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

STATE OF KANSAS, et al.,	)	
Plaintiffs,	)	Civil Action No. 2:24-cv-76-LGW-BWC
v.	)	
THE UNITED STATES DEPARTMENT OF LABOR, et al.,	)	
Defendants.	)	

BRIEF OF AMICI CURIAE CENTRO DE LOS DERECHOS DEL MIGRANTE, CANDELARIO RODRIGUEZ SERRANO, AND JORGE SÁNCHEZ REYES IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Statutes

Rules and Regulations

Other Authorities

Centro de Los Derechos del Migrante (CDM) and Candelario Rodriguez Serrano and Jorge Sánchez Reyes submit this brief as amici curiae in opposition to Plaintiffs' motion for summary judgment and in support of Defendants' cross-motion for summary judgment.

INTRODUCTION

In 1986, Congress created the H-2A program to allow employers to hire temporary foreign agricultural workers when there are insufficient domestic workers willing and able to perform a given job. When doing so, Congress understood that allowing the importation of foreign workers might incentivize employers to offer substandard wages and working conditions that domestic workers would not accept, which would itself have a depressive effect on the wages and conditions of domestic workers. Thus, Congress vested the Secretary of Labor with a significant role in the H-2A program, conditioning the issuance of an H-2A visa on the Secretary's certification that

domestic labor is unavailable and that the use of H-2A labor will not have an adverse effect on the wages and working conditions of domestic workers similarly employed. As the Department of Labor (DOL) and courts have consistently recognized, Congress left to DOL the responsibility of figuring out whether particular practices have such an adverse effect. Over the past four decades, DOL has done just that, adopting regulations setting out in detail what H-2A employers must do to demonstrate a lack of available domestic workers, the wages and conditions that H-2A employers must provide their workers to avoid an adverse effect, and an administrative enforcement apparatus to carry out Congress's instructions.

Here, Plaintiffs challenge an April 2024 rule that amends those long-standing regulations in response to well-documented abuses that led to substandard conditions for H-2A workers and exerted downward pressure on the wages and conditions of domestic workers. *See* DOL, Final Rule, Improving Protections for Workers in Temporary Agriculture in the United States, 89 Fed. Reg. 33898 (Apr. 29, 2024). But as this Court concluded in its ruling on Plaintiffs' motion for a preliminary injunction, "the Final Rule is a valid method by which the DOL can ensure that American workers are not adversely affected by H-2A visaholders" and "does not exceed the Final Rulemaking authority granted to the DOL by Congress." ECF 99 at 14, 19.

Nonetheless, while recognizing that DOL "acted within its authority as pr[e]scribed by Congress," the Court held that Plaintiffs were likely to prevail on their claim that DOL violated the National Labor Relations Act (NLRA) by "creat[ing] rights that Congress has not." *Id.* at 25–26. This analysis conflated two separate questions: whether certain challenged provisions are within the affirmative authority Congress gave to DOL, and whether the National Labor Relations Act serves as a limit on that authority. As to the first question, case law regarding agencies' ability to create private rights of action is not relevant. Those cases recognize that agencies may confer

benefits on individuals or entities, but that those benefits are not privately enforceable in court. Here, DOL has the statutory authority to prohibit practices that cause an adverse effect on the wages or working conditions of U.S. agricultural workers, as it has long done. That such prohibitions can be described as "rights" does not make them invalid exercises of the statutory authority that Congress conferred upon DOL to prevent adverse effect. And as to the NLRA, courts have long recognized that the statute is agnostic as to the regulation of concerted activity by agricultural workers—providing neither a source of protections nor a limitation on protections that may be afforded via independent statutory authority.

In addition, most of the Rule's provisions do not concern collective or concerted activity at all, but rather focus on topics like the effective date of annual recalculations of the minimum required wage rate, transparency as to the offered wage rate, and the effect of delayed start dates. Accordingly, even if the Court finds the specifically challenged provisions (20 C.F.R. §§ 655.135(h)(2) and (m), and 29 C.F.R. § 501.4(a)(2)) unlawful, well-established principles of administrative law limit the relief available to Plaintiffs to severance and vacatur of those provisions only, because the remainder of the Rule can fully function without them and the agency intended that those provisions be severable.

INTERESTS OF AMICI CURIAE

Amicus CDM is a nonprofit organization with offices in the United States and Mexico, focused on promoting migrant workers' rights under U.S. law. Since its founding in 2005, CDM has worked with thousands of H-2A workers, as well as U.S. workers in corresponding employment and workers on other kinds of visas, in various capacities. CDM provides legal services to workers and, together with other partners, conducts outreach and education regarding health and community resources. CDM has experienced obstacles in conducting this work due to

workers' fears of retaliation and employer intimidation, and restrictions on access to employer-provided housing. CDM has also convened the Comité de Defensa del Migrante (Migrant Defense Committee, or "Comité"), a group of current and former migrant workers in the H-2A and other programs. The Comité, which does not engage in collective bargaining, works to empower and organize migrant workers in the United States and in their home communities, to create a culture of informed migration, and to center migrant workers' perspectives in conversations about policies that affect them. Fear of retaliation constrains some Comité members' ability to carry out the organizing and educational activities that are central to the Comité's mission. CDM submitted comments as part of the rulemaking at issue in this action.

