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' REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

INTRODUCTION

Defendants are entitled to summary judgment because the Challenged Provisions[1] are a proper exercise of DOL's § 1188 authority, do not violate the NLRA, and are adequately explained. As to DOL's statutory authority to promulgate these provisions, Plaintiffs' response continues to wrongly assert that DOL's authority under § 1188(a) and (c) is limited to a certification function. As this Court has already concluded, "the 'best reading' of § 1188, in its entirety, is that Congress granted the DOL the authority to issue regulations to ensure that any certifications it issues for H-2A visas do not 'adversely affect' American agricultural workers," which includes the authority to issue the Challenged Provisions. PI Order at 15, 19. As to Plaintiffs' argument that these provisions violate the NLRA, Plaintiffs do not dispute that the cases addressing *Machinists* and *Garmon* preemption supply the proper analytical framework for assessing conflict between the NLRA and federal regulations. *See id.* at 4-5; *see also* Defs.' Mot. at 24-27 (setting forth argument). Under that framework, the Challenged Provisions do not conflict with the NLRA, as demonstrated by the many cases holding that regulation of the classes of individuals excluded from the NLRA's definition of "employee" is permissible. *See* Defs.' Mot. at 26. The Challenged Provisions also are not arbitrary and capricious. As this Court explained, "[DOL] is obliged to balance the competing goals" of the IRCA and "it provided sufficient reasoning for its decision." PI Order at 18 (citation omitted). Finally, the Plaintiff States lack standing and are thus not entitled to relief. For that reason and by application of Article III principles more generally, in the event the Court grants some relief to Plaintiffs, such relief should not apply universally, and the Court should sever any unlawful provisions from the remainder of the Rule. See Final Rule, *Improving Protections for Workers in Temporary Agricultural Employment in the United States*, 89 Fed. Reg. 33,898 (Apr. 29, 2024) ("Final Rule" or "Rule").

[1] As with Defendants' motion, "Challenged Provisions" refers to 20 C.F.R. § 655.135(h)(2), (m), and (n) and 29 C.F.R. § 501.4(a)(2), even though Plaintiffs' merits argument does not address subsections (m) and (n) specifically, *see generally* Pls.' Mot., Pls.' Opp'n.

ARGUMENT

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

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

Plaintiffs' opposition offers no "reason to depart from" the conclusion reached by this Court and the D.C. Circuit that "§ 1188 affords the DOL considerable latitude to promulgate regulations that protect American workers from being adversely affected by the issuance of H-2A visas." PI Order at 16. As this Court has explained, "the 'best reading' of § 1188, in its entirety, is that Congress granted the DOL the authority to issue regulations to ensure that any certifications it issues for H-2A visas do not 'adversely affect' American agricultural workers." *Id.* at 15. That includes the authority to issue the Challenged Provisions. *See id.* at 19. None of Plaintiffs' arguments to the contrary are persuasive.

First, Plaintiffs mischaracterize § 1188(c)(3)(A), which they say "only allows DOL" to perform a certification function. Pls.' Opp'n at 7; *see also id.* (asserting that this certification power "is not the same as being delegated rulemaking authority"). That argument misunderstands the relationship between § 1188(a)(1) and § 1188(c)(3)(A). Subsection (a)(1) provides that the Secretary of Labor must certify that there are not sufficient workers to perform the labor requested and that the potential use of H-2A workers will not adversely affect the wages and working conditions of similarly employed workers in the United States. *See* 8 U.S.C. § 1188(a)(1). From there, "[s]ection 1188(c) expounds upon the DOL's role in the certification process"—the role described in subsection (a)(1)—"by providing 'rules [that] apply in the case of the filing and consideration of an application for a labor certification.'" PI Order at 14. Subsection (c)(3)(A) then specifically refers to "criteria for certification," including criteria "prescribed by the Secretary," and "terms and conditions of a job offer which meets the requirements of the Secretary." 8 U.S.C. § 1188(c)(3)(A); *see also* § 1188(c)(3)(B)(i), (c)(3)(B)(ii) (b)(2)(A) (reflecting that these criteria and requirements will be laid out in regulations).

