ORAL ARGUMENT NOT YET SCHEDULED

NO. 13-5118

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REYMUNDO ZACARIAS MENDOZA, *et al.*,
Plaintiffs-Appellants,

v.

THOMAS E. PEREZ, in his official capacity, *et al.*,
Defendants-Appellees,

and

MOUNTAIN PLAINS AGRICULTURAL SERVICES, *et al.*,
Intervenors-Appellees.

On Appeal from a Final Order of the
U.S. District Court for the District of Columbia
(Honorable Beryl A. Howell)

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GLOSSARY

AEWR	Adverse Effect Wage Rate
APA	Administrative Procedure Act
DOL	U.S. Department of Labor
ETA	Employment and Training Administration
INA	Immigration and Nationality Act
MPAS	Collectively, Mountain Plains Agricultural Services and Western Range Association (Intervenors-Appellees)
OFLC	Office of Foreign Labor Certification
TEGL	Training and Employment Guidance Letter

SUMMARY OF ARGUMENT

For the first time in nearly two years of litigation, the Department of Labor (DOL) now asserts that the plaintiffs lack Article III standing. The plaintiffs, however, have demonstrated an injury-in-fact and a causal connection between that injury and DOL's Training and Employment Guidance Letters (TEGLs). DOL errs by mischaracterizing the nature of the plaintiffs' injury. That injury is not based on an abstract interest in herder positions that offer desirable wages and benefits. Rather, the TEGLs injure the plaintiffs in two ways. First, the TEGLs injure plaintiffs by reducing herding job opportunities at statutorily required, non-depressed wages and working conditions. The TEGLs set the floor for the wages and working conditions that a herding employer must offer to U.S. workers to determine whether any such workers are available to do herding jobs. Yet they allow that floor to fall below the standards required by the Immigration and Nationality Act (INA) and DOL's own regulations, thereby reducing job opportunities in which the plaintiffs have a legally protected interest. DOL fails to address this injury, much less refute it.

Second, the plaintiffs have established a factual basis for Mr. Velasquez Catalan's standing based on his separate injury as a similarly employed ranch hand. DOL argues that an influx of herders at the TEGLs' depressed wages and working conditions need not affect ranch hands. But that contention is at odds with

the agency's position in the most recent H-2A regulations, which recognize that farm laborers' skills are generally adaptable across a wide range of crop and livestock occupations, and that the wages and working conditions of one agricultural occupation necessarily affect those throughout the industry. Given DOL's determination in this regard, Mr. Velasquez Catalan has standing under this Court's competitor standing cases.

On the merits, the TEGLs are not, as DOL contends, interpretive or procedural rules exempt from the notice-and-comment requirement of the Administrative Procedure Act (APA). First, although DOL points to three statutory or regulatory provisions that the TEGLs "interpret," the TEGLs do not logically flow from any of these provisions. Second, contrary to DOL's contention, the TEGLs are not procedural in nature. Far from constituting an agency housekeeping rule, the TEGLs alter the substantive rights and interests of employers and employees in the herding industry by setting, for example, the minimum wages that herder employers must offer U.S. workers before having access to foreign workers through the H-2A program. Third, neither DOL's historical practice of adopting so-called "special procedures" for herders without notice and comment, nor its recognition in a legislative rule that it might later adopt "special procedures," can excuse DOL's issuance of the TEGLs without following the APA. The APA does not have a grandfather clause exempting from notice and

comment those rules that previously, but incorrectly, evaded the statute's requirements. Moreover, the H-2A regulations do not authorize the adoption of "special procedures" without notice-and-comment rulemaking, nor could they do so under this Court's precedent. *See United States v. Picciotto*, 875 F.2d 345, 347 (D.C. Cir. 1989).

