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

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

**BRIEF OF CENTRO DE LOS DERECHOS DEL MIGRANTE, CANDELARIO RODRIGUEZ SERRANO, AND JORGE SÁNCHEZ REYES AS AMICI CURIAE IN IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

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Pursuant to this Court's July 19, 2024, Order, Centro de Los Derechos del Migrante, a nonprofit organization that provides services to migrant workers, and Candelario Rodriguez Serrano and Jorge Sánchez Reyes, two H-2A workers, submit this brief as amici curiae in support of Defendants' opposition to Plaintiffs' Motion for a Preliminary Injunction.

## INTRODUCTION

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. 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, and that doing so 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, requiring the Secretary first to certify 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 before an employer may obtain a H-2A visa. As the Department of

Labor (DOL) and courts have consistently recognized since the statute was amended in 1986, recognizing the agency's expertise, 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 H-2A employers must provide their workers to avoid 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 have led to substandard conditions for H-2A workers, claiming that the Rule "illegally provide[s] collective bargaining rights" to H-2A workers. ECF 19-1 at 6 (discussing DOL, Final Rule, Improving Protections for Workers in Temporary Agriculture in the United States, 89 Fed. Reg. 33898 (Apr. 29, 2024)). The Rule, however, provides no such rights. 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 in job orders and offers, and the effect of delayed start dates on employer obligations.

Plaintiffs seek a preliminary injunction against the Rule in its entirety but fail to meet their high burden as to any of the four factors considered in determining whether to grant such extraordinary relief. In arguing that they are likely to succeed on the merits of their claims, Plaintiffs reference only three portions of the Rule—20 C.F.R. §§ 655.135 (h)(2)(i), (h)(2)(ii), and (m)—some of which DOL referred to as "worker empowerment" provisions.[1] Far from

[1] Plaintiffs also reference a provision of the Rule related to the change in the effective date of annual Adverse Effect Wage Rates (AEWRs), 20 C.F.R. § 655.120(a)(3), but they concede that the provision is "unrelated to the NLRA" and do not argue that it is unlawful. ECF 19-1 at 9.

effectuating a radical departure from longstanding regulations, these provisions simply add to the existing prohibitions on unfair treatment of and retaliation against workers, based on a record that shows retaliation and intimidation of workers engaged in concerted activities has played a role in perpetuating substandard wages and conditions for agricultural workers. Prohibiting such retaliation and intimidation—without granting any right to bargain collectively or any mechanism for doing so—is consistent with the long-accepted recognition that protecting the wages and working conditions of H-2A laborers prevents a race to the bottom that not only harms those workers, but domestic workers as well. Nothing about these provisions conflicts with the National Labor Relations Act (NLRA), since, as is well-established in precedent, the NLRA neither permits nor prohibits collective activity by agricultural workers. And these provisions, like the other provisions of the Rule, are well-within the Secretary's long-established authority to determine whether H-2A employment will "adversely affect the wages and working conditions of workers in the United States." 8 U.S.C. § 1188(a)(1)(B).

Apart from their failure to establish that they are likely to succeed on the merits of their claim, Plaintiffs have failed to demonstrate imminent irreparable harm. Although the State Plaintiffs invoke vague compliance costs associated with the Rule, those costs are not connected to the worker empowerment provisions that Plaintiffs attack as unlawful and, therefore, cannot justify an injunction against those provisions. The Grower Plaintiffs also assert harm based on a provision of the Rule as to which they have made no argument on the merits—a provision governing when annual adjustments to the Advanced Effect Wage Rate (AEWR) go into effect. And even as to that provision, any harm is entirely speculative. To the extent that the Grower Plaintiffs' claim that the worker empowerment provisions could lead to agricultural disaster, their claim is highly speculative and is based on a series of predictions that lack any evidentiary basis.

And even if the Plaintiffs had shown such harm was likely to occur, it could not justify a preliminary injunction in favor of anyone but agricultural employers in the State of Georgia.

Plaintiffs' inability to show harm from the provisions of the Rule that they challenge stands in sharp contrast to the harm to the public interest and to workers and service providers like amici that would flow from an injunction against the Rule. Plaintiffs' request for preliminary relief should be denied.

## BACKGROUND

### I. The H-2A Program

When first enacted in 1952, the Immigration and Nationality Act (INA) created an "H-2" nonimmigrant visa category for temporary foreign agricultural and nonagricultural workers. *See* Cong. Res. Serv., H-2A and H-2B Temporary Worker Visas: Policy and Related Issues, May. 11, 2023, at 1, https://crsreports.congress.gov/product/pdf/R/R44849. Under that statute, the Department of Justice had 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, in 1986, as part of the Immigration Reform and Control Act of 1986 (IRCA), Congress amended the Immigration and Nationality Act to separate the pre-existing nonimmigrant visa H-2 program for temporary and seasonal employment 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, Congress 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 (now codified at 8 U.S.C. § 1188(a)(1)). The statute also requires the Secretary to evaluate whether certain additional conditions exist before granting such certifications, *id.* (now 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.* (now 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). In 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. These regulations have been updated periodically in the ensuing four decades and 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 a final rule. 89 Fed. Reg. 33898. The Rule, which contains dozens of operative provisions and amends pre-existing program regulations on a range of topics, is divided into three sections.

**A. Employment Service regulations.** First, the Rule amends 20 CFR 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.[2] These revisions include changes

[2] "An employer's initial use of the agricultural clearance order process for domestic workers, however, is [] a prerequisite to the employer's subsequent application for authorization to hire

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 (discussion of changes to ES regulations).

**B. Labor certification process regulations.** The Rule also amends 20 CFR part 655, subpart B, which specifically governs the labor certification process for H-2A workers. These amendments range from nonretaliation provisions for participation in government investigations to seatbelt requirements for employer-provided transportation. *See* 89 Fed. Reg. at 33936–34041 (discussing changes to part 655, subpart B). Some provisions particularly relevant to Intervenors are discussed here.