Indeed, later in Plaintiffs' opposition, they appear to concede that DOL has—or at least might have—authority to promulgate regulations pursuant to these subsections. For example,

Plaintiffs point to other DOL regulations, including 20 C.F.R. § 655.122(a), which they say "do directly regulate 'wages' and 'working conditions' . . . which at least arguably brings them under the auspices of § 1188." Pls.' Opp'n at 14. So too do DOL regulations relating to the AEWR and other wages that DOL requires H-2A employers offer—wages to which workers outside the H-2A program are not legally entitled. *Id.* at 11 n.6 (acknowledging that "the minimum wage employers can pay H-2A workers does directly 'affect the wages and working conditions of workers in the United States similarly employed'") (citing 8 U.S.C. § 1188(a)(1)(B)). The same is true of the Challenged Provisions, which also prevent adverse effects to the "wages and working conditions of workers in the United States," as DOL amply explained throughout the Final Rule. *See* PI Order at 16-18 (summarizing Final Rule's rationale). In the Rule, DOL explained "that, despite previously-enacted protections, 'violations of the H-2A program requirements remain pervasive,' [and the agency] is unequipped to 'investigate every farm on which H-2A workers are employed,' and thus, the DOL cannot take sufficient action to rectify H-2A employers' violations of the program's requirements." *Id.* at 16 (quoting 89 Fed. Reg. at 33,989). Thus, the "Final Rule is a valid method by which the DOL can ensure that American workers are not adversely affected by H-2A visaholders." *Id.*

Second, Plaintiffs wrongly contend that the Court's prior interpretation of § 1188(c) makes superfluous other provisions of § 1188 that expressly use the term "regulation." Pls.' Opp'n at 8. As one example, Plaintiffs cite § 1188(a)(2), *see id.*, which states that the Secretary "may require by regulation . . . the payment of a fee to recover the reasonable costs of processing applications for certification." 8 U.S.C. § 1188(a)(2). That provision and § 1188(c) do independent work and therefore do not implicate the canon against surplusage. Subsection (c)(3)(A) authorizes the Secretary to set forth substantive recruitment criteria and requirements of a job offer necessary to approve temporary employment certification applications in furtherance of the statutory command to prevent adverse effects. On the other hand, subsection (a)(2) separately authorizes the Secretary to require payment of a fee for processing such applications as a condition of issuing the certification. The former thus addresses the Secretary's authority to require certain content in the

job offer; the latter addresses the authority to recover processing-related costs. The other provisions Plaintiffs cite similarly have independent effect. *See* Pls.' Opp'n at 8 (pointing to U.S.C. § 1101(a)(15)(H)(ii)(a) and incorrectly asserting that it would be redundant of Congress to authorize DOL to define "agricultural labor or services" and also establish by regulation requirements for job offers).

Third, Plaintiffs invoke *Loper Bright* to argue that DOL's rulemaking authority cannot encompass the Challenged Provisions because § 1188 does not "use[] words like 'necessary' or 'appropriate' or 'reasonable.'" *Id.* at 8-9 (citing *Loper Bright Enter. v. Raimondo*, 144 S. Ct. 2244, 2263 (2024)). But *Loper Bright* did not establish the talismanic test that Plaintiffs propose. Instead, *Loper Bright* stated more broadly that Congress "often enact[s]" statutes in which "the agency is authorized to exercise a degree of discretion," including those which "'expressly delegate[]' to an agency the authority to give meaning to a particular statutory term" and those which "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.'" *Loper Bright*, 144 S. Ct. at 2263 (citations 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 v. Perez*, 754 F.3d 1002, 1021-22 (D.C. Cir. 2014) (citing 8 U.S.C. § 1188(b)(1), subsections of (c)(3), and (c)(4)). In *Loper Bright*, the Court did not purport to catalog every example of statutory language by which Congress has delegated broad rulemaking authority to an agency. *See Loper Bright*, 144 S. Ct. at 2263 (setting forth in footnotes just four examples). In any event, § 1188(c)(3) tracks some of the (non-exhaustive) examples the Court cited in *Loper Bright*. *Compare* 8 U.S.C. § 1188(c)(3)(A) (referring to "criteria for certification" "as prescribed by the Secretary" and "terms and conditions" "which meet[] the requirements of the Secretary") *and* 8 U.S.C. § 1188(c)(3)(B)(i) ("the employer will offer to provide benefits, wages and working conditions required pursuant to this section and regulations") *with* 2 U.S.C. § 5846(a)(2) (requiring notification to Nuclear

Regulatory Commission when a facility or activity "contains a defect which could create a substantial safety hazard, as defined by regulations which the Commission shall promulgate").

Fourth, while Plaintiffs maintain that the Court cannot consider any portion of § 1188 other than subsection (a)(1), they do not dispute that they failed to press during the rulemaking the argument that they advance now contesting DOL's longstanding authority to promulgate rules implementing § 1188. *See* Pls.' Opp'n at 9-10. As Defendants previously explained, the Final Rule did not address that broader question of DOL's rulemaking authority because it was not presented in Plaintiffs' comment or—to DOL's knowledge—any others submitted during the rulemaking process. *See* Defs.' Mot. at 16 (citing and quoting Plaintiffs' comment). Plaintiffs fail to identify anything in the record to the contrary. *See generally* Pls.' Opp'n.

