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

FLORIDA GROWERS ASSOCIATION, INC., *et al.*,

Plaintiffs,

v.

No. 8:23-cv-00889-CEH-CPT

JULIE A. SU, Acting Secretary of Labor, in her official capacity, et al.,

Defendants.

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PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56, Fed. R. Civ. P., Plaintiffs ask the Court to enter judgment against the Defendants on each of the three Administrative Procedure Act claims and stop the implementation and enforcement of a final rule "revising the methodology by which [the Department of Labor] determines the hourly Adverse Effect Wage Rates (AEWR's) for non-range occupations…" (the "Rule"). 20 C.F.R. § 655.120.

I. Introduction and Background

Congress created a non-immigrant visa program (the "H-2A Program") to allow U.S. employers to hire workers who have "a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services … of a temporary or seasonal nature." 8

U.S.C.A. § 1101(15)(H)(ii)(a). Before a farm or farm labor contractor can hire H-2A workers, the Secretary of Labor must certify that: (1) there are not enough U.S. workers who are able, willing, and qualified to perform the labor at the time and place 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). Within that "adverse effect" assessment, the Department must find a balance between H-2A wages that are too low (and thus cause adverse effect to the wages of those "similarly employed" U.S. workers) and H-2A wages that are higher than needed (and thus end up harming farm employers and denying them access to the workers needed). *Cf.* 8 U.S.C. § 1188 and *Williams v. Usery*, 531 F.2d 305, 306–07 (5th Cir. 1976).

Since 1986, the Department of Labor ("Department") has used what it calls the Adverse Effect Wage Rate ("AEWR") as a minimum wage for H-2A visa workers and U.S. workers performing the same work. ECF 84 at ¶ 6. For most of that time, the Department has set the AEWR through the Farm Labor Survey ("FLS"), an annual survey of U.S. farmworker wages conducted by the Department of Agriculture. *Id*. The FLS-based AEWR violates statutory limits and the new provisions of the challenged Rule exacerbate those illegally high wages by using Bureau of Labor Statistics non-farm wages. Together, these methodologies inflict ruinous costs on American farms, radically throwing the program out of balance. *See* 20 C.F.R. § 655.120.

For decades, agencies like the Department have enjoyed the benefits of *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) during challenges to their illegal actions. That reliance, however, is now gone because "*Chevron* is overruled" and trial courts "must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires." *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244, 2273 (June 28, 2024).[1] Agencies are no longer the creator and judge of their own rules, and the Court can reclaim its rightful role as arbiter of agency action.

Defendants' argument throughout this case has been akin to this: "Congress did not explicitly tell us we ***can't*** set wages this way, so we've decided to go for it." *See* ECF 22 at 3-4. Defendants successfully convinced the Court at the preliminary injunction stage of this case that, by not prescribing a specific wage-setting mechanism to avoid "adverse effect" on U.S. farmworkers "similarly employed," Congress had given the Department carte blanche to set wages however the Department might choose. *See* ECF 69 at 5-6. This kind of "ambiguity" argument, that Courts could not meaningfully question the validity of agency rulemaking decisions, was explicitly rejected by the Supreme Court in *Loper Bright*. 144 S.Ct. at 2268 ("By forcing courts to instead pretend that ambiguities are necessarily delegations, *Chevron* does not prevent judges from making policy. It prevents them from judging."). The entire mechanism

[1] Put somewhat more bluntly, "Today, the Court places a tombstone on *Chevron* no one can miss. In doing so, the Court returns judges to interpretive rules that have guided federal courts since the Nation's founding." *Loper Bright*, 144 S.Ct. at 2275 (Gorsuch, J., concurring).

of judicial review of agency rulemaking has completely changed between the Court's order denying preliminary relief and today.

Beyond the re-balancing of the review process, the Plaintiffs address both elements of the 2023 H-2A wage rule: (1) the use of BLS non-farm survey data for farm worker supervisors or truck-drivers; and (2) the use of USDA data to set the rates of pay for the remainder of the workforce covered by the H-2A rules. These are not dry, technical critiques of statistical methods but, rather, fundamental questions of whether the Department is following Congress' direction to avoid "adverse effect" or has oversteered and created wages to be "attractive" to potential workers, which Congress does not allow. *Williams v. Usery*, 531 F.2d 305, 306–07 (5th Cir. 1976). This is a matter of interpretation for which courts are perfectly capable of deciding, without needing to rely on an agency's "expertise" in regulating a given subject.