The Rule amends 20 C.F.R. § 655.135, which sets out the required assurances and obligations of H-2A employer. 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).

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,

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foreign workers through the H–2A program." *Texas RioGrande Legal Aid, Inc. v. Range*, 594 F. App'x 813, 819 (5th Cir. 2014) (citing 20 C.F.R. § 655.121(a) (2010)).

"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).

DOL also altered the procedure for when the agency's annual changes to the "Adverse Effect Wage Rate" takes effect. The previous regulation simply provided that any new such rate —which often serves as the minimum wage required for a particular 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 pre-existing rule specified that, when an employee is terminated for cause or abandons their employment, the employer is released from certain obligations, but it 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) (2024). The Rule also adds a new provision addressing an employer's obligations where, after an employer obtains a certification, the start date for work is delayed. 20 C.F.R. § 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. 20 C.F.R. § 655.175(b).

Finally, the Rule includes a number of provisions aimed at transparency, clarifying what wage rates must be provided in a job order and requiring overtime wage rates and the circumstances under which overtime wages are available, only if overtime is available at all. *See* 20 C.F.R. §§ 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] remainder of the subpart] and shall not affect the remainder thereof." 20 C.F.R. § 655.190.

**C. 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* Fed. Reg. at 34041–43.

* * *

The Rule has a June 28, 2024, effective date, but the changes to 20 C.F.R. § 655.135(h) will not apply to clearance orders and associated H-2A applications before August 29, 2024. 89 Fed. Reg. at 33,904. DOL has since stated that it will also not enforce until August 29, 2024, the Rule's revisions to 29 C.F.R. § 501.4(a), the non-retaliation provision in the "enforcement" regulations. ECF 28 (Joint Motion to Vacate) at ¶ 4 (citing Wage and Hour Division, *Final Rule: Improving Protections for Workers in Temporary Agricultural Employment in the United States*, https://www.dol.gov/agencies/whd/agriculture/h2a/final-rule).

## III. This Litigation

Plaintiffs, seventeen states, an agricultural employer, and an association of Georgia agricultural employers, commenced this action against DOL and several DOL officials on June 10,

2024. Their complaint, which seeks vacatur of the Rule in its entirety, contains four claims: They claim that the Rule is contrary to the National Labor Relations Act, ECF 1 at ¶¶ 93–101, that the Rule exceeds statutory authority, *id.* at ¶¶ 102–126, and that the Rule is arbitrary and capricious, *id.* at ¶¶ 127–43.

On June 13, 2024, Plaintiffs filed a "Motion for Stay/Preliminary Injunction/Temporary Restraining Order," requesting a universal injunction against the enforcement and application of the Rule in its entirety. ECF 19. Defendants' opposition to that motion is due on July 8, 2024, and Plaintiffs' reply is due on July 22, 2024. ECF 29. A hearing on the motion is scheduled for August 2, 2024. *Id.*

**LEGAL STANDARD**

"A preliminary injunction is an 'extraordinary and drastic' remedy," which should be granted only "in the rarest of circumstances." *Donjon-SMIT, LLC v. Schultz*, 449 F. Supp. 3d 1345, 1358 (S.D. Ga. 2020) (quoting *Siegel v. LePore*, 234 F.3d 1163, 1176–77 (11th Cir. 2000)). "For the court to grant such extraordinary relief, a movant must establish four essential elements: (1) a likelihood of success on the merits of the overall case; (2) irreparable injury; (3) the threatened injury outweighs the harm the preliminary injunction would cause the other litigants; and (4) the preliminary injunction would not be averse to the public interest." *Id.* (citing *Chavez v. Fla. SP Warden*, 742 F.3d 1267, 1271 (11th Cir. 2014); *see also CBS Broad., Inc. v. EchoStar Commc'ns Corp.*, 265 F.3d 1193, 1200 (11th Cir. 2001) (holding that a preliminary injunction should not "be granted unless the movant clearly establishe[s] the burden of persuasion as to all four elements").[3]

[3] Plaintiffs have also requested a stay of the Rule's effective date pursuant to 5 U.S.C. § 705. Courts considering whether to issue a stay pursuant to section 705 have applied the preliminary-injunction standard to that question, and Plaintiffs do not propose any other standard. *See, e.g.*, *Colorado v. EPA*, 989 F.3d 874 (10th Cir. 2021) (collecting cases)

## ARGUMENT

### I. Plaintiffs are not likely to succeed on the merits.

A substantial likelihood of success on the merits "is generally the most important of the four factors." *Gonzalez v. Governor of Ga.*, 978 F.3d 1266, 1271 n.12 (11th Cir. 2020). Here, Plaintiffs have not met their burden as to that factor. They have made no argument at all as to the majority of the Rule they request be enjoined, and the arguments they make as to isolated portions of the Rule lack merit.

#### A. The Rule does not violate the NLRA.

Plaintiffs are unlikely to succeed on their claim that the Rule is contrary to the NLRA. None of the provisions of the Rule that Plaintiffs reference in their motion conflict with or are otherwise preempted by the NLRA, which is silent as to the labor relationships and working conditions of farmworkers.

The NLRA provides certain rights, including the rights to organize and bargain collectively to "employees." *See* 29 U.S.C. § 157. The statutory definition of "employee" explicitly excludes "agricultural laborer[s]." 29 U.S.C. § 152(3). This exclusion, however, does not "forbid" any conduct or regulation of conduct, as Plaintiffs argue. ECF 19-1 at 11. Rather, by "leav[ing] the employer-employee relation free of regulation in some aspects," Congress has "implie[d] that in such matters [its] policy is indifferent" to executive branch and state regulation of that particular area. *United Farm Workers of Am., AFL-CIO v. Ariz. Agr. Emp't Rels. Bd.*, 669 F.2d 1249, 1257 (9th Cir. 1982) (quoting *Bethlehem Steel Co. v. N.Y. State Lab. Rels. Bd.*, 330 U.S. 767, 773 (1947)).