Amici Candelario Rodriguez Serrano and Jorge Sánchez Reyes are Mexican nationals who have performed seasonal work in the United States under the H-2A program and intend to continue to do so. In their prior H-2A work, they experienced poor treatment by employers, including delayed wages, unsafe transportation, retaliation for complaints about working conditions on behalf of themselves and others, and restrictions on their ability to access medical services.

BACKGROUND

I. The H-2A Program

Enacted in 1952, the Immigration and Nationality Act (INA) created an "H-2" nonimmigrant visa category for temporary foreign workers. *See* Cong. Res. Serv., H-2A and H-2B Temporary Worker Visas: Policy and Related Issues at 1 (May. 11, 2023), https://crsreports.congress.gov/product/pdf/R/R44849. Under that statute, the Department of Justice (DOJ) promulgated regulations making the Secretary of Labor "responsible for whatever fact finding and evaluation are necessary to effectuate the statutory purpose of protecting domestic

workers' right to work." *Fla. Sugar Cane League, Inc. v. Usery*, 531 F.2d 299, 300–01 (5th Cir. 1976). The Secretary in turn issued further regulations to guide his exercise of that duty. *Id.*

As to agricultural workers, the DOL and DOJ "regulations d[id] not fully meet the need for an efficient, workable and coherent program that protects the interests of agricultural employers and workers alike." H.R. Rep. No. 99-682 (I), at 80 (1986). As a result, as part of the Immigration Reform and Control Act of 1986 (IRCA), Congress amended the INA to separate the pre-existing nonimmigrant visa H-2 program into two separate programs, referred to as the H-2A program for agricultural workers, and the H-2B program for non-agricultural employment. Pub. L. 99-603, 100 Stat. 3359 (1986), *codified at* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a)–(b). As to the H-2A program, the amendments expanded the role for the Secretary of Labor, codifying previous regulations establishing the foreign labor certification process, and limiting H-2A visas to situations where the Secretary certified "(A) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and (B) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed." *Id.* § 301, *codified at* 8 U.S.C. § 1188(a)(1). The amended statute also requires the Secretary to evaluate whether certain additional conditions exist before granting such certifications, *id.*, *codified at* 8 U.S.C. §§ 1188(c)–(d), and gives the Secretary vast enforcement authority to ensure that employers abide by the statute, regulations, and terms of employment contracts, *id.*, *codified at* 8 U.S.C. § 1188(g)(2).

Recognizing that "the amendments to the INA made by IRCA codify DOL's role in the temporary alien agricultural labor certification process," DOL first published H-2A regulations in 1987. DOL, Interim Final Rule, Labor Certification Temporary Employment of Aliens in

Agriculture and Logging in the United States, 52 Fed. Reg. 20496 (June 1, 1987) (1987 Rule); *see* DOL, Interim Final Rule, Enforcement of Contractual Obligations for Temporary Alien Agricultural Workers Admitted Under Section 216 of the Immigration and Nationality Act, 52 Fed. Reg. 20524 (June 1, 1987). Under these Rules, state agencies that receive funding as part of the Employment Service system provide recruitment and other services for employers pursuant to the Wagner-Peyser Act, 29 U.S.C. §§ 49–49n. DOL has updated these regulations periodically in the ensuing four decades, but they have long "include[d] provisions related to housing, meals, work-related equipment, and transportation." *Arriaga v. Fla. Pac. Farms, LLC*, 305 F.3d 1228, 1232–33 (11th Cir. 2002); *see, e.g.*, DOL, Final Rule, Temporary Agricultural Employment of H-2A Aliens in the United States, 87 Fed. Reg. 61660 (Oct. 12, 2022); DOL, Final Rule, Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement, 73 Fed. Reg. 77110 (Dec. 18, 2008).

II. The Challenged Rule

In September 2023, DOL issued a proposal to amend the H-2A regulations "in order to prevent exploitation and abuse of agricultural workers and ensure that unscrupulous employers do not financially gain from their violations or contribute to economic and workforce instability by circumventing the law, both of which would adversely affect the wages and working conditions of workers in the United States similarly employed, and would undermine the Department's ability to determine whether there are, in fact, insufficient U.S. workers for proposed H-2A jobs." DOL, Notice of Proposed Rulemaking, Improving Protections for Workers in Temporary Agricultural Employment in the United States, 88 Fed. Reg. 63570, 63753 (Sept. 15, 2023). After a public comment period, the agency issued the final rule. 89 Fed. Reg. 33898. The Rule contains dozens

of operative provisions and amends pre-existing program regulations on a range of topics, which can be divided into three categories.