> For those reasons, delegating ultimate interpretive authority to agencies is simply not necessary to ensure that the resolution of statutory ambiguities is well informed by subject matter expertise. The better presumption is therefore that Congress expects courts to do their ordinary job of interpreting statutes, with due respect for the views of the Executive Branch. And to the extent that Congress and the Executive Branch may disagree with how the courts have performed that job in a particular case, they are of course always free to act by revising the statute.

Loper Bright, supra, 144 S. Ct. at 2267.[2] Congress tasked the Department with avoiding "adverse effect" but did not empower them to impose wages beyond the level

[2] As a recent indication of the sea-change represented by *Loper Bright*, a federal court issued a nationwide preliminary injunction against the Department of Energy, noting that Congress enacted the APA "as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices." *State of Oklahoma v. Cardona*, Docket No. CIV-24-00461-JD, 2024 WL

necessary to avoid harm to U.S. workers' wages. The H-2A wage rule goes beyond the authority Congress conveyed and sets wages excessively high.

One thing that has not changed over the past year or more is that agricultural employers in Florida and throughout the United States continue to suffer under the illegally and unbearably high wages imposed by the Department. Businesses have closed, farms have been sold to developers, and in the rare instances where these ballooning labor costs can be passed on to consumers, American families bear this burden every time they visit the supermarket to buy food. The harm is ongoing, and the only relief in sight is from this Court putting a stop to the Department's unlawful actions and ordering Defendants to implement a rule that actually comports with Congress' clear directions.

Standard of Review

Ordinarily, courts follow the usual procedure for resolving Rule 56 motions: determining which facts are undisputed and applying the law to the parties' claims. "However, '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.'" *Brinklys v. Johnson*, 175 F.Supp.3d 1338, 1349 (M.D. Fla. 2016), quoting *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001). "Thus, in such a case, the standard in Rule 56 does not apply. … Rather, '[s]ummary judgment is the mechanism for deciding whether as a matter of law the agency action is supported by

3609109 (W.D. Okla., July 31, 2024), quoting *Loper Bright, supra*, 144 S.Ct. at 2261, quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 644 (1950).

the administrative record and is otherwise consistent with the APA standard of review.'" *Id.*, quoting *CS-360, LLC v. U.S. Dep't of Veterans Affairs*, 101 F.Supp.3d 29, 32 (D.D.C. 2015).

Argument

I. Wage Surveys that Specifically Ignore Farms Should Not be Used to Set Agricultural Wages

The rationale for why the Department's decision to use the OEWS wages for agricultural work that touches on certain occupational definitions is misguided and illegal. The Department acknowledged that it received a number of comments raising concerns with applying non-farm OEWS data to set wages for jobs "coded" by the Department as heavy-truck drivers or first-line supervisors on farms. AR000134-179. These comments also spoke to how occupations would be "coded" by the Department, looking at single tasks out of context to determine the overall "occupation" for a given set of workers. *Id.*

The comments in support of the rule did not demonstrate that the USDA or OEWS surveys were accurate or appropriate, let alone that the proposal was the best way to achieve the Congressional directive to avoid "adverse effect." Rather, they focused on an overall level of agricultural wages compared with wages in nonagricultural industries. *See, e.g.,* AR000135 (comparing the pay for teachers with H-2A workers earning money in Nebraska for part of the year; looking at market-wide trends in agricultural wages). There was no shortage in comments on how radically increasing wages would be good for the workers receiving those higher wages (*see, e.g.,*

AR000136), but of course, that is not the Department's Congressionally-designated role in the process. Their job is as gatekeeper to avoid harm to workers, not to play Santa Claus and require higher pay for workers.

Not so long ago, the Department recognized that using non-farm wages in this context was a terrible idea, loudly rejecting calls to use BLS data, then under the acronym OES but now known as OEWS:

> The selection of the Bureau of Labor Statistics (BLS) Occupational Employment Survey (OES) in the 2008 Final Rule was based on an underestimation of its inadequacies. The OES agricultural wage data has a number of significant shortcomings with respect to its accuracy as a measure of the wages of hired farm labor suitable to be used as the AEWR. Perhaps its most substantial shortcoming in this context is that the OES data do not include wages paid by farm employers.