ARGUMENT

I. The Plaintiffs Have Standing to Pursue Their APA Challenge.

The plaintiffs have suffered an injury-in-fact cognizable under Article III for the purpose of standing. Specifically, the TEGLs reduce U.S. workers' legally protected right to job opportunities in the herding industry at non-depressed wages and working conditions. The plaintiffs, who have substantial experience in, qualifications for, and interest in herding work, are harmed by the reduction of job opportunities that the TEGLs cause. In addition, the TEGLs permit the unlawful addition of foreign workers to the agricultural industry, thus pushing U.S. workers toward ranch positions for which similar qualifications and skills are required. In so doing, the TEGLs depress the wages and working conditions of similarly employed U.S. workers, including those of Mr. Velasquez Catalan, who is currently employed as a ranch hand.

A. The TEGLs Reduce Plaintiffs' Opportunities for Jobs at Statutorily Required, Non-Depressed Wages and Working Conditions.

1. DOL erroneously characterizes the plaintiffs' injury as one based on an abstract interest in desirable or attractive wages for herders. DOL Br. at 17; *see also* MPAS Br. at 30. The plaintiffs, however, do not base their standing on the mere fact that the TEGLs result in unattractive wages. Rather, as U.S. workers, the plaintiffs have a statutory right under the INA to apply for job opportunities at wages and working conditions not adversely affected by an influx of foreign workers, and to an absolute preference over foreign workers for those positions. 8 U.S.C. § 1188(a); 20 C.F.R. § 655.0(a)(2); *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 596 (1982). The TEGLs set the floor for the wages and working conditions that a herding employer must offer to U.S. workers to determine, consistent with 8 U.S.C. § 1188(a)(1) of the INA, whether any such workers are available to do herding jobs. Yet the TEGLs exempt herding employers from the requirement that they offer wages and working conditions otherwise required by the H-2A regulations, even though DOL found, through prior notice-and-comment rulemaking, that the wages and working conditions in the H-2A regulations are necessary to comply with the INA's labor certification standard. *See* Appellants' Opening Br. at 31-32.

As a consequence, the TEGLs result in the hiring of foreign workers at wages and working conditions that fall below those required by the INA, and reduce the number of jobs available for the plaintiffs at terms and conditions that meet the INA's standards. *See id.* at 28-32.[1] This reduction in job opportunities at statutorily required, non-depressed wages and working conditions constitutes the plaintiffs' injury.

DOL fails entirely to address this injury wrought by the TEGLs, and its mischaracterization of the plaintiffs' injury is an error that permeates its Article III argument. For example, DOL contends that the plaintiffs are not injured by the TEGLs because they have not worked in, or "actively pursu[ed]," herder positions since the TEGLs took effect in 2011. DOL Br. at 15; *see also* MPAS Br. at 41. But it is no answer to the plaintiffs' contention that the TEGLs reduce available job opportunities at standards required by the INA to argue that the plaintiffs should apply for and accept job opportunities that do *not* meet those standards. Indeed, DOL's regulations make clear that "U.S. workers cannot be expected to accept employment" at wages and working conditions that would adversely affect U.S. workers. 20 C.F.R. § 655.0(a)(2).

[1] The brief of Intervenors Mountain Plains Agricultural Service and Western Range Association (collectively, MPAS) makes clear how widespread the hiring of H-2A workers is within the herding industry. The "two associations employ 1,500 to 2,000 foreign sheepherders," and "virtually all" of their employees are H-2A workers. MPAS Br. at 3-4.

2. DOL appears to contend that the plaintiffs' injury, if any, is caused, not by the TEGLs, but by DOL's "open range herding rule regime more generally," of which the "2011 TEGLs [a]re merely the latest iteration." DOL Br. at 20; *see also* MPAS Br. at 42, 44. However, the causal connection that DOL attempts to draw between the plaintiffs' injury and earlier iterations of the "special procedures," instead of the current TEGLs, is misguided. The plaintiffs assert a continuing injury based on a reduction in current herder job opportunities at statutorily required, non-depressed wages and working conditions. The TEGLs rescinded and replaced their predecessors, so they, and they alone, govern the current terms and conditions of herding employment. *See* DOL, Employment and Training Administration (ETA), Notice: TEGL No. 15-06, Change 1, Special Procedures: Labor Certification Process for Occupations Involved in the Open Range Production of Livestock Under the H-2A Program, 76 Fed. Reg. 47,243 (Aug. 4, 2011) (hereinafter, Open Range TEGL), JA32; DOL, ETA, Notice: TEGL No. 32-10, Special Procedures: Labor Certification Process for Employers Engaged in Sheepherding and Goatherding Occupations Under the H-2A Program, 76 Fed. Reg. 47,256 (Aug. 4, 2011) (hereinafter, Sheepherding TEGL), JA38. Any injunctive challenge to earlier "special procedures" no longer in effect would be dismissed as moot and, moreover, could not redress the plaintiffs' current and

continuing injury. DOL's argument that the plaintiffs have failed to challenge the rule actually responsible for causing their injury should thus be rejected.[2]

