UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

STATE OF KANSAS, *et al.*

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF LABOR, *et al.*,

Defendants.

Civil Action No. 2:24-cv-76-LGW-BWC

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Nearly 40 years ago, Congress delegated authority to the Department of Labor ("DOL") to ensure that the hiring of temporary nonimmigrant farmworkers pursuant to the H-2A program did not "adversely affect the wages and working conditions of workers in the United States similarly employed." *See* 8 U.S.C. § 1188(a)(1). Beginning in 1987 and over the last four decades, DOL has promulgated regulations to implement that clear and broad statutory command. The Challenged Provisions[1] continue that effort by affording workers employed under the H-2A program—both H-2A workers and their domestic non-H-2A co-workers—with the tools necessary to advocate for themselves in response to H-2A employers who fail to provide the required baseline wages and working conditions. *See* Final Rule, *Improving Protections for Workers in Temporary Agricultural Employment in the United States*, 89 Fed. Reg. 33,898 (Apr. 29, 2024) ("Final Rule" or "Rule"). "Empowering workers in this way thus can improve compliance with the various terms and conditions of H-2A employment that [DOL] has separately determined are necessary to prevent adverse effect on similarly employed workers." *Id.* at 33,991. Further, in light of the H-2A workforce's unique vulnerabilities, the Challenged Provisions seek to place such workers "on more equal footing with similarly employed workers and thus reduce the potential for this workforce's vulnerability to undermine the advocacy efforts of similarly employed workers." *Id*.

Notwithstanding the Rule's fealty to Congress's direction, Plaintiffs—17 states, a private employer, and a trade organization—allege that the Challenged Provisions violate the National Labor Relations Act ("NLRA"), the Immigration and Nationality Act ("INA"), as amended by the Immigration Reform and Control Act of 1986 ("IRCA"), and the Administrative Procedure Act ("APA"). Plaintiffs now seek summary judgment. Plaintiffs' motion should be denied and Defendants' cross-motion should be granted.

[1] The term "Challenged Provisions" refers to 20 C.F.R. § 655.135(h)(2), (m), and (n) and 29 C.F.R. § 501.4(a)(2), even though Plaintiffs' merits argument does not address subsections (m) and (n) specifically, *see generally* Pls.' Mot. In Section IV, Defendants explain why permanent relief, if any, should not extend even to all of the Challenged Provisions or all of the Plaintiffs. As further explained in Section V, under no circumstances should any relief apply to the entire Final Rule.

At the outset, Plaintiff States lack standing. They have not suffered an injury in fact, and the Court should dismiss them from this case for that reason. As relevant here, the states' role in the H-2A program is to review job orders submitted by employers and check that the employers have provided the proper assurances. That role preceded the Challenged Provisions, which thus do no harm to the states. Moreover, the federal government provides funding for these administrative duties, and Plaintiff States have not shown that their budgets are affected.

On the merits, Defendants are entitled to summary judgment on all four counts. As to Counts Two and Three, as this Court explained, "the 'best reading' of § 1188, in its entirety, is that Congress granted the DOL the authority to issue regulations to ensure that any certifications it issues for H-2A visas do not 'adversely affect' American agricultural workers." ECF No. 99 ("PI Order"), at 15. That includes the authority to promulgate the Challenged Provisions: "DOL acted within its authority as proscribed by Congress through [IRCA]" when it issued the Challenged Provisions. *Id.* at 19. Count Four also fails because DOL reasonably explained the Challenged Provisions and relied on the factors that Congress expected it to consider. As this Court explained, "'[DOL] is obliged to balance the competing goals" of IRCA and "it provided sufficient reasoning for its decision." PI Order at 18 (alterations in original) (citation omitted).

Defendants are similarly entitled to summary judgment on Count One. The Challenged Provisions do not extend the protections or enforcement mechanisms of the NLRA to workers in the H-2A program. The NLRA provides specific rights and establishes an entire infrastructure to interpret and enforce those rights, including through a collective bargaining process. The Challenged Provisions only prevent H-2A employers from retaliating against covered workers in the H-2A program for engaging in certain protected activities, such as speaking together with their employer about working conditions (*i.e.*, engaging in protected concerted activity). Only DOL would investigate such retaliation, as it already does for existing forms of protected activity.

In any event, Plaintiffs point to no provision of the NLRA that prohibits DOL from promulgating the Challenged Provisions. Instead, Plaintiffs assert that these provisions violate the NLRA because that law's definition of "employee" does "not include any individual employed as

an agricultural laborer." *See* 29 U.S.C. § 152(3). But that definitional provision does not preclude wholesale any regulation of agricultural employees' interactions with their employers. It is well established that individuals that fall outside of the NLRA's "employee" definition may be covered by other labor statutes and regulations—including those promulgated by other federal agencies.

Finally, for the same reasons Plaintiff States lack standing, they cannot establish irreparable harm and are thus not entitled to a permanent injunction. A *de minimis* increase in administrative costs is insufficient. And to the extent the private Plaintiffs have established all four factors required for injunctive relief, any relief should be limited to those parties and only as to those of the Challenged Provisions as to which all four factors are met. Plaintiffs' argument that the APA requires universal vacatur is incompatible with the history of universal judicial relief and the need to tailor relief to address the harm actually demonstrated by the parties. And the Challenged Provisions are severable from the remainder of the Rule. Finally, the public interest, including the need to prevent adverse effects to workers in the United States, weighs against an injunction.

The Court should deny Plaintiffs' motion and grant Defendants' cross-motion.

BACKGROUND

I. DOL's Authority to Grant Temporary Labor Certifications Is Pivotal to Operation of the H-2A Program Overall.

The INA as amended by IRCA, establishes an "H-2A" nonimmigrant visa classification for a worker "having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform" temporary or seasonal "agricultural labor or services." 8 U.S.C. § 1101(a)(15)(H)(ii)(a); *see also* 8 U.S.C. §§ 1184(c)(1), 1188. The statute requires multiple federal agencies to take several steps before foreign workers may be admitted to the United States under the H-2A classification.

A prospective H-2A employer must apply to DOL for a temporary employment certification ("TEC"). Congress authorized DOL to issue a TEC only if certain statutory requirements are met. First, DOL must certify 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). Unless both conditions (A) and (B) are established, DOL may not issue a TEC. *Id.* § 1188(b) ("The Secretary of Labor may not issue a certification under subsection (a) with respect to an employer if the conditions described in that subsection are not met . . . ."). Second, DOL may not issue a TEC "if any" of the additional conditions listed in 8 U.S.C. § 1188(b) exist. These conditions include if: (1) "[t]here is a strike or lockout in the course of a labor dispute which, under the regulations, precludes such certification;" (2) in the previous two years, the employer employed H-2A workers and "substantially violated a material term or condition" of a TEC; (3) the employer does not provide adequate workers' compensation assurances; or (4) the employer fails to make "positive recruitment efforts within a multi-state region of traditional or expected labor supply." *Id.* § 1188(b). Third, certain rules "shall apply in the case of the filing and consideration of an application for a labor certification under [§ 1188(a)]." *Id.* § 1188(c). For example, DOL must ensure that the employer (i) "has complied with the criteria for certification (including criteria for the recruitment of eligible individuals as prescribed by the Secretary)" and (ii) does not have "qualified eligible individuals . . . to perform such labor or services on the terms and conditions of a job offer which meets the requirements of the Secretary." *Id.* § 1188(c)(3)(A).

To apply for a TEC, employers must first complete and submit a job order, 20 C.F.R. § 655.103(b), to DOL's National Processing Center ("NPC") between 60-75 days "before the employer's first date of need," *id.* § 655.121(b). After the NPC receives the job order, it transmits a copy to the State Workforce Agency ("SWA") in the relevant state. 20 C.F.R. § 655.121(e)(1). The SWA then must confirm that the job order complies with various requirements, including that the employer has agreed to "abide by the requirements of [20 C.F.R. part 655, subpart B]." 20 C.F.R. § 655.121(e)(2); *see also id.* § 655.121(a)(4) (a "job order must satisfy the requirements for agricultural clearance orders set forth in 20 CFR part 653, subpart F, and the requirements set forth

in § 655.122"). One of the longstanding requirements of subpart B is that an employer make a number of "assurances," including that it will not engage in discriminatory hiring practices, is not seeking H-2A workers among an ongoing strike or lockout, and has not or will not treat unfairly any person who has engaged in a host of protected activities. *See* 20 C.F.R. § 655.135.

After reviewing the job order, the SWA works with the employer to address any noted deficiencies. *Id.* § 655.121(e)(2). When the SWA accepts the job order as fully compliant, the SWA will "place the job order in intrastate clearance and commence recruitment of U.S. workers." *Id.* § 655.121(f). If the "area of intended employment" spans multiple states, the SWA that initially reviewed and approved the job order informs the NPC that the job order covers multiple states, and then the NPC transmits the approved job order to the SWAs in the other states where recruitment must occur. *Id.* § 655.121(f). A SWA must keep an approved job order on active file until the recruitment period ends, generally after 50 percent of the work contract has elapsed. *Id.* §§ 655.121(g), 655.135(d). The SWA must refer to the employer each U.S. worker who applies to an active job order. *Id.* § 655.121(g).[2]

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[2] Under the Wagner-Peyser Act, the federal government funds SWAs' job order processing and recruitment activities as part of the Employment Service ("ES"), a national system of employment offices operated by the states and overseen by DOL. *See* 29 U.S.C. § 49 (establishing the ES); 29 U.S.C. § 49d(a) (authorizing the appropriation of money in such amounts as Congress "may deem necessary to carry out" the program); *see also* Further Consolidated Appropriations Act, 2024, Pub. L. 118-47, Division D, Title I, 138 Stat. 460, 633 (appropriating funds for state grants under the Wagner-Peyser Act for FY2024). Funds are allocated amongst the states according to a statutory formula. 29 U.S.C. § 49e(b); *see* 20 C.F.R. § 652.203 ("The SWA retains responsibility for all funds authorized under the Wagner-Peyser Act . . . "). States, through the SWAs, may use these funds for, among other things, "job search and placement services to job seekers," "appropriate recruitment services," and "clearing labor among the States." 29 U.S.C. §§ 49b(a), 49f(a); 20 C.F.R. § 652.3; *see also* Training and Employment Guidance Letter (TEGL) No. 12-23, https://perma.cc/HY26-55W8 (providing guidance for fund allotments for Program Year 2024, beginning July 1, 2024). Allowable grant-funded activities explicitly include recruitment and related services to agricultural employers in connection with applications for TECs. *See* 20 C.F.R. part 653, subpart F (ES Agricultural Recruitment System for U.S. Workers); *see also* 8 U.S.C. § 1188(b)(4) (interstate circulation of H-2A-related job offers through the ES).

In addition to grant funding provided under the Wagner-Peyser Act, the INA also authorizes, and Congress appropriates, federal funding specifically for SWAs to provide services to employers in connection with applications for TECs. *See* 8 U.S.C. § 1188(g)(1); Further

After a job order has been approved and posted by a SWA, the employer must apply for a TEC from DOL. *Id.* § 655.130. The application must be made no less than 45 days before the first date of need. *Id.* § 655.130(b); *see also* 8 U.S.C. § 1188(c)(1) (DOL may not require application be filed more than 45 days prior to need for H-2A workers).

