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

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR STAY/PRELIMINARY INJUNCTION/TEMPORARY RESTRAINING ORDER

TABLE OF CONTENTS

TABLE OF AUTHORITIES 3
I. Introduction 4
II. Plaintiffs Are Likely to Succeed on the Merits 5
A. There is No Broad Statutory Delegation Here 5
B. This Court Should Reject DOL's Attempt to Evade the NLRA's Requirements 7
C. DOL Fails to Identify Any Clear Statutory Authority for the Final Rule 10
D. This is a Major Questions Doctrine Case 12
E. The Final Rule is Arbitrary and Capricious 14
1. DOL Relied on Factors that Congress Did Not Intend the Agency to Consider 14
2. DOL Provided an Implausible Explanation for the Final Rule 14
3. DOL Did Not Reasonably Explain Its Policy Change 15
III. The States Not Only Have Standing, But They Have Been Irreparably Harmed 15
IV. The Public Interest 17
V. Scope of Relief 18
VI. Conclusion 21

TABLE OF AUTHORITIES

Cases

Bayou Lawn & Landscaping Services v. Secretary of Labor, 713 F.3d 1080, 1084 (11th Cir. 2013).........11
Bd. of Educ. of Westside Cmty. Sch. v. Mergens By & Through Mergens, 496 U.S. 226, 244 (1990)..........7
Chamber of Com. v. City of Seattle, 275 F. Supp. 3d 1140, 1152 (W.D. Wash. 2017)..............................8
Florida v. Becerra, 544 F. Supp. 3d 1241, 1304 (M.D. Fla. 2021)..17
Forest Serv. v. Cowpasture River Preservation Ass'n, 590 U.S. 604, 622 (2020).....................................13
Griffin v. HM Florida-ORL, LLC, 144 S. Ct. 1, 1 n.1 (2023)...19
Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 646 (1980) 10
Ironridge Glob. IV, Ltd. v. SEC, 146 F. Supp. 3d 1294, 1317 (N.D. Ga. 2015)..18
Kentucky v. Biden, 23 F.4th 585, 606 n. 14 (6th Cir. 2022)...6
Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024) 5, 10
Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 913 (1990) 19
Nat'l Ass'n of Mfrs. v. Perez, 103 F. Supp. 3d 7, 25 (D.D.C. 2015)...9
North Carolina Coastal Fisheries Reform Group v. Capt. Gatson LLC, 76 F.4th 291, 297 (4th Cir. 2023) 12
Rojas v. City of Ocala, 40 F.4th 1347, 1351 (11th Cir. 2022) 16
Tennessee v. Becerra, Case No. 1:24-cv-161-LG-BWR, --- F. Supp. 3d ----, 2024 U.S. Dist. LEXIS 119525, at *36 (S.D. Miss. July 3, 2024)...20
Texas v. United States, 497 F.3d 491, 500–01 (5th Cir. 2007)...10
United Farm Workers of Am., AFL-CIO v. Arizona Agr. Emp. Rels. Bd., 669 F.2d 1249, 1257 (9th Cir. 1982) 9
United States v. Ala., 691 F.3d 1269, 1301 (11th Cir. 2012) 18
Washington v. Reno, 35 F.3d 1093, 1103 (6th Cir. 1994) 18
Weirsum v. U.S. Bank, N.A., 785 F.3d 483, 488 (11th Cir. 2015) 8
Williams v. Usery, 531 F.2d 305, 307 (5th Cir. 1976) 11

Statutes

29 U.S.C. § 152 8
8 U.S.C. § 1101 6
8 U.S.C. § 1103 5
8 U.S.C. § 1188 ....6, 10
Ariz. Stat. § 23-1381 13
K.S.A. 44-828...13
Nat'l Mining Ass'n v. Army Corps of Eng'rs, 145 F.3d 1399, 1409 (D.C. Cir. 1998)..........................19, 20
Rural & Migrant Ministry v. EPA, 565 F. Supp. 3d 578, 605 (S.D.N.Y. 2021)...................................19, 20
U.S.C. § 705 18
U.S.C. § 706 18
Wisc. Stat. 111.115 13

Other Authorities

Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 1012 (2018)............................19
Mila Shohoni, *The Power to Vacate a Rule*, 88 Geo. Wash. L. Rev. 1121, 1139 & n.87 (2020) 19

I. Introduction

Over and over again throughout the Defendants' brief, they rely on having "broad Congressional delegation" in order to implement the Final Rule. This is a tacit admission that the statute does not give them the authority to do what they are doing. And make no mistake, what they are doing is providing collective bargaining protection through the back door. No amount of wordsmithing can get past that reality. But when the veneer of broad Congressional delegation is destroyed, all that's left is one simple truth. They cannot give foreign migrant workers collective bargaining rights through the rulemaking process. But even if they had this alleged "broad Congressional delegation," the Final Rule is still unlawful. First, no amount of Congressional delegation allows an agency to rewrite a separate Congressional statute. The Department of Labor (DOL) did exactly that by utilizing the rulemaking process under the Immigration Reform and Control Act (IRCA) to violate the National Labor Relations Act's prohibition on federal collective bargaining protections being extended to agricultural workers. Second, they have to stay within the bounds of authority that was delegated. There was no Congressional authorization under the IRCA to unionize migrant farmworkers. Plain and simple. Third, this is a major questions doctrine case that presents an issue of vast political significance and Defendants need to show clear Congressional authorization, which they cannot. Finally, regardless of scope of authority, an agency cannot implement a rule that is arbitrary and capricious. This Final Rule is the very definition of arbitrary and capricious. Plaintiffs also easily clear the remaining factors for injunctive relief and their motion should be granted because there is no universe in which the Final Rule is lawful.