Employment Service Regulations. First, the Rule amends 20 C.F.R. parts 651, 653, and 658, subpart F, which govern state workforce agencies' (SWAs) provision of Employment Service (ES) services to employers, including access to the Agricultural Recruitment System—which helps agricultural employers recruit temporary qualified U.S. workers.[1] These revisions include changes to debarment rules for employers' successors in interest, provisions as to when services may be discontinued, provisions regarding how wages are to be displayed in job orders, and duties relating to misrepresentation or noncompliance by employers. *See* Rule, 89 Fed. Reg. at 33904–36.

Labor certification process regulations. The Rule also amends 20 C.F.R. part 655, subpart B, which governs the H-2A labor certification process. *See* 89 Fed. Reg. at 33936–34041 (discussing changes to part 655, subpart B). This includes amendments to 20 C.F.R. § 655.135, which sets out the required assurances and obligations of H-2A employers. Rule, 89 Fed. Reg. at 34062–63. The prior version of the Rule prohibited employers from retaliation based on the filing of administrative complaints or testimony, invoking any H-2A statutory or regulatory rights, or seeking legal assistance regarding the H-2A program. *See* 20 C.F.R. § 655.135(h) (2022). To these prohibited bases of retaliation, the agency added consultation with a "key service provider," defined to include healthcare workers, clergy, attorneys, law enforcement, and others; and the filing of a complaint or participation in an investigation or proceeding relating to the violation of any federal, state, or local law or regulation. 20 C.F.R. § 655.135(h)(1).

[1] "An employer's initial use of the agricultural clearance order process for domestic workers, … is … a prerequisite to the employer's subsequent application for authorization to hire foreign workers through the H–2A program." *Tex. RioGrande Legal Aid, Inc. v. Range*, 594 F. App'x 813, 819 (5th Cir. 2014) (citing 20 C.F.R. § 655.121(a) (2010)).

The Rule also adds a new provision prohibiting employers from intimidating or retaliating against any agricultural employee on the basis that they had engaged in, or refused to engage in, "activities related to self-organization" or "other concerted activities for the purpose of mutual aid or protection relating to wages or working conditions," or because they had refused to attend, listen to, or view employer-sponsored communication regarding such activity. *Id.* § 655.135(h)(2). Employers are also required to permit any H-2A worker or domestic worker in corresponding employment to designate a representative to attend and provide assistance in any investigatory interview that might lead to disciplinary action. *Id.* § 655.135(m). And employers must permit workers to invite guests into employer-furnished housing, outside their workday, subject to reasonable restrictions designed to protect worker safety or prevent interference with other workers' enjoyment of housing areas. *Id.* § 655.135(n).[2]

DOL also altered the procedure for when the agency's annual changes to the "Adverse Effect Wage Rate" takes effect. The previous regulation provided that any new such rate —which often serves as the minimum wage required for an H-2A job—would take effect on the "effective date" specified in the Federal Register. 20 C.F.R. § 655.120(b)(3) (2023). Under the amended regulation, any increased rate is effective as of the date of publication. 20 C.F.R. § 655.120(b)(3).

The previous rule specified that, when an employee is terminated for cause or abandons their employment, the employer is released from certain obligations, but did not specify what constitutes a termination "for cause." *See, e.g.*, 20 C.F.R. §§ 655.122(i)(5), (n) (2022). The new Rule specifies when a termination can be labeled as such. 20 C.F.R. § 655.122(n)(2). It also adds a new provision addressing an employer's obligations where a work start date is delayed after an

[2] 20 C.F.R. § 655.135(h)(2), (m), and (n), are collectively referred to as the "worker voice and empowerment" provisions. *See, e.g.*, 89 Fed. Reg. at 33901. Plaintiffs do not make any arguments as to § 655.135(n) in their memorandum.

employer obtains a certification. *Id.* § 655.175. Where such a delay is less than fourteen days, the employer is not required to withdraw or resubmit a certification application, so long as it timely informs workers of the delay (or pays them) and provides for transportation and subsistence for workers who were already traveling to their place of employment. *Id.* § 655.175(b).

Finally, the Rule includes a number of provisions aimed at transparency, specifying what wage rates must be provided in a job order, including overtime wage rates and the circumstances under which overtime wages are available, if overtime is available at all. *See Id.* §§ 655.120(a), 655.122(l)(4), 655.210(g)(3).

Along with these substantive changes, DOL added a severability provision, specifying that any provision of part 655, subpart B held to be invalid or unenforceable is "severable from [part 655] and shall not affect the remainder thereof." *Id.* § 655.190.

Enforcement regulations. The last section of the Rule revises 29 C.F.R. part 501, which covers the enforcement procedures for violations of the requirements of the H-2A program, including obligations to domestic workers. The revisions largely track the substantive revisions in other sections. *See* 89 Fed. Reg. at 34041–43.