Fifth, Plaintiffs assert that *Bayou Lawn*'s statement in dicta that DOL has "limited" H-2A rulemaking authority "is binding on this Court" and that, as a result, the Court should ignore the D.C. Circuit's thorough analysis in *Mendoza* and *Dole*. *See id.* at 10-11 & nn.4-6. The Court should reject both propositions. Defendants have already addressed *Bayou Lawn*, demonstrating that it was the fact that Congress expressly granted DOL rulemaking authority under the H-2A program (unlike, in the court's view, the H-2B program)—rather than the scope of that authority—that was key to the Eleventh Circuit's decision. *See* Defs.' Mot. at 16-17 (discussing *Bayou Lawn & Landscape Serv. v. Sec. of Labor*, 713 F.3d 1080, 1084 (11th Cir. 2013)). The *Bayou Lawn* court's reference to that authority being "limited" was not only dicta but was also not, in any event, based on the court's review of DOL's § 1188 authority. *See id.* at 16 n.11.

As for *Mendoza*, Plaintiffs acknowledge that the D.C. Circuit there did not cite or discuss *Chevron*. *See* Pls.' Opp'n at 10 n.4. Yet Plaintiffs say, because the decision cited *Brock*, which itself cited *Chevron*, reliance on *Mendoza* is improper. *See id.* Plaintiffs mischaracterize the *Mendoza* opinion. The court there did not invoke *Brock* when it explained that "[§] 1188(a)(1) establishes the INA's general mission[,] [but] Congress left it to the Department of Labor to implement that mission through the creation of specific substantive provisions." *See Mendoza*, 754 F.3d at 1021. The *Mendoza* court reached that result based on the text of § 1188 itself. *See*

id. at 1022 (citing 8 U.S.C. § 1188(b)(1), subsections of (c)(3), and (c)(4)). That court's lone citation to *Brock*, a "*cf.*" cite, quotes *Brock* in the "facts" portion of the opinion and states—without citation to *Chevron*—that DOL is "entrusted" with defining "adverse effect" and "specify[ing] how adverse effect is to be measured." *Am. Fed'n of Labor and Congress of Indus. Orgs. v. Brock*, 835 F.2d 912, 914 (D.C. Cir. 1987). As for *Dole*, this Court has already addressed that opinion in detail, and rightly concluded that there is "no reason to depart from the D.C. Circuit's well-reasoned interpretation" there that Congress entrusted DOL with "considerable latitude to promulgate regulations" that prevent the use of H-2A workers from adversely affecting workers in the United States. PI Order at 16.

Finally, Plaintiffs offer a host of reasons why the major questions doctrine should apply. None is persuasive. *See* Defs.' Mot. at 19-21 (addressing arguments). The doctrine applies only when an agency makes an "unprecedented" assertion of authority to regulate a matter of vast economic or political significance. *West Virginia v. EPA*, 597 U.S. 697, 721 (2022) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000)). Here, since 1987, DOL has consistently promulgated regulations to prevent adverse effects, including anti-retaliation and anti-discrimination provisions to facilitate a worker's right to seek compliance with the baseline wages and working conditions required of H-2A employers. *See* 1987 H-2A IFR, 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)); 1987 WHD IFR, 52 Fed. Reg. 20,524, 20,524-25 (June 1, 1987) (describing anti-discrimination enforcement "deemed necessary by DOL to carry out its statutory responsibilities regarding enforcement of an H-2A employer's contractual obligations"). Plaintiffs say that this longstanding practice is immaterial to the extent "these regulations went unchallenged" or were "upheld under the *Chevron* framework." Pls.' Opp'n at 15. But that assertion is contravened by *Loper Bright*, which confirms that a consistent and longstanding interpretation such as DOL's here is entitled to respect. *See* 144 S. Ct. at 2258; *see also id*. at 2309 (Kagan, J., dissenting) ("[T]he majority makes clear that what is usually called *Skidmore* deference

continues to apply. Under that decision, agency interpretations 'constitute a body of experience and informed judgment' that may be 'entitled to respect.'" (citations omitted)).