Once an employer obtains a TEC from DOL, it may then file a petition for a nonimmigrant worker with the United States Citizenship and Immigration Services ("USCIS"), a component of the Department of Homeland Security ("DHS"). *See* 8 U.S.C. § 1184(c). If the petition is approved, the foreign workers whom the employer seeks to employ must generally apply for a nonimmigrant H-2A visa at a U.S. embassy or consulate abroad, and seek admission to the United States with U.S. Customs and Border Protection, another component of DHS.[3]

II. The Final Rule Empowers Workers to Ensure Compliance with the H-2A Program's Minimum Requirements to Prevent Adverse Effects to Workers in the United States.

Since 1987, the H-2A statutory and regulatory scheme has provided numerous wage and working condition protections for H-2A visa workers and workers in corresponding employment,[4] including anti-retaliation provisions. *See, e.g., Labor Certification Process for the Temporary Employment of Aliens in Agriculture and Logging in the United States,* 52 Fed. Reg. 20,496,

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Consolidated Appropriations Act, 2024, 138 Stat. at 633 (appropriating funds to DOL for state grants to administer foreign labor certification activities under the INA); *see also* Training and Employment Guidance Letter (TEGL) No. 12-21, Change 2, https://perma.cc/UE5B-A5BN (providing guidance for foreign labor certification grant fund allotments for Fiscal Year 2024).

[3] To ensure that the H-2A program did not, in its implementation, adversely affect workers in the United States, Congress also delegated broad authority to DOL to ensure that these baseline protections are actually provided by employers. *See* 8 U.S.C. § 1188(g)(2) (authorizing DOL to "impos[e] appropriate penalties and seek[] appropriate injunctive relief and specific performance of contractual obligations" as "necessary to assure employer compliance with terms and conditions of employment under this section."). As DOL explained in 1987, "[i]t is clear from the enactment of IRCA . . . that the Congress intended that DOL would increase its effort regarding the enforcement of labor standards with respect to the H-2A programs." *Enforcement of Contractual Obligations for Temporary Alien Agricultural Workers Admitted Under Section 216 of the Immigration and Nationality Act,* 52 Fed. Reg. 20,524, 20,524 (June 1, 1987) ("1987 WHD IFR").

[4] "Corresponding employment" refers to the employment of non-H-2A workers by an employer who has an approved *Application for Temporary Employment Certification* in any work included in the job order, or in any agricultural work performed by the H-2A workers. 20 C.F.R. § 655.103.

20,517 (June 1, 1987) ("1987 H-2A IFR"). Before DOL promulgated the Final Rule, these anti-retaliation protections provided that H-2A employers cannot "intimidate, threaten, restrain, coerce, blacklist, discharge or in any manner discriminate against" an employee who has "filed a complaint," "instituted" a "proceeding," "testified" "in any proceeding," "consulted with an employee of a legal assistance program or an attorney," or "exercised or asserted on behalf of themselves or others any right or protection afforded by 8 U.S.C. § 1188" or DOL regulations. 20 C.F.R. § 655.135(h) (effective Nov. 14, 2022); 29 C.F.R. § 501.4(a) (effective Nov. 14, 2022).

Despite these protections, DOL found that "violations of the H-2A program requirements remain pervasive." 89 Fed. Reg. at 33,989. "[W]hen [Wage and Hour Division ("WHD")] investigates H-2A employers, it typically does not find full compliance with the law, with back wages averaging several hundred dollars owed per worker. But WHD cannot investigate every farm on which H-2A workers are employed." *Id.*; *see id.* 33,988 (explaining that, "in the previous 5 fiscal years, in 88 percent of WHD's H-2A investigations, WHD found employers in violation of the law," and citing a report finding that "70 percent of WHD investigations of farms found violations and that a farm employer's probability of being investigated in any year is 1.1 percent"). DOL further found that H-2A visa workers represent a population especially vulnerable to exploitation because of "the temporary nature of the work, frequent geographic isolation of the workers, and dependency on a single employer." *Id.* at 33,987. It also found that retaliation against H-2A workers for asserting or advocating for their rights remains common. *Id.* at 33,993. In some instances, DOL has "debarred and assessed penalties against H-2A employers that instructed workers to lie about their pay to investigators and threatened to kill, harm, punish, fire, blacklist, or deport workers for talking to authorities." *Id.* at 33,998. Based on this experience, DOL determined that the existing H-2A program regulations did not provide sufficient protections for H-2A workers to advocate for themselves regarding working conditions. *Id.* at 33,987.

The agency further found that similarly employed domestic workers "may be less likely to face unique vulnerabilities and forms of retaliation experienced by H-2A workers." *Id.* at 33,992. Because H-2A workers are easier to exploit, some employers are more likely to fill jobs through

the H-2A program and less likely to hire U.S. workers. *See id.* at 33,991. "[U]se of the H-2A program has grown dramatically over the past decade while overall agricultural employment in the United States has remained stable, meaning that fewer workers in the United States are employed as farmworkers." *Id.* at 33,990. Thus, DOL determined that the "exploitation and abuse" of H-2A workers by "unscrupulous employers" risks "contribut[ing] to economic and workforce instability" and potentially worse conditions for workers in the United States as a result. *Id.* at 34,405. Because DOL is required to certify that H-2A visas will not adversely affect workers in the United States, *see id.* at 33,993 (citing 8 U.S.C. § 1188(a)(1)), additional protections were necessary in order to "place the H-2A workforce on more equal footing with similarly employed workers [in the United States] and thus reduce the potential for this workforce's vulnerability to undermine the advocacy efforts of similarly employed workers." *Id.* at 33,991.

DOL issued the Final Rule to "establish the minimum terms and conditions of employment (*i.e.*, the 'baseline' or working conditions) necessary to 'neutralize any adverse effect resultant from the influx of temporary foreign workers.'" *See id.* at 33,987 (quoting *Williams v. Usery*, 531 F.2d 305, 306-07 (5th Cir. 1976)). The Challenged Provisions expand the list of activities protected from retaliation to safeguard the ability of workers covered by the H-2A program to express concerns, and together ask for changes in their working conditions (*i.e.*, concerted activities for mutual aid and protection), *id.* at 33,990, and impose "new employer obligations" that ensure H-2A employers do not retaliate against workers because those workers have advocated about their working conditions or have invited or accepted guests to worker housing. *Id.* at 33,991.

The Challenged Provisions include 20 C.F.R. § 655.135(h),[5] which states: H-2A employers cannot "intimidate, threaten, restrain, coerce, blacklist, discharge or in any manner discriminate against" an employee who has, *inter alia*, "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 relating to wages or working conditions; or

[5] Parallel provisions appear at 29 C.F.R. § 501.4.

has refused to engage in any or all of such activities," *id.* § 655.135(h)(2)(i),[6] or "refused to attend an employer-sponsored meeting with the employer or its agent, representative or designee, if the primary purpose of the meeting is to communicate the employer's opinion concerning any activity protected by this subpart; or has refused to listen to employer-sponsored speech or view employer-sponsored communications, the primary purpose of which is to communicate the employer's opinion concerning any activity protected by this subpart," *id.* § 655.135(h)(2)(ii).[7]

III. Procedural Background

Plaintiffs—17 states, one farm, and one trade organization that purports to represent agricultural employers in Georgia—filed this suit on June 10, 2024. ECF No. 1 ("Compl."). Plaintiffs allege that the Challenged Provisions are unlawful because they violate the NLRA, IRCA, and the major questions doctrine, and are arbitrary and capricious. *See* Compl. ¶¶ 93-143.

On August 26, 2024, the Court preliminarily enjoined DOL from enforcing the Final Rule within these 17 states and against the private plaintiffs. PI Order. The next day, Defendants moved to reconsider, asking the Court to limit the preliminary injunction to the Challenged Provisions. ECF No. 100. The Court denied Defendants' motion, concluding that the Rule's severability was not yet properly presented and stating that Defendants "will have an opportunity to raise [that issue] if and when the Court considers whether to grant a permanent injunction." ECF No. 104 at 7.

On October 2, 2024, Plaintiffs filed a motion for summary judgment. ECF No. 111 ("Pls.' Mot."). For the sole purpose of the parties' summary-judgment motions, the parties stipulated that the administrative record comprises the Notice of Proposed Rulemaking, Comments, and the Final Rule, all of which are publicly available. ECF No. 109, ¶ 5.

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[6] 20 C.F.R. § 655.135(h)(2) & (m) apply only to persons engaged in agriculture as defined and applied in 29 U.S.C. § 203(f), *i.e.*, persons exempt from the NLRA. *See* 89 Fed. Reg. at 33,991.

[7] Other changes were made to § 655.135(h)(1)(v) and (vii), but Plaintiffs do not challenge them. Additionally, § 655.135(m), requires, *inter alia*, that an employer "must permit a worker to designate a representative to attend any investigatory interview that the worker reasonably believes might result in disciplinary action," and § 655.135(n) permits workers to invite or accept guests to worker housing under certain circumstances. As discussed in Section V below, Plaintiffs do not press any merits arguments as to these two subsections.

LEGAL STANDARD

Generally, summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). However, where—as here—a district court reviews final agency action, "the rules governing summary judgment [motions in general] do not apply[,] because of the limited role of a court in reviewing the administrative record." *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps. of Eng'rs*, 354 F. Supp. 3d. 1253, 1266 (N.D. Ala. 2018). In APA cases, summary judgment "serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the standard of review." *Id.* at 1267. It is the plaintiff's burden to show that the agency acted arbitrarily and capriciously, and any "party seeking to have a court declare an agency action to be arbitrary and capricious carries a heavy burden indeed." *Legal Envt'l Assistance Found. Inc. v. EPA*, 276 F.3d 1253, 1265 (11th Cir. 2001) (citation omitted). "The factfinding capacity of the district court is thus typically unnecessary." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). "[C]ourts are to decide, on the basis of the record the agency provides, whether the action passes muster under the appropriate APA standard of review." *Id.*

ARGUMENT

I. Defendants Are Entitled to Summary Judgment on All Four Counts.

A. The Challenged Provisions Are a Proper Exercise of DOL's § 1188 Authority.

As this Court explained, "the 'best reading' of § 1188, in its entirety, is that Congress granted the DOL the authority to issue regulations to ensure that any certifications it issues for H-2A visas do not 'adversely affect' American agricultural workers." PI Order at 15. That includes the authority to promulgate the Challenged Provisions: "DOL acted within its authority as proscribed by Congress through [IRCA]" when it issued the Challenged Provisions. *Id.* at 19; *see also id.* ("Final Rule does not exceed [rulemaking] authority granted to the DOL by Congress under § 1188."). Thus, Defendants are entitled to summary judgment as to Counts Two and Three.

1. Congress delegated broad authority to DOL to promulgate regulations to ensure that an employer's use of H-2A workers would not harm similarly employed workers in the United States. "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)).[8] Congress "often enact[s]" statutes in which "the agency is authorized to exercise a degree of discretion." *Loper Bright*, 144 S. Ct. at 2263. "[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).

Section 1188 is one such statute that "delegates discretionary authority to an agency." *See id.* "The statute explicitly envisions implementing regulations that will clarify the meaning and application of its provisions." *Mendoza*, 754 F.3d at 1021-22 (citing 8 U.S.C. § 1188(b)(1), subsections of (c)(3), and (c)(4)). The Eleventh Circuit similarly explained that IRCA "expressly *grants* DOL rulemaking authority over the agricultural worker *H-2A* program." *Bayou Lawn & Landscape Servs. v. Sec'y of Labor*, 713 F.3d 1080, 1084 (11th Cir. 2013) (emphasis in original).