ARGUMENT

I. Congress delegated broad statutory authority to DOL to issue regulations to prevent H-2A visas from having an adverse effect on domestic workers.

"When the best reading of a statute is that it delegates discretionary authority to an agency," the judicial review contemplated by the Administrative Procedure Act is limited to interpreting the statute to "fix[] the boundaries of the delegated authority and ensuring the agency has engaged in reasoned decisionmaking within those boundaries." *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2264 (2024) (internal citations omitted). As this Court previously explained, "the 'best reading' of § 1188, in its entirety, is that Congress granted the DOL the authority to issue

regulations to ensure that any certifications it issues for H-2A visas do not 'adversely affect' American agricultural workers." ECF 99 at 15; *see also AFL-CIO v. Dole*, 923 F.2d 182, 184–87 (D.C. Cir. 1991) (recognizing that section 1188 provides DOL a "rather broad congressional delegation").[3] As DOL put it, "Congress clearly envisioned that DOL would play a crucial role in the process as the Secretary issues certifications, assesses temporary need, and takes actions to ensure employer compliance with the terms and conditions of employment, including promulgating regulations to effectuate their responsibilities under the INA." Rule, 89 Fed. Reg. at 33939 (citing 8 U.S.C. § 1101(a)(15)(H)(ii) and §§ 1188(a)–(g)(2)).

The delegation of authority to DOL is clear from the statutory text and context. To start, section 1188(a)(1) specifies that "a petition to import an alien as an H-2A worker" cannot be granted unless an employer has applied to the Secretary of Labor for a certification that:

> (A) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and (B) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

This provision codified regulations that the Attorney General had issued under the pre-amendment INA with respect to the H-2 program. *Fla. Sugar Cane*, 531 F.2d at 300 (discussing then-applicable regulations and statute). As the pre-split Fifth Circuit explained in *Florida Sugar Cane*, these regulations delegated to DOL "whatever fact finding and evaluation [was] necessary to effectuate the statutory purpose of protecting domestic workers' right to work," and "conferr[ed] extensive discretionary authority upon the Secretary of Labor." *Id.* at 303. Pursuant to that authority, the

[3] Plaintiffs assert that "prior cases reviewing DOL's H-2A rulemaking authority under the IRCA… relied on *Chevron* deference" and thus suggest they are no longer good law. ECF 111 at 13. That is not correct. *AFL-CIO v. Dole* did not invoke *Chevron*; rather, consistent with *Loper Bright*, the D.C. Circuit there identified a "broad congressional delegation" and found "a policy decision taken within [its] bounds." 923 F.2d at 187.

Secretary had promulgated extensive regulations relating to both the certification process and the requisite wages and working conditions. *See id.* at 301 (discussing regulations).

In enacting IRCA and specifying a role for the Secretary of Labor, Congress intended to expand DOL's authority, not diminish it. *See* 1987 Rule, 52 Fed. Reg. at 20496 (expressing agency's contemporaneous understanding of the statutory purpose). As the Supreme Court has explained, when Congress adopts a provision "'obviously transplanted from another legal source,' it 'brings the old soil with it.'" *George v. McDonough*, 596 U.S. 740, 746 (2022). Here, Congress did just that and more, as demonstrated by other provisions of section 1188, which, while not explicitly granting DOL regulatory authority, repeatedly reference existing DOL regulations and contemplate future regulations.

Section 1188(b), for example, lists conditions under which the Secretary "may not issue a certification under subsection (a)." The very first such condition is if:

> There is a strike or lockout in the course of a labor dispute which, *under the regulations*, precludes such certification.

8 U.S.C. § 1188(b)(1) (emphasis added). This statutory provision undercuts Plaintiffs' arguments about regulatory authority both in general and as applied to the realm of labor relations. Had Congress not intended the Secretary to have the authority to issue regulations regarding the grant of certifications under subsection (1), this provision would make no sense. And although no statute gave farmworkers the right to strike, Congress plainly thought that it was appropriate for DOL to issue regulations regarding striking farmworkers. Other provisions of section 1188(b) charge the Secretary with discretionary judgment, including requirements that the Secretary determine whether assurances regarding workers' compensation are "satisfactory," and whether recruitment efforts have been sufficient. *Id.* §§ 1188(b)(3), (4).

Section 1188(c), which provides "rules" for the consideration of labor certification applications, also plainly contemplates that DOL would issue further substantive regulations. For example, such a certification should be granted if, among other things, "the employer has complied with the criteria for certification (including criteria for the recruitment of eligible individuals a*s prescribed by the Secretary*)." *Id.* § 1188(c)(3)(A)(i) (emphasis added). Criteria are typically "prescribed" via regulation. The statute also provides that, for three years from its effective date, certain employers must "provide benefits, wages and working conditions required pursuant to this section and *regulations*," and provides scenarios in which then-operative section 20 C.F.R. § 655.202(b)(6) "or any successor regulation" regarding displaced H-2A workers would not apply. 8 U.S.C. §§ 1188(c)(3)(B)(i), (vi) (emphasis added). And section 1188(c)(4) specifies that "[e]mployers shall furnish housing in accordance with regulations." None of these provisions is itself a grant of rulemaking authority, but each plainly recognizes that such rulemaking authority exists.