3. DOL attempts to identify a hypothetical plaintiff who might have Article III standing to challenge the TEGLs, *see* DOL Br. at 19-20, but its discussion in this regard is irrelevant. The question here is whether *these* plaintiffs have standing to bring their APA claim. In any event, although DOL contends that workers who are "actively seeking" herding jobs would have standing to challenge the TEGLs, *id.* at 19, it does not explain why the plaintiffs in this case—whom DOL characterizes as "monitoring the job market to see if they hear of an opening with wages and working conditions that they deem sufficient," *id.* at 17-18—do not meet this standard, even under DOL's own assessment of the evidence.

4. DOL and MPAS raise a hodgepodge of other arguments regarding plaintiffs' standing, all of which are unavailing. DOL now erroneously suggests that some of the plaintiffs' declarations suffer from an evidentiary "defect" because they bear electronic signatures. *Id.* at 5 n.3. The district court's Local Rule 5.4(b)(5), however, "permits filing, signing, and verification by electronic means."

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[2] DOL's argument underscores the futility of efforts to find sufficient job opportunities under the TEGLs at statutorily required, non-depressed wages and working conditions. DOL concedes that "whatever poor working conditions exist now in the herding market . . . existed before the 2011 TEGLs took effect," including while the plaintiffs were employed as H-2A herders. DOL Br. at 20; *accord* MPAS Br. at 19-20. Thus, the plaintiffs' observations about herders' wages and working conditions, to the extent they pre-date the TEGLs, remain accurate.

Brown v. Wachovia Bank, 244 F.R.D. 16, 20 (D.D.C. Aug. 3, 2007). Consistent with that rule, plaintiffs' counsel have on file the original, signed declarations.

For its part, MPAS argues for the first time on appeal that although Mr. Zacarias Mendoza states that he was a "ranch hand" in Utah in 2011, other indicia suggest that he was a herder when his employer offered him a raise from $750 to $800. MPAS Br. at 23 n.9, 36. MPAS should have raised this argument in the district court, at which time the plaintiffs would have had an opportunity to supplement the record. In any event, the issue raised by MPAS does not concern a material fact: The plaintiffs' standing does not rise or fall with the existence of a few herding jobs that offer wages above $750 per month—the DOL-established prevailing wage for sheepherders in most states. *See* Appellants' Opening Br. at 38.[3] The relevant question is whether the TEGLs permit wages and working conditions that are depressed by the presence of foreign workers, thereby excluding U.S. workers from statutorily required job opportunities. Should the

[3] In fact, if Mr. Mendoza was a herder when he worked "tending cattle" in Utah alongside an H-2A worker, *see* Mendoza Decl. ¶ 6, JA46-47, his declaration suggests that he was paid less than the legally required prevailing wage, even after his employer offered him a "raise" to $800. At least under DOL's 2013 prevailing wages, U.S. cattle herders in Utah working for employers who also hire H-2A cattle herders are entitled to $875 per month plus room and board (compared to $750 plus room and board for sheepherders). DOL, Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States: Prevailing Wage Rates for Certain Occupations Processed Under H-2A Special Procedures; Correction and Rescission, 78 Fed. Reg. 19,019, 19,020 (Mar. 28, 2013).

Court disagree, the plaintiffs respectfully request a remand to the district court so that the plaintiffs may introduce evidence as to the 2011 prevailing wages in Utah for cattle herders and have an opportunity to provide a supplemental declaration from Mr. Zacarias Mendoza clarifying his testimony.