The rulemaking "authority Congress conferred upon the DOL can be found in § 1188 of the IRCA." PI Order at 14. In § 1188(c), Congress set forth rules that "shall apply in the case of the filing and consideration of an application for a labor certification under this section"—*i.e.*, the labor certification described in § 1188(a). 8 U.S.C. § 1188(c); *see also* PI Order at 14 ("Section 1188(c) expounds upon the DOL's role in the certification process by providing 'rules [that] apply in the case of the filing and consideration of an application for a labor certification.'"). Subsection (c)(3)(A) then provides:

[8] Notably, *Mendoza* nowhere cites *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), *overruled by Loper Bright Enter. v. Raimondo*, 144 S. Ct. 2244 (2024), nor otherwise suggests § 1188 is ambiguous or that the court is deferring to the agency's interpretation of the statute. *See generally* 754 F.3d 1002; *see also id.* at 1007.

> The Secretary of Labor shall make, not later than 30 days before the date such labor or services are first required to be performed, the certification described in subsection (a)(1) if—
>
> > (i) the employer has complied with the *criteria for certification* (including criteria for the recruitment of eligible individuals *as prescribed by the Secretary*), and
> >
> > (ii) the employer does not actually have, or has not been provided with referrals of, qualified eligible individuals who have indicated their availability to perform such labor or services on *the terms and conditions of a job offer which meets the requirements of the Secretary*.

8 U.S.C. § 1188(c)(3)(A) (emphasis added). Other provisions in § 1188 reflect that these *criteria* and *requirements* will be laid out in *regulations*. For example, § 1188(c)(3)(B) describes the circumstances in which employers must "offer to provide benefits, wages and working conditions required pursuant to this section *and regulations*." *Id*. § 1188(c)(3)(B)(i) (emphasis added); *see also id.* § 1188(b)(2)(A) (referring to "material term[s] [and] condition[s] of the labor certification" described in § 1188(a)). The statute as a whole, and § 1188(c)(3) in particular, vests the Secretary with authority to issue regulations governing the terms and conditions of employment under the program, and thus with discretionary authority to "give meaning" to and "fill up the details" of § 1188(a)(1)(B)'s adverse-effect standard (which is cross-referenced in § 1188(c)(3)(A)). *See* PI Order at 14-15 ("Congress grants the DOL the power to issue regulations to ensure that the certification requirements of § 1188(a)—specifically, the requirement that American agricultural workers not be adversely affected—are met before the DOL issues such a certification.").[9]

2. Soon after IRCA's enactment in 1986, DOL began issuing regulations to effectuate its statutory responsibility under what is now § 1188(a).[10] *See* 1987 H-2A IFR, 52 Fed. Reg. at 20,507 (describing "methodology for the twofold determination of availability of domestic

[9] The Secretary's authority has been delegated to "the Office of Foreign Labor Certification (OFLC)," which is tasked with issuing TECs, as well as WHD, which is tasked with "conduct[ing] certain investigatory and enforcement functions with respect to terms and conditions of employment" under the H-2A program. *See* 20 C.F.R. § 655.101(a), (b).

[10] The 1987 regulations retained the minimum terms and conditions of employment set forth in the 1978 pre-IRCA regulations. *See* 1978 H-2A Rule, 43 Fed. Reg. 10,306, 10,312.

workers and of any adverse effect"); *see also Loper Bright*, 144 S. Ct. at 2258 ("respect to [agency] interpretations of federal statutes" is "especially warranted when [such interpretations are] issued roughly contemporaneously with enactment of the statute and remain[] consistent over time").

For example, a TEC application must contain the terms and conditions of employment, 20 C.F.R. § 655.122(b), (c), and the employer must agree to abide by all H-2A regulations, *id.* § 655.135. In addition, DOL's offered wage provision requires employers to offer, advertise in their recruitment, and pay the highest of various wages, including the Adverse Effect Wage Rate ("AWER"), the prevailing wage, any collective bargaining wage, and the federal and state minimum wages. *See* 20 C.F.R. §§ 655.120(a), 655.122(*l*). These requirements prevent the use of H-2A workers from adversely affecting the wages and working conditions of workers in the United States. The applicable wage must be offered to U.S. workers, and then—to the extent an insufficient number of U.S. workers are willing to perform the requested labor—to both H-2A workers and workers in corresponding employment. *Id.* § 655.122(a), (*l*).

Other regulations setting forth minimum terms and conditions of employment similarly prevent adverse effects to workers in the United States. *See, e.g.*, 20 C.F.R. § 655.122(f) (employer provided items); *id.* § 655.122(g) (meals); *id.* §655.122(h) (inbound and outbound transportation); *id.* § 655.122(i) (guarantee to offer the worker employment for at least three-fourths of the work contract); *id.* § 655.122(j) (earnings records); *id*. § 655.122(k) (hours and earnings statements); *id.* § 655.122(m) (frequency of pay); *id.* § 655.122(n) (termination for cause); *id.* § 655.122(o) (protections in the event of contract impossibility); *id.* § 655.122(p) (deductions); *id.* § 655.122(q) (provision of work contract). The regulations require that these minimum wages and conditions be provided to both H-2A workers and workers in corresponding employment—including U.S. workers—in order to further DOL's statutory mandate to prevent adverse effects. *See* 20 CFR § 655.103(b) (definition of "corresponding employment"), *id.* § 655.122(d)-(q) (requirements of work contract to be included in and provided to workers in corresponding employment).

So too does the regulatory requirement—issued in 1987 shortly after IRCA's enactment—that employers provide assurances that they will not retaliate against workers for taking various

steps to ensure employer compliance with the requirements of IRCA and its implementing regulations. *See* 1987 H-2A IFR, 52 Fed. Reg. at 20,501, 20,517 (describing assurances).

In issuing these implementing regulations, DOL "has historically understood the INA's adverse effect requirement" as (1) "establishing a baseline 'acceptable' standard for working conditions below which workers in the United States would be adversely affected" and (2) "requiring parity between the terms and conditions of employment provided to H-2A workers and other workers employed by an H-2A employer." 89 Fed. Reg. at 33,987; *see Garcia-Celestino v. Ruiz Harvesting, Inc.*, 843 F.3d 1276, 1285 (11th Cir. 2016) ("The H-2A regulations . . . require an 'employer' to provide certain minimum benefits to H-2A temporary workers," thereby "ensur[ing] that foreign workers will not appear more attractive to the 'employer' than domestic workers . . . ."); *Overdevest Nurseries v. Walsh*, 2 F.4th 977, 984 (D.C. Cir. 2021) (citing *Mendoza* and finding corresponding employment regulations to be "eminently reasonable").

3. DOL properly promulgated the Challenged Provisions in exercise of this broad rulemaking authority, as this Court recognized. PI Order at 16-18 (summarizing Final Rule's rationale). DOL concluded that the Challenged Provisions are necessary to ensure that H-2A employment does not adversely affect the wages and working conditions of workers in the United States similarly employed for two principal reasons. First, for agricultural workers in the United States to meaningfully be able to assert their rights and seek better wages and working conditions, their H-2A program counterparts must be able to do the same without the grave and unique risks that retaliation means for them. While agricultural workers in the United States are not covered by the NLRA, they face relatively fewer risks if they, for example, come together to seek better pay (*e.g.*, they may face job loss at a given employer but not the inability to work for *any other* U.S. employer like their H-2A worker counterparts). If employers could turn to the relatively captive and vulnerable H-2A workforce to undermine efforts by workers in the United States to seek better wages and working conditions, the H-2A program would directly have an adverse effect on those workers in the United States. Second, the Challenged Provisions give workers employed under the H-2A program the tools necessary to self-advocate to ensure employers comply with the

longstanding minimum terms and conditions of employment required under the H-2A program, which protections themselves are designed to prevent adverse effect.

Plaintiffs nonetheless object to these provisions on a number of grounds, all of which lack merit. First, Plaintiffs argue that § 1188 "assign[ed] to the DOL a mere ministerial function," authorizing DOL to promulgate H-2A regulations in only three specific instances. Pls.' Mot. at 14, 16. But this Court properly concluded that DOL's rulemaking authority was not so narrowly circumscribed. The Court's thorough analysis was not—contrary to Plaintiffs' assertions—"an absurd reading of the statute." *See* Pls.' Mot. at 16 (quoting *Bayou Lawn*, 713 F.3d at 1084). Rather, as the Court recognized, IRCA represents a "broad congressional delegation" to DOL in which "Congress entrusted" the agency with a significant role: "strik[ing] the balance" between the "competing goals" of "providing an adequate labor supply and protecting the jobs of domestic workers"—interests "which are often in tension." *AFL-CIO v. Dole*, 923 F.2d 182, 187 (D.C. Cir. 1991); *see also supra* at 10-14. DOL has made that determination since prior to IRCA's enactment in 1987, including by setting minimum standards and protections for H-2A workers and those in corresponding employment. *See* 1987 H-2A IFR, 52 Fed. Reg. at 20,496 ("IRCA codif[ies] DOL's role" in the "agricultural labor certification process" to prevent adverse effects). And in enacting IRCA, Congress vested DOL with "discretion" to determine "how to ensure that the importation of farmworkers met the statutory requirements." *Dole*, 923 F.2d at 184. There is "no reason to depart from the D.C. Circuit's well-reasoned interpretation" in *Dole* that "§ 1188 affords the DOL considerable latitude to promulgate regulations that protect American workers from being adversely affects by the issuance of H-2A visas." PI Order at 16.

Second, Plaintiffs claim in a footnote that the Court, in assessing the full scope of DOL's rulemaking authority, must confine its review to § 1188(a)(1), which was cited in the Final Rule. Pls.' Mot. at 15 n.6. Plaintiffs wrongly assert that reliance on any other subsection would constitute impermissible consideration of a *post hoc* justification. *See id.* Section 1188(a)(1) was cited because that subsection provides the relevant substantive standard—preventing adverse effects to workers in the United States—that the Challenged Provisions work to achieve. Far from "an

'entirely new theory,'" that explanation has not changed. *Rhea Lana, Inc. v. United States*, 925 F.3d 521, 524 (D.C. Cir. 2019). This case therefore looks nothing like the lone *post hoc* rationalization decision cited by Plaintiffs. *DHS v. Regents of the Univ. of California*, 591 U.S. 1, 23 (2020) (declining to consider new memorandum that bore "little relationship to" the reasoning offered originally on the basis that to do otherwise would force "both litigants and courts to chase a moving target"). While DOL did not discuss § 1188(c) specifically in the Final Rule, that was because DOL was not addressing more generally its longstanding authority to promulgate rules implementing § 1188, which was not contested in any comments submitted during the rulemaking—including by Plaintiffs. *See* Comment from Office of the Kansas Attorney General, *available at* https://www.regulations.gov/comment/ETA-2023-0003-0274 (asking DOL to "withdraw the proposed rule" only "insofar as it includes collective bargaining protections" and "provides a right of access to unions on employer property," but not arguing, as they do here, that DOL lacked statutory authority to promulgate any regulation under § 1188). If anything, by shifting its argument from whether DOL has power to issue *this* regulation to whether DOL has power to issue regulations under § 1188 *at all*, it is Plaintiffs that are causing DOL and the Court "to chase a moving target." *See Regents*, 591 U.S. at 23 (2020).

