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' SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR OPPOSITION TO PLAINTIFFS' MOTION FOR STAY/PRELIMINARY INJUNCTION/TEMPORARY RESTRAINING ORDER

TABLE OF CONTENTS

Pursuant to the Court's invitation, *see* Hearing Transcript ("Tr.") (Aug. 2, 2024), 66:13-67:1, Defendants provide this supplemental brief in support of their opposition to Plaintiffs' motion for a temporary restraining order, preliminary injunction, and § 705 stay. Defendants respond to three topics raised during the August 2, 2024 hearing: (1) DOL's authority to promulgate the challenged provisions; (2) the lack of a conflict between the challenged provisions and the NLRA; and (3) the need for any potential remedy to be properly tailored.

I. DOL Has Authority to Promulgate the Challenged Provisions, Which Prevent Adverse Effects to Workers in the United States.

Defendants have thoroughly briefed the broad authority Congress vested in DOL to ensure that the H-2A program does not harm the wages and working conditions of workers in the United States. *See* Defs.' Br. at 15-21, ECF No. 69 (citing, among other cases, *Mendoza v. Perez*, 754 F.3d 1002 (D.C. Cir. 2014)). As the D.C. Circuit explained, "Section 1188(a)(1) establishes the INA's general mission," but "Congress left it to [DOL] to implement that mission through the creation of specific substantive provisions." *Mendoza*, 754 F.3d at 1021.[1] Congress "often enact[s]" statutes in which "the agency is authorized to exercise a degree of discretion." *Loper Bright Enter. v. Raimondo*, 144 S. Ct. 2244, 2263 (2024). "[S]ome statutes 'expressly delegate[]' to an agency the authority to give meaning to a particular statutory term." *Id.* (citation omitted). "Others empower an agency to prescribe rules to 'fill up the details' of a statutory scheme, or to regulate subject to the limits imposed by a term or phrase that 'leaves agencies with flexibility.'" *Id.* (citation omitted). 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)). In § 1188(c), Congress set forth rules that "shall

[1] Notably, *Mendoza* nowhere cites *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), *overruled by Loper Bright Enterprises 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 ("[DOL] is tasked with administering the visa program to protect the wages and working conditions of U.S. workers.").

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). Subsection (c)(3)(A) then states:

> 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 subsection (a)). The statute as a whole, and § 1188(c)(3) in particular, thus vests the Secretary with authority to issue regulations governing the terms and conditions of employment under the program, 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)).[2]

At times during the hearing, Plaintiffs appeared to acknowledge that DOL has rulemaking authority, including in connection with its adverse-effect mandate. *See, e.g.*, Tr. 20:15-23. But

[2] At the hearing, the Court asked why the Rule cited § 1188(a)(1) as the relevant statutory authority for the challenged provisions, *see, e.g.*, 89 Fed. Reg. 33,898, 33,901 (Apr. 29, 2024) ("[T]he Department believes that these protections are important to prevent adverse effect on the working conditions of workers in the United States similarly employed." (citing 8 U.S.C. 1188(a)(1))), and not also § 1188(c)(3). That is because, as stated, *see, e.g.*, Tr. 39:15-40:23, it is § 1188(a)(1) that provides the relevant substantive standard that the challenged provisions work to achieve, and in the cited portion of the Rule, DOL was explaining why this Rule furthered Congress's statutory command to prevent adverse effects. DOL was not addressing in the Rule more generally its longstanding authority to promulgate rules implementing § 1188 which, significantly, was not contested in any comments submitted during this rulemaking.

Plaintiffs then offered various reasons why DOL's authority does not extend to the challenged provisions. None of those reasons provide a basis to preliminarily enjoin these provisions.

First, Plaintiffs cited the Eleventh Circuit's decision in *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." *See* Tr. 23:8-9. But Plaintiffs do not wrestle with 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 in *Bayou Lawn*.[3] The Eleventh Circuit's reference to DOL's H-2A authority being of "limited" scope is therefore dicta. *See* Tr. 41:24-42:9 (Court's question on *Bayou Lawn*). Nevertheless, Defendants agree that DOL's authority has some limit. *See* Tr. 42:7-9. And indeed, the parties appear to agree on what that limit is 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. *See* Tr. 42:11-15 (Defendants' description of limit); Tr. 20:21-23. The Final Rule falls well within those limits.