The broad enforcement powers granted to the Secretary in section 1188(g)(2) confirm that Congress contemplated far more than a ministerial role for DOL. That provision authorizes her to "take such actions, including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be necessary to assure employer compliance with terms and conditions of employment under this section."

These statutory provisions distinguish the role Congress created for DOL in the H-2A program from the one that it created for DOL in the H-2B program, which was at issue in *Bayou Lawn & Landscape Services v. Secretary of Labor*, 713 F.3d 1080 (11th Cir. 2013), and on which Plaintiffs heavily rely. Indeed, in *Bayou Lawn & Landscape*, the Eleventh Circuit explicitly distinguished between the H-2A and H-2B programs, noting that Congress had specifically granted

DOL authority as to the former, but not the latter, under which all authority rests with the Department of Homeland Security (DHS). *Id*. at 1084. The statutory provision on which DOL relied in that case, 8 U.S.C. § 1184(c)(1), and which requires DHS to "consult" with appropriate agencies, resembles that which applied to the H-2 program before Congress adopted IRCA and decided to create an extensive role for DOL in the H-2A program. As amended, though, the duty to ensure that H-2A work does not negatively impact the domestic workforce plainly lies with DOL, not any other agency.

Plaintiffs argue that DOL's authority is nonetheless limited because the power to "certify" in section 1188(a)(1) implies only a ministerial function, ECF 111 at 25. But there is no reason why that is so. A government official cannot "certify" whether labor or services would have an adverse effect on the wages or working conditions of domestic workers without first determining whether that is true. As DOL explained more than thirty years ago, the statute "leaves to the Secretary the task of developing operational standards to effect the Congressional purpose" and "require[s] the Secretary to develop systematic standards and procedures for deciding upon labor certification applications." DOL, Final Rule, Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States: Prevailing Practice Determinations, 57 Fed. Reg. 43118, 43119 (Sept. 17, 1992). Indeed, since 1987—the year after the H-2A program was created—DOL has consistently understood the statute to provide rulemaking authority. *See* 1987 Rule, 52 Fed. Reg. at 20507. That interpretation "issued contemporaneously with the statute at issue, and which ha[s] remained consistent over time," is "especially useful in determining the statute's meaning." *Loper Bright*, 144 S. Ct. at 2262, *quoted in Perez v. Owl, Inc.*, 110 F.4th 1296, 1308 (11th Cir. 2024). And this interpretation has been repeatedly endorsed by reviewing courts. *See, e.g.*, *Overdevest Nurseries, L.P. v. Walsh*, 2 F.4th 977, 983 (D.C. Cir. 2021); *Mendoza v. Perez*,

754 F.3d 1002, 1021 (D.C. Cir. 2014); *Fla. Growers Ass'n v. Su*, No. 8:23-CV-889, 2024 WL 670464, at *2 (M.D. Fla. Jan. 5, 2024), *report and recommendation adopted*, No. 8:23-CV-889, 2024 WL 1343021 (M.D. Fla. Mar. 29, 2024).

II. The challenged worker voice and empowerment provisions are within DOL's statutory and constitutional authority.

The challenged worker voice and empowerment provisions are within the bounds of the broad authority delegated to DOL to protect against an adverse effect on the wages and working conditions of domestic workers. As DOL explained, and as demonstrated by the record, the practices the Final Rule prohibits have had an adverse effect on domestic workers; it is thus within DOL's authority to regulate them. Neither the fact that the prohibition on such practices confers benefits or rights on agricultural workers, nor the major questions doctrine, alters that conclusion.

A. The challenged provisions are reasonably designed to prevent an adverse effect on domestic workers.

The purpose of the worker voice and empowerment provisions is "to prevent adverse effect on similarly employed workers by ensuring that workers have the tools to ensure that their rights under the H-2A program are not violated and to advocate regarding the terms and conditions of their employment, on more equal footing with similarly employed workers in the United States." 89 Fed. Reg. at 33992; *see id.* at 33991 (explaining that the provisions "reduce the potential for th[e H-2A] workforce's vulnerability to undermine the advocacy efforts of similarly employed [domestic] workers"); *id.* (discussing "evidence that collective action by workers can help prevent adverse effect, particularly through improving employer compliance with the terms and conditions of employment under the H-2A program"); *id.* at 33987 (explaining that challenged provisions are exercise of DOL's "broad authority to implement the INA's prohibition on adverse effect"); *id.* at 33990 (explaining why these provisions are "necessary to prevent adverse effect on the wages and working conditions of workers in the United States similarly employed"); *id.* at 34005 (similar).