Third, Plaintiffs cite *Bayou Lawn & Landscape Servs. v. Sec'y of Labor*, 713 F.3d 1080 (11th Cir. 2013), as proof that DOL's adverse-effect rulemaking powers are limited. But Plaintiffs ignore the fact that *Bayou Lawn* was about whether DOL had rulemaking authority under the separate H-2B program. In answering that question, the court concluded that Congress "expressly *grant*[*ed*] DOL rulemaking authority over the agricultural worker *H-2A* program," but not over the H-2B program. *See Bayou Lawn*, 713 F.3d at 1084 (emphasis in original). The fact that DOL has rulemaking authority to implement the H-2A program was thus key to that court's decision; the *scope* of DOL's H-2A authority, however, was immaterial to the holding.[11] The Eleventh Circuit's

[11] Indeed, the scope of DOL's authority under the H-2A program does not appear to have been briefed in that case. Perhaps for that reason, the only statutory section cited by the *Bayou Lawn* court pertaining to DOL's rulemaking power under that program was 8 U.S.C.

reference to DOL's H-2A authority being of "limited" scope is therefore dicta. Nevertheless, Defendants agree that DOL's authority has some limit in this context: the Secretary has authority to promulgate rules under § 1188 that reasonably relate to Congress's command to DOL to ensure that the use of H-2A workers does not adversely affect the wages and working conditions of workers in the United States. The Challenged Provisions fall well within those limits, as this Court has already concluded. PI Order at 16 ("Final Rule is a valid method by which the DOL can ensure that American workers are not adversely affected by H-2A visaholders").

Fourth, in a further attempt to analogize to *Bayou Lawn*'s discussion of the separate H-2B Program, Plaintiffs point to a statutory note accompanying § 1188. That note, which Defendants previously cited, *see* ECF No. 69 at 17-18, states that the Attorney General, in consultation with DOL and USDA, "shall approve all regulations to be issued implementing" § 1101(a)(15)(H)(ii)(a) and § 1188. *See* 8 U.S.C. § 1188 note.[12] Plaintiffs argue that this note demonstrates that DOL's rulemaking authority under § 1188 is limited to consultation "while the [DHS Secretary] has broad rulemaking authority over the H-2A program." Pls.' Mot. at 3; *see also id.* at 14-15. As a preliminary matter, this provision does not say that the DHS Secretary shall issue regulations pursuant to § 1188; it states that he shall approve all regulations "issued implementing" that section. And, in fact, the DHS Secretary did approve the Final Rule before it was issued. *See* 89 Fed. Reg. at 34,043 ("The Secretary of Homeland Security . . . has approved this rule."). In any event, unlike in *Bayou Lawn*, where the court characterized DOL as relying (at that time) primarily on a consultation provision to justify its H-2B rulemaking powers, *see* 713 F.3d at 1083-84, here DOL relies on its express rulemaking authority under the separate H-2A program.

Fifth, Plaintiffs assert that the Challenged Provisions violate § 1188(a)'s command to prevent adverse effects to workers in the United States because they "focus[] on conferring benefits

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§ 1101(a)(15)(H)(ii)(a). 713 F.3d at 1084. The Eleventh Circuit did not need to address, and did not in fact analyze, the provisions in § 1188 described above.

[12] "Although this provision vests approval authority in the 'Attorney General,' the Secretary of Homeland Security now may exercise this authority." 89 Fed. Reg. at 34,043 n.111 (citing 6 U.S.C. §§ 202(3)-(4), 251, 271(b), 291, 551(d)(2), 557; 8 U.S.C. § 1103(c)).

on migrants, and only in a roundabout way consider[] the plight of American workers." Pls.' Mot. at 26; *see also id.* at 17-18. But this argument misunderstands the Final Rule in four key ways. First, the "benefits" provided by the Challenged Provisions—tools to ensure that workers can advocate for themselves, including prohibitions on employer retaliation for such advocacy—first must be offered to U.S. farmworkers before H-2A employers can fill the open positions with H-2A workers. *See* 20 C.F.R. § 655.122(a) (employers must first "offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2A workers"). That includes the Challenged Provisions. Second, any workers in corresponding employment—including U.S. workers—must receive the same "benefits, wages, and working conditions" provided by H-2A employers to H-2A employees. *See Overdevest,* 2 F.4th at 984 (describing corresponding employment requirements). That also applies to the Challenged Provisions. Third, that the Challenged Provisions protect only workers employed under the H-2A program (both H-2A and corresponding workers) is not unique. Rather, DOL's regulations have always required that participating employers offer and provide certain minimum terms and conditions of employment, not otherwise required of non-H-2A employers, as a means of preventing adverse effects to workers in the United States. Finally, affording these protections to especially vulnerable H-2A workers is necessary to ensure that employers do not seek to use the program explicitly because of the unique vulnerability of H-2A workers.

The AEWR provides a simple example. The AEWR is often higher than the minimum wage non-H-2A employers may pay to agricultural workers. But requiring payment of the AEWR still prevents adverse effects for workers in the United States, including workers *not* employed under the H-2A program: As the Eleventh Circuit has explained, "[b]y requiring that the 'employer' provide these baseline benefits, the regulations ensure that foreign workers will not appear more attractive to the 'employer' than domestic workers, thus avoiding any adverse effects *for domestic workers*." *Garcia-Celestino*, 843 F.3d at 1285 (emphasis added). Moreover, in this Final Rule, as discussed above, DOL explained that in order to ensure that both H-2A workers and corresponding workers can report violations, and in order to ensure that agricultural employers

cannot use the H-2A workforce to undermine workers in the United States who advocate regarding wages and working conditions, the H-2A program must protect H-2A workers and corresponding workers from employer discrimination when they engage in self-advocacy.

Finally, Plaintiffs suggest that the Court's interpretation of DOL's § 1188 rulemaking authority could present non-delegation concerns. *See* Pls.' Mot. at 19-20 (citing *Kentucky v. Biden*, 23 F.4th 585, 606 n.14 (6th Cir. 2022)). Plaintiffs' complaint does not include a non-delegation claim. *See generally* Compl. In any event, such a claim would fail because § 1188 does not "'merely announce[] vague aspirations'" or give DOL "'*carte blanche*' to do whatever [it sees] fit." *Kentucky*, 23 F.4th at 608 n.14 (concluding, in portion omitted by Plaintiffs, that the act in question did not present non-delegation concerns). Section 1188 instead grants DOL rulemaking authority "to achieve specific, enumerated goals in administering" the H-2A certification process, including that the employment of H-2A workers not adversely affect similarly employed workers in the United States. *Id.* That is more than sufficient. The Supreme Court has consistently upheld "Congress' ability to delegate power under broad standards," *Mistretta v. United States*, 488 U.S. 361, 373 (1989), and "ha[s] 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law,'" *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 474-75 (2001) (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting)). Indeed, non-delegation challenges have failed in the context of far broader delegations. *See also National Broadcasting Co. v. United States*, 319 U.S. 190, 216 (1943) (to regulate in the "public interest"); *Yakus v. United States*, 321 U.S. 414, 422, 427 (1944) (to set "fair and equitable" prices and "just and reasonable" rates); *Am. Trucking Assns.*, 531 U.S. at 472 (to issue whatever air quality standards are "requisite to protect the public health").

4. The major questions doctrine does not suggest a different result. That doctrine—which is reserved for "extraordinary cases," involving assertions of "extravagant statutory power over the national economy" or "highly consequential power beyond what Congress could reasonably be understood to have granted," *West Virginia v. EPA*, 597 U.S. 697, 724 (2022) (citations omitted)—does not apply here, for several reasons.

First, DOL's promulgation of the Challenged Provisions is unlike the assertions of regulatory authority to which the Supreme Court has applied the doctrine, such as when: OSHA sought to adopt "a broad public health regulation" that would have required 84 million Americans to either get vaccinated or take other COVID-19 precautions in all workplaces with more than 100 employees, *NFIB v. OSHA*, 595 U.S. 109, 119 (2022); the CDC sought to regulate "the landlord-tenant relationship" through a nationwide eviction moratorium, *Alabama Ass'n of Realtors v. HHS*, 594 U.S. 758, 764 (2021); the EPA contemplated regulation of power plants that would have resulted in a nationwide cap on carbon dioxide emissions and required restructuring the country's mix of electricity generation, *West Virginia*, 597 U.S. at 721; or the Department of Education sought to implement a student-loan forgiveness plan that was estimated to "cost taxpayers between $469 billion and $519 billion"—"nearly one-third of the Government's $1.7 trillion in annual discretionary spending." *Biden v. Nebraska*, 600 U.S. 482, 483, 502-03 (2023) (cleaned up).[13]

Second, as discussed above, *see supra* at 10-14, the grant of statutory authority here constitutes a "broad congressional delegation" to DOL to prevent adverse effects to workers in the United States. *Dole*, 923 F.2d at 187. That expansive delegation looks nothing like the grants of authority at issue in major questions cases. *See West Virginia*, 597 U.S. at 723 ("modest words," "vague terms," "subtle devices," and "oblique or elliptical language" are insufficient "in certain extraordinary cases" involving "[e]xtravagant grants of regulatory authority") (cleaned up); *see*

[13] The non-binding Fourth Circuit decision Plaintiffs cite is similarly unhelpful. *See* Pls.' Mot. at 24 (discussing *N. Carolina Coastal Fisheries Reform Grp. v. Capt. Gaston LLC*, 76 F.4th 291 (4th Cir. 2023)). First, that case did not involve a challenge to agency action; rather, an environmental group sued commercial shrimpers, alleging that they violated the Clean Water Act. *Id.* at 294. Second, Defendants disagree with the Fourth Circuit's suggestion that the doctrine could apply beyond the narrow circumstances in which the Supreme Court has relied on it. *See id.* at 296. Finally, the facts are distinguishable. The Fourth Circuit determined the "economic and social consequences" of a ruling in the environmental group's favor "would be enormous," affecting "virtually every fisherman" in the country. *Id.* at 300 (stating that "[f]ishing in America generates hundreds of billions of dollars [and] employs millions of people"). And the statutory basis for the environmental group's challenge relied on "vague terms," such as the Clean Water Act's "definitional section defining 'pollutant.'" *Id.* at 301. As already explained, § 1188(a)(1) is clear as to DOL's obligation to prevent adverse effects. *See supra* at 10-14.

also Biden v. Nebraska, 600 U.S. at 494-95 ("modify" is a "term [that] carries 'a connotation of increment or limitation,'" and must be read to mean "to change moderately or in minor fashion"). DOL has consistently promulgated regulations to prevent adverse effects, including to ensure that employers provide the minimum terms and conditions of the H-2A program. *See supra* at 12-14. Thus, the Challenged Provisions do not represent a novel exercise of agency authority or rely on an "ancillary" statutory provision. *See West Virginia*, 597 U.S. at 724. "To the contrary . . . the relevant grant of authority at issue here at 8 U.S.C. 1188(a) is one that the Department has long relied on to establish program requirements that ensure that the employment of H-2A workers does not adversely affect the wages and working conditions of workers in the United States similarly employed, and is an area where the Department has significant expertise." 89 Fed Reg. at 33,995; *see also* 2010 H-2A Final Rule, 75 Fed. Reg. at 6948; 2008 H-2A Final Rule, 73 Fed. Reg. 77,110, 77,159 (Dec. 18, 2008); 1987 H-2A IFR, 52 Fed. Reg. at 20,508, 20,513.

