IN THE 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

SUPPLEMENTAL BRIEFING FOLLOWING ORAL ARGUMENT

At the conclusion of oral argument on August 2, 2024, this Court informed the parties that it would welcome additional briefing on subject matter that arose during the argument. Plaintiffs accordingly submit this additional discussion for the Court's consideration.

INTRODUCTION

The preliminary injunction hearing revealed that Defendants are not sure exactly what statutory authority supports the Final Rule. What started with Defendants relying on 8 U.S.C. § 1188(a)(1) for authority evolved to Defendants asserting authority under § 1188(c)(3)(B)(iii) in their briefing and then further evolved to Defendants speculating that § 1188(c)(3)(A) might give them the authority they are looking for. These are obvious *post hoc* litigation justifications that reflect poorly on the legality of the Final Rule. None of Defendants' attempts produce authority that allows them to provide collective bargaining type rights for H-2A workers when the National Labor Relations Act (NLRA) has specifically and unequivocally excluded all agricultural workers from its reach since 1935. *See* 29 U.S.C. § 152(3). There are six important points: (1) *Loper-Bright* renders the cases Defendants' relied on for their arguments

unpersuasive, (2) the Secretary of Labor's primary role over the H-2A program is to consult and she has only limited rulemaking authority, (3) Defendants cannot attempt to rely on authority that the agency itself did not rely on in the Final Rule, (4) 8 U.S.C. §§ 1188(c)(3)(B)(iii) and (c)(3)(A) do not provide Defendants authority for the Final Rule, (5) Defendants interpretation of the NLRA would make its prohibition on agricultural workers receiving its protections dead letter law, and (6) a § 705 stay is not the same as a nationwide injunction.

ARGUMENT

I. *Loper Bright's* effect on earlier cases decided under *Chevron*

In *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2273 (2024), the Supreme Court held that "courts need not and under the APA may not defer to an agency interpretation of the law simply because the statute is ambiguous." The court also said if "the *best reading* of a statute is that it delegates authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limitations." *Id.* at 2263. Finally, the court stated, "statutory ambiguity…is not a reliable indicator of actual delegation of discretionary authority to agencies." *Id.* at 2272. In short, this Court cannot presume statutory delegation if the statute is ambiguous. It must determine the "best reading" of the statute in order to decide whether such delegation exists.

The line of cases Defendants rely on for the proposition of broad Congressional delegation were all pre-*Loper Bright* cases that relied on *Chevron* deference. This included assuming statutory delegation if the statute is ambiguous. For example, in *AFL-CIO v. Dole*, 923 F.2d 182, 184 (D.C. Cir. 1991), the court held, "Congress did not, however, further define adverse effect and left it in the Department's discretion how to ensure that the importation of farmworkers met the statutory requirements." It also cited *AFL-CIO v. Brock*, 835 F.2d 912, 915

n. 5 (D.C. Cir. 1987) for its proposition that striking the balance on providing adequate labor supply and protecting domestic workers under the H-2A program was "a judgment call which Congress entrusted to the Department of Labor." *Dole*, 923 F.2d at 187. However, *Brock* stated that the "evidence supports the Department's argument that Congress did not circumscribe the Department's discretion under either Act." *Brock*, 835 F.2d at 915 n. 5. In short, the cases Defendants relied on were all relying on *Chevron* and run counter to the holding of the court in *Loper Bright* that "statutory ambiguity…is not a reliable indicator of actual delegation of discretionary authority." *Loper Bright*, 144 S. Ct. at 2272.

For that reason, this Court cannot rely on the cases Defendants cite as authority for their assertion of broad Congressional delegation.[1] Instead, it must do what *Loper Bright* requires and conduct the best reading of the statute. And the best reading of this statute is that Defendants' authority is limited and it does not provide them with authority to circumvent the clear limits in the NLRA for agricultural workers.