II. Plaintiffs Are Likely to Succeed on the Merits

A. There is No Broad Statutory Delegation Here

Instead of showing where in the IRCA the DOL has the authority to unionize H-2A workers, the Defendants attempt to hide behind the veil of broad statutory delegation. This is for good reason. The statute does not give them such authority. Regardless, if the IRCA actually gave the Defendants this broad delegation they boast about, they should be able to point to where in the statute the broad delegation is given. They do not. Instead, they rely on out-of-circuit authority that existed at a time when *Chevron* deference was still good law. That authority is no longer even persuasive in light of *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024).

In *Loper Bright*, the court held that "instead of declaring a particular party's reading 'permissible' in such a case, courts use every tool at their disposal to determine the best reading of the statute," and that "in an agency case as in any other…there is a best reading all the same" as "if no agency were involved." *Id.* at 2266. This also applies to whether delegation exists. "When the *best reading of a statute is that it delegates discretionary authority to an agency*, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits." *Id.* at 2263 (emphasis added). Defendants are asking the Court to assume broad delegation exists by relying on out-of-circuit pre-*Loper Bright* cases rather than the statute itself. But when one examines the actual statute, the best reading is that no such broad delegation exists.

The first red flag is that, under the statutory scheme of the Immigration and Nationality Act (INA), which the IRCA amended, the Secretary of Homeland Security and Attorney General are given broad authority to enforce the statute and implement regulations. *See* 8 U.S.C. § 1103. No such broad delegation is authorized for the DOL Secretary. Second, the statute that directly

addresses H-2A workers relates specifically to workers "having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform *agricultural labor or services, as defined by the Secretary of Labor in regulations*." 8 U.S.C. § 1101(a)(15)(H)(ii)(a). The statute gives the DOL Secretary the authority to define what is "agricultural labor or services." It does not grant broad authority over the entire H-2A program. Nor would it make sense to. Immigration as a whole, and the conditions upon which someone comes into the country, is the province of the Secretary of Homeland Security and Attorney General. Not the DOL Secretary. Finally, when narrowed down to the specific authority DOL relies on for the Final Rule, no such rulemaking authority exists as it gives the DOL Secretary certification authority over H-2A applications. *See* 8 U.S.C. § 1188(a).

It is not even a close call that the "best reading" of the statute is the "broad" delegation claimed by the DOL Secretary simply does not exist. And if such a broad authority actually existed in the statute, despite a lack of explicit delegation, that presents another problem. It would make 8 U.S.C. § 1188(a) unconstitutional under the non-delegation doctrine. In *Kentucky v. Biden*, 23 F.4th 585, 606 n. 14 (6th Cir. 2022) the court noted that accepting the President's interpretation that he could "do essentially whatever he want[ed] so long as he determines it necessary to make federal contractors more 'economical and efficient' ... *certainly* would present non-delegation concerns." Similarly, if DOL's interpretation is accepted and the DOL Secretary can use an immigration statute as a backdoor to providing collective bargaining rights to agricultural workers, there would be serious non-delegation concerns. However, the court need not go there as the statute obviously does not allow broad delegation.

When the veneer of broad delegation is stripped away, the Defendants have no argument left as the statute does not authorize anything close to what the Final Rule tries to do. But even if one accepts their broad delegation argument, the Final Rule would still be unlawful.

B. This Court Should Reject DOL's Attempt to Evade the NLRA's Requirements

The Final Rule conflicts with the NLRA. In an attempt to evade the NLRA's express exclusion of agricultural laborers, DOL generally makes two arguments. First, DOL argues that the Final Rule does not conflict with the NLRA because the Final Rule does not purport to provide collective bargaining rights but instead seeks to protect "concerted activity" aimed at "self-advocacy" and "self-organization." Resp. at 13–14. This poor attempt at wordplay does not hide the simple fact that this is collective bargaining. Section 7 of the NLRA provides protection for not only collective bargaining but also, as DOL concedes, for "self-organization" and for "concerted activities for the purpose of collective bargaining or other mutual aid or protection." Resp. at 12 (quoting 29 U.S.C. § 157). Thus, by its express terms as DOL now admits, the Final Rule's purported protections overlap with the protections afforded by the NLRA. As a result, the Final Rule necessarily conflicts with the NLRA's exclusion of those protections from agricultural laborers.

As a more general matter, DOL cannot evade or frustrate the NLRA's requirements through creative wordsmithing. *See Bd. of Educ. of Westside Cmty. Sch. v. Mergens By & Through Mergens*, 496 U.S. 226, 244 (1990) (rejecting an attempt "to evade the Act" through "strategic[]" definitions). For instance, the DOL contends that its Final Rule does not violate the NLRA "simply because the NLRA itself does not reach agriculture workers." Resp. at 14. This, however, paints a misleading picture of the text of the NLRA. In defining "employee"—the term that determines which groups of workers receive protection—, the NLRA *explicitly* excludes

agricultural laborers. Specifically, the definition states, in pertinent part, "but *shall not include* any individual employed as an agricultural laborer." 29 U.S.C. § 152(3) (emphasis added).

This exclusion is particularly meaningful because when § 152(3) was initially enacted, it excluded only two other groups of direct employees, "domestic workers" and "individuals employed by a parent or spouse."[1] *Chamber of Com. v. City of Seattle*, 275 F. Supp. 3d 1140, 1152 (W.D. Wash. 2017). Really, agricultural laborers are the only large category of workers directly employed by corporations, and thus situated so as to benefit from collective bargaining, who are excluded from NLRA protection. *See* 29 U.S.C. § 152(3). The Court must give this language and Congressional choice meaning; for how else could Congress have signaled that agricultural laborers were not to receive the protections granted by the NLRA? *Cf. Weirsum v. U.S. Bank, N.A.*, 785 F.3d 483, 488 (11th Cir. 2015) ("'We are not at liberty to rewrite the statute to reflect a meaning we deem more desirable'; 'we *must give effect to the text Congress enacted*.'" (quoting *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 228 (2008))). This is not a case where the statute was silent as to whether agricultural workers were to be given federal union protections under the NLRA; it explicitly excluded them. Yet, through its Final Rule, the DOL undoes this deliberate and enduring choice.