Indeed, from the H-2A program's inception, DOL has promulgated anti-retaliation and anti-discrimination provisions to facilitate a worker's rights to seek compliance with the baseline wages and working conditions required of H-2A employers. *See* 1987 H-2A IFR, 52 Fed. Reg. at 20,501, 20,517 (describing required anti-retaliation assurances originally promulgated at 20 C.F.R. § 655.103(g)); 1987 WHD IFR, 52 Fed. Reg. at 20,524-25 (describing anti-discrimination enforcement "deemed necessary by DOL to carry out its statutory responsibilities regarding enforcement of an H-2A employer's contractual obligations"). Plaintiffs nevertheless ask: If the power to issue the Challenged Provisions is clear, "why is DOL only [promulgating the Challenged Provisions] now?" Pls.' Mot. at 26. DOL provided an answer, as the Court noted: "DOL explains that, despite previously-enacted protections, 'violations of the H-2A program requirements remain pervasive,' [and the agency] is unequipped to 'investigate every farm on which H-2A workers are employed,' and thus, the DOL cannot take sufficient action to rectify H-2A employers' violations of the program's requirements." PI Order at 16 (quoting 89 Fed. Reg. at 33,989).

Accordingly, Defendants are entitled to summary judgment on Counts Two and Three.

B. The Challenged Provisions Do Not Violate the NLRA.

Plaintiffs point to no provision of the NLRA that prohibits affording agricultural workers employed under the H-2A program the protections found in the Challenged Provisions. Instead, Plaintiffs assert that the Challenged Provisions violate the NLRA simply because the NLRA itself does not reach agricultural workers. *See* 29 U.S.C. § 152(3).[14] But that definitional provision does not preclude wholesale any regulation of agricultural employees' interactions with their employers. Courts have consistently held that those individuals that fall outside of the NLRA's "employee" definition may still be subject to, and protected by, other labor statutes and regulations—including those promulgated by other federal agencies. Defendants are therefore entitled to summary judgment on Count One.

1. The Challenged Provisions and the NLRA are distinct in important ways, contrary to Plaintiffs' assertion that "there is no substantive difference between the collective bargaining rights protected by the NLRA and the 'collective action' rights protected by the Final Rule." Pls.' Mot. at 11. On the one hand, Section 7 of the NLRA protects a covered employee's 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 (emphasis added). And Section 8, among other prohibitions and requirements, bars certain "unfair labor practice[s]," including employer interference in the exercise of a covered employee's § 7 rights, and requires employers to bargain collectively with employees' representatives. *Id.* § 158(a).

[14] The "NLRA's protections extend only to workers who qualify as 'employee[s]' under [29 U.S.C. § 152(3)]." *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 397 (1996). That section, which defines "employee" for NLRA purposes, does "not include any individual employed as an agricultural laborer." 29 U.S.C. § 152(3). While "[n]o definition of 'agricultural laborer' appears in the NLRA," the term "derive[s] its meaning from the definition of 'agriculture' supplied by" the Fair Labor Standards Act ("FLSA"). *Holly Farms*, 517 U.S. at 397; *see also* 29 U.S.C. § 203(f) (defining "agriculture" for FLSA purposes). "In construing the agricultural laborer exemption," the National Labor Relations Board looks to DOL, the agency "charged with the responsibility for and has the experience of administering the [FLSA]." *Holly Farms*, 517 U.S. at 405.

On the other hand, the Challenged Provisions simply expand the H-2A program's existing anti-discrimination provisions, enforced by WHD, to expressly protect from employer retaliation workers who engage in self-advocacy and self-organization. *See* 89 Fed. Reg. at 33,901, 34,005-06. The Challenged Provisions do not purport to bring *any* workers within the ambit of the NLRA and do not extend enforcement powers of the National Labor Relations Board to agricultural workers. The Challenged Provisions also "do[] not provide for collective bargaining rights," do not "grant any rights to labor organizations," and do not "compel a worker to join a union." 89 Fed. Reg. at 33,991; *see also id.* at 33,994 ("rule does not require collective bargaining, employer recognition, or any other action by the employer in response to worker organizing."); *id.* at 34,006 (similar); *id.* at 34,005 (similar). Unlike the NLRA, the Challenged Provisions "do[] not require H-2A employers to recognize labor organizations or to engage in any collective bargaining activities." *Id.* at 33,901. Nor do the provisions provide for certification or representation elections, regulate unfair labor practices, or create any kind of labor relations board or process for handling representation cases or unfair labor practice complaints as does the NLRA.[15]

2. In any event, Plaintiffs point to no provision of the NLRA that prohibits or conflicts with the Challenged Provisions. Rather, Plaintiffs' entire argument rests on the flawed premise that the Challenged Provisions violate the NLRA because that act defines "employee" to "not include" "an agricultural laborer." 29 U.S.C. § 152(3); *see* Pls.' Mot. at 1 (asserting that "American farmworkers are still barred" from protections for "collective labor activities"). But that definitional provision does not bar DOL from issuing the Challenged Provisions.

[15] Similarly, the Challenged Provisions do not define or seek to prohibit unfair labor practices as do 29 U.S.C. § 158(a)(1), (2), and (3) of the NLRA. Similarly, the designation of representative provision, *see* 20 C.F.R. § 655.135(m), bears no resemblance to 29 U.S.C. § 159(a), which provides that certified representatives have exclusive rights to represent employees in collective bargaining over conditions of employment. And DOL did not adopt its initial proposal to protect secondary boycotts and pickets, explaining that such activities were regulated under NLRA §§ 158(b)(4)(i) and (ii). 89 Fed. Reg. at 34,006. Contrary to Plaintiffs' assertions, Pls.' Mot. at 23-24, the Final Rule expressly states that its provisions would only protect "otherwise lawful" concerted activity, 89 Fed. Reg. at 34,007.

Citing this definitional provision, Plaintiffs ask: "[H]ow else could Congress have signaled that agricultural laborers were not to receive the protections granted by the NLRA?" Pls.' Mot. at 10. But as the Court suggested at the preliminary-injunction hearing, Congress could have accomplished such an objective—had it wished to—"by just coming out and saying, 'You can't collectively bargain if you are an agricultural worker[.]'" Hearing Tr. at 26:25-27:2; *see also id.* at 26:5-10 ("NLRA could have said, just writ large, agricultural workers, you're not allowed, you're not allowed collective action. That's one way they could have done it, or they could have done it the way they did it. They said, 'Employees are allowed but, agricultural workers, you're not an employee.'"). Plaintiffs maintained that it would have made no difference if, instead of excluding agricultural workers from the definition of "employee" under the NLRA, Congress had—as the Court suggested—affirmatively stated that agricultural workers are prohibited from engaging in concerted activities for mutual aid and protection. Tr. 25:14-15. Plaintiffs are wrong.

In the context of labor regulations, federal agencies have, at a minimum, the same authority to regulate as do state agencies; that is, the room Congress left beyond the NLRA. Therefore, "[t]o determine whether [] tension [between a federal regulation and the NLRA] constitutes unacceptable conflict [courts] look to the extensive body of Supreme Court cases that mark out the boundaries of the field occupied by the NLRA." *Chamber of Com. of U.S. v. Reich*, 74 F.3d 1322, 1333-34 (D.C. Cir. 1996). "Since the progenitors of these cases originally arose in the context of state actions that were thought to interfere with the federal statute, they are referred to collectively as establishing the NLRA 'pre-emption doctrine.'" *Id.* at 1334. "The principles developed, however, have been applied equally *to federal governmental behavior that is thought similarly to encroach into the NLRA's regulatory territory*." *Id.* (emphasis added); *see also UAW-Lab. Emp. & Training Corp. v. Chao*, 325 F.3d 360, 362-63 (D.C. Cir. 2003) (applying same analysis and refusing to enjoin DOL from enforcing an Executive Order ("EO") that required certain contractors to post notices informing employees of their right not to join union on the basis that the EO did not, under the relevant "preemption" doctrines, conflict with NLRA); 89 Fed. Reg. at 33,993-94 (describing additional cases).

Under this doctrine, the Challenged Provisions do not conflict with the NLRA. *See* 89 Fed. Reg. at 33,993 (explaining why the provisions are not preempted under *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236 (1959) and *Int'l Ass'n of Machinists & Aerospace Workers* v. *Wis. Emp't Relations Comm'n,* 427 U.S. 132 (1976)). *Garmon* preemption does not prohibit these provisions because that doctrine "operat[es] only as to activities arguably protected or prohibited [by the NLRA], *not* to ones simply left alone, even if left alone deliberately." *UAW-Lab. Emp. & Training Corp.*, 325 F.3d at 364 (emphasis in original). And the Challenged Provisions cover activities that the NLRA "left alone": Congress neither provided concerted activity protections to agricultural workers nor prohibited such workers from engaging in concerted activity. Unlike the hypothetical statute described by the Court in which Congress might have stated "agricultural workers are not permitted [to engage in] collective action," Tr. 25:12 (describing hypothetical and asking Plaintiffs to compare it to the NLRA's definitional provision), Congress merely left alone the labor regulation of agricultural workers.[16]

Machinists preemption—which preempts regulation of employer or worker conduct that Congress intended be left "unregulated and to be controlled by the free play of economic forces," *see* 427 U.S. at 144—also does not bar the Challenged Provisions. "The *Machinists* rule creates a free zone from which all regulation, *whether federal or State*, is excluded." *Golden State Transit Corp.* v. *City of Los Angeles,* 493 U.S. 103, 111 (1989) (emphasis added) (citations omitted). "The Supreme Court has never found that Congress intended for the NLRA to occupy the 'field' with respect to the regulation of labor concerns." *Nat'l Ass'n of Mfrs.* v. *Perez,* 103 F. Supp. 3d 7, 25

[16] The relationship between federal minimum wage law and the AEWR is similar. Congress established the federal minimum wage when it passed the FLSA in 1938, three years after enacting the NLRA. Fair Labor Standards Act of 1938, ch. 676, § 6, 52 Stat. 1060, 1062-63 (1938). Most employees were covered by the FLSA's minimum wage requirement, but agricultural workers were excluded. *See id.* at § 13(a)(6), 52 Stat. at 1067. Some farmworkers, including certain employees on small farms, family members, local hand harvest laborers, migrant hand harvest workers under the age of 16, and range production employees, continue to be excluded from the federal minimum wage, *see* 29 U.S.C. § 213(a)(6); 29 C.F.R. § 780.3, and all are still excluded from FLSA's overtime protections, *see* 29 U.S.C. § 213(b)(12). Neither fact restricts DOL's authority, in the more limited context of the H-2A program and its adverse-effects mandate, to require H-2A employers to pay the AEWR to such workers.

(D.D.C. 2015); *see also id.* ("Congress did not intend for the NLRA to wholly occupy the field with respect to labor regulation and thereby foreclose all other regulation of that area.").

Plaintiffs concede that the NLRA does not prohibit all labor regulation of agricultural employees. *See* Pls.' Mot. at 12 ("[It] goes without saying" that "a *state* is not pre-empted from allowing agricultural workers to have collective bargaining rights."); *see also, e.g.*, California Agricultural Labor Relations Act, Cal. Lab. Code § 1140 *et seq.* That is unsurprising in light of the host of cases holding that the classes of employees excluded from the NLRA's "employee" definition may still be subject to other labor protections. *See UFW v. Ariz. Agric. Emp't Rels. Bd.,* 669 F.2d 1249, 1257 (9th Cir. 1982); *see also Willmar Poultry Co. v. Jones,* 430 F. Supp. 573, 577-78 (D. Minn. 1977) ("The court has not been directed to, nor has it found, any explicit expression of a national labor policy that agricultural laborers be denied all representational rights."); *Chamber of Commerce v. City of Seattle,* 890 F.3d 769, 793 (9th Cir. 2018) (rejecting argument that independent contractors intended to be free of regulation "federal or local").