II. DOL's statutory authority to issue H2A regulations

The best reading of the statute is that Defendants do not have broad Congressional delegation. In fact, the original IRCA amendments to the INA demonstrate that the Attorney General has the authority to issue regulations for the H-2A program. Specifically, Section 301(e) of the IRCA amendments states, "The *Attorney General*, in consultation with the Secretary of Labor and the Secretary of Agriculture, shall approve all regulations to be issued implementing

[1] Plaintiffs do not challenge the past Department of Labor rules under the H-2A program; nor are those rules in any danger of being overruled solely because they relied on *Chevron* deference. In *Loper Bright*, the court held, "we do not call into question prior cases that relied on the *Chevron* framework" and that the cases that held "specific agency actions are lawful…are still subject to statutory *stare decisis*." *Id.* at 2273. However, these cases cannot be relied on for authority moving forward.

sections 101(a)(15)(H)(ii)(a) and 218 of the Immigration and Nationality Act [8 U.S.C. 1101(a)(15)(H)(ii)(a), 1188]." Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 301(e), 100 Stat. 3416 (emphasis added).[2] The role of the Secretary of Labor is, like the Secretary of Agriculture, to *consult* with the Attorney General as he or she approves regulations. Textually, there is no way to square the statute with Defendants' broad claim that they can issue sweeping substantive regulations governing the entire agriculture sector under IRCA.

Regardless of how past cases may have interpreted Defendants' authority, the best reading of the statute is that the Secretary of Labor has consultation authority over the H-2A program unless Congress specifies otherwise. The term "consultation" is especially significant within this circuit. In *Bayou Lawn & Landscape Services v. Secretary of Labor*, 713 F.3d 1080, 1084 (11th Cir. 2013), the court held, "DHS was given overall responsibility, including rulemaking authority, for the H-2B program. DOL was designated a consultant. It cannot bootstrap that supporting role into a co-equal one." Although the decision concerned the H-2B program, the Court's reasoning would logically extend to the same term in the same statute, as Plaintiffs explained previously. *See* Dkt. 84 at 12, n. 2. Certainly, Congress has given Defendants explicit rulemaking authority in other places, as was briefed extensively in Plaintiffs' motion. But this only demonstrates that Congress knows how to delegate explicit rulemaking authority when it wants to. The combination of explicit delegation of rulemaking to the Attorney General (and Defendants' role as consultants), combined with explicit provisions where Congress authorized the Secretary of Labor to make rules, forecloses any argument for broad Congressional delegation. As the court concluded in *Bayou Lawn*, the Department of Labor has "limited

[2] For ease of reference, Plaintiffs have included the relevant provision as an exhibit. *See* Ex. 1.

rulemaking authority over the agricultural H-2A program." *Id.* at 1083. Defendants fail to show that they have anything more than limited rulemaking authority.

III. Defendants cannot rely on any statutory justification other than 8 U.S.C. § 1188(a)(1)

Before Plaintiffs delve into whether the Final Rule falls within the scope of Defendants' "limited" rulemaking authority, it is important to note that "the grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943). In addition, courts cannot accept "counsel's *post hoc* rationalizations for agency actions…it is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicles Mfrs Assoc. v. State Farm*, 463 U.S. 29, 50 (1983). This ensures that the "parties and the public can respond fully and in a timely manner to an agency's exercise of authority" and "instills confidence that the reasons given are not simply 'convenient litigating positions[s].'" *Department of Homeland Security v. Regents of the University of California*, 591 U.S. 1, 23 (2020) (internal citation omitted). But "[p]ermitting agencies to invoke belated justifications, on the other hand, can upset 'the orderly functioning of the process of review,' forcing both litigants and courts to chase a moving target." *Id.* (internal citation omitted).

Here Plaintiffs are chasing a moving target because Defendants keep changing their purported statutory authority to implement the Final Rule. The Final Rule itself cites to 8 U.S.C. § 1188(a)(1) for its authority, not 8 U.S.C. § 1188(c). Yet Defendants in their briefing relied on 8 U.S.C. **§** 1188(c)(3)(B)(iii) as authority for the Final Rule. Then, in response to this Court's questioning during oral argument, cited 8 U.S.C. § 1188(c)(3)(A) as possible authority. This court should not (and cannot) rely on such *post hoc* rationalizations for the Final Rule. If it does, it would create a situation where Plaintiffs are chasing a moving target that would upset the

orderly functioning of the process of review and reward Defendants for taking morphing positions that are convenient for litigation. *See id.* In addition, if Defendants are in fact relying on a statutory provision for authority that they did not cite to in the Final Rule, they committed a procedural violation of the APA, since they deprived the public of an adequate opportunity to provide notice and comment regarding its justification for the Final Rule. *See* 5 U.S.C. § 706(2)(D). In any scenario, this Court should limit its review of Defendants' authority for the Final Rule to 8 U.S.C. § 1188(a)(1). And nothing in that provision gives them any such authority.