Second, DOL argues that the NLRA does not set the "outer bounds of labor regulation by other means." Resp. at 14. Stated differently, DOL asserts that other federal agencies may also issue labor regulations. Much of the law cited by DOL in support of this argument stands for the proposition that States—not other federal agencies—may enact other labor regulations. *See, e.g.*,

[1] For the sake of completeness, Congress has amended the NLRA to exclude independent contractors, supervisors, and individuals employed by an employer subject to the Railway Labor Act. 29 U.S.C. § 152(3). Despite these amendments, however, Congress has not amended the NLRA to remove the exclusion of agricultural laborers from protection.

United Farm Workers of Am., AFL-CIO v. Arizona Agr. Emp. Rels. Bd., 669 F.2d 1249, 1257 (9th Cir. 1982) ("Thus, where, as here, Congress has chosen not to create a national labor policy in a particular field, the states remain free to legislate as they see fit, and may apply their own views of proper public policy to collective bargaining process insofar as it is subject to their jurisdiction."); *Nat'l Ass'n of Mfrs. v. Perez*, 103 F. Supp. 3d 7, 25 (D.D.C. 2015) (recognizing, as Defendants represent, that "the Supreme Court has never found that Congress intended for the NLRA to occupy the 'field' with respect to the regulation of labor concerns" but, immediately thereafter, stating that "'the history of the labor pre-emption doctrine in this Court does not support an approach which sweeps away *state-court jurisdiction* over conduct traditionally subject to *state regulation* . . . .'" (emphasis added) (quoting *Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters*, 436 U.S. 180, 188 (1978))). Thus, while Plaintiffs agree a state could enact regulations conferring collective bargaining rights to agricultural laborers, the NLRA precludes a federal agency from enacting such rules.

The Defendants' argument that other federal regulations touched upon labor regulations also has no bearing on this case. Plaintiffs never argued that the NLRA prohibits federal agencies from providing labor regulations. Plaintiffs simply said that agencies cannot violate or rewrite other statutes in doing so. And none of those cases were ones where a federal agency attempted to provide collective bargaining rights to agricultural workers despite a clear statutory provision prohibiting it. But that is exactly what the Defendants attempt to do here. If that were allowed it would open the floodgates to agencies utilizing the rulemaking process to rewrite any statute that it disagrees with. The results of that would be disastrous and this court should not open those floodgates.

C. DOL Fails to Identify Any Clear Statutory Authority for the Final Rule

In response to Plaintiffs' arguments regarding statutory authority under the IRCA, DOL argues that Congress delegated it broad authority to ensure that "an employer's use of H-2A workers would not harm similarly employed workers in the United States" and that the Final Rule represents an exercise of such broad authority. Resp. at 15–25. For the reasons stated earlier, this argument about broad delegation does not have any merit.

But even if Congress did delegate some authority to DOL, that delegation is necessarily limited by the text of the IRCA. *See Loper Bright*, 144 S. Ct. at 2273. ("And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it."); *see also Texas v. United States*, 497 F.3d 491, 500–01 (5th Cir. 2007) ("The authority of administrative agencies is constrained by the language of the statute they administer."). Additionally, the Constitution imposes its own narrowing construction, favoring a more limited view of DOL's authority under the IRCA. *See, e.g.*, *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980).

As explained previously, the Secretary of Labor has only a narrow role under § 1188(a)(1); she must consider two questions: (1) whether "there are…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 (2) whether "the employment of…alien[s] in such labor or services will…adversely affect the wages and working conditions of workers in the United States similarly employed." *Id.* Section 1188(a)(1) is not a grant of general rulemaking authority over the H-2A program as a whole. Rather, DOL's role in the H-2A program is limited, straightforward, and clear. It certainly does not confer collective bargaining rights on migrant farmworkers.

At one point, DOL indicates that the Final Rule sets forth "a baseline set of working conditions necessary to prevent adverse effects to *workers in the United States*." Resp. at 25 (emphasis added). Elsewhere, DOL pivots by characterizing the Final Rule as providing *H-2A workers* with "more *equal* footing with *similarly employed* workers in the United States." Resp. at 24 (emphasis added). But the Final Rule does neither. It grants rights and benefits to H-2A workers that similarly employed agricultural workers in the United States do not have under the NLRA. And DOL does not have statutory authority to tip the balance of rights in H-2A workers' favor.

Tellingly, DOL largely fails to engage with Plaintiffs' argument that the IRCA does not grant an affirmative power to raise wages or improve working conditions generally. In fact, DOL appears to double down on its authority to do so, noting that the benefits of the Final Rule "first must be offered to U.S. farmworkers before H-2A employers can fill the open positions with H-2A workers." Resp. at 26 (citing 20 C.F.R. § 655.122(a)). According to DOL, the extension of these benefits to domestic workers necessarily fulfills its statutory obligation to avoid adverse effects for domestic workers. But this argument fails to account for the pre-split Fifth Circuit's holding in *Williams v. Usery*, 531 F.2d 305, 307 (5th Cir. 1976) that the Secretary's "authority to insure against a lowering of wages is hardly synonymous with the affirmative power to raise wages . . . ."

DOL's argument also ignores the context of 8 U.S.C. § 1188(a)(1) which gives DOL *certification* authority. In *Bayou Lawn & Landscaping Services v. Secretary of Labor*, 713 F.3d 1080, 1084 (11th Cir. 2013) the 11th Circuit rejected attempts to broaden the reading of the term

"consultation" to reach rulemaking, which the court described as "absurd."[2] Regardless of how "broad" the delegation, DOL cannot use the term "certification" to then engage in rulemaking that allows H-2A workers to unionize. A leap from "certification" to providing union protections would be "absurd."