Plaintiffs' argument thus rests on an incompatible tension. On the one hand, they argue that the NLRA's definitional provision is functionally equivalent to a provision that stated: "Agricultural workers are prohibited from engaging in concerted action." *See* Tr. 27:3-13.[17] On the other hand, they concede that the NLRA does not preempt a state from affording protections to agricultural workers to engage in concerted activities for mutual aid and protection. *See* Pls.' Mot. at 12. But if Congress had intended the NLRA's definitional provision to bear the meaning Plaintiffs ascribe to it, a state's attempt to extend concerted activity protections to agricultural workers would be (at least) "arguably . . . prohibited [by the NLRA]" and subject to *Garmon* preemption. *See UAW-Lab. Emp. & Training Corp.*, 325 F.3d at 364. Of course, courts have consistently interpreted the NLRA not to prohibit state or federal agencies from issuing labor

[17] Plaintiffs have asserted that is so because 29 U.S.C. § 152(3) uses the words "shall not." *See* Tr. 27:3-13. It is not clear why that matters. The provision remains a definitional one, describing who is and is not treated as an "employee" *for NLRA purposes*; it has no bearing on "activities . . . left alone" by the NLRA. *UAW-Lab. Emp. & Training Corp.*, 325 F.3d at 364.

regulations—like the Challenged Provisions—governing agricultural workers. *Chamber of Com.*, 74 F.3d at 1333-34; *accord Golden State Transit Corp.,* 493 U.S. at 111.

In this regard, the Challenged Provisions neither "rewrite" the NLRA nor "render [that law's] exclusion of agricultural workers ineffective." Pls.' Mot. at 12. Although the provisions utilize terminology from the NLRA with an established meaning, they do not purport in any way to grant collective bargaining rights or to apply the NLRA's enforcement framework to agricultural workers. Rather, they simply prohibit those employers who choose to participate in the H-2A program from retaliating against workers who engage in certain self-advocacy efforts, making employers who violate the prohibition subject to the H-2A program's enforcement mechanisms and penalties/remedies—but not to any aspect of the NLRA's distinct enforcement regime.

3. The Court nonetheless concluded that the Challenged Provisions conflict with the NLRA. *See* PI Order at 19-26. Defendants respectfully submit that the Court should revisit two fundamental aspects of its earlier analysis.

First, as set forth above, *see supra* at 22-27, there is no conflict between the Challenged Provisions and the provision defining "employee" for NLRA purposes, 29 U.S.C. § 152(3). In its earlier ruling, the Court indicated that the "NLRA preemption" cases governed only "the question of whether states may constitutionally enact laws protecting the collective bargaining rights of agricultural workers within their boundaries." PI Order at 24-25. As discussed above, however, traditional preemption principles provide the applicable conflict analysis courts use to assess the scope of a federal agency's power to regulate labor issues. *See Chamber*, 74 F.3d at 1333-34; *UAW-Lab. Emp. & Training Corp.*, 325 F.3d at 362-63. Those principles demonstrate that the challenged provisions do not conflict with the NLRA. *See supra* at 23-27. Defendants respectfully urge the Court to reconsider its earlier analysis regarding NLRA preemption in light of *Chamber* and *UAW-Lab. Emp. & Training Corp.*—two decisions that the Court has not yet addressed.

Because there is no conflict between the Challenged Provisions and the NLRA, reliance on *FCC v. NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 300 (2003) is also misplaced. *See* PI Order at 19, 25. The Court cited that decision in explaining why the Challenged Provisions are not "in

accordance with law." *Id.* at 19. But that case involved a provision that looks like the hypothetical statute the Court discussed at the hearing—not the as-written definitional provision at issue here. The provision at issue in *NextWave* affirmatively prohibited an agency from "revok[ing] . . . a license . . . to . . . a person that is . . . a debtor under [the Bankruptcy Code] . . . solely because such . . . debtor . . . has not paid a debt that is dischargeable in the case under this title . . . ." 537 U.S. at 300 (quoting 11 U.S.C. § 525). The FCC's revocation of NextWave's licenses was therefore "not in accordance with law" because the agency directly violated the Bankruptcy Code. *See id.* at 300-01 (explaining that the FCC revoked NextWave's licenses because of the company's "failure to make the payments that were due"). There is no comparable prohibition here.

Second, the Court's prior order relied on cases that address an issue not presented here: whether an agency may create or imply a private right of action. *See* PI Order at 20 (citing *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002); *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001); *Harris v. James*, 127 F.3d 993, 1008 (11th Cir. 1997)). For example, in *Sandoval*, the question was whether disparate-impact regulations promulgated under Title VI of the Civil Rights Act of 1964 created a private right of action. 532 U.S. at 291 ("Both the Government and respondents argue that the *regulations* contain rights-creating language and so must be privately enforceable, but that argument skips an analytical step. . . . It is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress.") (emphasis in original).[18] In *Gonzaga University*, the question was whether Congress, in enacting the Family Educational Rights and Privacy Act, created federal rights enforceable in a § 1983 action. *See* 536 U.S. at 285 ("A court's role in discerning whether personal rights exist in the § 1983 context should therefore not differ from its role in discerning whether personal rights

[18] As the Supreme Court explained in *Sandoval*, the Court "[did] not inquire here whether the [disparate-impact regulation] was authorized by § 602 [of the Civil Rights Act]." 532 U.S. at 278. Rather, "[t]he petition for writ of certiorari raised, and [the Court] agreed to review, only the question posed in the first paragraph of this opinion: whether there is a private cause of action to enforce the regulation." *Id.*

exist in the implied right of action context."). *Harris* involved a similar question of whether Medicaid recipients have a right to transportation enforceable under § 1983. *See* 127 F.3d at 1012.

And in each case, there was no dispute about whether Congress could delegate to agencies the authority to promulgate regulations that affect regulated parties' substantive rights, as Congress did here in § 1188. Indeed, the regulations at issue in these cases did affect the regulated parties' rights and obligations. *See Sandoval*, 532 U.S. at 280-82 (while "§ 601 of the Civil Rights Act] prohibits only intentional discrimination," the "regulations promulgated under § 602 . . . proscribe[d] activities that have a disparate impact on racial groups, even though such activities are permissible under § 601"); *Harris*, 127 F.3d at 995 ("federal regulation require[ed] State Medicaid plans to ensure necessary transportation for recipients to and from providers").[19]

The Challenged Provisions are no different. They affect the substantive rights and obligations of H-2A employers and farmworkers—just as the AEWR and other regulations promulgated under § 1188 do. *See* PI Order at 15-16 (recognizing DOL's authority to promulgate AEWR regulations). But DOL is not asserting, and the parties are not contesting, that the Challenged Provisions seek to afford workers with a new, federal private cause of action to enforce the H-2A statute or regulations, whether under § 1188 or 42 U.S.C. § 1983. Rather, the same longstanding enforcement mechanisms that apply to an H-2A employer's failure to pay the AEWR or provide meals, transportation, housing, or meet any other obligation also apply here: DOL may enforce the statutory and regulatory requirements. *See* 8 U.S.C. § 1188(g)(2).

Accordingly, Defendants are entitled to summary judgment on Count One.

C. The Challenged Provisions Are Not Arbitrary and Capricious.

Plaintiffs' arbitrary-and-capricious claim (Count Four) fares no better. Agency action must be upheld in the face of such a challenge so long as the agency "articulate[s] a satisfactory explanation for [the] action including a rational connection between the facts found and the choice made." *Little Sisters of Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 682 (2020)

[19] Notably, Plaintiffs do not assert that these decisions about private rights of action control here. *See generally* Pls.' Mot.

(citation omitted). A court's review is "narrow" and it "is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Under this standard, a court "simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021).

Plaintiffs argue that DOL (1) relied on factors that Congress did not intend the agency to consider, (2) gave an "implausible explanation" for issuing the Challenged Provisions, and (3) departed from past practice without a reasonable explanation. Pls.' Mot. at 27. Each argument is meritless. As this Court already concluded, "'[DOL] is obliged to balance the competing goals of the [IRCA] . . . .' The DOL made its judgment call. And it provided sufficient reasoning for its decision." PI Order at 18 (alterations in original) (quoting *Dole*, 923 F.2d at 186).

1. DOL Did Not Rely on Impermissible Factors

Plaintiffs assert that DOL's explanation for the Challenged Provisions "relies on factors Congress did not intend for the agency to consider." *Id.* First, they say that DOL improperly considered "the importance of unionization within the agricultural workforce and the harm these workers have endured without union protections" because Congress had "already considered the benefits of collective action for farm workers." *Id.* This argument largely duplicates Plaintiffs' argument that the Challenged Provisions violate the NLRA. For the same reasons, *see supra* at 22-29, that argument fails. In promulgating the Challenged Provisions, DOL did not weigh the benefits of unionization of the agricultural workforce writ large, and these provisions do "not require H-2A employers to recognize labor organizations or to engage in any collective bargaining activities such as those that may be required by the NLRA itself . . . ." 89 Fed. Reg. at 33,901. Instead, they require H-2A "employers to provide assurances that they will not intimidate, threaten, or otherwise discriminate against certain workers or others for engaging in 'activities related to self-organization,' including 'concerted activities for the purpose of mutual aid or protection relating to wages or working conditions' . . . ." *Id.*

Plaintiffs also contend that DOL improperly considered "protection of foreign workers" and that "prevention of foreign migrant laborer exploitation" is not a factor that Congress intended DOL to consider. Pls.' Mot. at 28. As explained above, *see supra* at 10-14, Congress has granted DOL statutory authority to establish conditions under which employers must operate as a prerequisite for participation in the H-2A visa program; in this regard, Congress has expressly charged DOL with "consider[ing]" protection of foreign workers in promulgating rules under the program. *See*, *e.g.*, 8 U.S.C. § 1188(b)(2)(A) (authorizing debarment of employers for substantial violations of labor certification requirements "with respect to the employment of domestic or nonimmigrant workers"); *id*. § 1188(c)(3)(B)(i) ("the employer will offer to provide benefits, wages and working conditions required pursuant to this section and regulations"). And, as the Final Rule explains, the whole point of the protections for foreign workers under the H-2A program is to prevent adverse effects on the wages and working conditions of similarly employed workers in the United States—as *required* by statute, *see* 8 U.S.C. § 1188(a)(1)(B)—by making it more difficult for employers to exploit foreign agricultural workers and contribute to economic and workforce instability. *See* 89 Fed. Reg. at 33,900. Moreover, Plaintiffs point to no provision that prohibits DOL from considering foreign worker protections as a factor in promulgating a rule. Had Congress intended to prohibit DOL from considering foreign worker protections, it readily could have said so. *Cf. Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 509 (1981) (finding arbitrary and capricious regulation that balanced costs and benefits of a worker health rule where statute stated "benefit" of worker health should be placed above any other consideration if the benefit was achievable); 42 U.S.C. § 1320f-3(e)(2)(D) (prohibiting agency from considering evidence from any clinical trial that placed lower value on extending the life of elderly, disabled, and terminally ill individuals as compared to other individuals).

Finally, and as addressed below, *see infra* at 32-33, Plaintiffs are wrong when they say that, under the Final Rule, "foreign workers end up with more workplace protections for collective bargaining than American agricultural workers." Pls.' Mot. at 28. DOL "has historically understood the INA's adverse effect requirement" as (1) "requiring parity between the terms and

conditions of employment provided to H-2A workers and other workers employed by an H-2A employer," and (2) "as establishing a baseline 'acceptable' standard for working conditions below which workers in the United States would be adversely affected," 89 Fed. Reg. at 33,987; *see Garcia-Celestino*, 843 F.3d at 1285, and promulgated regulations to those ends, *see* 43 Fed. Reg. at 10,312; 52 Fed Reg. at 20,508, 20,513. In other words, non-H-2A workers employed by an H-2A employer will get the same benefits from the Final Rule as the H-2A workers. And other workers in the United States will not be adversely affected by the aggregate impact on the workforce from use of the H-2A program.