Recognizing that the NLRA is silent as to collective action by agricultural workers, states have long regulated such action. For example, plaintiff Kansas has adopted a statutory scheme providing agricultural workers a limited "right to organize," which includes prohibitions on

retaliation for union activity. Kan. Stat. Ann. §§ 44-818, 828(b); *see also* La. Stat. Ann. §§ 23:886, 888, 891 (providing agricultural workers the right to unionize and collectively bargain, among others). Other states have chosen instead to mirror the substantive provisions of the NLRA and apply them to farmworkers. *See, e.g.*, *Bud Antle, Inc. v. Barbosa*, 45 F.3d 1261, 1264 (9th Cir. 1995) (discussing California scheme). The same principles that establish that the NLRA does not preempt these state laws, which confer collective bargaining rights on agricultural employees, establish that the NLRA does not bar even the few limited provisions of the Rule that relate to concerted activity.

There are two kinds of preemption under the NLRA, which have been held to apply both to state and federal regulation. *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). Neither is implicated by any portion of the Rule. First, *Garmon* preemption, named after the Supreme Court's decision in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), prohibits the regulation of activity that the NLRA "protects, prohibits, or arguably protects or prohibits." *Wis. Dep't. of Indus., Lab. & Hum. Rels. v. Gould Inc.*, 475 U.S. 282, 286 (1986). As the D.C. Circuit has explained, unlike other forms of "field preemption," "*Garmon* works differently," having no application to topics "simply left alone, even if left alone deliberately." *Chao*, 325 F.3d at 364. As Plaintiffs concede, concerted activity by agricultural workers was left alone by Congress deliberately. *See* ECF 19-1 at 6. Thus, agricultural labor relations is not an area that the NLRA protects—even arguably. *See NLRB v. Comm. of Interns & Residents*, 566 F.2d 810, 815 n.5 (2d Cir. 1977) (recognizing state "jurisdiction over the labor relations of farms and their employees"); *Di Giorgio Fruit Corp. v. NLRB*, 191 F.2d 642, 647 (D.C. Cir. 1951) (holding that

the NLRA does not apply to unions "composed exclusively of agricultural laborers"); *N.Y. State Vegetable Growers Ass'n v. Cuomo*, 474 F. Supp. 3d 572, 584–856 (W.D.N.Y. 2020) (holding that the NLRA does not "arguably cover[]" agricultural employees); *Wilmar Poultry Co., Inc. v. Jones*, 430 F. Supp. 573, 578 (D. Minn. 1977) (holding that *Garmon* preemption did not bar state law "because the NLRA's protections and prohibitions do not apply to agricultural laborers").

Second, *Machinists* preemption, which forbids the regulation of "conduct that Congress intended 'be unregulated because [it is] left to be controlled by the free play of economic forces,'" likewise does not apply. *Chamber of Com. of the U.S. v. Brown*, 554 U.S. 60, 65 (2008) (quoting *Lodge 76, Int'l Ass'n of Machinists Aerospace Workers v. Wisc. Emp't. Rels. Comm'n*, 427 U.S. 132, 140 (1976)). As courts have consistently held, "the fact that a group of workers is excluded from the definition of 'employee' in § 152(3), without more, does not compel a finding of *Machinists* preemption." *Chamber of Com. of the U.S. v. Seattle*, 890 F.3d 769, 793 (9th Cir. 2018); *see 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 implicate *Machinists* preemption).

In short, under this well-established precedent, Plaintiffs' argument that "the NLRA clearly forbids" protections for concerted activity by farmworkers, ECF 19-1 at 11–12, has no merit.

**B. The Rule is within the Secretary's statutory authority.**

Plaintiffs are also unlikely to prevail on their claims that the Rule exceeds DOL's statutory authority. This argument both ignores several statutory provisions DOL invoked as authority for

issuing parts of the Rule and mischaracterizes the scope of authority granted by the provision it addresses.

**1. Plaintiffs do not challenge those portions of the Rule supported by the Wagner-Peyser Act.**

In their complaint, Plaintiffs concede that DOL "purports to rely on [the] Wagner-Peyser Act, 29 USC 49 et seq," but "the challenged portions of the Final Rule do not rely on this authority." ECF 1-1 at 12. While Plaintiffs do not precisely indicate which portions of the Rule they challenge, Defendants relied on the Wagner-Peyser Act for the amendments to 20 CFR parts 651, 653, and 658. *See* 89 Fed. Reg. at 33899 (invoking 29 U.S.C. § 49k); *id.* at 33904–36 (discussing amendments to regulations "that implement the Wagner-Peyser Act of 1933"). That statute undoubtedly grants the Secretary general rulemaking authority. *See* 29 U.S.C. § 49k ("The Secretary is authorized to make such rules and regulations as may be necessary to carry out the provisions of this chapter."). Accordingly, Plaintiffs' arguments about the scope of authority conferred by the INA cannot provide a basis for enjoining those parts of the Rule that amend 20 CFR parts 651, 653, and 658.