IV. 8 U.S.C. § 1188(c)(3) does not grant DOL authority for the Final Rule

Even if Defendants were allowed to raise other provisions of § 1188 for authority for the Final Rule, their effort fails. Defendants first try to rely on § 1188(c)(3)(B)(iii) in their briefing in an attempt to find statutory authority lurking somewhere. Then during the hearing, Defendants (in response to the Court's questions) tried to latch onto to § 1188(c)(3)(A) for supposed authority. Both contentions are without merit.

Defendants are correct that Congress delegated some limited rulemaking authority to the DOL through § 1188(c)(3)(B)(iii). But the statute could not be clearer that this delegation was limited both in scope and time. Specifically, the provision directs the Secretary of Labor to publish findings regarding what is known as the 50-percent rule, which requires H-2A employers to "provide employment to any qualified United States worker who applies to the employer until 50 percent of the period of the work contract, under which the foreign worker who is in the job was hired, has elapsed." 8 U.S.C. § 1188(c)(3)(B)(i); *see also id.* at § 1188(c)(3)(B)(iii) (directing Secretary to "immediately publish findings required by this clause"). If Congress failed to act on the Secretary's findings, the provision provided DOL a three-year period to

promulgate an interim or final rule addressing the matter. *See id.* at § 1188(c)(3)(B)(iii). This, however, was the limit of the delegation of rulemaking authority by § 1188(c)(3)(B)(iii).

The DOL has implicitly and explicitly recognized this limit. Implicitly, a search of the Federal Register reveals that, since the section's enactment nearly forty years ago, DOL has cited the provision only when addressing the 50-percent rule. *See* Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States; "Fifty-Percent Rule," 55 Fed. Reg. 29356 (July 19, 1990).[3] Explicitly, DOL has acknowledged the limited scope of the provision. First, DOL has stated the provision "tasked the Department with determining whether agricultural employers should be required by regulation to hire U.S. workers after H-2A workers have already departed for the place of employment." Temporary Agricultura Employment of H-2A Nonimmigrants in the United States, 84 Fed. Reg. at 36172. This has nothing to do with establishing collective bargaining or concerted-activity rights for H-2A workers.

Second, DOL has openly recognized that "[t]he requirements of 8 U.S.C. § 1188(c)(3)(B)(iii) were fully satisfied when the Department promulgated interim final regulations on July 19, 1990." Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement, 73 Fed. Reg. at 77127. Thus, DOL has already fully acted upon the rulemaking authority granted to it by § 1188(c)(3)(B)(iii).

[3] *See also* Temporary Agricultural Employment of H-2A Nonimmigrants in the United States, 87 Fed. Reg. 61660, 61743 (Oct. 12, 2022); Temporary Agricultural Employment of H-2A Nonimmigrants in the United States, 84 Fed. Reg. 36168, 36172, 36206−07 (July 26, 2019); Temporary Agricultural Employment of H-2A Aliens in the United States, 75 Fed. Reg. 6884, 6912 (Feb. 12, 2010); Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement, 73 Fed. Reg. 77110, 77125, 77127 (Dec. 18, 2008).