MPAS also contends that the plaintiffs have not been injured by the TEGLs because the plaintiffs would require higher wages to return to herding than they earn through their current jobs. MPAS Br. at 30-31. MPAS's own discussion of the facts, however, makes clear that its assertion is untrue for Mr. Velasquez Catalan and Mr. Castro, assuming the two currently work forty-hour workweeks. In any event, MPAS's assertion is irrelevant. Were the TEGLs to undergo notice-and-comment rulemaking, DOL would likely require employers to offer job opportunities at higher wages and working conditions than those currently permitted under the TEGLs, which may be sufficient to enable the plaintiffs to return to herding work.

Finally, MPAS errs in asserting that the TEGLs are no less favorable to herders than earlier iterations of DOL's "special procedures" and, therefore, cannot have injured the plaintiffs. *Id.* at 33, 44. Contrary to MPAS's assertion, whether the plaintiffs are injured does not depend on whether the TEGLs are worse than earlier—and equally unlawful—"special procedures" that DOL adopted without notice-and-comment rulemaking. Were it otherwise, an agency could insulate an

unlawful rule from notice and public comment for all time simply by adopting one such rule and immediately replacing it with another, equally unlawful version.

MPAS relies on this Court's decision in *Transportation Workers Union v. TSA*, 492 F.3d 471 (D.C. Cir. 2007), but that case provides no support for MPAS's assertion. *Transportation Workers* involved a challenge to an agency's decision to replace one interpretive rule with another without notice-and-comment rulemaking. The plaintiff conceded that both versions of the rule were interpretive, but relied on a distinct line of cases by this Court "holding that an agency cannot significantly change its position . . . , even between two interpretive rules, without prior notice and comment." *Id.* at 475 (citing, e.g., *Alaska Prof'l Hunters Ass'n, Inc. v. FAA*, 177 F.3d 1030 (D.C. Cir. 1999)). The Court held that the plaintiff lacked standing to challenge the adoption of the new interpretive rule because, even under the old interpretive rule, he would have suffered the same injury. *Id.* at 477.

In contrast, the plaintiffs here do not argue that the TEGLs must undergo notice-and-comment rulemaking because of their divergence from earlier "special procedures." Rather, the plaintiffs contend that the TEGLs are simply more of the same unlawful conduct in which DOL has historically engaged and that, as legislative and substantive rules, the TEGLs are subject to the APA's notice-and-comment rulemaking requirement.

B. The TEGLs Injure U.S. Workers Employed as Ranch Hands, Including Mr. Velasquez Catalan.

DOL does not deny that Mr. Velasquez Catalan, as a ranch hand, is "similarly employed" to a herder within the meaning of 8 U.S.C. § 1188(a)(1)(B). Rather, it contends that the plaintiffs waived any argument regarding Mr. Velasquez Catalan's standing on this basis. DOL Br. at 21. Mr. Velasquez Catalan has consistently argued, however, that he is a "similarly employed" U.S. worker, and he has produced evidence of the nature of his current employment. *See* Compl. ¶ 19, JA11-12; Catalan Decl. ¶ 6, JA56; Dist. Ct. Doc. 26, Pl.'s Opp. to Mot. to Dismiss at 10-11.

DOL separately contends that there is no factual basis to support the theory that "competition for *herding* jobs should affect the working conditions for *ranch hand* jobs." DOL Br. at 22; *see also* MPAS Br. at 38. In so doing, however, DOL ignores its own position on this issue, as expressed in the H-2A Final Rule issued by the agency in 2010. DOL, Employment and Training Administration (ETA), Final Rule: Temporary Agricultural Employment of H-2A Aliens in the United States, 75 Fed. Reg. 6884 (Feb. 12, 2010). There, DOL made clear that "farm laborers' skills are adaptable across a relatively wide range of crop or livestock activities and occupations." *Id.* at 6899. For this reason, DOL determined that the adverse effect wage rate (AEWR) for the H-2A program (which is necessary to "put incumbent farm workers in the position they would have been in but for the

H-2A program," *id.* at 6891) must be "derived from data across a relatively broad . . . occupational span" within the agricultural industry, *id.* at 6899. Accordingly, it defined the AEWR as the annual average of combined crop and livestock workers' hourly wages as published by the U.S. Department of Agriculture's Farm Labor Survey. *Id.* at 6891; *see also* 20 C.F.R. § 655.103(b). DOL's rationale necessarily contemplated that an influx of foreign workers into one type of agricultural position will affect the wages and working conditions of other agricultural positions. As a result, DOL's contention that there is no factual basis to conclude that competition for herding jobs should affect the working conditions for ranch hand jobs is untenable.