Finally, DOL's argument that H-2A benefits must also be provided to U.S. farmworkers and to workers in corresponding employment raises another problem for the Final Rule. Resp. at 26; *see also id.* at 33 ("[N]on-H-2A workers employed by an H-2A employer will get the same benefits from the Final Rule as the H-2A workers."). That is to say, DOL is either attempting to provide benefits to H-2A workers to which U.S. farmworkers are not entitled in violation of the NLRA, or attempting to circumvent the NLRA another way by creating new rights for foreign workers and expecting those rights to also be imputed to domestic farm workers by default. Either way, DOL did not have statutory authority to promulgate the Final Rule.

D. This is a Major Questions Doctrine Case

The Defendants' response misapprehends what the major questions is and how it applies. They primarily lean in on the fact that the major questions doctrine does not apply in this case. And they apply an impossibly high standard for when the major questions doctrine would apply. But they do so in a manner that's contrary to what courts have found. For example, in *North Carolina Coastal Fisheries Reform Group v. Capt. Gatson LLC*, 76 F.4th 291, 297 (4th Cir. 2023), that court held "we seek clear authorization from Congress before holding that the

---

[2] In their response, the Defendants tried to misconstrue *Bayou Lawn* as saying it gives them broad rulemaking authority over the H-2A program. Resp. at 25. This is incorrect. As noted in Plaintiff's original motion, the case held that Defendants have rulemaking authority for the H-2A program under 8 U.S.C. § 1101(a)(15)(H)(ii)(a) that provision is limited to defining "agricultural or labor services" and not a general grant of rulemaking over the entire program. Notably, the Defendants refuse to engage this argument.

shrimpers need a Clean Water Act permit to return their bycatch to the Pamlico Sound" and "whether returning bycatch qualifies as a 'discharge' of a 'pollutant' under the Act is a major question." The court also noted, "economic and social consequences would be enormous" because "[f]ishing in America generates hundreds of billions of dollars, employs millions of people, and provides recreational sport for millions more" and "forcing virtually every fisherman to risk punishment or obtain a permit from the EPA—separate from the existing state and federal schemes—would work an enormous effect." *Id.* at 300. It would be even more applicable here since this Final Rule represents the intersection of three major areas: (1) the agricultural industry, (2) immigration, and (3) unionization.

Agency action that regulates agriculture, immigration, and unionization clearly bears extraordinary political significance. The issue in question is a controversial one with serious arguments on both sides of the equation. And since the passage of the NLRA, the collective bargaining rights of agricultural workers have been traditionally regulated by the states. See, e.g., K.S.A. 44-828(c)(6); Ariz. Stat. § 23-1381; Wisc. Stat. 111.115. Due to the Final Rule's political significance and intrusion into an area that is the particular domain of state law, the major questions doctrine applies here. If a rule that deals with whether bycatch is a pollutant implicates the major questions doctrine, then certainly this would.

And because Congress has not acted to "significantly alter the balance between federal and state power" with "exceedingly clear language" to authorize DOL to create new rights for migrant farmer workers, the Final Rule violates the major questions doctrine. *Forest Serv. v. Cowpasture River Preservation Ass'n*, 590 U.S. 604, 622 (2020). Common sense tells us this much. If Congress' intent was to allow H-2A workers to have collective bargaining rights, it

would have said so—especially when a separate Congressional statute prohibits it. But they did not, and therefore clear authorization cannot possibly exist.

E. The Final Rule is Arbitrary and Capricious.

The Final Rule embodies what it means for a regulation to be arbitrary and capricious for three reasons: (1) it relied on factors Congress did not intend, (2) the reason provided by the agency is implausible, and (3) it represents a sharp departure from past practice without reasonable explanation.

1. DOL Relied on Factors that Congress Did Not Intend the Agency to Consider

In its response to the States' contention that DOL relied on impermissible factors, DOL repeats the argument that the new rights created by the Final Rule do not violate the NLRA. Resp. at 31-32. DOL also continues the refrain that "non-H-2A workers employed by an H-2A employer will get the same benefits from the Final Rule as the H-2A workers," which is to say that the Final Rule will create these new rights for domestic farm workers too. But these arguments suffer the same flaws discussed above, namely, that the Final Rule does create rights Congress has declined to create for farm workers and DOL does not have statutory authority to create those rights.

2. DOL Provided an Implausible Explanation for the Final Rule

Defending against the States' argument that DOL provided an implausible explanation for the Final Rule, DOL returns again to the claim that the Final Rule will create new rights for both H-2A workers and domestic workers. Resp. at 31. ("'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 Final Rule.") (internal citation omitted). And DOL circularly argues that "[t]he Final Rule in this case articulates why the Department

concluded that expanding the H-2A program's existing anti-discrimination protections was necessary to avoid adverse effect." Resp. at 34. But such a conclusory statement does nothing to assuage the lack of reasoned explanation for DOL's decision to circumvent the NLRA, both as to H-2A workers and as to domestic farm workers (to the extent creating rights for domestic farm workers will actually be an effect of the Final Rule). In addition, avoidance of adverse effects to American workers (to the extent they exist at all) only occurs in a roundabout way through a causal chain that begins and ends with foreign migrant workers receiving federal collective bargaining benefits. It is ultimately a pretext for what DOL really wanted to do, which was provide collective bargaining rights to foreign agricultural workers.