**2. The remainder of the Rule is within the Secretary's authority under the INA.**

In enacting the other parts of the Rule, DOL invoked its authority under various provisions of the INA added by the IRCA. *See* 89 Fed. Reg. at 33899, 33938, 33939. As DOL explained in the Rule, these provisions reflect that "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." *Id.* (citing 8 U.S.C. § 1101(a)(15)(H)(ii) and §§1188(a)–(g)(2)).[4]

Here, the best reading of the H-2A provisions of the INA, in light of their text, context, and history, is that Congress delegated to the Secretary of Labor discretionary authority to determine what terms were necessary to ensure that H-2A labor does not have an adverse effect on the wages and conditions of domestic workers. As the Supreme Court recently held, "[w]hen the best reading of a statute is that it delegates discretionary authority to an agency," the judicial review contemplated by the APA 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 Enterp. v. Raimondo*, No. 22-451, __ S. Ct. __, 2024 WL 3208360, at *14 (June 28, 2024) (internal citations omitted). In such cases, the agency's interpretation of the statute may be "informative to the extent it rests on factual premises within the agency's expertise." *Id.* at *17 (quotation omitted). As relevant here, and as reflected by decades of precedent, Congress delegated authority to DOL to determine "how to ensure that the importation of farmworkers met the statutory requirements" of the various provisions of section 1188, particularly the adverse effect provision. *AFL-CIO v. Dole*, 923 F.2d 182, 184 (D.C. Cir. 1991). The provisions identified by Plaintiffs are all within the appropriate boundaries of that authority.

**a. The statute provides the Secretary with broad regulatory authority.**

Plaintiffs focus narrowly on section 1188(a)(1), which, they claim, provides the Secretary with only "ministerial" authority to grant or deny a certification. ECF 19-1 at 6, 7, 24. To the contrary, as confirmed by the text of the statute as a whole, its context, and its purpose, as well as

[4] To the extent that Plaintiffs assert DOL invoked solely section 1188(a)(1) for the Rule, ECF 19-1 at 13, they are incorrect.

longstanding precedent, the statute delegates to the Secretary broad regulatory authority and discretionary duties. *See, e.g.*, *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) (holding that statutory interpretation "depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis").

**i.** 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 Secretary had promulgated extensive regulations relating to both the certification process and the requisite wages and working conditions. *See id.* at 301 (discussing regulations); *see also, e.g.*, *Va. Agric. Growers Ass'n, Inc. v. DOL*, 756 F.2d 1025 (4th Cir. 1985) (holding that one such regulation was within DOL's statutory authority).

In enacting IRCA and adding a role for the Secretary of Labor to the statute, 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, goes on to list 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 both Plaintiffs' arguments about regulatory authority 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 though no statute gave farmworkers the right to strike, Congress plainly thought 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. 8 U.S.C. §§ 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, it states that 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*)." 8 U.S.C. § 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 "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. *id.* § 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.

Any doubt that Congress contemplated more than a "ministerial" authority for DOL is put to rest by the broad enforcement powers granted to the Secretary by section 1188(g)(2). 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 drew a distinction 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). The statutory provision DOL relied upon in that case, which required 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, the duty to ensure H-2A work does not negatively impact the domestic workforce lies plainly with DOL, not any other agency.

Plaintiffs argue that DOL's authority is nonetheless limited because the power to "certify" implies only a ministerial function, 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 of 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, DOL has consistently recognized the statute as providing implicit rulemaking authority since 1987—the year after the H-2A program was created. *See* 1987 Rule, 52 Fed. Reg. 20507.

This administrative construction is consistent with the longstanding principle that "the power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). And here, as the D.C. Circuit has explained, the best reading of the statute is that "Section 1188(a)(1) establishes the INA's general mission; Congress left it to the Department of Labor to implement that mission through the creation of specific substantive provisions." *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014); *see Overdevest Nurseries, L.P. v. Walsh*, 2 F.4th 977, 983 (D.C. Cir. 2021) (holding that Congress "left the decision of how to interpret [section 1188(a)(1)(B)] to the Secretary"); *Fla. Growers Ass'n v. Su*, No. 8:23-CV-889-CEH-CPT, 2024 WL 670464, at *2 (M.D. Fla. Jan. 5, 2024), report and recommendation adopted, No. 8:23-CV-889-CEH-CPT, 2024 WL 1343021 (M.D. Fla. Mar. 29, 2024) (recognizing DOL's "discretion to determine the methodological

approach that best achieves a balance between the competing goals of maintaining an adequate labor supply and protecting the jobs of domestic workers" (citations omitted)).

**b. The three identified provisions are within the boundaries of DOL's authority.**

The provisions that Plaintiffs have identified are a reasonable exercise of DOL's authority to protect against an adverse effect on the wages and working conditions of domestic workers.[5] As DOL explained in the preamble to the Rule, the purpose of these 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 also 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).

[5] As it is Plaintiffs' burden to demonstrate that the Rule exceeds DOL's authority, Defendant-Intervenors do not address the authority for other portions of the Rule not identified by Plaintiffs, though some of the authority is fairly obvious. For example, provisions of the Rule regarding employer-provided housing, *e.g.,* 20 C.F.R. § 655.135(n), are authorized by 8 U.S.C. § 1188(c)(4), which specifies that "Employers shall furnish housing in accordance with regulations." And provisions of the Rule relating to recruitment, *e.g.*, 20 C.F.R. § 655.137, are authorized by 8 U.S.C. § 1188(c)(3)(A)(i), which conditions labor certifications on compliance with "criteria for the recruitment of eligible individuals as prescribed by the Secretary."

In arguing that the Rule exceeds DOL's statutory authority, Plaintiffs rely on inapposite case law that stands for the proposition that actions relating to wages and working conditions for H-2A workers must be motivated by a desire to prevent an adverse effect on domestic workers. ECF 19-1 at 14–16. In particular, they rely on the decision in *Williams v. Usery*, 531 F.2d 305 (5th Cir. 1976), in which the court held that a DOL regulation was within the agency's authority under the pre-IRCA INA. There, 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. *See* p. 25 *supra*. As Plaintiffs concede, ECF 19-1 at 16, DOL has regulatory authority to do just that.[6] 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." *Florida Growers*, 2024 WL 670464, at *20. Whether or not the Rule would have that effect, the court found that it was within DOL's authority, since DOL's statements in the preamble to the Rule 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.