Moreover, DOL neglects to acknowledge, much less distinguish, this Court's well-established competitor standing cases, which rely "on economic logic to conclude that a plaintiff will likely suffer an injury-in-fact when the government acts in a way that increases competition or aids the plaintiff's competitors." *Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010) (internal quotation marks omitted); *see also* Appellants' Opening Br. at 34-35 and cases cited therein. Under these cases, and in light of DOL's own considered position on competition within the agricultural industry, Mr. Velasquez Catalan has Article III standing as a similarly employed ranch hand.

C. The Plaintiffs Easily Satisfy the Standard for Prudential Standing.

DOL concedes that if the plaintiffs have Article III standing, they will have prudential standing under the INA "because they qualify as United States workers, and the injury they allege is the same type of injury that Congress intended the statute to address." DOL Br. at 22 n.10 (internal citation omitted). In contrast, MPAS generally reprises its Article III arguments in the context of prudential standing. MPAS Br. at 45-46. Those arguments fail for the same reasons identified above in Parts I.A and I.B. In addition, MPAS's contention that the plaintiffs are not willing and available for herding positions within the meaning of the INA requires no further discussion beyond that stated in the plaintiffs' opening brief. *See* Appellants' Opening Br. at 43-46.

MPAS's only additional contention is that because Mr. Velasquez Catalan's duties as a ranch hand are different in some ways from those of a herder, he is not a "similarly employed" worker under the INA. MPAS Br. at 47. But a worker need not have duties identical to those of a herder to be "similarly employed" under the INA. Indeed, such an assertion is nonsensical given the INA's focus on whether employment is similar, not precisely the same. Moreover, it is hard to imagine a job more similar to herding than a ranch hand position. In fact, cases interpreting an exemption under the Fair Labor Standards Act for workers who are "principally engaged in the range production of livestock"—that is, herders—underscore how

little difference there may be between herders' work and that of other livestock workers, such as ranch hands. *See*, *e.g.*, *Hodgson v. Elk Garden Corp.*, 482 F.2d 529, 534-35 (4th Cir. 1973).

II. DOL Violated the APA by Issuing the TEGLs Without Notice and an Opportunity for Public Comment.

A. The TEGLs Are Legislative, Not Interpretive, Rules and Thus Are Not Exempt from Notice-and-Comment Rulemaking.

DOL contends that the TEGLs constitute interpretive rules and thus fall within an exception to the APA's notice-and-comment requirement. DOL is wrong, however, because the TEGLs do not merely "clarif[y] a statutory term" or "remind[] parties of existing statutory duties." *Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 236 (D.C. Cir. 1992). DOL points to three statutory or regulatory provisions that it claims are interpreted by the TEGLs, but as described below, the TEGLs' detailed and rigid scheme does not "flow fairly from the substance of" any of these provisions. *Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 494 (D.C. Cir. 2010) (internal quotation marks omitted).

1. First, although DOL contends that one of the TEGLs interprets 8 U.S.C. § 1188(a)(1), DOL Br. at 26, that provision of the INA simply states that before allowing the importation of H-2A workers, DOL must certify that there are not sufficient U.S. workers available and qualified for the jobs and that the importation of H-2A workers will not adversely affect the wages and working

conditions of similarly employed U.S. workers. Section 1188(a)(1)'s broad language leaves to DOL the task of determining how to make such a certification, including how to determine whether there are sufficient U.S. workers available for the jobs identified in an H-2A petition. The TEGLs' very specific terms and conditions governing herding employment, including the wages, hours of work, and frequency of pay that must be offered to U.S. workers to test their availability, are not "compel[led]" or even "logically justifie[d]" simply by the terms of § 1188(a)(1), and are thus not interpretive rules. *Catholic Health Initiatives*, 617 F.3d at 494 (internal quotation marks omitted).