In arguing that the Rule exceeds DOL's statutory authority, Plaintiffs argue that DOL cannot take actions that "improve migrant worker wages and working conditions at all." ECF 111 at 17. That argument ignores basic economics and the entire point of the statute's adverse effect provision: Poor wages and working conditions for H-2A workers cause an adverse effect on domestic workers, and thus DOL has an *obligation* to prevent such wages and working conditions. *Williams v. Usery*, 531 F.2d 305 (5th Cir. 1976), cited by Plaintiffs, ECF 111 at 17–18, does not suggest otherwise. There, in holding that a DOL regulation *was* within the agency's authority under the pre-IRCA INA, the court rejected a farmworker's argument that the Secretary had "an obligation" to set a wage "high enough to attract those domestic workers not otherwise willing to work in sugar cane." 531 F.2d at 305. In so doing, the court explained that, under the then-operative statute and as to wage rates in particular, the Secretary's duty was, "in the absence of specific statutory standards," to prescribe a wage rate "reasonably suited to achieve the statutory purpose of guarding against a general wage deflation from the employment of foreign workers." *Id.* at 307. The Secretary did not, the court held, have a more general duty to prescribe "attractive wages" for domestic workers. *Id.*

Williams confirms that the Secretary *does* have the authority to prescribe regulations to guard against an adverse effect on domestic workers. That decision did not bar the Secretary from promulgating any rule that had the *effect* of increasing wages or working conditions of workers; rather, it held that any rule promulgated by the Secretary must be "reasonably suited" to "neutralize any adverse effect resultant from the influx of temporary foreign workers." *Id.* at 306. This holding is consistent with the holding in *Florida Sugar Cane League*, decided as a companion case to *Williams*, that "the Secretary might have utilized any of a number of reasonable formulas to prevent the employment of seasonal foreign workers from having an adverse effect upon domestic

workers," given that the statute "does not specify the particular way in which avoidance of this adverse effect must be determined." 531 F.2d at 304.

Here, the provisions identified by Plaintiffs do not run afoul of *Williams*. DOL explicitly and repeatedly explained how the provisions identified by Plaintiffs are designed to neutralize any adverse effect resultant from the influx of temporary foreign workers. As Plaintiffs concede, ECF 111 at 18, DOL has regulatory authority to do just that. Plaintiffs' statutory argument thus fails for similar reasons as the argument made in *Florida Growers*, where the district court recently denied a preliminary injunction against a 2023 H-2A wage rule. There, the plaintiffs argued that DOL "impermissibly set[] wages as a means of attracting U.S. workers to engage in the agricultural work conducted by H-2A laborers, rather than to prevent an adverse effect on the pay of similarly employed U.S. workers." *Fla. Growers*, 2024 WL 670464, at *20. Even if the rule would have that effect, the court found it to be within DOL's authority, since DOL's statements in the preamble adequately "tethered [the challenged rule] to its statutory mandate to prevent the reduction of the wages of similarly employed U.S. workers." *Id.* at *21. The same is true here.

B. That the Rule confers benefits or "rights" does not make it unlawful.

In its order on Plaintiffs' motion for a preliminary injunction, this Court held that the Final Rule was likely "unconstitutional" because DOL "exceeded the general authority constitutionally afforded to agencies" by creating "rights." ECF 99 at 19–20. This conclusion was in error. Where Congress has delegated to an agency the power to regulate conduct, that includes the power to enact regulations that confer benefits on other parties—even benefits that can be colloquially described as rights. The case law the Court cited speaks not to the authority of agencies to enact such regulations, but rather agencies' ability to make such regulations *privately enforceable*. *Alexander v. Sandoval*, 532 U.S. 265 (2001), *cited in* ECF 99 at 20, is instructive. There, the Court

simply held that there was no private right of action to sue to enforce regulations issued by DOJ pursuant to Title VI of the Civil Rights Act. In so doing, the Court did not hold that those substantive regulations were invalid and could not be enforced by DOJ—the Court explicitly assumed otherwise. 532 U.S. at 281. Similarly, in *Harris v. James*, the Court held that a Medicaid regulation did not create a "right" enforceable under 42 U.S.C. § 1983—but did not suggest that the regulation itself was substantively invalid because it required Medicaid plans to ensure recipients receive the benefit of transportation. 127 F.3d 993 (11th Cir. 1997), *cited in* ECF 99 at 20; *see also Gonzaga Univ. v. Doe*, 536 U.S. 273, 274 (2002), *cited in* ECF 99 at 20 (holding that the term "rights" contained in section 1983 has a specific meaning, different than a "benefit").