75 Fed. Reg. 6896 (Feb. 12, 2010). Somewhere between the Obama administration and the Biden administration, the Department seems to have forgotten this.

In trying to justify using non-farm wages to set H-2A wages, the Department incorrectly (or disingenuously) claims that the FLS does not survey truck-drivers, supervisors, or construction workers on the farm. 88 Fed. Reg. 12771. According to the U.S. Department of Agriculture, the agency that administers the FLS, "The Farm Labor Survey provides the basis for employment and wage estimates for ***all workers*** directly hired by U.S. farms and ranches (excluding Alaska) for each of four quarterly reference weeks." (Emphasis added.)[3] The FLS form does not request information for particular occupations but asks for total compensation for "agricultural workers,"

[3] https://www.nass.usda.gov/Surveys/Guide_to_NASS_Surveys/Farm_Labor/

defining that to mean the following: "Agricultural workers are workers directly hired and paid by the farm operation to perform work on a farm or ranch in connection with the production of agricultural products."[4] *See* AR000035-46. The FLS specifically provides space for farms to report the wages of "First-Line Supervisors or Farm Workers" and catch-all categories like "All Other Field Workers" and "Any Other Worker Not Listed Above." AR000039.

As shown in the administrative record, the FLS form that USDA sends to farm employers does not ask them to parse job duties employee-by-employee nor to weigh those specific responsibilities or pigeonhole an employee into a particular occupational code. *See* AR000035-46. The Department insists on "up-coding" workers who might occasionally (if ever) perform job duties that overlap with a higher-paying occupation outside the six occupations reported in the FLS (the "Big 6" occupations). That may have been good enough under *Chevron*, but stripped of that deference, the Department's insistence that its decision to maximize the required wage is beyond judicial review fails, and the Department cannot convince the Court that its wage-setting decisions comport with the authorizing statute.

II. The Use of FLS Data to Set H-2A Wages for "Big 6" Occupations Must Also Be Invalidated

Common to the challenges to both the OEWS data to set wages for truck-drivers, first-line supervisors, and other occupations and the FLS data for the "Big 6"

[4] https://www.nass.usda.gov/Publications/Methodology_and_Data_Quality/Farm_Labor/06_2024/Report%20Form.pdf at p.3

occupations is the Department's failure to account for the regulatory requirements to provide free housing to workers covered by an H-2A contract, free kitchen facilities, free international transportation, free visa processing fees, and other fixed-costs. *See* 20 C.F.R. § 655.122(d) (housing), (g) (free meals), (h) (transportation, inbound and outbound), and (j) (filing fees, visa fees, and labor certification fees).

The U.S. workers employed by farms, farm labor contractors, or non-farm employers who do not participate in the H-2A program have no such requirements or expenses, so using the wage rates captured in the FLS and OEWS survey data to set H-2A wage results in wages significantly higher than U.S. workers "similarly employed" and artificially inflates H-2A wages illegally. This is a substantial amount of money, too. For example, Florida Growers Association pays approximately $8,000 for petition fees, visa fees, transportation, and housing per worker. Declaration of J. Peter Chaires, attached hereto as Exhibit A, at ¶ 7. On average, those costs make the net wages for the Association's employees $5.50 to $6.50 per hour higher than the survey-based wages used to set the baseline AEWR. *Id.* at ¶ 8. This creates significant competitive disadvantages for H-2A employers like Florida Growers Association and its member farms. *Id.* at ¶ 9. As a direct result of the massive wage increases mandated by the Department in the past year-plus that this lawsuit has been pending (both OEWS and FLS AEWRs) have already caused some of the members of the Association to cease their farming operations. *Id.* at ¶ 10.

Section 1188(c)(4) provides that an H-2A employer "shall furnish" housing, without discussion of whether furnishing such housing may be reflected in the net pay

to workers using such housing. Where Congress intended to require employers to provide something to workers under H-2A contracts without cost to the worker, it did so clearly. *Compare* 8 U.S.C. § 1188(c)(4) ("Employers shall furnish housing in accordance with regulations"), *with* 8 U.S.C. § 1188(b)(3) ("the employer will provide, at no cost to the worker," workers' compensation insurance). "It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994), quoting *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338 (1994).