Indeed, it is telling that when DOL adopted the general H-2A standards for the wages and working conditions that employers must offer to test U.S. workers' availability, it did so by notice-and-comment rulemaking. *See* H-2A Final Rule, 75 Fed. Reg. at 6959 (citing § 1188 as authority for DOL's regulations governing the labor certification process for H-2A employment). Under DOL's position here, however, such standards would also be interpretive and could be issued without providing notice and seeking public comment. It strains credulity to believe that DOL would have subjected the H-2A Final Rule, including its labor certification provisions, to notice-and-comment procedures if the agency truly believed it could have issued such regulations as interpretive rules.

Having adopted the H-2A Final Rule after notice-and-comment rulemaking, DOL cannot now effectively amend that legislative rule—as the TEGLs do, *see* Appellants' Opening Br. at 53-55—without also subjecting the TEGLs to the APA's notice-and-comment safeguards, *see Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993).

2. DOL also argues that the TEGLs interpret the term "offered wage rate" in 20 C.F.R. § 655.120(a) to mean that employers must pay herders a prevailing wage as determined by State Workforce Agency surveys. DOL Br. at 26. But the TEGLs cannot conceivably interpret § 655.120(a), which does not even use the term "offered wage rate" except in its title.

Rather, § 655.120(a) states that "an employer must offer . . . and pay a wage that is the highest of the AEWR, the prevailing hourly wage or piece rate, the agreed-upon collective bargaining wage, or the Federal or State minimum wage, except where a special procedure is approved for an occupation or specific class of agricultural employment." The TEGLs cannot be said to *interpret* the requirement that an employer pay an AEWR where it exceeds the prevailing wage because the TEGLs replace that requirement with the mandate that employers need only pay a prevailing wage. *See* Appellants' Opening Br. at 11-12, 53-54. DOL's reliance on *American Mining Congress* is thus misplaced, since the agency rules challenged in

that case—unlike the TEGLs—"offer[ed] no interpretation that repudiate[d] or [wa]s irreconcilable with an existing legislative rule." 995 F.2d at 1113.

Moreover, although § 655.120(a) refers to an exception to its general rule where a "special procedure" has been adopted, the substance of the TEGLs does not logically flow from this provision, nor can the provision exempt DOL from the APA's notice-and-comment requirement when the agency creates such a "special procedure." *See* Appellants' Opening Br. at 54-55; *Picciotto*, 875 F.2d at 347; *see also* discussion, *infra*, at pp.23-24.

3. Finally, DOL attempts to justify the TEGLs' meager standards for range housing as interpretations of the INA's "statutory phrase 'housing for employees principally engaged in the range production of livestock.'" DOL Br. at 26 (quoting 8 U.S.C. § 1188(c)(4)). DOL contends that the TEGLs identify what the agency "considers adequate and safe mobile housing in the open range." *Id.*

The problem for the government's argument is that 8 U.S.C. § 1188(c)(4) does not explicitly require "safe" or "adequate" housing for herders, or supply any other standard that the TEGLs might interpret. *See* Appellants' Opening Br. at 15-16. In fact, the portion of the statute selectively quoted by DOL actually arises in the context of a congressional directive that the agency "issue regulations which address the specific requirements of housing for employees principally engaged in the range production of livestock." 8 U.S.C. § 1188(c)(4). "When Congress

authorizes an agency to create standards, it is delegating legislative authority, rather than itself setting forth a standard which the agency might then particularize through interpretation." *Hoctor v. USDA*, 82 F.3d 165, 169 (7th Cir. 1996). Accordingly, the TEGLs do not interpret 8 U.S.C. § 1188(c)(4).