**3. The Rule does not implicate the major questions doctrine.**

Plaintiffs argue that the major questions doctrine is implicated by the Rule because it is "politically significant" and thus the statute must provide "clear authorization." ECF 19-1 at 19, 23.[7] But neither such a characterization of a rule nor the fact that a rule is "contentious" or "complicated," *id.* at 21, is sufficient to trigger the application of this doctrine. Rather, the major questions doctrine is applicable only in "extraordinary cases" where an agency seeks to exercise

[6] Plaintiffs raise their disagreement with DOL's conclusion that these provisions will serve the statutory purpose as part of their arbitrary and capricious argument, ECF 19-1 at 26–28, and thus the Intervenor-Defendants do so as well, below.

[7] Plaintiffs' complaint includes an independent claim based on a "Violation of Major Questions Doctrine." The major questions doctrine cannot be "violated." It is simply an approach to judicial review of agency action used to determine whether an agency has exceeded its statutory authority. *Georgia v. President of the U.S.*, 46 F.4th 1283, 1295 (11th Cir. 2022).

"sweeping and consequential authority" of "vast economic and political significance." *West Virginia v. EPA*, 597 U.S. 697, 716, 721 (2022) (citations omitted). While, as is true for most rules, there is no dispute that the Rule is important to many Americans and businesses, and 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 in administering the foreign labor certification process since Congress created the program. The Rule cannot reasonably be characterized as "extraordinary."

Plaintiffs' major questions doctrine argument is grounded on the proposition that "the conditions upon which workers can or should unionize" is a "major question." ECF 19-1 at 19. On its face, that argument has no relevance to many provisions of the Rule, such as those that govern the effective date of changes to the AEWR or how offered wage rates must be disclosed. As to 20 C.F.R. § 655.135 (h)(2)(i), h(2)(ii), and (m), the mere fact that these provisions touch on topics related to unionization (again, they do not provide for unionization) does not trigger the clear-authorization rule of the major questions doctrine. As the Eleventh Circuit has recognized, not every rule that is controversial implicates the major questions doctrine. For instance, in *Florida v. Department of Health and Human Services*, 19 F.4th 1271 (11th Cir. 2021), the Court 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, as 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. *Biden v. Missouri*, 595 U.S. 87 (2022) (per curiam). Likewise, the Eleventh Circuit rejected invocation of the major questions doctrine in *In re Gateway Radiology Consultants, P.A.*, 983 F.3d 1239 (11th Cir. 2020), a challenge to a Small Business

Administration rule regarding eligibility for Paycheck Protection Program loans, explaining that the question of whether bankruptcy debtors were eligible for such loans was "not of the same 'deep economic and political significance'" as those where the major questions doctrine applies, and was "squarely within, instead of outside, the SBA's expertise." *Id.* at 1255 n.8. *See also Coin Center v. Yellen*, No. 3:22cv20375-TKW, 2023 WL 7121095, at *7 (N.D. Fla. Oct. 30, 2023) (declining to apply major questions doctrine and noting its application is limited to "extraordinary cases").

The challenged provisions in this Rule are no more extraordinary than those challenged in *Florida* and *Gateway Radiology*. 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 people and businesses, as are most rules, the number of directly affected entities and economic impact is far lower than that in *Florida* (where it did not apply) and in cases where the doctrine has been applied. *See, e.g.*, *Nebraska*, 143 S. Ct. at 2373 (applying the doctrine where economic impact of rule was "staggering by any measure" and estimated to cost between $469 and $519 billion); *Georgia v. President*, 46 F.4th at 1295–96 (invoking the doctrine

in a case challenging an Executive Order that mandated federal contractors adopt a COVID-19 vaccination mandate for their workers).

**C. The Rule is not arbitrary or capricious.**

Finally, Plaintiffs are unlikely to prevail on their claim that the Rule is arbitrary or capricious. "To survive arbitrary and capricious review, an agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Nat'l Mining Ass'n v. United Steel Workers*, 985 F.3d 1309, 1321 (11th Cir. 2021) (cleaned up). "Arbitrary and capricious review is highly deferential and presumes the validity of agency action." *Id.* As with their other arguments, Plaintiffs' arbitrary and capricious arguments are targeted only at the provisions of the Rule relating to concerted activity and, therefore, provide no basis for finding the rest of the Rule unlawful.

Plaintiffs make three separate arguments. First, Plaintiffs argue that the Rule is arbitrary and capricious because DOL "relie[d] on factors Congress did not intend for the agency to rely on." ECF 19-1 at 26. DOL did no such thing; it relied on its conclusion that the worker empowerment provisions were necessary to prevent an adverse effect on the wages and conditions of domestic workers. It explained that, without these provisions:

> H-2A workers are less able and less likely to advocate on behalf of themselves or their coworkers to seek compliance with the terms and conditions of H-2A employment that the Department has determined are necessary to prevent adverse effect on the wages and working conditions of workers in the United States similarly employed. Additionally, the ability of employers to hire this uniquely vulnerable workforce may suppress the ability of agricultural workers in the United

> States to negotiate with employers and advocate on their own behalf regarding their terms and conditions of employment.

89 Fed. Reg. at 33990. There is no question that the impact of working conditions of H-2A workers on domestic employment is an appropriate factor for DOL to consider.