The Department will argue to this Court that they are somehow required to mandate that H-2A employers provide free housing or even that the Department is forbidden from even considering the cost of providing that housing when weighing "adverse effect" on the wages of U.S. workers similarly employed. The INA requires neither interpretation and in the post-*Chevron* world, the Department's interpretation carries no more weight than Plaintiffs' or, more importantly, this Court's.

To illustrate the problem, an H-2A farm worker in Florida paid at the "regular" AEWR based on the Farm Labor Survey earns at least $14.77 per hour in 2024. Even assuming, *arguendo*, that the FLS accurately surveys the average wages of non-H-2A Florida farmworkers, the Department's refusal to consider the $5.50 to $6.50/hour fixed costs discussed above means that the actual wages of the H-2A worker are really more like $20.27 to $21.27 per hour. Or, put differently, the average non-H-2A farm worker in Florida earning that $14.77 per hour has to spend at least 30% of that amount

on their housing costs, and often closer to 50% of their earnings.[5] So, the net earnings for that worker are more like $10.34 or even $7.39/hour when housing is taken into account. The Department has missed the mark by a wide margin, requiring significantly higher pay for H-2A workers than is required to avoid "adverse effect" on the wages of the similarly employed U.S. workers. Multiple commenters raised this issue to the Department (cited *infra*), but Defendants utterly ignored those comments.

By turning a blind eye to this crucial point, the Department is violating Congress' directive to avoid "adverse effect" and instead have created an artificially high "AEWR" at odds with the *Williams v. Usery* decision. Congress directed the Department not to allow H-2A wages to "adversely affect" U.S. workers' wages by undercutting them. But the Department is comparing apples to oranges; base wages vs. base wages ***plus housing plus transportation plus application fees and costs***. This is not simply a policy dispute, but the Department's complete abdication of responsibility to comply with Congress' directions.

Even post-*Chevron*, an agency can make a reasonable policy choice in how it administers its authorizing statute, but the range of choices is not unlimited. The Department, for example, could not set H-2A wages at $100.00 per hour because it makes the math easier or because the Department could not be bothered to find the

[5] *See, e.g.,* http://flhousingdata.shimberg.ufl.edu/reach/results?nid=99 (for the 7-county Tampa Bay area); https://flhousing.org/wp-content/uploads/2022/08/Home-Matters-Report-2022.pdf ("Over 2.1 million low-income Florida households pay more than 30% of their incomes towards housing, the maximum amount considered affordable by experts, with over half, 1.2 million low-income households, paying more than 50%.")

actual "adverse effect" level. They are no less out-of-bounds to ignore additional costs and double-count earnings by providing wages that would normally be used to cover housing costs and mandate providing free housing and other costs on top of that wage rate! Doing so goes beyond Congress' directive regarding adverse effect and throws the entire program out of balance.

The Secretary of Labor, through the H-2A wage-setting regulations, has taken the position that agricultural employers will be explicitly forbidden from obtaining the labor certification necessary to employ temporary foreign agricultural workers unless the employer agrees to pay the hourly wage rate set by the Department and agrees to provide free housing and free international transportation to all applicable workers. The "hook" for this authority, according to Defendants, is 8 U.S.C. § 1188(a)(1)(B), but Defendants do not (and cannot) explain how a wage rate that accounted for those mandated fixed costs would "adversely affect" the wages of similarly employed U.S. workers. Certainly, Section 1188(a)(1)(B) cannot be read to convey limitless power to set any wage rate the Secretary may decide is appropriate – $25, $50, $1,000/hour – the authority is specifically delineated as the rate necessary to avoid "adverse effect" and nothing more.

> When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. The court fulfills that role by recognizing constitutional delegations, 'fix[ing] the boundaries of [the] delegated authority,' … and ensuring the agency has engaged in 'reasoned decisionmaking' within those boundaries. By doing so, a court upholds the traditional conception of the judicial function that the APA adopts.

Loper Bright, supra, 144 S.Ct. at 2263 (citations omitted).