In sum, Defendants were correct the first time when they did not cite § 1188(c)(3)(B)(iii) as a source of rulemaking authority. It is entirely apparent that § 1188(c)(3)(B)(iii) provides DOL no authority to enact the provisions challenged in this action. Also, the existence of § 1188(c)(3)(B)(iii) hurts Defendants' argument that it has broad rulemaking authority because it demonstrates that when Congress wanted to give DOL rulemaking authority, it narrowed and defined the limits of that authority.[4]

Section 1188(c)(3)(A) does not help Defendants' argument either. At best, § 1188(c)(3)(A) provides authority to set "criteria for certification." Setting criteria to perform a ministerial certification function is not the same as being delegated rulemaking authority. Congress was explicit when it authorized the Secretary to engage in rulemaking by using the term "regulation" in other contexts. *See* § 1188(a)(1)(2) and (c)(4). Congress' specific language for each provision must be given its appropriate meaning. Therefore, this is also not a provision that provides authority for rulemaking.

Even if there was some limited rulemaking authority for Defendants under § 1188 generally, the Court must still determine whether the best reading of the statute provides Defendants with the authority to provide collective bargaining type protections to H-2A workers. There is no plausible reading of the statute that provides any such authority, much less the best reading. Defendants try to bring *Chevron* deference through the backdoor by claiming broad delegation and then asking the Court to provide deference to its interpretation of the statute because of it. The Court should reject this attempt.

[4] This conclusion is strengthened by other provisions of 8 U.S.C. § 1188 that grant DOL limited rulemaking authority, such as § 1188(c)(4), which states that "the Secretary of Labor shall issue regulations which address the specific requirements of housing for employees principally engaged in the range production of livestock, and § 1188(a)(2), which permits the Secretary of Labor to promulgate a regulation governing fees for certification.

V. The proper statutory interpretation of NLRA conflicts with the Final Rule

Finally, Defendants cannot violate the NLRA through the Final Rule. Defendants attempt to frame the issue as one of preemption. They claim that even though the NLRA excludes agricultural workers from receiving its protections, a federal agency can still do it as long as it utilizes a different statute as its authority. This cuts against the presumption against ineffectiveness in statutory interpretation. This canon holds that a textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored. *See* A. Scalia and B. Garner, *Reading Law: The Interpretation of Legal Texts* 63-65 (2012).

The NLRA makes an explicit exclusion of agricultural workers from its definition of employees entitled to its protection by utilizing the term "shall not" when referencing them. *See* 29 U.S.C. § 152(3). Congress meant something with that exclusion. The NLRA was not a minor provision of an appropriations bill. As Plaintiffs' briefing noted, it was designed to calm serious and oftentimes violent tensions that occurred between workers and management. Against that backdrop, Congress still made a conscious decision nearly 90 years ago to exclude agricultural workers from its protections. It was the result of a delicate series of compromises made at a time when labor unrest was a foremost public issue, which Defendants would now undo with the stroke of a pen. The Court should be particularly skeptical when an agency locates newfound—and profoundly significant—statutory authority in an old statute, especially when it has a tremendous impact over a huge sector of the economy. *See UARG v. EPA*, 573 U.S. 302, 328 (2014) (courts dubious of agency's discovery of its "newfound authority" to issue regulation); *Nebraska v. Biden*, 600 U.S. 477, 519 (2023) (courts "pump[] the breaks" when an agency discovers "an unheralded power" over "a significant portion of the American economy" in a "long-extant statute" (quoting *UARG*, 573 U.S. at 324)); *id*. (courts consider "'consistency of an

agency's views when we weigh the persuasiveness of any interpretation it proffers in court'" (quoting *Bittner v. United States*, 598 U.S. 85, 97 (2023) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944))); *Loper Bright*, 144 S. Ct. at 2273 ("[I]nterpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining a statute's meaning.").

If any agency could override that through relying on vague authority from another statute, it would obstruct Congress' prohibition in the NLRA and render it ineffective. This is especially true given Defendants' contention that the Final Rule's newfound benefits would also extend to some American workers as well. The Court should reject the Defendant's attempts to make the NLRA's exclusion of agricultural workers dead letter law. The correct reading of the NLRA is that it prohibits any federal collective bargaining type protections for all agricultural workers as that is the only interpretation that furthers rather than obstructs Congress' purposes.