Plaintiffs nonetheless assert that DOL was precluded from considering how and whether "unionization" could minimize an adverse impact on the wages and working conditions of domestic workers because of Congress's decision to exclude farmworkers from the scope of the NLRA. ECF 19-1 at 26.[8] This argument retreads Plaintiffs' meritless NLRA preemption argument, discussed above. Congress's decision not to provide concerted activity protections to agricultural laborers in the NLRA is not a prohibition on anyone else doing so. Indeed, 8 U.S.C. § 1188(b)(1), which requires the Secretary to promulgate regulations specifying when a strike or lockout bars the grant of a labor certification, is irreconcilable with the notion that Congress intended to prohibit DOL from considering issues relating to unions or collective bargaining in the foreign labor certification process.

Plaintiffs also maintain that DOL was prohibited from considering "the protection of foreign workers." ECF 19-1 at 26. But the fact that, as DOL recognized here, the protection of foreign workers may be necessary to prevent an adverse effect on domestic workers is reflected in the statute. As one court explained:

> [T]he INA itself recognizes that H-2A employment may 'adversely affect the wages and working conditions of workers in the United States similarly employed' even where 'there are not sufficient [U.S.] 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.' Were it otherwise, the INA would have no need

[8] As discussed above, the identified provisions of the Rule protect concerted activity and collective action other than "unionization."

> to require that both conditions—domestic labor shortage and wage adequacy—be present prior to the granting of a foreign labor certification."

*Garcia v. Stewart*, 531 F. Supp. 3d 194, 207 (D.D.C. 2021) (quoting 8 U.S.C. § 1188(a)(1)); *see Mendoza*, 754 F.3d at 1017 (recognizing "the INA seeks to prevent" a situation where substandard wages and conditions for H-2A workers "force [domestic workers] to accept substandard wages and working conditions").

Plaintiffs conclusorily assert that protecting collective action by "H-2A workers cannot have the impact [Defendants] say it does," ECF 19-1 at 27, but DOL has provided a rational explanation, based on "comments and the Department's enforcement experience," that protections for concerted activity are "necessary to prevent adverse effect on the wages and working conditions of workers in the United States similarly employed." 89 Fed. Reg. at 33990. "Agencies are permitted to rely on their experience in the regulated field, so long as they explain what their experience is and how that experience informs the agency's conclusion*." Nat'l Mining Ass'n*, 985 F.3d at 1322. DOL did so here. And multiple commenters explained why a lack of protections for concerted activity for H-2A farmworkers has a more pronounced effect on working conditions for H-2A workers than other agricultural workers. *See id.* at 33988–89 (discussing comments). As such, there is nothing irrational or impermissibly speculative about DOL's reasoning that the fact "that H-2A workers are less able and less likely to advocate on behalf of themselves or their coworkers to seek compliance with the terms and conditions of employment set forth in the Department's regulations" leads to employment below the requisite standards, "which will adversely affect workers in the United States." *Id.* at 33987.

Second, Plaintiffs assert that DOL's explanation for protecting H-2A farmworkers from retaliation and denials of access to service providers, is mere pretext for the goal of "unioniz[ing] H-2A farmworkers." ECF 19-1 at 28. But "[i]t is 'a simple but fundamental rule of administrative

law' that reviewing courts 'must judge the propriety of agency action solely by the grounds invoked by the agency.'" *Calcutt v. FDIC*, 598 U.S. 623, 624 (2023) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). As such, "a court may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons." *Dep't of Commerce v. New York*, 588 U.S. 752, 781 (2019). To establish that an agency's stated reasons were actually pretextual, a plaintiff must overcome the presumption of good faith with more than mere "conjecture." *Doe #1–#14 v. Austin*, 572 F. Supp. 3d 1224, 1236 (N.D. Fla. 2021) (quoting *Commerce*, 588 U.S. at 781); *see Confederacion de Asociaciones Agricolas del Estado de Sinaloa, A.C. v. United States,* 32 F.4th 1130, 1143 (Fed. Cir. 2022) ("Speculation as to improper motive provides no basis to look behind [an agency]'s stated reason[.]"). Here, Plaintiffs have not met that high bar. While Plaintiffs may disagree with DOL's theory, the preamble to the Rule sets out DOL's reasoning as to how the identified provisions minimize the effect of the H-2A program on the wages and conditions of domestic workers. *See* 89 Fed. Reg. at 33992, 33994, 33998, 34000, 34003. A good faith disagreement does not make DOL's reasoning pretextual. And, notably, this was not a situation where the outcome of the Rule was preordained regardless of public comment received: DOL decided *not* to finalize several portions of the Rule that would have directly benefited unionization, making Plaintiffs' assertion that DOL's goal was "unioniz[ing] H-2A farmworkers," and not the goals stated in the Rule, itself implausible. *See, e.g.*, 89 Fed. Reg. at 34016 (discussing decision not to adopt provision requiring employers to provide labor organizations with worker contact information); *id.* (discussing decision not to adopt provision regarding labor neutrality agreements) *id.* at 34020–21 (discussing decision not to adopt provision regarding access for labor organizations).

Third, Plaintiffs argue that the Rule is an inadequately explained "sharp departure" from prior practice. ECF 19-1 at 28–29. In fact, as noted above, the H-2A regulations had for decades included protections against discrimination and retaliation for certain activities. *See, e.g.*, 20 C.F.R. § 655.135(h) (2022). Moreover, contrary to Plaintiffs' assertion that DOL provided inadequate explanation or awareness, ECF 19-1 at 28–29, DOL acknowledged that the Rule provided greater protections for workers than existing regulations and explained its conclusion that "the current protections are not enough to prevent adverse effect." 89 Fed. Reg. at 33990.

## II. Plaintiffs have not adequately established an irreparable injury.

"[E]ven if Plaintiffs establish a likelihood of success on the merits, the absence of a substantial likelihood of irreparable injury would, standing alone, make preliminary injunctive relief improper." *Siegel*, 234 F.3d at 1176. "To succeed in demonstrating a threat of irreparable harm, a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief." *Mama Bears of Forsyth Cnty. v. McCall*, 642 F. Supp. 3d 1338, 1359 (N.D. Ga. 2022) (citation omitted). Plaintiffs have not made that requisite showing.