2. DOL Provided a Reasoned Explanation for the Challenged Provisions

Plaintiffs next argue that DOL's explanation for the Challenged Provisions is "implausible" because it "effectively provides NLRA rights to H-2A workers," even though "American farmworkers explicitly do not have" those rights under federal law. Pls.' Mot. at 29. But DOL specifically and reasonably explained that the Challenged Provisions do not provide such rights. *See supra* at 22-23. Because DOL "reasonably explained" its decision—which it did here—the regulation is not arbitrary and capricious. *Prometheus Radio Project*, 592 U.S. at 423.

Plaintiffs' argument also ignores the fact that the H-2A program and the Final Rule "require parity between the terms and conditions of employment provided to H-2A workers and other workers employed by an H-2A employer." 89 Fed. Reg. at 33,987. Thus, "American farmworkers" employed by an H-2A employer to work alongside H-2A workers must be afforded the same protections as the H-2A workers, including those provided under the Challenged Provisions. *Contra* Pls.' Mot. at 30 (incorrectly asserting that "Americans workers [would] receive a lower level of protection than their foreign competition"). Thus, the Challenged Provisions establish baseline wages and working conditions and, in turn, "neutralize[] any 'adverse effect'" on domestic workers from the hiring of H-2A visa workers. 89 Fed. Reg. at 33,992; *see also id.* at 33,900 (noting that protections granted to H-2A visa workers are meant to disincentivize employers from exploiting the H-2A program for cheap foreign labor). Ultimately, the anti-discrimination protections in this Final Rule are no different from the other baseline protections

that the H-2A program has long enforced for H-2A workers and corresponding employment, such as meal and housing requirements, which agricultural workers also generally do not have. Plaintiffs' disagreement with DOL's policy judgment is not a basis for finding the Rule arbitrary and capricious. *See Inv. Co. Inst. v. CFTC*, 720 F.3d 370, 380 (D.C. Cir. 2013) (rejecting argument that "amounts to nothing more than [a] policy disagreement").

3. DOL Reasonably Explained Its Policy Change

Plaintiffs' argument that the agency did not adequately explain its "sharp departure from past practice," *see* Pls.' Mot. at 308, is misplaced. "[A]n agency is certainly entitled to change course." *Am. Petrol. Inst. v. EPA*, 906 F.2d 729, 738 n.11 (D.C. Cir. 1990). "[A]gencies are expected to reevaluate the wisdom of their policies in response to changing factual circumstances." *COMPTEL v. FCC*, 978 F.3d 1325, 1335 (D.C. Cir. 2020). No heightened standard applies when an agency changes its policy so long as the agency "display[s] awareness that it *is* changing position," and shows that "the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

Plaintiffs claim that DOL needed to "display awareness" that it is "changing position" by requiring new protections for H-2A workers that it had not previously required for 38 years. Pls.' Mot. at 30 (quoting *Fox Television Stations*, 556 U.S. at 515). It did so: the Final Rule recognizes that it adds new requirements for H-2A employers that have not previously existed as part of the program. *See generally* 89 Fed. Reg. at 33,901-03 (summarizing the new provisions and the reasons for adopting them). Moreover, DOL "reasonably considered the relevant issues and reasonably explained the decision" to adopt these new policies. *Prometheus Radio Project*, 592 U.S. at 423. The Final Rule is unlike agency actions in cases where an agency "chang[ed] position" by issuing new regulations or otherwise acting to repeal and replace an existing regulation or policy without explaining its actions. *See, e.g.*, *Ohio v. Becerra*, 87 F.4th 759, 772 (6th Cir. 2023) (applying *Rust v. Sullivan*, 500 U.S. 173, 186 (1991), in upholding a regulation that replaced a contrary regulation issued two years prior). In those instances, an agency must recognize that the

new rule supersedes the previous, contrary one. *See, e.g.*, *Fox Television Stations*, 556 U.S. at 515 ("An agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books."). But here, Plaintiffs do not claim that the Final Rule *replaces* an existing policy, rather than adding new requirements to the existing scheme. In that regard, DOL's explanation—that it was adding new requirements, and why—suffices.

II. The States Have Not Established an Injury-In-Fact and Thus Lack Standing.

The State Plaintiffs have not demonstrated that they suffer an injury-in-fact from the Challenged Provisions to afford them standing to sue. "[T]hose who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy." *City of Los Angeles v. Lyons,* 461 U.S. 95, 101 (1983). For the Court to have subject-matter jurisdiction over a challenge to agency action, the plaintiff must demonstrate standing. *See Ga. Republican Party v. Sec. & Exch. Comm'n*, 888 F.3d 1198, 1201 (11th Cir. 2018). Standing first requires that "the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) 'actual or imminent, not conjectural or hypothetical.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Second, "there must be a causal connection between the injury and the conduct complained of" such that the injury is fairly traceable to the defendant and not the result of the independent action of some third party not before the court. *Id.* Third, it must be "likely," and not merely "speculative," that the injury will be redressed by a favorable decision from the court. *Id.* at 561. Plaintiffs have the burden of establishing standing. *Ga. Republican Party*, 888 F.3d at 1201; *see also Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr, S.A.*, 320 F.3d 1205, 1210 (11th Cir. 2003) (noting that plaintiffs bear the burden of persuasion as the prerequisites for a preliminary injunction, including irreparable harm). These elements "are not mere pleading requirements but rather an indispensable part of the plaintiff's case." *Lujan*, 504 U.S. at 561. Thus, "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.*

Moreover, "standing is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). Rather, plaintiffs "must demonstrate standing for each claim [they] seek[] to press." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). "[A] litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." *Hollingsworth v. Perry*, 570 U.S. 693, 708 (2013) (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1991)); *see also California v. Texas*, 593 U.S. 659, 672 (2021) ("Remedies . . . 'operate with respect to specific parties,'" not "on legal rules in the abstract." (citation omitted)).

The Plaintiff States assert that the Rule imposes "administrative costs" on the SWAs. Pls.' Mot. at 6. As explained, *see supra* at 3-6, DOL transmits a job order to the appropriate SWA, who then reviews it to confirm that it complies with various requirements, including assurances that the employer will abide by the applicable laws and regulations. If the job order meets the criteria, the SWA places it in clearance and commences recruitment. *See id.* Because the Rule changes some of the requirements imposed on employers, Plaintiff States claim that it imposes additional costs on a SWA's review of new job orders for compliance with the regulations.

Plaintiff States' theory of harm fails for two reasons. First, Plaintiff States' description of administrative costs fails to adequately explain how the Rule will require the States to expend their own funds on SWAs' H-2A-related activities, which are funded by the federal government. *See supra* at 5 n.2. The Wagner-Peyser Act requires DOL to provide congressionally appropriated grant funds to SWAs annually, and these funds are used to review H-2A job orders, among other things. *See* 29 U.S.C. §§ 49d(a), 49e(b), 49f(a); 20 C.F.R. § 653.501. The INA also authorizes funding that DOL provides to SWAs for activities related to foreign labor certification. 8 U.S.C. § 1188(g)(1). SWAs can use these funds to cover all necessary and reasonable costs of carrying out activities in connection with the H-2A program, including updating administrative policies. Neither the Wagner-Peyser Act nor the INA requires, as a condition of accepting federal grant funds, that States expend any of their own funds to cover program costs. Sovereign immunity or not, Plaintiff States have no basis to recover administrative costs where the administrative costs are already funded by the federal government. Because the Plaintiff States have not demonstrated

that the Final Rule will impose any costs on the States, and because the States have not asserted any other injury, the Plaintiff States lack standing.

Second, Plaintiff States' theory of harm fails because the SWAs are already required to review the terms and conditions of employment that employers submit in job orders and to check that employers have provided assurances that they will comply with applicable laws and regulations. *See* 20 C.F.R. § 655.121(e)(2); *see also id.* § 655.135 (employers' assurances). The Final Rule does not change this obligation to review job orders for compliance; it merely alters some of the applicable requirements and assurances with which employers must comply. And the SWAs' obligation to put approved job orders into interstate clearance for recruitment is unchanged by the Final Rule. In other words, the only change that SWAs experience from the Challenged Provisions is that they will use a different form for job orders post-dating the effective date of the rule in order to review employers' terms and check for the employers' assurances.[20] The States cannot claim that they suffer harm merely from DOL's updated paperwork.

III. Plaintiffs Have Not Established that They Are Entitled to a Permanent Injunction

To the extent Plaintiffs seek a permanent injunction, they have not shown that they are entitled to such relief. A permanent injunction requires not only success on the merits, but also a demonstration that (1) the movant has suffered an irreparable injury; (2) remedies available at law are inadequate to compensate for that injury; (3) an equity remedy is warranted after balancing the hardships; and (4) the public interest would not be disserved by a permanent injunction. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). Plaintiffs do not address these factors at all in their motion, and for that reason alone have not carried their burden of showing an entitlement to injunctive relief, and judgment should be entered for Defendants.

Moreover, for the same reasons that the State Plaintiffs lack standing, *see supra* at 34-36, they cannot demonstrate irreparable harm. But even if the Plaintiff States could establish some *de minimis* administrative costs imposed on them by the Final Rule, such an injury would still not

[20] Drafts of these updated forms can be found at https://www.dol.gov/agencies/eta/foreign-labor/farmworker-protection-final-rule, under "OFLC forms."

satisfy the irreparable harm requirement for a permanent injunction. Plaintiffs' burden to show irreparable harm is higher than what is required to establish standing. *See, e.g.*, *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). "For an injury to be irreparable it 'must be both certain and great,' not 'merely serious or substantial.'" *Ga. ex rel. Ga. Vocational Rehab. Agency v. United States ex rel. Shanahan*, 398 F. Supp. 3d 1330, 1344 (S.D. Ga. 2019) (Wood, J.) (quoting *Kan. ex rel. Kan. Dep't for Children & Families v. SourceAmerica*, 874 F.3d 1226, 1250 (10th Cir. 2017)).

"[E]conomic loss does not, in and of itself, constitute irreparable harm." *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985); *see also Rosen v. Cascade Int'l, Inc.*, 21 F.3d 1520, 1527 (11th Cir. 1994) ("[C]ases in which the remedy sought is the recovery of money damages do not fall within the jurisdiction of equity."); *Hobson v. Fischbeck*, 758 F.2d 579, 581 (11th Cir. 1985) (holding equitable relief unavailable because plaintiff "has an adequate remedy at law—he could pay the disputed tax and then sue for a refund"). And while a plaintiff generally "suffers irreparable harm where 'monetary relief might not be available . . . because of the [government's] sovereign immunity," *Ga. ex rel. Ga. Vocational Rehab Agency*, 398 F. Supp. 3d at 1344 (quoting *Kan. ex rel. Kan. Dep't for Children & Families*, 874 F.3d at 1251), courts have recognized that "a party asserting such a loss is not relieved of its obligation to demonstrate that its harm will be 'great,'" *Ohio v. Becerra*, 577 F. Supp. 3d 678, 699 (S.D. Ohio 2021), *aff'd in part, rev'd in part and remanded*, 87 F.4th 759 (6th Cir. 2023) (quoting *N. Air Cargo v. U.S. Postal Serv.*, 756 F. Supp. 2d 116, 125 n.6 (D.D.C. 2010)); *see also, e.g.*, *Allina Health Servs. v. Sebelius*, 756 F. Supp. 2d 61, 67-68 (D.D.C. 2010) (collecting cases); *Otsuka Pharm. Co. v. Burwell*, No. GJH-15-852, 2015 WL 1962240, at *11 (D. Md. Apr. 29, 2015) (similar). "Otherwise, a litigant seeking injunctive relief against the government would always satisfy the irreparable injury prong, nullifying that requirement in such cases." *CoverDyn v. Moniz*, 68 F. Supp. 3d 34, 49 (D.D.C. 2014). The Plaintiff States do not quantify the alleged costs to them associated with the Final Rule. But because, as explained above, the only impact the challenged provisions will have on the SWAs is the need to review updated paperwork and check employers' assurances, any costs would

likely represent a tiny fraction of the state's total annual budget. As such, the Plaintiff States have not met their burden of showing that any costs would be so great as to constitute irreparable harm.