Further, Plaintiffs' attempt to analogize this case to *West Virginia v. EPA* falls flat. *See* Pls.' Opp'n at 14. The Challenged Provisions do not rely on "oblique or elliptical language," or an "ancillary" or "previously little-used backwater" statutory provision. *See West Virginia*, 597 U.S. at 724, 728. "To the contrary . . . the relevant grant of authority at issue here at 8 U.S.C. 1188(a) is one that the Department has long relied on to establish program requirements that ensure that the employment of H-2A workers does not adversely affect the wages and working conditions of workers in the United States similarly employed, and is an area where the Department has significant expertise." 89 Fed Reg. at 33,995; *see also* 2010 H-2A Final Rule, 75 Fed. Reg. 6,884, 6,948 (Feb. 12 2010); 2008 H-2A Final Rule, 73 Fed. Reg. 77,110, 77,159 (Dec. 18, 2008); 1987 H-2A IFR, 52 Fed. Reg. at 20,508, 20,513. The expansive delegation to DOL here looks nothing like the grants of authority at issue in major questions cases. *See West Virginia*, 597 U.S. at 723 ("modest words," "vague terms," "subtle devices," and "oblique or elliptical language" are insufficient "in certain extraordinary cases" involving "[e]xtravagant grants of regulatory authority") (cleaned up); *see also Biden v. Nebraska*, 600 U.S. 482, 494-95 (2023) ("modify" is a "term [that] carries 'a connotation of increment or limitation,'" and must be read to mean "to change moderately or in minor fashion").

Nor can it reasonably be argued that the "sheer scope" of the agency's claimed authority makes this an "extraordinary case" to which the major questions doctrine is relevant. *See West Virginia*, 597 U.S. at 721 (quoting *Brown & Williamson*, 529 U.S. at 159). The Supreme Court has invoked the doctrine where it has determined that the regulations before it seek to regulate "vast swaths of American life." *Id.* at 744 (Gorsuch, J., concurring). Such cannot be said of the Challenged Provisions, which supplement the list of existing protected activities for which H-2A

employers cannot discriminate against agricultural workers in the H-2A program.[2] Plaintiffs' fear that there "would be no limit on what DOL could do" if the Challenged Provisions were deemed lawful is therefore overblown. *See* Pls.' Opp'n at 14. Moreover, Defendants have already acknowledged that § 1188 has limits—namely, a regulation promulgated pursuant to § 1188 must reasonably relate to DOL's statutory obligation to ensure that the use of H-2A workers does not adversely affect the wages and working conditions of workers in the United States. That is what the Challenged Provisions do. PI Order at 16 ("Final Rule is a valid method by which the DOL can ensure that American workers are not adversely affected by H-2A visaholders.").

Because the Challenged Provisions are a proper exercise of DOL's § 1188 rulemaking authority, the Court should grant Defendants summary judgment as to Counts Two and Three.

B. The Challenged Provisions Do Not Violate the NLRA.

Plaintiffs do not dispute Defendants' core argument that the cases addressing *Machinists* and *Garmon* preemption supply the proper analytical framework for assessing conflict between the NLRA and federal regulations. *See* Pls.' Opp'n at 4-5; *see also* Defs.' Mot. at 24-27 (setting forth argument). Under this applicable framework, the Challenged Provisions do not conflict with the NLRA, as demonstrated by the many cases holding that regulation of the classes of individuals excluded from the NLRA's definition of "employee" is permissible. *See* Defs.' Mot. at Defs.' Mot. at 26. Plaintiffs' opposition instead presses three arguments as to why the Challenged Provisions violate the NLRA, asserting that: (1) the provisions "create[] the same right to unionize for agriculture workers as the NLRA does for other employees," (2) the provisions "effectively neuter[]" the NLRA and "make[] it ineffective," and (3) "*Garmon* preemption applies to the [Challenged Provisions] because the NLRA's text" states that an employee under the NLRA "'shall not include' agricultural workers." Pls.' Opp'n at 3-5. None of these arguments hold up under further scrutiny.

[2] Plaintiffs' argument that the Challenged Provisions trigger the major questions doctrine because they allow DOL to "step[] into the state's regulatory role" misunderstands the NLRA's definitional provision for the same reasons outlined below. *See infra* at 8-12.

First, contrary to Plaintiffs' assertion, "H-2A workers will" not "have the same right to collective[ly] bargain as workers covered by the NLRA." Pls.' Opp'n at 3; *see also id.* (contending that "the effect" of the NLRA and the Challenged Provisions "is the same"). At the preliminary-injunction hearing, the Court noted that it was "dangerous" for Plaintiffs to continue referring to the Challenged Provisions as providing collective bargaining rights because that term "has a meaning" in labor law and "it's not colloquial" to incorrectly summarize the provisions as establishing that right. Hearing Tr. at 51:16-52:7. In its order granting a preliminary injunction, the Court recognized, as Defendants had argued, that the Challenged Provisions are "consequentially different from the NLRA because the Final Rule 'does not require H-2A employers to recognize labor organizations or to engage in any collective bargaining activities.'" PI Order at 22 (quoting 89 Fed. Reg. 33,901). Those differences are real, as Defendants have explained. *See* Defs.' Mot. at 23. Among many other differences, the Challenged Provisions: are enforced by DOL's Wage and Hour Division and do not extend the enforcement powers of the National Labor Relations Board to agricultural workers; do not provide for collective bargaining rights, grant any rights to labor organizations, or compel an employer to recognize or bargain with a union; do not provide for certification or representation elections, regulate unfair labor practices, or create any kind of labor relations board or process for handling representation cases or unfair labor practice complaints that the NLRA does; and do not otherwise purport to bring *any* workers within the ambit of the NLRA. *Id.* The Challenged Provisions aim much more narrowly to allow H-2A workers and those in corresponding employment to voice concerns to their employer, including by coming together as a group to voice those concerns and interests, without being subject to retaliation.