The State Plaintiffs' claimed injury is the "additional administrative costs" that they claim they will incur because the Rule requires state workforce agencies to "change their approach and behavior" in reviewing H-2A job orders. ECF 19-1 at 29. The State Plaintiffs' declarants, however, largely base these claims of increased administrative costs on the Rule's provisions related to debarment lists (in 20 C.F.R. § 653) and discontinuation of services (in 20 C.F.R. § 658)—parts of the Employment Service regulations. *See*, *e.g.*, ECF 19-12 (York Decl.) ¶¶ 12-13. But in their Complaint, Plaintiffs suggest they are not challenging these regulations, ECF 1-1 at 12, and, in their preliminary injunction motion, Plaintiffs make no argument as to the lawfulness of these provisions. Even if the Plaintiffs were likely to succeed on the merits as to the provisions of 20

C.F.R. part 655 they *do* address in their motion, harm caused by other portions of the Rule would not entitle them to an injunction, because "[r]egulations—like statutes—are presumptively severable." *Bd. of Cnty. Cmm'rs of Weld Cnty. v. EPA*, 72 F.4th 284, 296 (D.C. Cir. 2023). Under the APA, courts "set aside only the invalid parts [of a regulation] unless the remaining ones cannot operate by themselves or unless the agency manifests an intent for the entire package to rise or fall together." *Id.* The provisions that Plaintiffs address on the merits operate independently from those the State Plaintiffs argue will cause them harm, 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. Because the provisions that Plaintiffs argue are illegal are severable from the rest of the Rule, any harm that Plaintiffs claim they would incur from other parts of the Rule cannot justify a preliminary injunction as to the rest of the Rule. *Cf. Fla. Beach Advert., LLC v. City of Treasure Island,* 511 F. Supp. 3d 1255, 1267–68 (M.D. Fla. 2021) (holding that an "injury under one provision of a statute or regulation does not confer standing on a plaintiff to challenge all provisions of that statute or regulation" (citation omitted)).

The State Plaintiffs' declarants also make generic statements that state agencies will need to update their "standard operating procedures and policies regarding the review of job orders" and to provide training because the agencies will now need to "evaluate H-2A employers' compliance" with the provisions "before approving job orders." *See*, *e.g.*, ECF 19-12 at ¶ 11. But state agencies are not required to conduct any investigation or evaluation of employers' compliance with the challenged provisions before approving job orders. *See* 20 C.F.R. § 653.501 (detailing the

requirements for processing job orders). And although state agencies are required to ensure that employers make assurances that they are complying with all employment-related laws, *id*. § 653.501(c)(3)(iii), the procedure for ensuring that employers make assurances that they are complying with the challenged provisions should be no different from the procedure for ensuring that they make assurances about other laws.[9] If and when an employer *violates* these assurances, enforcement is tasked to DOL—not the states. *See* 29 C.F.R. part 501. Moreover, to the extent state agencies feel the need to update their procedures or provide training, they would already need to do so because of provisions of the Rule whose legality are not being challenged here, such as the provisions regarding checking employers against debarment lists, so any costs associated with undertaking updates and training would have to be incurred anyway.[10]

Plaintiffs likewise do not show that the Grower Plaintiffs will suffer irreparable harm absent an injunction. Plaintiffs first point to 20 C.F.R. § 655.120(b)(3), which specifies that the updated AEWR will become effective on the date it is published in the Federal Register—generally in mid-December. But, for one, as with the provisions that the State Plaintiffs claim cause them injury, Plaintiffs have made no argument that this aspect of the Rule is unlawful. And while in prior years, when publishing an updated AEWR, DOL has chosen to provide an "effective date" a few weeks post-publication, there was nothing in the pre-2024 regulations that required that, and thus

[9] Given Kansas law already prohibits retaliation for concerted activity, it is unclear how a concomitant federal prohibition could increase its costs.

[10] Although not addressed in Plaintiffs' memorandum, one declarant also asserts that an Arkansas state agency would incur costs based on services it provides to all unions in the state "[i]f agricultural workers unionized." ECF 19-7 (Bassett Decl.) ¶ 4. Such an injury based on the possibility that agricultural workers might unionize at some point in the future is not "actual and imminent," *Siegel*, 234 F.3d at 1176, particularly given that the Rule does not "compel a worker to join a union," "require H-2A employers to recognize labor organizations," or "grant any rights to labor organizations," 89 Fed. Reg. at 33901, 33991. Moreover, it could not be used to justify an injunction to prevent harm to any other state.

DOL would be free to make the AEWR effective on publication even if implementation of the new rule were enjoined. The 2024 Rule simply eliminates any discretion. Finally, Plaintiffs have not demonstrated with certainty that either Miles Berry Farm or any GFVGA members will be employing H-2A workers in the weeks immediately following any future AEWR update—the only time at which § 655.120(b)(3) could be relevant. Miles Berry Farm does not contend that it will be employing any H-2A workers in December or January. *See* Miles Decl. ¶ 14. And although GFVGA's members Minor Brothers Farm and Minor Produce, Inc., state that they will be employing H-2A workers until December 20, Minor Decl. ¶ 15, the updated AEWR is frequently published after that date. *See*, *e.g.*, 83 Fed. Reg. 66306 (Dec. 26, 2018) (publishing AEWR on December 26); 82 Fed. Reg. 60628 (Dec. 21, 2017) (publishing AEWR on December 21). The mere possibility that two GFVGA members *may* have to pay some workers a higher wage rate for a few days or weeks, a possibility that would similarly exist even *without* the Rule, does not meet Plaintiffs' burden of establishing they will suffer irreparable harm absent a preliminary injunction.