DOL also argues that the TEGLs' housing provisions are interpretive, not legislative, rules because DOL need not rely on them to sanction employers on a case-by-case basis for providing herders with inadequate housing or failing to provide housing at all. Rather, DOL contends that it can rely on § 1188(c)(4) alone to impose such sanctions. DOL Br. at 39. However, even assuming that DOL has this power on a case-by-case basis in adjudication, it in fact relies on the TEGLs to set specific, binding standards for herder housing, and it does so on a *categorical* basis, a sure sign that the TEGLs are legislative. *Cf. Pesikoff v. Secretary of Labor*, 501 F.2d 757, 763 n.12 (D.C. Cir. 1974) (concluding that an unpublished, internal memorandum was interpretive where DOL did not rely on the memorandum to deny an employer's request for labor certification). To gain approval from DOL to import H-2A workers, herding employers must agree to make job offers that comply with the standards set by the TEGLs, including housing standards. *See, e.g.*, Sheepherding TEGL, JA39-40 (discussing requisite contents of job offers and identifying housing standards that must be included in job offers); Open Range TEGL, JA33 (same). Thus, without the TEGLs, there would be no specific,

enforceable standard determining when DOL must turn down employer job orders that fail to offer the housing benefits identified in the TEGLs.[4]

B. The TEGLs Are Substantive, Not Procedural, Rules and Thus Are Not Exempt from Notice-and-Comment Rulemaking.

The government contends that the TEGLs are mere "guidelines for how parties present themselves or their viewpoints to the agency," and thus constitute procedural rules exempt from notice-and-comment rulemaking. DOL Br. at 34. But the TEGLs—though denominated as "special procedures"—go far beyond a procedural "agency housekeeping rule[]." *JEM Broad. Co., Inc. v. FCC*, 22 F.3d 320, 328 (D.C. Cir. 1994). Rather, by setting material terms of employment used to test U.S. workers' availability and to hire H-2A workers, the TEGLs "alter the rights or interests of parties," exhibiting the hallmark of a substantive, not procedural, rule. *Elec. Privacy Info. Ctr. v. DHS*, 653 F.3d 1, 5 (D.C. Cir. 2011) (internal quotation marks omitted).

Although DOL likens the TEGLs to a rule deemed procedural in *American Hospital Ass'n v. Bowen*, 834 F.2d 1037 (D.C. Cir. 1987), that case provides no support for the agency's position. *Bowen* concluded that an agency manual was

[4] The TEGLs also cannot be justified as interpretive rules on the ground that the Office of Foreign Labor Certification (OFLC) lacks authority to issue substantive rules. MPAS Br. at 55. Among other reasons, even if OFLC's authority is so limited, the TEGLs were issued by the Employment and Training Administration, not OFLC.

procedural where it "set forth an enforcement plan for [the agency's enforcement] agents," *id.* at 1050, who were responsible for reviewing whether the activities of hospitals, doctors, and other health care providers conformed to the Medicare Act's substantive standards, *id.* at 1042. From the perspective of hospitals and other health care providers, *see id.* at 1048-49, the manual "impose[d] no new burdens," at most "making it more likely that their transgressions from Medicare's standards w[ould] not go unnoticed" and "imposing on them the incidental inconveniences of complying with an enforcement scheme," *id.* at 1051. Critically, *Bowen* emphasized that "[w]ere [the agency] to have inserted a new standard of review governing . . . scrutiny of a given procedure, or to have inserted a presumption of invalidity when reviewing certain operations, its measures would surely require notice and comment." *Id.*; *see also James V. Hurson Assocs., Inc. v. Glickman*, 229 F.3d 277, 281 (D.C. Cir. 2000) (holding that USDA rule abolishing face-to-face meetings to approve food labels was procedural where it "did not alter the substantive criteria by which [the agency] would approve or deny proposed labels" but "simply changed the procedures it would follow in applying those substantive standards").

Unlike the manual at issue in *Bowen*, the TEGLs alter the rights and interests of employers, for example, by setting minimum standards for employer-provided housing not derived from the governing statute. *See* Appellants' Opening Br. at 15-

16. The TEGLs also alter the rights of U.S. workers, for example, by requiring them to accept a prevailing wage set by the TEGLs or face being replaced by H-2A herders who will work for that wage. *Id.* at 11-12. And the TEGLs provide new standards for review of labor certification applications covering herders, *see generally id.* at 9-16, a substantive addition to the regulatory scheme that "surely require[s] notice and comment," *Bowen*, 834 F.2d at 1051. Because the TEGLs affect the substantive standards under which the agency approves employers' labor certification applications, they do not fall within the APA's exception for procedural rules.