The balance of hardships and the public interest also weigh against issuing an injunction here. When the government is a party, these two inquiries merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). "[T]here is inherent harm to an agency in preventing it from enforcing regulations that Congress found it in the public interest to direct that agency to develop." *Cornish v. Dudas*, 540 F. Supp. 2d 61, 65 (D.D.C. 2008). DOL determined that the Rule was in the public interest, and an injunction frustrating the enforcement of that rule would therefore harm the agency and the public interest. Specifically, DOL found that new protections for workers employed under the H-2A program would "help prevent exploitation and abuse of agricultural workers and ensure that unscrupulous employers do not financially gain from their violations or contribute to economic and workforce instability by circumventing the law," and that a lack of these protections "would adversely affect the wages and working conditions of workers in the United States similarly employed." 89 Fed. Reg. at 33,900. Because the statute expressly elevates consideration of "the wages and working conditions of workers in the United States," 8 U.S.C. § 1188(a)(1)(B), DOL's Final Rule aligns with Congress's stated policy goals and is therefore in the public interest.

IV. Vacatur Is Not Warranted, and Any Relief Should Be Limited to the Plaintiffs that Have Established Standing and Irreparable Harm.

In the event that the Court finds that some Plaintiffs are entitled to relief, such relief should not include a universal remedy, *e.g.* vacatur or a nationwide injunction. Rather, any remedy should be limited to the Plaintiffs that have demonstrated an injury-in-fact for standing purposes and satisfied the irreparable harm requirement for a permanent injunction, *see supra* at 34-38.

The APA's provision for courts to "set aside" unlawful agency actions, 5 U.S.C. § 706(2), does not authorize the type of universal vacatur that Plaintiffs seek. As a matter of first principles, the "set aside" language in § 706(2) should not be read as authorizing remedies, which are governed by § 703 of the APA. Section 703 states that "[t]he form of proceeding for judicial review" of agency action is either a "special statutory review proceeding" or, in "the absence or

inadequacy thereof," any "applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus." 5 U.S.C. § 703. Because Plaintiffs do not purport to identify any applicable "special statutory review proceeding," § 703 affords them only traditional equitable remedies such as the prohibitory injunction that the Court has already entered in this case. *See* S. Doc. No. 79-248, at 36-37 (1946) (referring to § 703 as governing remedies). Section 706(2) does not address remedies at all. Rather, § 706(2) is properly understood as a rule of decision directing the reviewing court to disregard unlawful "agency action, findings, and conclusions" in resolving the case before it, consistent with basic principles of judicial review. Universal vacatur is therefore not an available remedy under the APA. *See United States v. Texas*, 599 U.S. 670, 693-99 (2023) (Gorsuch, J., concurring in the judgment) (joined by Justices Thomas and Barrett) (indicating that the APA does not require, or perhaps even permit, universal vacatur of agency actions); *Nuziard v. Minority Bus. Dev. Agency*, No. 4:23-CV-00278-P, 2024 WL 965299, at *41-43 (N.D. Tex. Mar. 5, 2024) (explaining that the "APA does not explicitly authorize vacatur").

Nothing in the APA suggests that relief should be universal. *See, e.g.*, *California v. Azar*, 911 F.3d 558, 582-84 (9th Cir. 2018) (vacating nationwide scope of injunction in facial challenge under the APA). No federal court had issued a nationwide injunction before Congress's enactment of the APA in 1946, nor would any court do so for more than fifteen years thereafter. *See Trump v. Hawaii*, 585 U.S. 667, 716 (2018) (Thomas, J., concurring). A court "do[es] not lightly assume that Congress has intended to depart from established principles" regarding equitable discretion. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). The APA's general instruction that unlawful agency action "shall" be "set aside," 5 U.S.C. § 706(2), does not mandate such a departure. The Supreme Court therefore has confirmed that, even in an APA case, "equitable defenses may be interposed," *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 155 (1967), such as a court's inherent power to define the scope of relief granted.

Universal vacatur would essentially have the same effect as a nationwide injunction. And many courts, including the Eleventh Circuit, have cautioned district courts against nationwide

injunctions. *See, e.g.*, *Georgia v. President of the United States*, 46 F.4th 1283, 1306 (11th Cir. 2022). Relief should be no broader than necessary to remedy any harm demonstrated by Plaintiffs. *See Gill v. Whitford*, 585 U.S. 48, 73 (2018); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). "[N]ationwide injunctions or universal remedies . . . seem to take the judicial power beyond its traditionally understood uses, permitting district courts to order the government to act or refrain from acting toward nonparties in the case. . . . Nationwide injunctions sometimes give States victories they did not earn . . . ." *Arizona v. Biden*, 40 F.4th 375, 396 (6th Cir. 2022) (Sutton, C.J., concurring); *see also Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring) (questioning propriety of nationwide injunctions)); *see also Trump v. Hawaii*, 585 U.S. 667, 720 (2018) (Thomas, J., concurring) (suggesting universal injunctions are inconsistent with "limits on equity and judicial power"); *Louisiana v. Becerra*, 20 F.4th 260, 264 (5th Cir. 2021) (staying nationwide injunction of COVID-19 vaccination mandates as "an issue of great significance" that "will benefit from the airing of competing views in our sister circuits" (citation omitted)). As Justice Gorsuch, joined by Justice Thomas, has explained, "[b]ecause plaintiffs generally are not bound by adverse decisions in cases to which they were not a party, there is a nearly boundless opportunity to shop for a friendly forum to secure a win nationwide." *DHS*, 140 S. Ct. at 601 (Gorsuch, J., concurring). This creates risks of "conflicting nationwide injunctions," with "asymmetric" stakes where "a single successful challenge is enough to stay the challenged rule across the country." *Id.*; *see also Trump*, 585 U.S. at 713 (Thomas, J., concurring) (universal relief "take[s] a toll on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch.").

As explained above, *see supra* at 34-36, the Plaintiff States have not established standing. A fortiori, then, they cannot establish irreparable harm. *See supra* at 36-38. Any equitable relief thus should extend no further than the remaining Plaintiffs (*i.e.*, Miles Berry Farm and the members of GFVGA). Should the Court find that the private Plaintiffs have demonstrated actual injuries and are entitled to relief, an injunction as to those parties would provide complete redress, and any

broader relief would be inappropriate. *See Gill*, 585 U.S. at 73. In its preliminary injunction order, the Court did not address whether the State Plaintiffs had suffered an injury, either for standing or irreparable harm purposes, finding that the private Plaintiffs' alleged injuries were sufficient to satisfy the preliminary injunction factors. PI Order at 29 & n.9. But the foregoing principles counsel in favor of the Court evaluating whether the States have an independent injury for, if they do not, relief should not extend to them. Relief should be tailored to remedy the actual harm demonstrated by Plaintiffs. *See Gill*, 585 U.S. at 73; *Madsen*, 512 U.S. at 765; *see also Lewis*, 518 U.S. at 358 n.6 ("[S]tanding is not dispensed in gross."). Because the State Plaintiffs have not suffered an independent injury, relief should extend, at most, to the private Plaintiffs.

V. If the Court Grants Relief to Plaintiffs, the Court Should Sever Any Provisions Found to Be Unlawful from the Remainder of the Final Rule.

In the event that the Court finds that any Plaintiffs are entitled to relief, the Court should sever the provisions that it finds to be unlawful from the remainder of the Final Rule. In their motion for summary judgment, Plaintiffs refer generally to the "Final Rule" as a whole, but raise merits arguments only about the protections afforded under 20 C.F.R. § 655.135(h)(2) and its parallel provision at 29 C.F.R. § 501.4(a)(2). Although Plaintiffs previously suggested that 20 C.F.R. § 655.135(m) and (n) were also unlawful, ECF No. 19, at 8, they offer no merits argument specifically addressing subsections (m) and (n). *See generally* Pls.' Mot. Further, in the background section of their brief, Plaintiffs describe the revisions to the regulations at 20 C.F.R. § 655.120(b)(2) and (3), governing AEWR updates, *see id.* at 5, but they assert no merits argument against these updates. Accordingly, Plaintiffs' claims regarding § 655.120(b)(2) and (3) should be deemed abandoned. *See Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995) ("[G]rounds alleged in the complaint but not relied upon in summary judgment are deemed abandoned."). At the very least, Plaintiffs are not entitled to summary judgment as to those provisions or any other provision of the Final Rule beyond 20 C.F.R. § 655.135(h)(2) and 29

C.F.R. § 501.4(a)(2).[21] Vacatur or an injunction as to any other part of the Final Rule would be unwarranted because the Plaintiffs have not even argued, much less proved, that any other provision is unlawful or would cause irreparable harm.

"Whether the offending portion of a regulation is severable depends upon the intent of the agency *and* upon whether the remainder of the regulation could function sensibly without the stricken provision." *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 22 (D.C. Cir. 2001) (citing *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294 (1988)). In the Final Rule, the Department made clear its intent that the various regulatory provisions be severable from each other, and further explained that the diverse regulatory provisions established by the Rule would function sensibly should any particular provision or provisions be invalidated. *See* 89 Fed. Reg. at 33,952 ("The worker voice and empowerment provisions adopted in this rule, along with other provisions, provide layers of protection to prevent adverse effect, and these layers of protection would remain workable and effective at preventing adverse effect even if any individual provision is invalidated."). "[A]n express severability provision . . . plainly demonstrates the agency's actual intent regarding partial invalidation." *Am. Fed'n of Lab. & Cong. of Indus. Orgs. v. Nat'l Lab. Rels. Bd.*, 466 F. Supp. 3d 68, 98 (D.D.C.), *order amended on reconsideration*, 471 F. Supp. 3d 228 (D.D.C. 2020), *aff'd in part, rev'd in part and remanded*, 57 F.4th 1023 (D.C. Cir. 2023). Accordingly, the Final Rule is severable and the Court should at most enjoin only those provisions it finds unlawful, severing the remainder of the Final Rule.

CONCLUSION

The Court dismiss the State Plaintiffs for lack of standing, grant summary judgment in favor of Defendants, and deny Plaintiffs' motion for summary judgment. In the event the Court finds relief warranted for Plaintiffs, any such relief should be limited to the Plaintiffs that have established irreparable harm and to the Challenged Provisions causing such harm.

[21] If the Court finds that Plaintiffs' arguments concerning 20 C.F.R. § 655.135(m) and (n), and 29 C.F.R. § 501.4(a)(2) sufficiently challenge these provisions on the merits—which it should not—then relief as to these provisions, but no others, might be warranted as well.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2024, I electronically filed the foregoing paper with the Clerk of Court using this Court's CM/ECF system, which will notify all counsel of record of such filing.

/s/ Michael J. Gaffney
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