Defendants have argued (earlier in this case, and in the other pending AEWR challenges), that the H-2A wage rule is within the universe of policy choices to set wages and, absent direct Congressional prohibition, they are free to choose this methodology from that group of potential choices. The Department implicitly or explicitly claims expertise over the "necessary" wage levels to avoid adverse effect. But the agency certainly has no greater general expertise in interpreting statutes than this Court does. *Loper Bright, supra*. Nor does it have specific expertise in the actual wages of U.S. farmworkers – no component branch of the Department surveys those workers, and the Department outsources the survey to the Department of Agriculture. The USDA data is then taken as-is, and used to set wages without any consideration of the housing costs or other fixed costs that no agency bothers to survey, calculate, or even consider.

III. The Use of Survey Data to Set a Minimum Wage At All is Problematic In This Context

Beyond refusing to consider the non-wage costs to H-2A employers and how that intersects with the "adverse effect" provisions in the statute, the Department received (and apparently ignored) a number of comments on problems with the use of survey data in H-2A wage-setting. *See, e.g.,* AR000147-148. As the pool of "similarly employed" U.S. farm workers continues to dwindle, year after year, use of the H-2A visa program has skyrocketed. The Department's own disclosures document this

growth, from just 50,000 positions certified in FY 2005[6] to nearly 400,000 positions in FY 2023[7] and on pace to exceed that total again this year. This growth has two unavoidable effects on the wage-survey process: (1) fewer and fewer non-H-2A employers to survey to find a current average wage for the "similarly employed" workers not covered by an H-2A contract; and (2) an upward "pull" on those non-H-2A wages caused by the increasing ubiquity of H-2A contracts in agriculture.

Employers who do not yet participate in the H-2A program are not required by the Department to pay any wage other than the applicable state or federal minimum wage. Yet, since H-2A employers are required under the Department's rules to hire "any qualified, eligible U.S. worker who applies to the employer until 50 percent of the period of the work contract has elapsed" (20 C.F.R. § 655.135(d); the "50% rule"), and pay them the DOL-mandated wage rate (20 C.F.R. §§ 655.120(a), 655.122(a) and (l)), domestic employers must, effectively, compete for their own workers with their H-2A employer neighbors. The H-2A wage becomes the local minimum wage, so when USDA surveys the non-H-2A employer the following year,[8] they will report a wage at least as high as the existing AEWR, which then becomes an even higher "floor" for the next year, and so on, year after year. The Department now acknowledges that, while the FLS-based AEWR historically increased by about $5 per

[6] https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/OFLC_Report_v11_8-23-07.pdf
[7] https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2A_Selected_Statistics_FY2023_Q4.pdf
[8] USDA admits that it also surveys H-2A employers, which the agency is not supposed to do and which further accelerates the feedback loop on wage inflation.

hour every 10 years, it is now increasing by at least $5 every 5 years. The wages are increasing and, more disconcertingly, the rate of increase is increasing.

Commenters raised these concerns, which were catalogued but not seriously discussed by the Department in issuing the 2023 rule, including the following:

- "Using the FLS artificially inflates the reported wages 'because not only does it not differentiate between U.S. workforce and H-2A workforce creating an echo chamber of rising wages, but it also includes incentive pay such as piece rates, bonuses, and overtime as well. This artificially inflates the reported wage in the FLS.'" AR000147, referencing comments 0051, 0053, 0059, 0072, and 0074.
- "Misuse of this survey to create AEWRs because (1) it not [*sic*] differentiate between U.S. workforce and H-2A workforce – thereby creating an echo chamber of rising wages; (2) it includes incentive pay such as piece rate, bonuses, and overtime as well. This artificially inflates the reported wage in the FLS." AR000147, comment 0051.
- Challenges to use of FLS because it fails to account for the growth of the H-2A program and difficulty of finding non-H-2A employers to survey, and the upward pressure on non-H-2A wages to retain their workforce, further skewing the results upward improperly. AR000148, comment 0050.

Again, this is not simply a policy disagreement, sour grapes, or armchair quarterbacking by the agricultural employer community. The Secretary of Labor is allowed to make policy decisions. She is not allowed to make policy decisions outside

of what Congress has allowed nor decisions that are arbitrary and capricious, no matter how much she may want to do so. The concerns cited above cannot be dismissed as employers preferring lower wages or advocating for one methodology over another equally valid methodology. They are pointing out specific ways in which the AEWR methodology adopted by the Department exceeds and violates the direction provided by Congress as to adverse effect. The APA requires the Department, just like any other federal agency, to explain why the rule that it has issued is consistent with the statutory authority conferred by Congress and is an appropriate exercise of that authority. The days of agencies hiding behind *Chevron* and getting away with telling courts "because we said so" are over.