Second, Plaintiffs argued that the challenged provisions are too many "steps removed" from DOL's authority to prevent adverse effects to workers in the United States. *See* Tr. 21:6-22:11. But, as Defendants explained in their brief, *see* Defs.' Br. at 21, the fit is much tighter than Plaintiffs suggest. DOL must ensure that the use of H-2A workers does not adversely affect the wages and working conditions of workers in the United States. Both before and after IRCA's

[3] 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. § 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.

enactment, DOL has done that by setting a baseline level of wages and working conditions that must be offered and paid by H-2A employers—a floor that is necessary to prevent the wages and working conditions of workers in the United States from being driven downward by the availability of H-2A workers. 89 Fed. Reg. at 33,987. Since 1987, DOL has also prohibited H-2A employers from discriminating against employees who engage in certain protected activities, such as taking steps to ensure that employers comply with their promise to provide these baseline wages and working conditions. *See Labor Certification Process for the Temporary Employment of Aliens in Agriculture and Logging in the United States,* 52 Fed. Reg. 20,496, 20,501, 20,517 (June 1, 1987) (describing required anti-retaliation assurances originally promulgated at 20 C.F.R. § 655.103(g)). Based on public comments and its own enforcement experience, DOL determined that too many H-2A employers are not complying with H-2A program requirements. Accordingly, DOL promulgated the challenged provisions to amend the list of protected activities—to include, *e.g.*, engaging in concerted action—that workers might use to ensure H-2A employers pay the wages and provide the working conditions that workers are owed.

DOL additionally determined, on the basis of comments it received, that H-2A workers face unique vulnerabilities that should be mitigated to prevent adverse effects to workers in the United States. *See* 89 Fed. Reg. at 33,987 (describing comments received regarding vulnerability of H-2A worker population); *see also* Defs.' Br. at 22-23; Tr. 37:20-38:1 (citing *Arreguin v. Sanchez*, 398 F. Supp. 3d 1314 (S.D. Ga. 2019)). Specifically, H-2A workers are tied to a single employer for their visa status. This means that, for H-2A workers to be able to recoup the time and money they spend to participate in the H-2A program and earn the wages they depend on, they face a unique pressure to stay with their employer, even if they encounter violations and poor treatment. *See* 89 Fed. Reg. at 33,988 (explaining imbalance of power that flows from H-2A workers being "tied to a single employer"); *see also id.* at 33,990 (relying "upon the same employer for such an important economic opportunity makes [H-2A workers] less likely to speak up about working conditions or noncompliance"). Workers in the United States, even those who are not covered by the protections of the NLRA, are often able to advocate for themselves, alone or in

coordination with their colleagues, without bearing the unique and enormous risk that H-2A workers bear when they engage in the same type of self-advocacy. *See id.* at 33,988 (citing relevant studies and other data). Thus, to prevent the employment of H-2A workers from having an adverse effect on workers in the United States similarly employed, the Department determined that H-2A workers should be able to raise concerns, join together with fellow H-2A workers and others in corresponding employment, and generally advocate for themselves regarding their wages and working conditions without fear of losing their jobs and, accordingly, their visas. The challenged provisions therefore "help place the H-2A workforce 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.* at 33,991.

Third, Plaintiffs pointed to the title of the Final Rule—"Improving Protections for Workers in Temporary Agricultural Employment"—and said that "improving" protections for workers "goes beyond what [DOL is] statutorily allowed to do when it's supposed to be about neutralizing adverse effects." Tr. 17:20-24; *see also* Tr. 20:24-21:1 (arguing that *Williams v. Usery* stands for proposition that DOL cannot "improv[e] conditions for migrant farm workers"). Plaintiffs fundamentally misunderstand the way in which the H-2A program's adverse-effect regulations operate. It is true that DOL cannot, for example, set an AEWR "on the basis of attractiveness to workers." *Williams v. Usery*, 531 F.2d 305, 306 (5th Cir. 1976). But DOL has been charged by Congress with neutralizing adverse effects, including by establishing (and over the years, modifying or "improving") the minimum terms and conditions of employment under the program if the Secretary finds that doing so is necessary to ensure that the employment of H-2A workers will not drive down, *i.e.*, adversely affect, the wages and working conditions of workers in the United States. By, for example, setting an AEWR above what H-2A employers might otherwise seek to pay H-2A workers and workers in corresponding employment, DOL's regulatory efforts serve to protect against wage depression or stagnation for workers in the United States. The same rationale applies to the challenged provisions.