Plaintiffs next claim that the regulations will cause GFGVA and its members irreparable injury because they will need to familiarize themselves with the Rule and learn how to implement it. If the mere fact that people needed to familiarize themselves with new laws were sufficient to constitute irreparable harm, however, all changes to laws and regulations would cause irreparable injury. The well-established principle that a "preliminary injunction is an extraordinary and drastic remedy," *Siegel*, 234 F.3d at 1176 (citation omitted), does not support "such a broad standard," *Florida v. HHS*, 19 F.4th at 1292. Moreover, GFGVA and its members will need to familiarize themselves with those aspects of the Rule *not* challenged, even if the provisions relating to worker empowerment are enjoined. Similarly, to the extent Plaintiffs claim injury based on the costs

associated with gathering and entering information on H-2A applications, those costs are not attributable to the worker empowerment provisions on which Plaintiffs focus their challenge.

Finally, Plaintiffs worry that allowing workers to have a representative at investigative interviews could lead to fruit sitting unpicked in the field and farmers losing customers and goodwill. ECF 19-1 at 31–32. But the chain of events to reach such injuries is long and speculative, requiring not only that workers get into a dispute, that the employer conduct an investigatory interview, that a worker ask for a representative, and that the representative be unavailable either in person or remotely, but that the employer decide to have the workers and crew supervisor just sit in the office and wait while trying to reach the representative, that they end up waiting without working for a whole day, and that that lost day directly impact the number of berries picked and the farm's ability to deliver its orders to its customers on time. Such a conjectural scenario cannot establish irreparable harm. A "possibility of irreparable harm" is not sufficient for a preliminary injunction. *Winter v. NRDC*, 555 U.S. 7, 21–22 (2008).

**III. The balance of equities and public interest weigh against preliminary relief.**

"When a District Court grants a preliminary injunction, it should weigh the equities carefully. Cursory analysis is insufficient." *Virginia Coll., LLC v. SSF Savannah Properties, LLC*, 93 F. Supp. 3d 1370, 1380 (S.D. Ga. 2015). In addition, "before a preliminary injunction may issue, the moving party must show that 'an injunction would not disserve the public interest.'" *Mercedes-Benz U.S. Int'l, Inc. v. Cobasys, LLC*, 605 F. Supp. 2d 1189, 1207 (N.D. Ala. 2009) (quoting *N. Am. Med. Corp. v. Axiom Worldwide, Inc.*, 522 F.3d 1211, 1217 (11th Cir. 2008)). Here, these factors weigh against a preliminary injunction. As DOL found, based on an extensive record, the practices prohibited by the Rule directly harm the economic and physical well-being of vulnerable H-2A workers, and, as a result, have a depressive effect on the wages and working

conditions of domestic workers in corresponding employment. *See, e.g.*, 89 Fed. Reg. at 34045 (discussing need for regulation); 34049–50 (discussing unquantifiable benefits associated with the Rule). Indeed, as noted by commenters, many of the practices targeted by the Rule make it difficult for H-2A workers "basic needs" to be met. *See, e.g.*, *id.* at 33914, 33915, 34019. Allowing that harm to continue is contrary to the public interest and outweighs any harm that Plaintiffs have identified. *See USA Farm Lab., Inc. v. Su*, No. 1:23-CV-00096-MR-WCM, 2023 WL 6283333, at *15 (W.D.N.C. Sept. 26, 2023) (concluding balance of equities weighed against injunction against AEWR regulation, as it would "cause at least as much harm to these third-party workers, who would be deprived of wages that they are entitled to under the Final Rule, as a denial would harm the Plaintiffs, who would potentially avoid having to pay these wages"). Moreover, as "the H-2A program was not intended to 'replace American workers with cheap, exploited labor' to the detriment of workers and the economy as a whole," 89 Fed. Reg. at 33958, there is no public interest in allowing employers to continue to do so.

## IV. Any relief should be tailored to specific provisions of the Rule as applied to specific plaintiffs.

Should the Court find Plaintiffs have satisfied the requirements for a preliminary injunction, any relief should be tailored so as to be no "more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Georgia v. President*, 46 F.4th at 1306.

First, the Court should enjoin only those parts of the Rule that the Court concludes Plaintiffs are likely to demonstrate are unlawful; "the scope of injunctive relief is dictated by the extent of the violation established." *Id.* (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)). Here, as noted above, Plaintiffs have made no argument as to the lawfulness of the vast majority of the Rule, and thus an injunction against those portions of the Rule cannot be necessary to remedy any violation they are likely to establish. Should the Court find Plaintiffs likely to succeed in their

arguments as to any of the identified provisions—20 C.F.R. §§ 655.135 (h)(2)(i), h(2)(ii), or (m)—injunctive relief should be limited to those provisions, because DOL has expressly provided that the provisions of the Rule are severable. *See supra* pp. 34–35.

Second, any relief should be limited to the parties who have demonstrated they are likely to suffer imminent irreparable harm as a result of the operation of provisions likely to be found unlawful. *See Georgia v. President*, 46 F.4th at 1303–04 (recognizing that cases where injunctions beyond the parties are appropriate are "rare"). To the extent the Court finds that growers are likely to suffer irreparable harm as a result of unlawful provisions of the Rule, any relief should be limited to the State of Georgia. The State Plaintiffs lack standing to pursue relief on behalf of growers in their states. *See Murthy v. Missouri*, No. 23-411, __ S. Ct. __, 2024 WL 3165801, at *17 (U.S. Jun. 25, 2024) (holding that "[s]tates do not have standing as parens patriae to bring an action against the Federal Government" (citation omitted)). And a "general interest of national uniformity" is not a basis for extending the scope of a preliminary injunction beyond such parties. *Georgia v. President*, 46 F.4th at 1306.

## CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion for a preliminary injunction.

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Respectfully submitted,

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