3. DOL Did Not Reasonably Explain Its Policy Change

DOL defends its sharp departure from past practice by simply arguing that an "agency is certainly entitled to change course," Resp. at 34 (quoting *Am. Petrol. Inst. v. EPA*, 906 F.2d 729, 738 n.11 (D.C. Cir. 1990)), such as in cases where an agency changed position by issuing new regulations or otherwise repealing and replacing an existing regulation or policy. Resp. at 35. But DOL is not only replacing an existing policy; it's replacing existing statutory law. It is enacting a Final Rule that directly conflicts with the will of Congress as expressed in the NLRA. As noted earlier, the Defendants don't have the authority to do this. But even if they did, they are required to provide a reasonable explanation as to why. Instead, they tried to explain how the Final Rule provides a round-about benefit to American workers. This is certainly not a reasonable explanation.

III. The States Not Only Have Standing, But They Have Been Irreparably Harmed

DOL half-heartedly tries to make a standing argument on this point but implicitly acknowledges that at least one party has standing. It does not contest that Miles Berry Farm and

the Georgia Fruit and Vegetable Growers Association have standing. Nor could DOL advance such a contention where the Final Rule directly impacts and injures the ability of Miles Berry Farm and the members of the Georgia Fruit and Vegetable Growers Association to operate their farms. Thus, even if the States lack standing, which they do not, they can still proceed in the litigation as a result of the one-plaintiff rule. *See Rojas v. City of Ocala*, 40 F.4th 1347, 1351 (11th Cir. 2022) ("Because one plaintiff has standing, we need not consider whether the other plaintiffs had sufficient contact with the offensive practice to establish standing." (quoting *Pelphrey v. Cobb Cnty.*, 547 F.3d 1263, 1280 (11th Cir. 2008))). And for the same reason Miles Berry Farm and the Georgia Fruit and Vegetable Growers Association have standing, they also suffer irreparable harm.

The States also have standing and experience irreparable harm. DOL argues that states don't have standing because State Workforce Agencies' (SWAs) "administrative costs are already funded by the federal government." Resp. at 37. But DOL doesn't argue that federal grants are necessarily always enough to cover SWAs' costs, just that some federal funds pay for at least some of SWAs' activities. For example, DOL argues that the Wagner-Peyser Act requires DOL to provide "congressionally appropriated funds to SWAs" and that the INA "authorizes funding that DOL provides to SWAs" for activities related to foreign labor certification. *Id.* But Congress has not mandated the Final Rule here; DOL has. So DOL cannot show that amounts previously mandated or authorized by Congress are enough to keep up with new requirements imposed by DOL on the States. In fact, all the declarations show the opposite is true. For example, in Plaintiff Tennessee, it "compels Tennessee to commit these state resources toward its implementation without additional funding from DOL to account for the increase in workload." *See* Ex. 1. DOL offers no evidence to the contrary.

DOL also argues that the Final Rule does not change the SWAs' obligation to check for employers' assurances that they will comply with applicable laws and regulations, and that the "States cannot claim that they suffer harm merely from DOL's updated paperwork." Resp. at 68-69. But that's where DOL is wrong. Because the Final Rule will result in the states implementing new training and spending more time reviewing additional assurances that employers will be required by the Final Rule to provide. And these costs are unrecoverable. That's why the States not only have standing, but they will be irreparably harmed.

DOL speculates that the costs imposed on SWAs "would likely represent a tiny fraction of the state's total annual budget." Resp. at 39. But even if DOL presented evidence to that effect (it did not), the preliminary injunction standard is not dependent on costs as represented by a percentage of a state's "total annual budget." The magnitude of harm is irrelevant so long as the harm is irreparable, which it certainly is. Therefore, the State Plaintiffs undoubtedly have both standing and irreparable harm.

IV. The Public Interest

DOL argues that the public interest weighs against an injunction here because "there 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.*" Resp. at 39 (quoting *Cornish v. Dudas*, 540 F. Supp. 2d 61, 65 (D.D.C. 2008)). But Congress never directed DOL to authorize collective bargaining rights for migrant farm workers. In fact, it did just the opposite by consistently omitting unionization rights for farm workers from the NLRA. Applying DOL's own logic, the public interest weighs in favor of an injunction because DOL is acting contrary to the will of Congress. *See Florida v. Becerra,* 544 F. Supp. 3d 1241, 1304 (M.D. Fla. 2021) ("After all, 'there is generally no public interest in the perpetuation of unlawful agency action.'" (brackets

omitted) (quoting *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016); *Ironridge Glob. IV, Ltd. v. SEC*, 146 F. Supp. 3d 1294, 1317 (N.D. Ga. 2015) (concluding it is never "in the public interest for the Constitution to be violated," and that guarding against a separation-of-powers violation is "important to the public interest"); *see also Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994) (finding "great[] public interest in having governmental agencies abide by the federal laws that govern their existence and operations"). Likewise, agency action that "frustrat[es]" a federal statute—in this case the NLRA—is not in the public interest. *See United States v. Ala.*, 691 F.3d 1269, 1301 (11th Cir. 2012).

V. Scope of Relief

When discussing the scope of potential relief, DOL argues against a nationwide injunction. Specifically, DOL attempts to cast doubt on Plaintiffs' arguments in favor of protecting nonparties, uniformity, and consistent application of immigration policy. DOL also questions whether vacatur is an appropriate remedy under the APA. Resp. at 41. But the APA prescribes that remedy. And if a rule is illegal under federal law, that legal status is not dependent upon state lines.

Defendants focus their argument regarding the scope of relief on the relief available to the States rather than the private plaintiffs, while also failing to seriously grapple with the unique breadth of the relief available through the specific provisions relied upon by the private plaintiffs. Plaintiffs challenge the legality *of the Final Rule*, bringing this action through the APA and 5 U.S.C. §§ 705, 706. Section 705 specifically allows a court to "issue all necessary and appropriate process to postpone the effective date of an agency action." This plain statutory language speaks broadly and does not cabin the relief in terms of the parties before a court.