II. The Challenged Provisions and the NLRA Do Not Conflict.

Plaintiffs also argued that the challenged provisions conflict with and violate the NLRA. Tr. 24:25-31:14. In response, the Court asked Plaintiffs to address whether the analysis would be any different if, instead of excluding agricultural workers from the definition of "employee" under the NLRA, Congress instead affirmatively stated that agricultural workers are prohibited from engaging in concerted action. Tr. 25:1-27:2. Plaintiffs' response, in short, was that this alternative formulation would make no difference. *See, e.g.*, Tr. 25:14-15. Plaintiffs are wrong.

In the context of labor relations, federal agencies have, at a minimum, the same authority to regulate as do state agencies; that is, the room Congress left beyond the NLRA. *See* Defs.' Br. at 15 n.7. 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.*; *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 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 Final Rule does not conflict with the NLRA. *See* Defs.' Br. at 14-15. As DOL explained in its Final Rule, *see* 89 Fed. Reg. at 33,993, neither *Garmon* nor *Machinists* bar the issuance of the challenged provisions, whether by federal or state regulators. *Garmon* does not apply because *Garmon* "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 Rule here falls into that space: Congress neither provided concerted activity protections to agricultural workers nor prohibited such workers from engaging in concerted activity. It merely left alone whatever legal regime regulated the labor relations of agricultural workers. That is also why, if a court were confronted with 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), the analysis would likely yield a different result.[4]

Machinists similarly does not apply. "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) (citations omitted). Plaintiffs concede that the NLRA does not prohibit all labor regulation of agricultural employees. *See* Pls.' Reply at 9, ECF No. 84 ("Plaintiffs agree a state could enact regulations conferring collective bargaining rights to agricultural laborers."); *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 (cited in Defendants' brief at 14-15) holding that the classes of employees excluded from the NLRA's definition of "employee" may still be subject to other labor protections. *See* Defs.' Br. at 14-15; *see also, e.g.*, *Willmar Poultry Co. v. Jones*, 430 F. Supp. 573, 578 (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.").

Plaintiffs state that they have "never argued that the NLRA prohibits federal agencies from providing labor regulations." Pls.' Reply at 9. And that is what DOL has done here: regulated

[4] Plaintiffs' primary argument that the NLRA and this alternative, hypothetical statute are functionally the same is that 29 U.S.C. § 152(3) includes the words "shall not." *See* Tr. 27:3-13. It is not clear why that matters. The provision at issue remains a definitional one, and the provision merely describes who is and is not treated as an "employee" *for NLRA purposes*; in that regard, it has no bearing on "activities . . . simply left alone" by the NLRA. *UAW-Lab. Emp. & Training Corp.*, 325 F.3d at 364.

labor. Indeed, when it passed IRCA, Congress contemplated that DOL's regulations implementing IRCA's requirements would relate to labor relations. *See* 8 U.S.C. § 1188(b)(1) (instructing DOL not to issue H-2A certification if "[t]here is a strike or lockout in the course of a labor dispute which, *under the regulations*, precludes such certification") (emphasis added).

The challenged provisions do not "violate or rewrite" the NLRA in the process. *See id.* Instead, the provisions apply certain protections to engage in self-advocacy (not remotely the whole of the NLRA) to a subset of agricultural workers (not all such workers) based on Congress's command in IRCA that DOL must not allow the use of H-2A workers if doing so would adversely affect workers in the United States. *See* Defs.' Br. at 13-14. The Final Rule utilizes terminology from the NLRA that has an established meaning, but the Rule does not purport in any way to apply the NLRA's enforcement framework to agricultural workers. Rather, the Rule simply prohibits 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 any aspect of the NLRA's distinct enforcement regime.

