. DOL is Not Required to Test for Adverse Effects

Plaintiffs contend that DOL's imposition of an AEWR without first identifying or measuring "adverse effect" exceeds its authority under 8 U.S.C. § 1188(a). Pls' Am. Compl. ¶¶ 33, 48. Not so.

As noted above, DOL's authority to certify an application depends on whether DOL finds that the employment of H-2A workers "will not adversely affect the wages and working conditions of workers in the United States similarly employed." 8 U.S.C. § 1188(a)(1)(B). DOL acted within its delegated discretion when it reaffirmed—in the 2010 H-2A Rule, 75 Fed. Reg. 6884, 6893-94 (Feb. 12, 2010)—the decision made in the first H-2A rule in 1987 that a finding of "adverse effect" was not a prerequisite for establishing an AEWR.[5]

Pursuant to DOL's delegated discretionary authority under § 1188(a), DOL's regulations implementing § 1188(a)(1) have always conditioned certification on the employer's agreement to offer, advertise, and pay the highest of several enumerated wages, including the AEWR. *See* 1987 H-2A Rule, 52 Fed. Reg. at 20502, 20521; 20 C.F.R. §§ 655.120(a), 655.122(*l*). This requirement is one of the primary means by which DOL ensures that the employment of H-2A workers "will not adversely affect" the wages and working conditions of workers in the U.S. 88 Fed. Reg. 12760, 61, 65, 66. As DOL has explained, the AEWR and the corresponding methodology and dataset used to establish the AEWR "reflects a longstanding concern that there is a potential for the entry of foreign workers to depress the wages and working conditions of domestic agricultural workers," and "is designed to prevent the potential wage-depressive impact of foreign workers on the domestic agricultural workforce," 75 Fed. Reg. at 6891. Finding that "the empirical evidence is inconclusive about the past

[5] DOL did not revisit this decision in the 2023 Final Rule. *See* 88 Fed. Reg. at 12784 (comments on this issue classified as "out of scope").

impact" of H-2A workers, DOL has determined that this "forward-looking" approach is particularly important "regardless of any past adverse effect" to "protect U.S. workers whose low skills make them particularly vulnerable to even relatively mild—and thus very difficult to capture empirically—wage stagnation or deflation" that may result from hiring H-2A workers. *Id.* at 6893. Indeed, DOL explained that the lack of evidence of wage depression "is not evidence that an AEWR is unnecessary; rather, it may be evidence that the imposition of the AEWR heretofore has been successful in shielding domestic workers from the potentially wage depressing effects of overly large numbers of temporary foreign workers." *Id.*; *see also id.* at 6894 (subsequent evidence did not provide any further clarity regarding adverse effect). Thus, for years DOL's AEWR methodology and choice of dataset has reflected a prophylactic approach to implementing the statute's requirements.

Not only is this approach reasonable and well within the Secretary's discretionary authority to ensure against adverse effect, it is also consistent with the plain language of the statute. Section 1188(a)(1)(B) authorizes DOL to certify that the employment of H-2A workers "*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)(B) (emphasis added). In other words, the text of § 1188(a)(1)(B) is best read to require DOL to determine what conditions must be in place to ensure that the employment of H-2A workers *will not* have such an adverse effect. The statute does not direct DOL to certify whether the employment of H-2A workers "has not" or "does not" adversely affect workers in the U.S. This is especially evident when compared to the present tense used

under § 1188(a)(1)(A), requiring that DOL certify that there "*are not*" sufficient workers available to perform the employer's needed labor or services.[6] Had Congress intended DOL to make a similar finding with respect to adverse effect under § 1188(a)(1)(B), it easily could have used the same verb tense structure as under § 1188(a)(1)(A). That it did not reflects Congress' specific concern with the potential for future adverse effect. *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 86 (2017) (courts presumes differences in language "convey differences in meaning").

IV. THE RELIEF SOUGHT BY PLAINTIFFS IS IMPROPER

Nationwide injunctions are overbroad and an abuse of discretion. *See Georgia v. President of the U.S.*, 46 F.4th 1283, 1304–07 (11th Cir. 2022). It is also Defendants' position that vacatur of a rule is not an available remedy under the APA. *See United States v. Texas*, 599 U.S. 670, 686-704 (2023) (Gorsuch, J., concurring). If summary judgment is not granted for Defendants, Defendants request additional briefing on the issue of remedy, including whether vacatur is available.

CONCLUSION

Wherefore, Defendants request that the Court enter summary judgment in their favor on all counts.

Respectfully submitted,

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[6] And indeed, DOL's regulations establish requirements for a rigorous labor market test to recruit any available able, willing, and qualified U.S. workers to perform the needed work, *before* DOL may make this certification. *See, e.g.,* 20 C.F.R. §§ 655.150-655.158.

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