Further, Section 705 "is a corollary to that in Section 706 of Title 5 which provides that when agency action is found to be 'arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law,' the appropriate remedy is for the court to hold the agency action unlawful and to set it aside." *Rural & Migrant Ministry v. EPA*, 565 F. Supp. 3d 578, 605 (S.D.N.Y. 2021) (quoting 5 U.S.C. § 706(2)(A)). Appellate courts have recognized the expansive nature of relief under the APA for over thirty-five years, stating that "when a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." *Nat'l Mining Ass'n v. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (quoting *Harmon v. Thornburgh*, 878 F.2d 848, 495 n.21 (D.C. Cir. 1989)); *see also* Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 1012 (2018) ("Unlike judicial review of statutes, in which courts enter judgments and decrees only against litigants, the APA . . . go[es] further by empowering the judiciary to act directly against the challenged agency action."). And, going back as far as 1971, the Supreme Court has affirmed lower court decisions, rooted in the APA, that have universally invalidated agency rules. Mila Shohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. 1121, 1139 & n.87 (2020) (collecting Supreme Court cases, including *Investment Co. Institute v. Camp*, 401 U.S. 617, 619–20 (1971)).

The broad scope of relief available is so uncontroversial that the ability of a court to enjoin a rule has been embraced by Justices of wide-ranging judicial philosophies. *See Griffin v. HM Florida-ORL, LLC*, 144 S. Ct. 1, 1 n.1 (2023) (Kavanaugh, J., concurring in the denial of application for stay) (focusing on text of §§ 705, 706, including authorization to "set aside," to conclude district court has broad authority to stay agency regulation (citing Mitchell, *supra*. 104 VA. L. REV. at 1012)); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 913 (1990) (Blackmun, J.,

dissenting) ("The Administrative Procedure Act permits suit to be brought by any person 'adversely affected or aggrieved by agency action.' In some cases, the 'agency action' will consist of a rule of broad applicability; and if the plaintiff prevails, the result is that *the rule is invalidated, not simply that the court forbids its application to a particular individual*." (emphasis added)).[3] More recently, district courts have routinely granted stays against agency action, specifically rules, rather than merely enjoining application of a rule as against select plaintiffs. *See, e.g.*, *Tennessee v. Becerra*, Case No. 1:24-cv-161-LG-BWR, --- F. Supp. 3d ----, 2024 U.S. Dist. LEXIS 119525, at *36 (S.D. Miss. July 3, 2024) ("When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated – not that their application to the individual petitioners is proscribed." (quoting *Career Coll. & Schs. of Tex. v. Dep't of Educ.*, 98 F.4th 220, 255 (5th Cir. 2024))); *Rural & Migrant Ministry*, 565 F. Supp. 3d at 605.

Against this extensive body of case law, DOL posit, in passing, that the APA does not foreclose a defendant agency from raising an equitable defense to the enjoinder of a rule. Resp. at 39. But DOL fails to identify what equitable defense it cares to raise. And it is not the job of this Court to serve as DOL's advocate and imagine what equitable principles might favor limiting an injunction. In any event, while DOL's vagueness on its equities point makes it impossible for Plaintiffs to present this Court with an analysis that weighs the equities, it is clear that some equities favor enjoining the Final Rule. Specifically, the market for experienced and dependable H-2A workers is competitive. If, as DOL and amici contend, the Final Rule benefits H-2A workers, then enjoining enforcement of the Final Rule as to only Miles Berry Farm and the

---

[3] Although Justice Blackmun penned these words in a dissent, courts have recognized that this portion of his dissent "apparently express[ed] the view of all nine Justices." *Nat'l Mining Ass'n*, 145 F.3d at 1409.

members of the Georgia Fruit and Vegetables Growers Association would place those farmers and growers at a disadvantage when hiring H-2A workers. Thus, the Plaintiffs will suffer harm as a result of any enforcement of the Final Rule by Defendants, not just as a result of enforcement directly against the Plaintiffs.

VI. Conclusion

Through the Final Rule, the Defendants have engaged in blatantly unlawful activity through rewriting the NLRA, exceeding its statutory authority under the IRCA, and engaging in arbitrary and capricious rulemaking. Plaintiffs will suffer irreparable harm if this court does not intervene to enjoin the Final Rule. The court should maintain the status quo by granting the preliminary injunction.

Respectfully submitted this 22d day of July, 2024,

KRIS W. KOBACH
Attorney General of Kansas

/s/ Abishek S. Kambli
Abhishek S. Kambli, Kan. SC No. 29788
Deputy Attorney General
James R. Rodriguez, Kan. SC No. 29172
Assistant Attorney General
KANSAS OFFICE OF THE
ATTORNEY GENERAL
Topeka, Kansas 66612-1597
Phone: (785) 296-7109
Email: abhishek.kambli@ag.ks.gov
jay.rodriguez@ag.ks.gov

CHRISTOPHER M. CARR
Attorney General of Georgia

Stephen J. Petrany
Solicitor General
Office of the Attorney General
40 Capitol Square, SW
Atlanta, Georgia 30334
(404) 458-3408
spetrany@law.ga.gov

/s/ G. Todd Carter
G. Todd Carter, Esq.
Georgia Bar No: 113601
Special Assistant Attorney General
OFFICE OF THE GEORGIA ATTORNEY GENERAL
BROWN, READDICK, BUMGARTNER, CARTER, STRICKLAND & WATKINS, LLP
5 Glynn Avenue
P. O. Box 220
Brunswick, GA 31521-0220
Tel: 912-264-8544
Fax: 912-264-9667
tcarter@brbcsw.com

ALAN WILSON
Attorney General of South Carolina

/s/ Joseph D. Spate
Joseph D. Spate
Assistant Deputy Solicitor General
Office of the Attorney General of South Carolina
1000 Assembly Street
Columbia, SC 29201
(803) 734-3371
josephspate@scag.gov