Finally, the Court presented Plaintiffs' counsel with an analogy to the federal minimum wage law, asking whether DOL violates that law when it sets an AEWR, which is effectively a minimum wage that applies only to workers of H-2A employers. Tr. 23:23-24:24. Defendants agree that the Court's analogy is helpful in understanding the instant scheme, and further submit that taking the analogy one step further based on the history of the federal minimum wage law is additionally instructive. 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 from this protection. *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 (describing scope of § 213(a)(6) exemption), and all are still excluded from the 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, where such workers are covered under the H-2A program. There is simply no conflict between, on the one hand, the FLSA excluding certain agricultural workers from minimum wage and overtime protections and, on the other, DOL regulations requiring H-2A employers to pay an AEWR—a rate that typically exceeds the federal minimum wage. Each statute operates independently of each other, in different contexts and based on different rationales. The same is true here.[5]

III. If Plaintiffs Establish a Likelihood of Success on the Merits, the Remedy Should Be Properly Tailored.

The State Plaintiffs have not met their burden of showing irreparable harm, and as such, should the Court find that other Plaintiffs satisfy all of the preliminary injunction requirements, any remedy should be narrowly tailored to redress harms demonstrated by those specific Plaintiffs.

Plaintiffs assert that the States will incur administrative costs from the Final Rule because they will have to "implement[] new training and spend[] more time reviewing additional assurances that employers will be required by the Final Rule to provide." Pls.' Reply at 16. Even

[5] Plaintiffs made one additional merits argument at the hearing: that this is a major questions doctrine case. Defendants have already addressed that issue. *See* Defs.' Br. at 26-28. Plaintiffs did cite, for the first time in their reply brief, a Fourth Circuit decision on this issue. *See N. Carolina Coastal Fisheries Reform Grp. v. Capt. Gaston LLC*, 76 F.4th 291 (4th Cir. 2023). That non-binding case does not aid Plaintiffs. 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* Defs.' Br. at 28.

assuming this is correct—and only eight out of seventeen Plaintiff States submitted a declaration suggesting that there might be any increase in administrative costs[6]—Plaintiffs' declarations and argument do not account for the fact that the States receive federal funding for the job order processing activities the Final Rule requires.[7] *See* Defs.' Br. at 5 n.2, 35. None of the States' declarations address their receipt of federal funds, and so no State Plaintiff has demonstrated that the Final Rule will require it to incur any uncovered costs. Plaintiffs bear the burden of demonstrating irreparable harm, so their failure to provide information about the amount of state spending relative to the federal funds allocated for the H-2A program is dispositive of this factor. Moreover, even if there is some small uncovered administrative cost in some States, Plaintiffs have not shown that the harm is "great," as the standard for emergency relief requires. Defs.' Br. at 36 (quoting *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.)); *see also id.* at 36 n.16 (providing a link to the draft updated forms that SWAs would check as part of the job order approval process). In fact, Plaintiffs say, without citation, that "[t]he magnitude of harm is irrelevant," Pls.' Reply at 17, and then shift the burden to Defendants to produce evidence that the administrative costs are small relative to the state's total budget (an amount as to which States surely have the best information), *id.* Plaintiffs bear the burden to demonstrate irreparable harm that is "great," Defs.' Br. at 36, and they have not

[6] *See* Bassett Decl., ECF No. 19-7 (Arkansas); Waits Decl., ECF No. 19-13 (Arkansas again); Roth Decl., ECF No. 19-8 (Virginia); Goldwire Decl., ECF No. 19-9 (South Carolina); Davis Decl., ECF No. 19-10 (North Dakota); Potts Decl., ECF No. 19-11 (Florida); York Decl., ECF No. 19-12 (Texas); Cabrera Decl., ECF No. 19-14 (Idaho); Butler Decl., ECF No. 84 Ex. 1 (Tennessee, submitted with Plaintiffs' reply brief).

[7] Only one Plaintiff State, Arkansas, submitted a second declaration asserting that the Rule will increase costs for the State's labor mediation office. *See* Bassett Decl., ECF No. 19-7. While the federal funds provided to states are not used to pay the costs of mediating labor disputes, Plaintiff Arkansas fails to demonstrate how the Final Rule will directly result in increased mediation expenses—let alone costs that represent a sufficiently "great" harm. Arkansas's declaration relies on the mischaracterization that the Final Rule "create[s] collective bargaining rights for certain foreign migrant agricultural workers." *Id.* This is simply false—the Final Rule does not require collective bargaining, nor does it require H-2A employers to recognize labor organizations. *See* Defs.' Br. at 12-14. Even if Plaintiff Arkansas established sufficient injury for standing and irreparable harm purposes, relief should not run to any other state that has failed to do so.

shown that the Plaintiff States meet that standard. For these reasons, assuming the Court finds that any of the non-State Plaintiffs are entitled to relief, the appropriate remedy would be a preliminary injunction tailored to redress the harm demonstrated by those Plaintiffs. *See* Defs.' Br. at 38. Specifically, if the Court determines that injunctive relief is warranted—which it is not—the Court should limit injunctive relief to Miles Berry Farm and/or the GFVGA members.