These cases, which are grounded in principles of statutory interpretation as to Congressional intent, do not stand for the proposition more generally that any agency action that can be described as conferring a "right" on a party is unconstitutional. To the contrary, the defining characteristic of a legislative rule requiring notice-and-comment rulemaking is that it "creates new rights or imposes new obligations." *Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 710, 717 (D.C. Cir. 2015); *see also Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (holding that agency action is only reviewable if it is "one by which rights or obligations have been determined"). And courts frequently uphold rules that, like the worker empowerment provisions, provide employees with "rights" in the colloquial, though not privately enforceable, sense. For example, in *National Mining Ass'n v. United Steel Workers*, the Eleventh Circuit upheld, among others, a DOL rule that required employers to notify workers of unsafe workplace conditions—creating a "right" to such notification. 985 F.3d 1309, 1319–20, 1323–24 (11th Cir. 2021). And in *Florida Sugar Cane*, the Fifth Circuit affirmed DOL's authority to require employers to pay migrant workers a specific wage rate—which created a "right" to be paid that rate. 531 F.2d at

303–04. To be sure, an agency can only confer a "right" or "benefit" where Congress has authorized it to do so—but that is a requirement for *every* agency action, not simply those that can be described as creating rights. And as the Court already held, the Rule is within the scope of Congress's broad delegation to DOL. *See* ECF 99 at 13–19.

C. The Rule does not implicate, much less violate, the major questions doctrine.

Plaintiffs argue that the Rule "violates" the major questions doctrine. ECF 111 at 20. But that doctrine is not a law or principle that can be violated. It is "a tool of statutory interpretation," "like a dictionary, or expressio unius, or the extraterritoriality canon." *Save Jobs USA v. DHS Off. of Gen. Couns.*, 111 F.4th 76, 80 (D.C. Cir. 2024); *see Georgia v. President of the U.S.*, 46 F.4th 1283, 1295 (11th Cir. 2022) (describing the major questions doctrine as a "principle of statutory interpretation"). Announced by the Supreme Court as an exception to the since-overruled doctrine of *Chevron* deference, *see Loper Bright*, 144 S. Ct. at 2269, the major questions doctrine comes into play only in "extraordinary cases," "in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority." *West Virginia v. EPA*, 597 U.S. 697, 721 (2022) (citation omitted). The mere fact that a rule implicates "vigorously debated, politically fraught issues," ECF 111 at 21, is not enough to trigger that hesitation and for the doctrine to apply. *See, e.g.*, *Mayfield v. DOL*, 117 F.4th 611, 617 (5th Cir. 2024) (holding that, "even if we assume that labor relations are a politically controversial topic," the major questions doctrine did not apply to DOL rule).

For instance, in *Florida v. Department of Health and Human Services*, 19 F.4th 1271 (11th Cir. 2021), the Eleventh Circuit held that the doctrine did not apply in analyzing statutory authority for a rule that required health care employees in Medicare- and Medicaid-participating facilities

be vaccinated against COVID-19, because the rule did "not bring about an enormous and transformative expansion in regulatory authority." *Id.* at 1287–88 (citations omitted). Notably, the Supreme Court later upheld the same rule, without mentioning the major questions doctrine. *See Biden v. Missouri*, 595 U.S. 87 (2022) (per curiam). Likewise, the Eleventh Circuit found the major questions doctrine inapplicable in *In re Gateway Radiology Consultants, P.A.*, 983 F.3d 1239 (11th Cir. 2020), a challenge to eligibility rules for Paycheck Protection Program loans. The court explained that the question whether bankruptcy debtors were eligible for such loans was "not of the same 'deep economic and political significance'" as those in cases where the major questions doctrine applied. *Id.* at 1255 n.8; *see also Coin Ctr. v. Yellen*, No. 3:22-cv-20375, 2023 WL 7121095, at *7 (N.D. Fla. Oct. 30, 2023) (declining to apply the major questions doctrine and noting that its application is limited to "extraordinary cases").

Likewise, here, the Rule cannot reasonably be characterized as "extraordinary" in scope or significance. While, as is true for most rules, there is no dispute that the Rule is important to many Americans and businesses, and that some may disagree with the policy choices DOL has made, the questions addressed by the Rule are of the kind and nature that the Secretary has been addressing since Congress created the H-2A program. DOL has, for four decades, required H-2A employers to make assurances regarding the conditions under which employees will work—including nondiscrimination and nonretaliation provisions, based on the same statutory authority invoked in the 2024 Rule. *See, e.g.*, 1987 Rule, 52 Fed. Reg. at 20517. The Rule adds to existing protections; it does not alter the nature of the longstanding existing relationship between DOL and regulated entities or states. *Compare with Biden v. Nebraska*, 143 S. Ct. 2355, 2373 (2023) (applying the major questions doctrine where no prior regulation "ha[d] even begun to approach the size or scope" of new student-loan cancellation program); *West Virginia v. U.S. Dep't of the*

Treasury, 59 F.4th 1124, 1146 (11th Cir. 2023) (applying the doctrine to a rule that "alter[ed] the traditional balance of federalism by imposing a condition on a state's entire budget process"). Finally, while DOL's Rule is important to many, the number of directly affected entities and economic impact are smaller than in *Florida v. Department of Health and Human Services,* where the Eleventh Circuit held that the major questions doctrine did not apply.