/s/ Thomas T. Hydrick
Thomas T. Hydrick
Assistant Deputy Solicitor General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
803-734-4127

TIM GRIFFIN
Arkansas Attorney General

/s/Michael Cantrell
Michael Cantrell
Assistant Solicitor General
Nicholas J. Bronni
Solicitor General
Office of the Arkansas Attorney General
323 Center Street, Suite 200
Little Rock, AR 72201
Telephone: (501) 682-2401
michael.cantrell@arkansasag.gov
Counsel for Petitioner State of Arkansas

ASHLEY MOODY
Attorney General of Florida

/s/ Christine Pratt
Christine Pratt (FBN 100351)
COUNSELOR TO THE ATTORNEY GENERAL
Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399
(850) 414-3300
(850) 410-2672 (fax)
christine.pratt@myfloridalegal.com

RAÚL R. LABRADOR
Attorney General of Idaho

/s/ Joshua Turner
Joshua Turner, *pro hac vice*
Chief of Constitutional Litigation & Policy
700 W. Jefferson St., Suite 210,
PO Box 83720,
Boise, Idaho 83720
(208) 334-2400
josh.turner@ag.idaho.gov
Counsel for Plaintiff State of Idaho

THEODORE E. ROKITA
Attorney General of Indiana

/s/ James A. Barta
JAMES A. BARTA
Solicitor General
Indiana Attorney General's Office
IGCS – 5th Floor
302 W. Washington St.
Indianapolis, IN 46204
Phone: (317) 232-0709
Email: james.barta@atg.in.gov
Counsel for the State of Indiana

BRENNA BIRD
Attorney General of IOWA

/s/ Eric H. Wessan
Eric H. Wessan, *pro hac vice*
Solicitor General
1305 E. Walnut Street
Des Moines, Iowa 50319
(515) 823-9117
eric.wessan@ag.iowa.gov
Counsel for Plaintiff State of Iowa

LIZ MURRILL
Attorney General of Louisiana

/s/ J. Benjamin Aguiñaga
J. Benjamin Aguiñaga
Solicitor General
Louisiana Department of Justice
1885 North Third Street
Baton Rouge, Louisiana 70804
(225) 326-6766
aguinaga@ag.louisiana.gov
Counsel for Plaintiff State of Louisiana

ANDREW BAILEY
Attorney General of Missouri

/s/ Reed C. Dempsey
Reed C. Dempsey #1697941DC
Deputy Solicitor General
Missouri Attorney General's Office
Post Office Box 899
Jefferson City, MO 65102
Tel. (573) 751-1800
Fax. (573) 751-0774
reed.dempsey@ago.mo.gov

AUSTIN KNUDSEN
Attorney General of Montana

/s/ Christian B. Corrigan
Christian B. Corrigan
Solicitor General
Peter M. Torstensen, Jr.
Deputy Solicitor General
MONTANA DEPARTMENT OF JUSTICE
215 North Sanders
P.O. Box 201401
Helena, Montana 59620-1401
(406) 444-2026
christian.corrigan@mt.gov
peter.torstensen@mt.gov
Counsel for Plaintiff State of Montana

MICHAEL T. HILGERS
Attorney General of NEBRASKA

/s/ Lincoln J. Korell
Lincoln J. Korell
Assistant Solicitor General
OFFICE OF THE ATTORNEY GENERAL OF NEBRASKA
2115 State Capitol
Lincoln, Nebraska 68509
(402) 471-2682
Lincoln.Korell@nebraska.gov
Counsel for Plaintiff State of Nebraska

DREW H. WRIGLEY
North Dakota Attorney General

/s/ Philip Axt
PHILIP AXT
Solicitor General
Office of Attorney General
600 E. Boulevard Ave Dept. 125
Bismarck ND 58505
Phone: (701) 328-2210
Email: pjaxt@nd.gov
Counsel for the State of North Dakota

GENTNER DRUMMOND
Attorney General of Oklahoma

/s/ Garry M. Gaskins
Garry M. Gaskins, II, OBA # 20212
Solicitor General
Zach West, OBA # 30768
Director of Special Litigation
OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA
313 N.E. 21st St.
Oklahoma City, OK 73105
Phone: (405) 521-3921
Garry.Gaskins@oag.ok.gov
Zach.West@oag.ok.gov

JONATHAN SKRMETTI
Attorney General and Reporter of Tennessee

/s/ J. Matthew Rice
J. Matthew Rice
Solicitor General
Whitney Hermandorfer
Director of Strategic Litigation
Office of the Attorney General and Reporter of Tennessee
P.O. Box 20207
Nashville, TN 37202-0207
Phone: (615) 741-7403
Email: Matt.Rice@ag.tn.gov
Whitney.Hermandorfer@ag.tn.gov
Counsel for State of Tennessee

KEN PAXTON
Attorney General of the State of Texas
BRENT WEBSTER
First Assistant Attorney General
RALPH MOLINA
Deputy Attorney General for Legal Strategy
RYAN D. WALTERS
Chief, Special Litigation Division

/s/ Kathleen T. Hunker
KATHLEEN T. HUNKER
Special Counsel
Tex. State Bar No. 24118415

GARRETT GREENE
Special Counsel
Tex. State Bar No. 24096217
OFFICE OF THE ATTORNEY GENERAL OF TEXAS
Special Litigation Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Tel.: (512) 463-2100
Kathleen.Hunker@oag.texas.gov
Garrett.Greene@oag.texas.gov

JASON S. MIYARES
Attorney General of Virginia

/s/ Kevin M. Gallagher
Kevin M. Gallagher
Principal Deputy Solicitor General
Brendan T. Chestnut
Deputy Solicitor General
Virginia Office of the Attorney General
202 North 9th Street
Richmond, Virginia 23219
Telephone: (804) 786-2071
Fax: (804) 786-1991
Email: kgallagher@oag.state.va.us
Email: bchestnut@oag.state.va.us
Counsel for Plaintiff Commonwealth of Virginia