Second, and relatedly, the Challenged Provisions do not "neuter[]" the NLRA "and make[] it ineffective." Pls.' Opp'n at 4. Rather, the NLRA's employee definition and the Challenged Provisions have simultaneous and independent effect. Pursuant to the former, the panoply of rights and enforcement mechanisms of the NLRA which apply to many workers do not apply to agricultural workers; pursuant to the latter, H-2A employers (but not other agricultural employers)

must agree, among other assurances, that they will not retaliate against their agricultural workers for engaging in certain protected activities, such as speaking together with their employer about working conditions. Accordingly, even since the Challenged Provisions took effect, no agricultural worker has become protected by the NLRA or its distinct enforcement regime, and thus the Challenged Provisions do not "alter[]" the NLRA's employee definition.

Third, and most importantly, the Challenged Provisions do not impermissibly conflict with the NLRA's employee definition, under either the *Machinists* or the *Garmon* line of cases. As Plaintiffs acknowledge, *Chamber of Com. of U.S. v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996), and *UAW-Lab. Emp. & Training Corp. v. Chao*, 325 F.3d 360 (D.C. Cir. 2003) "analyze federal labor regulations under the preemption doctrine in two ways: *Garmon* preemption, which applies to activities the NLRA protects or prohibits, and *Machinist* preemption, which applies to activities the NLRA deliberately leaves unregulated." Pls.' Opp'n at 5. Although Defendants explain why that same analysis applies here, *see* Defs.' Mot. at 24-27, Plaintiffs offer no reason to depart from it, *see* Pls.' Opp'n at 4-6. Therefore, as Defendants urged in their motion, the Court should revisit its earlier analysis in light of this established caselaw. *See* Defs.' Mot. at 27 (noting that the Court has not yet addressed *Chamber of Commerce* and *UAW-Labor Employment & Training Corp.*).

Although Plaintiffs do not dispute that these preemption doctrines govern the analysis here, they disagree with how they should be applied. *See id.* Specifically, Plaintiffs contend that "*Garmon* preemption applies to the" Challenged Provisions because, according to Plaintiffs, "the NLRA's text makes a clear statement about federal authority over collective bargaining rights: employees have these rights and employees 'shall not include' agricultural workers." *Id.* But contrary to Plaintiffs' argument, the NLRA's text does not say that any "rights granted by the NLRA (not just the NLRA itself) 'shall not' apply" to agricultural workers. Pls.' Opp'n at 5. Rather, 29 U.S.C. § 152(3) is a definitional provision that defines the reach of the NLRA; it does not preclude wholesale any regulation of agricultural employees' interactions with their employers, whether by state or federal agencies. As the Court previously noted, Congress could have written the NLRA differently to affirmatively forbid any of the protections of the NLRA from

being extended to certain classes of employees. *See* Hearing Tr. at 26:25-27 (Congress could have, but did not, say "You can't collectively bargain if you are an agricultural worker[.]"); *see also id.* at 26:5-10 ("NLRA could have said, just writ large, agricultural workers, you're not allowed, you're not allowed collective action. That's one way they could have done it, or they could have done it the way they did it. They said, 'Employees are allowed but, agricultural workers, you're not an employee.'"). But Congress choose a different path and Plaintiffs offer no basis for this Court to effectively rewrite 29 U.S.C. § 152(3).