IV. Defendants' Statute of Limitations Affirmative Defense Fails

As an affirmative defense to Plaintiffs' challenge to the FLS-based wages, Defendants have claimed that the challenge is untimely, since the FLS-based wages have been in use since the February 2010 H-2A rule. ECF 84 at 12. The state of the law on that subject has changed since Defendants filed their answer, so it is possible that they have abandoned this affirmative defense. To the extent they have not, the affirmative defense fails.

A. Renewal Doctrine

The use of the FLS to set H-2A AEWRs, generally, and the Department's failure to account for the cost of providing housing and other fixed-costs aspects of H-2A participation were raised by commenters ahead of the Department's promulgation of the 2023 wage rule. The Administrative Record acknowledges that Plaintiff

National Council of Agricultural Employers ("NCAE") specifically commented that the FLS-based AEWR does not include the additional costs of providing housing, transportation, and visa expenses: "According to the NCAE, these wages do not account for additional required benefits such as housing, transportation, visa expenses and subsistence, which can total an estimated $4.00 to $8.00 per hour." AR000140 and AR000187. Other commenters echoed this concern:

- "DOL fails to recognize that H-2A employers are required to pay for the workers' housing and transportation. Therefore, the AEWR in H-2A, when combined with other things the employer must pay for, is actually a much higher wage that is 'egregiously unfair to agricultural construction companies.'" AR000142.
- "By applying the OEWS Wage Rate and failing to take these variables into account, the DOL is unjustly enriching the workers and at the expense of the employers. This is directly contrary to the mission of the DOL, which is to represent the best interest of the United States as a whole." *Id.*
- "If the AEWR is maintained, benefits accrued to the worker, such as housing and transportation, should be factored in. If the purpose behind the AEWR is to set a wage rate such that employing H-2A workers is not less expensive than employing an able, willing, and qualified U.S. workers, then it stands to reason that the full cost of employing the H-2A worker must be considered. [0051] [noting that housing/transportation aren't considered 0078]." *Id.*

This issue was clearly raised by commenters in response to the Department's notice of proposed rulemaking. The "renewal" doctrine applies when an agency considers comments on a previously-issued rule and "reopens" that rule, restarting the statute of limitations to challenge the rule. *See, e.g., Mendoza v. Perez*, 754 F.3d 1002, 1018-19 (D.C. Cir. 2014) (citing *Impro Prods., Inc. v. Block*, 722 F.2d 845, 850 & n.9 (D.C. Cir. 1983)). This is what occurred with the 2023 wage rule and the use of FLS data.

B. *Corner Post* and Florida Growers Association

Even if the Court were to find that the 2023 wage rule did not substantively "reopen" the 2010 FLS-based AEWR rule, the relevant measuring date for purposes of the six-year statute of limitations is not the publication of the rule in 2010 but, rather, the first date on which a party has been affected by the rule. *Corner Post, Inc. v. Board of Governors of the Federal Reserve System,* 144 S.Ct. 2440 (July 1, 2024).

Here, the lead Plaintiff, Florida Growers Association, was not incorporated until September 2019 and did not begin to pay wages at the "adverse effect wage rate" set by the Department until January 31, 2020, well within six years from the commencement of this action in April 2023. Declaration of J. Peter Chaires, attached hereto as Exhibit A, at ¶ 4. Prior to January 2020, Florida Growers Association had not been injured by the Department's wage rule and would not have had standing to challenge the wage rule under 5 U.S.C. § 702. *Corner Post*, *supra*, 144 S.Ct. at 2449.[9]

[9] Individual members of the Association Plaintiffs have similarly been first-affected by the wage rules within the 6-year period before this action commenced in 2023. But for purposes of simplicity, the lead named Plaintiff meets this test, and that standing is sufficient to preserve the challenge and defeat Defendants' affirmative defense.

The Supreme Court specifically rejected the agency's argument that an APA claim "accrues" at the time of "final" agency action under APA Section 704, holding instead that "An APA plaintiff does not have a complete and present cause of action until she suffers an injury from final agency action, so the statute of limitations does not begin to run until she is injured." *Id.* at 2450. Thus, on these facts, at least one plaintiff has standing to challenge the FLS wage rule first issued in 2010, and Defendants' affirmative defense fails.