VI. A § 705 stay is not the same as a nationwide injunction

A stay under 5 U.S.C. § 705 is an appropriate remedy because the Plaintiffs ultimately seek to set aside or vacate the agency's actions. Just as a district court has authority to enter a preliminary injunction as the temporary form of a permanent injunction, it may also enter a stay as the temporary form of vacatur, which cannot be party restricted. *See Career Colls. Of Tex. v. U.S. Dep't of Educ.,* 98 F.4th 220, 255 (5th Cir. 2024) (Like vacatur under § 706, § 705 relief "should not be party restricted"). Textually, § 705 plainly authorizes a court to "postpone the effective date of an agency action." *See In re GTE Serv. Corp*., 762 F.2d 1024, 1026 (D.C. Cir. 1985) (section 705 provides "statutory authority to stay agency orders pending review").

Defendants are incorrect that "basically a stay is the same as a nationwide injunction at least in effect here." Dkt. 92 at p. 63. Stays and preliminary injunctions are not "one and the

same." *Nken v. Holder*, 556 U.S. 418, 434 (2009). They differ in a crucial way: "stays act on the *proceeding*" while "preliminary injunctions act on the *person*.".[5] Frank Chang, *The Administrative Procedure Act's Stay Provision: Bypassing Scylla and Charybdis of Preliminary Injunctions*, 85 GEO. WASH. L. REV. 1529, 1546 (2017). So while both an injunction and a stay can prevent "some action before the legality of that action has been conclusively determined[,]" an injunction "direct[s] an actor's conduct" but a stay "temporarily suspend[s] the source of authority to act." *Nken*, 556 U.S. at 428-29. Therefore, Defendants' criticisms of nationwide injunctions—even if they extended to injunctions of immigration issues—are not germane. *See Career Colls.*, 98 F.4th at 255 ("The Department's protests against nationwide relief are incoherent in light of its use of the Rule to prescribe uniform federal standards.")

Defendants are correct that the *test* under the *Nken* factors is the same for stays and preliminary injunctions. But that does not mean that the same concerns applicable to nationwide injunctions apply to a § 705 stay, which operates on the rule not the parties. A stay is a less coercive measure that does not carry the threat of sanctions against a non-conforming party for precisely this reason. But the flip side of the logic is that a stay cannot apply only to the parties before it. *See Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2463 (Kavanaugh, J., concurring) (2024). Defendants produce no authority to the contrary. Their citations to concurrences of various Justices are non-binding (Dkt. 69 at 39) and ignore Justice Kavanaugh's recent concurrence in *Corner Post* where he specifically rejected the argument that "vacatur of a federal rule is akin to a nationwide injunction." *Corner Post* at 2467.

[5] The scope of a stay does not rely on which particular party has standing to sue and the Defendants acknowledge at least one party has standing to sue. But the states also have standing. Contrary to the Defendants' assertions at the hearing, the states provided numerous declarations of administrative costs from the Final Rule that will not be fully reimbursed by the federal government.

Finally, while Defendants contend that courts do not "lightly assume" Congress intended to depart from established equitable principles (Doc. 69 at 38), they forget that the APA was an effort to codify what already was well established principles for agency challenges. *See id*. at 2468 (rejecting the argument that Congress did not create new remedies under the APA; "But vacatur was not a new remedy"). Before the APA, this Court recognized stays of agency action as "part of" the federal courts' "traditional equipment for the administration of justice." *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 9-11 (1942). The APA then codified the existing equitable powers of federal courts to stay agency actions. *See Sampson v. Murray*, 415 U.S. 61, 68 & n.15 (1974) (explaining section 705 "was primarily intended to reflect existing law"). Indeed, this used to be common knowledge at the Department of Justice. *See* Tom C. Clark, *Att'y Gen's Manual on the Administrative Procedure Act* 105 (1947) perma.cc/NPT4T-PD23 (noting section 705 was a "restatement of existing law" at the time of the APA's enactment).

CONCLUSION

Defendants cannot provide H-2A workers protections that mirror those of the NLRA. Period. Defendants know this but aimed to utilize whatever pretext they could in order to justify the Final Rule. But it does not change that the Final Rule is not even close to lawful. The Court should not allow Defendants to flout the law. It should grant Plaintiffs' motion for a stay of the effective date of the Final Rule under 5 U.S.C. § 705 or a nationwide preliminary injunction.

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