Further, Plaintiffs' argument that *Garmon* preemption applies runs afoul of their own concessions, as well as the governing case law. Plaintiffs have conceded that the NLRA does not preempt a state from affording protections to agricultural workers to engage in concerted activities for mutual aid and protection. *See* Pls.' Mot. at 12; *see also* Pls.' Opp'n at 6 n.2. That concession dooms Plaintiffs' NLRA argument. That is because, as previously set forth, the *Garmon* doctrine applies to the federal government in the same way that it applies to the states. *See Chamber of Com.*, 74 F.3d at 1333-34; *UAW-Lab. Emp. & Training Corp.*, 325 F.3d at 362-63; *see also* Defs.' Mot. at 24-27 (discussing cases). And, as noted above, Plaintiffs do not dispute this that the cases applying *Garmon* supply the proper conflict analysis here. *See* Pls.' Opp'n at 4-5; *see also* Defs.' Mot. at 24-27. Therefore, in asking whether a federal or a state regulation is barred by *Garmon*, courts ask the same question: Is the regulation "arguably . . . prohibited" by the NLRA? *See UAW-Lab. Emp. & Training Corp.*, 325 F.3d at 364. If not, pursuant to *Garmon*, neither federal nor state agencies are prohibited from issuing the regulation in question. Because, as Plaintiffs concede, state agencies are not barred from issuing the Challenged Provisions, neither is DOL. That is confirmed by the many cases—cited by Defendants and yet ignored by Plaintiffs—holding that the classes of employees excluded from the NLRA's "employee" definition may still be subject to other labor protections. *See* Defs.' Mot. at 26 (citing *UFW v. Ariz. Agric. Emp't Rels. Bd.,* 669 F.2d 1249, 1257 (9th Cir. 1982); *Willmar Poultry Co. v. Jones,* 430 F. Supp. 573, 577-78 (D. Minn. 1977); *Chamber of Commerce v. City of Seattle,* 890 F.3d 769, 793 (9th Cir. 2018)); *see also* 89 Fed. Reg. at 33,993 (addressing cases).

Accordingly, because the Challenged Provisions do not violate the NLRA, the Court should grant Defendants summary judgment as to Count One.

C. The Challenged Provisions Are Not Arbitrary and Capricious.

The Court also should reject Plaintiffs' arbitrary-and-capricious claims as meritless. As the Court has already said, "'[DOL] is obligated to balance the competing goals of the [IRCA] . . . .' The DOL made its judgment call. And it provided sufficient reasoning for its decision." PI Order at 18 (alterations in original) (quoting *AFL-CIO v. Dole*, 923 F.2d 182, 186 (D.C. Cir. 1991)). Nothing more is required under the APA. *See FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021) (recounting that, under the APA, a court "simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision.").

Plaintiffs' argument that DOL was not permitted by Congress to consider the rights of workers to engage in concerted action—or, in their incorrect words, "collective bargaining," Pls.' Opp'n at 16—is entirely duplicative of their NLRA arguments. If Congress did not explicitly forbid DOL from issuing a Rule regarding the right to engage in concerted action, then Congress did not forbid DOL from considering that as a factor in the rulemaking process. Plaintiffs offer no basis to find otherwise.

Plaintiffs' next argument that DOL's explanation for the Rule is not sufficiently "reasoned" is also without merit, as the Court has already held. *Id.*; PI Order at 18. Plaintiffs' argument amounts to nothing more than a policy disagreement, which is not a basis for finding the Rule to be arbitrary and capricious. *See, e.g.*, *Inv. Co. Inst. v. CFTC*, 720 F.3d 370, 380 (D.C. Cir. 2013).

Their argument that DOL did not justify a "sharp departure" from prior policy is similarly flawed. Pls.' Opp'n at 17. There is no heightened standard for an agency to justify a policy that is different from prior policy. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). The agency just needs to provide a reasoned explanation for the change. *See id.* DOL did that here.

Plaintiffs' final argument, that DOL did not adequately explain the *legal* basis for the Rule, *i.e.*, the source of DOL's authority to issue this Rule, *see* Pls.' Opp'n at 17, was not raised in

Plaintiffs' initial brief in support of summary judgment. In any event, this argument is duplicative of Plaintiffs' statutory-authority claim. Because DOL has authority to issue this Rule, *see supra* Part I.A, the arbitrary-and-capricious argument fails.

Accordingly, because the Challenged Provisions are not arbitrary and capricious, the Court should grant Defendants summary judgment as to Count Four.

II. The States Lack Standing.

Plaintiffs assert that if the Private Plaintiffs have standing, "the Court can end its standing analysis as all Plaintiffs are seeking the same relief." This is not so, for "standing is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). Moreover, the Plaintiffs do not all seek the same relief: the Private Parties seek, in part, an injunction as to their farms; and the State Plaintiffs seek, in part, an injunction that applies to all employers within their States. The Court must independently assess the standing of each party because, if the States lack standing, it would be inappropriate to issue relief running to them. *See* Defs.' Mot. at 40-41.[3]