Plaintiffs nonetheless seek nationwide relief in the form of a stay under 5 U.S.C. § 705. A nationwide stay is, in effect, the same as a nationwide injunction, *see* Defs.' Br. at 11-12 (explaining that the standard of review is the same for a stay as for a preliminary injunction), and Plaintiffs have not explained why this Court should ignore the Eleventh Circuit's warning that "nationwide injunctions frustrate foundational principles of the federal court system," *see Georgia v. President of the United States*, 46 F.4th 1283, 1306 (11th Cir. 2021); *see also id.* (explaining that courts should "especially" hesitate in issuing nationwide injunction "on a preliminary basis").

Finally, in the event the Court grants any relief to some or all of the Plaintiffs, such relief should apply at most to the provisions of the Final Rule that Plaintiffs have adequately demonstrated warrant a preliminary injunction. Defs.' Br. at 39 n.17. For any provision that Plaintiffs have not established a substantial likelihood of success on the merits or irreparable harm flowing from that particular provision, no preliminary relief is available. Plaintiffs do not contest the severability of the Rule, which includes many independent provisions. In particular, Plaintiffs have not raised a merits argument against any of the Final Rule's provisions other than the worker voice and empowerment provisions. Moreover, the Plaintiff States have only pointed to the review of the challenged assurances as the source of any alleged harm. *See, e.g.*, Pls.' Reply at 17 (referring to SWAs "spending more time reviewing additional assurances that employers will be required by the Final Rule to provide"). Accordingly, any relief that runs to the Plaintiff States should in any event not extend beyond those provisions.[8]

[8] Throughout their opening brief, Plaintiffs refer to the "Final Rule" as a whole, though their challenge is limited to a few, select provisions. *See generally* Pls.' Mot., ECF No. 19. In their brief, Plaintiffs argue that the worker voice and empowerment provisions (20 C.F.R.

Dated: August 12, 2024

Respectfully submitted,

JILL E. STEINBERG
United States Attorney

/s/ *O. Woelke Leithart*
O. Woelke Leithart
Idaho Bar No. 9257
Assistant United States Attorney
U.S. Attorney's Office
Post Office Box 8970
Savannah, Georgia 31412
Telephone: (912) 652-4422
E-mail: Woelke.Leithart@usdoj.gov

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

JULIE STRAUS HARRIS
Assistant Branch Director

/s/ Michael J. Gaffney
MICHAEL J. GAFFNEY (D.C. Bar No. 1048531)
MICHAEL P. CLENDENEN
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L. Street, NW
Washington, D.C. 20005
Telephone: (202) 514-2356
E-mail: Michael.J.Gaffney@usdoj.gov

Attorneys for Defendants

§ 655.135(h)(2), (m), and (n) and 29 C.F.R. 501.4(a)(2)) are unlawful (though their merits argument does not address subsections (m) and (n) specifically). *See generally id.* Plaintiffs' brief similarly presents no argument as to the lawfulness of the only other provisions of the Final Rule mentioned in Plaintiffs' complaint: 20 C.F.R. 655.120(b)(2) and (3) (regarding AEWR effective dates). *See id.*; *see also* Compl. ¶¶ 68-76, ECF No. 1. Accordingly, Plaintiffs are not entitled to preliminary relief as to those provisions—or any other provision of the Final Rule other than, at most, the worker voice and empowerment provisions. Furthermore, Plaintiff States have only alleged harm as to the assurances found in 20 C.F.R. 655.135(h)(2), (m) and (n). As DOL explained, "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." 89 Fed. Reg. at 33952. Accordingly, any preliminary relief running to the Plaintiff States must be limited to those provisions.