III. The Rule does not "violate" the NLRA.

Separate from their argument that DOL exceeded its statutory authority, Plaintiffs argue that the Rule "violates" the NLRA, based entirely on the premise that Congress's decision to exclude agricultural laborers from the statutory definition of employee in that statute acts as a prohibition on any protections for concerted activity by such workers. *See* ECF 111 at 10–13. But courts have long held that, by carving out certain classes of workers from the NLRA, including agricultural workers and others, Congress did not preclude such workers from receiving protections via other means. *See, e.g.*, *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 181 (2007) (recognizing that NLRA left "states free to regulate their labor relationships with their public employees," who are excluded from the scope of the statute); *Greene v. Dayton*, 806 F.3d 1146, 1149 (8th Cir. 2015) (holding that Congress's exclusion of domestic service workers from the NLRA does not prohibit state from affording similar protections). Rather, the NLRA is simply agnostic as to concerted activity by these workers. *See United Farm Workers of Am., AFL-CIO v. Ariz. Agr. Emp't Rels. Bd.*, 669 F.2d 1249, 1257 (9th Cir. 1982) (recognizing that by excluding agricultural workers from NLRA, Congress "implie[d] that in such matters [its] policy is indifferent" (quoting *Bethlehem Steel Co. v. N.Y. State Lab. Rels. Bd.*, 330 U.S. 767, 773 (1947))).

Plaintiffs attempt to distinguish this well-established case law on the grounds that it arises in the context of state regulation, as opposed to federal agency regulation. ECF 111 at 16. But that

distinction is irrelevant. For one, Plaintiffs' suggestion that the *Garmon* and *Machinists* preemption doctrines are used only to assess whether state action is contrary to the NLRA, and not to assess whether federal executive agency action is contrary to the NLRA, is wrong. *See, e.g.*, *UAW-Lab. Emp't & Training Corp. v. Chao*, 325 F.3d 360, 363 (D.C. Cir. 2003) (applying *Garmon* preemption doctrine to federal executive action); *Chamber of Com. of U.S. v. Reich*, 74 F.3d 1322, 1334 (D.C. Cir. 1996) (same re: *Machinists* preemption). Moreover, in the cases where courts have held that state regulation of concerted activity by farmworkers is not preempted, the reason why no preemption exists is because the NLRA does not have anything to say about farmworkers at all. The NLRA's agnosticism towards agricultural workers has the same impact on agencies' authority to provide protections for concerted activity to those workers as it does on states' authority to do so: none.

IV. Any relief should be limited to the specific provisions of the Rule deemed unlawful.

"Regulations—like statutes—are presumptively severable: If parts of a regulation are invalid and other parts are not, [courts] set aside only the invalid parts unless the remaining ones cannot operate by themselves or unless the agency manifests an intent for the entire package to rise or fall together." *Bd. of Cnty. Commissioners of Weld Cnty. v. EPA*, 72 F.4th 284, 296 (D.C. Cir. 2023). This presumption reflects the more general rule that judicial "relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *see also Thomas v. Bryant,* 614 F.3d 1288, 1317 (11th Cir. 2010) (recognizing that courts must ensure "that the scope of the awarded relief does not exceed the identified harm").

Should the Court find that any of the provisions addressed by Plaintiffs in their memorandum (20 C.F.R. §§ 655.135(h)(2) and (m), and 29 C.F.R. § 501.4(a)(2)) are unlawful, the

Court should apply the presumption of severability and sever and vacate only those provisions. These provisions operate independently from the other provisions of the Rule, including, for example, those relating to how wages are to be displayed in job orders, the effective date of the Adverse Effect Wage Rate, and what constitutes a "for-cause" termination that exempts an employer from transportation requirements. And "there is no indication that the regulation would not have been passed" without those challenged provisions. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294 (1988). To the contrary, the Rule includes a severability provision, and DOL explicitly stated its "intent that all provisions and sections be considered separate and severable and operate independently from one another." 89 Fed. Reg. at 33952; *see, e.g.*, *Nat'l Ass'n of Mfrs. v. SEC*, 105 F.4th 802, 816 (5th Cir. 2024) (applying presumption of severability and holding that severability clause "dispels any doubt what the [agency] would have done" in the absence of the provision deemed unlawful).

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion for summary judgment and grant Defendants' cross-motion for summary judgment.

Dated: October 30, 2024

Respectfully submitted,
/s/ Adam R. Pulver

Daniel Werner, Ga. Bar No. 422070
Radford Scott LLP
315 W. Ponce de Leon Ave., Suite 180
Decatur, GA 30030
(678) 271-0304
dwerner@radfordscott.com

Adam R. Pulver, D.C. Bar No. 1020475
*admitted *pro hac vice*
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
apulver@citizen.org

Counsel for Amici Curiae