Plaintiffs' explanation of the harm that States will suffer is also inadequate. Nowhere do their declarations quantify the amount of federal funds that the SWAs receive for H-2A related activities or compare those numbers to the amount of state money that must be spent. And Plaintiffs do not disagree that they receive some federal funds that can be used for H-2A related activities, including implementation of the Final Rule. Instead, Plaintiffs flip the burden onto Defendants to show that the States' costs will *not* be completely covered by federal funds. *See* Pls.' Opp'n at 19-20. Plaintiffs, not Defendants, have the burden of establishing standing. *Ga. Republican Party v. Sec. & Exch. Comm'n*, 888 F.3d 1198, 1201 (11th Cir. 2018). The States' failure to provide any data on federal funds provided compared to State funds spent means that

[3] As Plaintiffs correctly note, only one plaintiff needs to have standing for the Court to have jurisdiction over *the case*, meaning that it can decide the merits. *See* Pls.' Opp'n at 18. But reaching the merits in a case is not the same as issuing relief to parties that are not properly before the Court because they lack standing. *See California v. Texas*, 593 U.S. 659, 672 (2021) ("Remedies . . . 'operate with respect to specific parties,'" not "on legal rules in the abstract." (citation omitted)).

they have not met their burden of showing that they have uncompensated administrative costs associated with the Rule. The Court therefore must rule that the States lack standing.[4]

IV. Universal Relief Is Not Warranted.

The Court should not enter nationwide relief, whether in the form of vacatur or a permanent injunction. As this Court already recognized, universal relief is disfavored and not appropriate in this case. *See* PI Order at 31-36. Since universal relief under the APA "would have the same effect as a nationwide [permanent] injunction, the same risks associated with nationwide [permanent] injunctions would attain." *Id.* at 34.

Plaintiffs' arguments in favor of vacatur should be rejected. Plaintiffs argue at length that a court *can* vacate an agency's rule, meaning, in Plaintiffs' assessment, that the rule would be inoperative nationwide. *See* Pls. Opp'n at 22–25. But to say that this Court has the *power* to do something does not establish that such action would be appropriate in this case. Nor does Plaintiffs' concluding remark that vacatur is "more than just discretionary" under the language of 5 U.S.C. § 706, *id.* at 25, compel a different result. No court in this circuit has ever held that a court *must* vacate an unlawful agency action under the APA if another remedy is available. The APA "was primarily intended to reflect existing law," not "to fashion new rules of intervention for District Courts." *Sampson v. Murray*, 415 U.S. 61, 68 n.15 (1974) (discussing stays under 5 U.S.C. § 705). No federal court had issued a nationwide injunction before Congress's enactment of the APA in 1946, nor would any court do so for more than fifteen years thereafter. *See Trump v. Hawaii*, 585 U.S. 667, 716 (2018) (Thomas, J., concurring). A court "do[es] not lightly assume that Congress has intended to depart from established principles" regarding equitable discretion. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). The Supreme Court therefore has confirmed that, even in an APA case, "equitable defenses may be interposed," *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 155 (1967), such as a court's inherent power to define the scope of relief granted.

[4] For the same reasons, and for the reasons explained in Defendants' cross-motion, *see* Defs.' Mot. at 36-38, the States cannot show irreparable harm and are not entitled to relief.

The arguments Plaintiffs offer now as to why the Court *should* issue universal relief, *see* Pls.' Opp'n at 26–27, simply repeat the arguments they offered in favor of a nationwide preliminary injunction. Plaintiffs say that (1) universal relief is appropriate in immigration cases, (2) lack of uniformity weighs against party-specific relief, and (3) universal relief is more easily administrable. *See id.* But the Court has considered these arguments before and rejected them, *see* PI Order at 34–36, and should reject them again here for the same reasons and because Plaintiffs offer no new grounds for nationwide relief.[5]

Finally, nationwide relief would be particularly problematic now because there are three other district courts in different circuits considering challenges to the same Rule. *See Barton v. DOL*, No. 5:24-cv-24 (E.D. Ky.); *N.C. Farm Bureau Fed'n, Inc. v. DOL*, No. 5:24-cv-527-FL (E.D.N.C.); *Int'l Fresh Produce Ass'n v. DOL*, No. 1:24-cv-309-HSO-BWR (S.D. Miss.). A nationwide remedy would render any orders that might follow in those courts meaningless as a practical matter. It would also preclude appellate courts from testing Plaintiffs' claims against the Final Rule's operation in other jurisdictions. Moreover, more than half of the States are not challenging the Final Rule. There is no reason why Plaintiffs' disagreements with the Rule should govern the rest of the country. *See California v. Azar*, 911 F.3d 558, 583 (9th Cir. 2018) ("The determinantal consequences of a nationwide injunction are not limited to their effects on judicial decisionmaking. There are also the equities of non-parties who are deprived the right to litigate in