/s/ Braden H. Boucek
Braden H. Boucek
Tenn. BPR No. 021399
Ga. Bar No. 396831

/s/ Jordan Miller
Jordan Miller
Michigan Bar. No. P81467
SOUTHEASTERN LEGAL FOUNDATION
560 W. Crossville Road, Suite 104
Roswell, GA 30075
Tel.: (770) 977-2131
bboucek@southeasternlegal.org
jmiller@southeasternlegal.org

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

The State of KANSAS, et. al, Plaintiffs, v. UNITED STATES DEPARTMENT OF LABOR, ET AL. Defendant.	Civil Action No. 2:24-cv-76-LGW-BWC

DECLARATION OF LANCE BUTLER

Pursuant to 28 U.S.C. § 1746, I, Lance Butler, hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, based on my personal knowledge and information:

1. My name is Lance Butler, and my business address is 220 French Landing Drive, Nashville, TN 37243. I am over the age of eighteen, have personal knowledge of the subject matter, and am competent to testify concerning the matters in this declaration.
2. I have served as a Grants Program Manager in the Foreign Labor Certification (FLC) Unit at the Tennessee Department of Labor and Workforce Development since May 5, 2014. My job responsibilities include overseeing the Tennessee Department of Labor and Workforce Development's review of employer requests for foreign labor (Job Orders) prior to the submission of foreign labor applications to the United States Department of Labor (DOL) for certification.

Purpose of Declaration

3. I am submitting this declaration in support of Plaintiffs' Motion for Injunctive Relief as to a Final Rule, published by DOL on April 29, 2024, titled "Improving Protections for Workers in Temporary Agricultural Employment in the United States," (89 Fed. Reg. 33,898) (effective June 28, 2024) (Final Rule). The Final Rule is DOL's final action after DOL published a September 2023 proposal to purportedly create collective bargaining rights for certain foreign migrant agricultural workers and reviewed comments from stakeholders.

State Regulation (H2-A Program)

4. Pursuant to the Immigration Reform and Control Act of 1986 (IRCA), employers who wish to employ foreign workers must apply to DOL for certification before the foreign workers can receive H-2A employment visas. Applicants must first submit a Job Order to the applicable State Workforce Agency for approval prior to submission of an H-2A Application to DOL for certification.

5. The Tennessee Department of Labor and Workforce Development is Tennessee's State Workforce Agency for purposes of reviewing Job Orders. Within the Tennessee Department of Labor and Workforce Development, it is the FLC Unit's responsibility to receive and review Job Orders to ensure they are free of deficiencies prior to the filing of H-2A applications with DOL.

6. An experienced and qualified FLC staff member must review every job order associated with a request for H-2A visas for compliance with federal and state regulations.

7. In program year 2023, there were 360 Tennessee agribusinesses that applied for H-2A visas, associated with 555 unique job orders.

Impact on Tennessee (H-2A Program)

8. The additional duties and requirements promulgated under the Final Rule will require Tennessee and regulated entities within Tennessee to dedicate many more compensated hours and direct out-of-pocket costs to review H-2A employers for federal compliance. The new rule does not provide additional resources or funding to conduct the investigations.

9. In the last three program years, the number of employers requesting H-2A visas has grown by nearly 15%. With the aging-out of current domestic agricultural employees and a shortage of domestic workers to fill the vacancies, the number of clearance orders is anticipated to continue to grow.

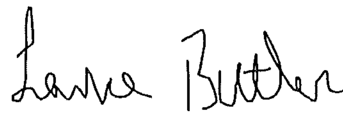
10. State resources will be required to implement the new Final Rule. The Final Rule compels Tennessee to commit these state resources toward its implementation without any additional funding from DOL to account for the increase in workload.

11. The Final Rule would require the Tennessee Department of Labor and Workforce Development to update its standard operating procedures and policies relating to review of job orders. For example, the Final Rule would require the Tennessee Department of Labor and Workforce Development to consider H-2A employers' compliance with the collective bargaining aspects of the Final Rule before approving job orders. The Tennessee Department of Labor and Workforce Development's personnel would also need to be trained on such changes required by the Final Rule.

12. The Final Rule would impose an immediate and increased monitoring burden on the Tennessee Department of Labor and Workforce Development, which is required to begin scrutinizing every application for H-2A visas against an inadequate list of debarred employers, and to begin a lengthy process to sever all ES services to those employers. This process is time consuming and resource intensive. It requires staff to review and approve draft Job Orders, comb through hundreds of worksite addresses within the job orders and cross reference them with debarred employers, agents, and successors in interest. This process puts a significant burden on the Tennessee Department of Labor and Workforce Development's staff and its limited resources, impeding the Tennessee Department of Labor and Workforce Development ability to perform its many other duties in service of Tennessee.
13. The Final Rule requires that if an employer fails to comply with reporting the delay in start dates, the agency must now file the apparent violation and may refer the apparent violation to the Department's WHD which would increase the Tennessee Department of Labor and Workforce Development's staff workload for this program.
14. Due to this significant increase in workload, additional staffing would be required to comply with the Final Rule.
15. The Final Rule proposes changes to § 658.501(a)(4), regarding Tennessee employers who accidentally misclassify the H-2A and/or H2-B job positions. This section implies this may be common. The proposed change is unsupportive of the employers who are in good faith employing workers in this state and may have been participating in the incorrect visa program. The process is not discussed for employers who have historically misclassified their positions and now learn of this change after already participating in a visa program.

With these visa programs being time sensitive, deadlines would be missed, and emergency orders would increase resulting in additional burdens on DEW staff.

This the 19th day of July 2024.



Lance Butler
Grants Manager, Workforce Services Division
Tennessee Department of Labor and Workforce Development