V. The H-2A Wage Rule Should be "Held Unlawful and Set Aside" With Nationwide Scope

To the extent Defendants try to argue that the Court should issue an extremely narrow injunction as to the wage rule (if any), citing mask-mandate or vaccination cases, that argument should be immediately rejected. Those issues involved inherently local health decisions, whereas the current case challenges the very legality of a program that the Department administers in all 50 states, the District of Columbia, and U.S. territories on an across-the-board basis. The more analogous case was decided earlier this week, *Ryan, LLC v. Federal Trade Commission,* Docket No. 3:24-cv-00986-E, 2024 WL 3879954 (Aug. 20, 2024), in which Judge Ada Brown found that federal law required her to "hold unlawful" and "set aside" the Federal Trade Commission's rulemaking on non-compete provisions in employment contracts. *Id.*, slip op. at 14. And doing so must be with nationwide effect, rather than only within the boundaries of her own judicial district. The injunction was addressed at the agency's promulgation and enforcement of the regulation, so it has effect as to all

employers in all districts in the country on an equal basis. *Id.* As Judge Brown noted, "setting aside agency action under § 706 has 'nationwide effect,' is 'not party-restricted,' and 'affects persons in all judicial districts equally.'" *Id.* quoting *Braidwood Mgmt., Inc. v. Becerra,* 104 F.4th 930, 951 (5th Cir. 2024).

VI. Conclusion

The Court has addressed some of the same issues raised in this motion in the prior motion for preliminary injunction and is familiar with the parties and their general positions as to the validity/invalidity of the H-2A wage rule. But we stand now in a totally new landscape than when the Court last had an opportunity to rule on these issues. The post-*Chevron* world changed everything about this case and should lead the Court to invalidate the rule. The Department's claim of expertise does not save the rule. Congress gave the Department a simple instruction – do not cause adverse effect to U.S. workers' wages. Nowhere in the statute is there authority to require wages higher than required to accomplish that goal. In fact, requiring those higher-than-market wages directly violates the other direction from Congress, to provide enough workers to meet the labor needs of American agricultural employers. The wage rule cannot legally stand and must be invalidated.

For all the foregoing reasons, Plaintiffs respectfully ask that the Court:

1. Enter a permanent injunction, pending a decision on the merits, enjoining Defendants from: (i) implementing the Final Rule, 88 Fed. Reg. 12,760 (Feb. 28, 2023); (ii) requiring any employer from posting for recruitment online or otherwise advertising or paying any H-2A wage rate higher than the applicable AEWR published

by Defendants at 87 Fed. Reg. 77, 140 (Dec. 16, 2022)[10]; (iii) from enforcing the payment of any wage rates arising the Final Rule against any employer. As part of such injunction, direct Defendants to continue processing H-2A applications using the wage rates published on December 16, 2022 until such time as Defendants can implement a revised methodology that complies with the requirements of 8 U.S.C. § 1188(a)(1)(B);

2. Enter a declaratory judgment as to Counts I, II, and III that the Final Rule and FLS-based AEWR methodology are invalid, and enter an order vacating the Final Rule and the definitions of "Adverse effect wage rate" and "Average adverse effect wage rate" at 20 C.F.R. § 655.103(b) and the methodology at 20 C.F.R. § 655.120(b), and permanently enjoining Defendants from implementing them or from issuing any further AEWR notices that do not include a finding of actual "adverse effect," that fail to consider domestic farm labor contractor wages, that fail to consider the cost of H-2A employer-provided housing and transportation, or that fail to survey actual hourly wages rather than gross pay;

3. Award Plaintiffs their costs and expenses, including reasonable attorneys' fees, whether under the Equal Access to Justice Act or otherwise; and

4. Award such further and additional relief as is just and proper.

[10] Or December 14, 2023, the most recent publication of FLS-based AEWRs, issued while this matter has been pending. 88 Fed. Reg. 86677 (Dec. 14, 2023).

Dated: August 23, 2024

/s/ Christopher J. Schulte
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CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2024, I filed the foregoing Plaintiffs' Motion for Summary Judgment via CMECF which will serve all attorneys of record.

/s/ Christopher J. Schulte
Christopher J. Schulte, *Pro Hac Vice*