[5] Plaintiffs also argue that DOL has improperly interpreted the Court's preliminary injunction order as not applying to employers who have subsequently joined as a member of GFVGA. *See* Pls.' Opp'n at 27. Whether Defendants' interpretation of the preliminary injunction order is correct is a separate issue that has not been properly raised in summary judgment briefing, not an argument in favor of nationwide relief. In any event, "standing is to be determined as of the commencement of suit," *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 571 n.5 (1992), and a "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties," *Valley Forge Christian Coll. v. Am. United for Sep. of Church & St., Inc.*, 454 U.S. 464, 474 (1982) (citation omitted). Likewise, equity has long limited mechanisms whereby potentially affected individuals may "await developments in the trial or even final judgment on the merits in order to determine whether participation would be favorable to their interests." *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547 (1974). DOL thus has rightly interpreted the Court's order as not applying to future members of GFVGA absent any indication to the contrary.

other forums."); *see also id.* at 582–84 (vacating nationwide scope of injunction in facial challenge under the APA).

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

Finally, as Defendants explained, *see* Defs.' Mot. at 41–42, each of the Challenged Provisions is severable from the remainder of the Final Rule, and if the Court finds one or more provision to be unlawful, it should sever those provisions and allow the remainder of the Rule to go into effect. The Rule contains many provisions that Plaintiffs do not even challenge.[6] There is no good reason for the Court not to allow those provisions to take effect.

Plaintiffs offer no persuasive arguments against severability. They say that there is no evidence that DOL considered how the different provisions would operate if one or more provision is found unlawful. *See* Pls.' Opp'n at 28. That is not true. As previously discussed, the Rule contains a severability clause, which indicates that DOL *did* consider the separate operability of each provision. *See* Defs.' Mot. at 42; *see also* 89 Fed. Reg. at 33,952–53 (discussion in the preamble of the various provisions that can operate independently). In any event, the independent operation of these clauses is self-evident. For example, the provision that workers be required to wear seatbelts in moving vehicles, *see* 20 C.F.R. § 655.122(h)(4)(ii), clearly operates independently of the worker voice and empowerment provisions and can stand alone on its own. The same goes for the provision that employers cannot confiscate or withhold workers' passports, *see* 20 C.F.R. § 655.135(o), as well as for the many other unchallenged provisions.

Plaintiffs also fault Defendants for not providing a "roadmap" as to severability and claim that Defendants are asking the Court to "rewrite" the Rule. Pls.' Opp'n at 28. But in fact, the

[6] *See, e.g.*, 20 C.F.R. § 655.122(h)(4)(ii) (requiring use of seatbelts in vehicles); 20 C.F.R. § 655.122(n) (providing definition of termination "for cause"); 20 C.F.R. § 655.135(o) (prohibiting employers from confiscating or withholding workers' passports); 20 C.F.R. § 655.137 (requiring employers to provide certain information about foreign labor recruitment activities); 20 C.F.R. § 655.182 (modifications to debarment process); 20 C.F.R. §§ 658.500–04 (modifications to discontinuation process); *see also* 89 Fed. Reg. at 34,048–60 (changes to effective date of the annual AEWR calculation).

roadmap is simple: if the Court agrees with Plaintiffs' arguments on the merits, it should enjoin enforcement of only the provisions against which Plaintiffs mount a (successful) merits argument, *i.e.*, 20 C.F.R. § 655.135(h)(2) and 29 C.F.R. § 501.4(a)(2). *See* Defs.' Mot. at 41–42.[7] Doing so would not "rewrite" the Rule; Defendants are not asking the Court to add or substitute any words in the Rule, they are merely noting that the Court should at most enjoin enforcement of the allegedly unlawful provisions.

CONCLUSION

The Court should grant summary judgment in favor of Defendants.

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Respectfully submitted,

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[7] Plaintiffs still do not appear to offer any merits argument as to 20 C.F.R. § 655.135(m) (the designated-representative provision). *Contra* Pls.' Opp'n at 4 n.1 (claiming that § 655.135(m) mirrors a provision of the NLRA). They say generally that the Rule violates the NLRA, but their argument generally concerns concerted activity (incorrectly dubbed by Plaintiffs as "collective bargaining"), which is tied to the assurances provision of § 655.135(h)(2). They do not offer any merits argument as to why having a representative at investigatory interviews is not authorized by the INA or violates the NLRA. Plaintiffs likewise offer no merits argument against 20 C.F.R. § 655.135(n) (providing limited right of workers to invite guests into employer-furnished housing).

CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2024, I electronically filed the foregoing paper with the Clerk of Court using this Court's CM/ECF system, which will notify all counsel of record of such filing.

/s/ Michael J. Gaffney
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