C. Neither Historical Practice Nor the H-2A Final Rule Exempts the TEGLs from the APA's Notice-and-Comment Requirement.

DOL and MPAS further attempt to justify the TEGLs' adoption without notice-and-comment rulemaking by relying on historical practice and a portion of the H-2A Final Rule addressing "special procedures." Both arguments lack merit.

First, even if DOL's adoption of the TEGLs without notice-and-comment procedures is part of a "long-established practice," as DOL contends, DOL Br. at 29, the APA does not have a grandfather clause exempting from notice and comment those rules that have long evaded the statute's requirements. It is no answer to the workers' contention that DOL violated the law to say that the agency has always done so.

In a variation on that theme, MPAS argues that the public has had numerous opportunities to comment to Congress and DOL regarding the admission of foreign herders and DOL's use of "special procedures" generally. MPAS Br. at 56-59. But that assertion is beside the point. The plaintiffs' APA claim is based on the plaintiffs' inability to comment on the substance of the "special procedures" under the most recent TEGLs. Past opportunities to comment—at most indirectly—on DOL's use of "special procedures" more generally do not cure or otherwise excuse the APA violation alleged by the plaintiffs.

DOL separately contends that the TEGLs are permissible because they "specifically derive from an exception codified in the existing" H-2A Final Rule. DOL Br. at 29, 33. In this regard, DOL relies on 20 C.F.R. § 655.102, *see* DOL Br. at 33-34, but that section does not excuse DOL's failure to engage in notice-and-comment rulemaking before adopting the TEGLs. To the extent DOL's argument also hinges on § 655.120(a), *see id.* at 33, it fares no better. Section 655.102 states that DOL may "establish, continue, revise, or revoke special procedures for processing certain H-2A applications." 20 C.F.R. § 655.102. And it provides that "for work in . . . the range production of sheep or other livestock, the OFLC Administrator has the authority to establish monthly, weekly, or semi-monthly [AEWRs]." *Id.* Section 655.120(a) addresses the offered wage rate in the H-2A program, stating that an employer must pay the higher of an AEWR and various

other wage rates, "except where a special procedure is approved for an occupation or specific class of agricultural employment."

Although these provisions recognize that DOL may adopt "special procedures" with respect to some occupations, they do not explicitly exempt the adoption of such procedures from the APA's notice-and-comment rulemaking requirement. Nor could the provisions do so if they tried. As this Court held in *United States v. Picciotto*, 875 F.2d 345, an agency may not "grant itself a valid exemption to the APA for all future regulations, and be free of [the] APA's troublesome rulemaking procedures forever after, simply by announcing its independence in a general rule." *Id.* at 347. In *Picciotto*, this Court considered whether the Park Service could enforce a rule, adopted without notice-and-comment rulemaking, that prohibited demonstrators from storing property at a demonstration site after a set period of time. *Id.* at 346. The agency argued that the rule was enforceable because a separate Park Service regulation contained an "open-ended provision" allowing the agency to adopt "reasonable conditions" in fashioning permits. *Id.* This Court rejected the argument that since the regulation permitting "reasonable conditions" went through notice-and-comment rulemaking, "the new restrictions [did] not need to." *Id.* It reasoned that to hold otherwise "would frustrate Congress' underlying policy in enacting the APA by rendering compliance optional." *Id.* at 347.

DOL attempts to distinguish *Picciotto* by contending that its "special procedure regulation does not grant DOL the authority to adopt an independent 'condition' for limiting the behavior of a regulated party." DOL Br. at 34. DOL's argument fails because it ignores that under the agency's reading of §§ 655.102 and 655.120(a), the regulations *do* purport to grant the agency an open-ended ability to adopt conditions—in the form of so-called "special procedures"—under which H-2A employers will be exempt from the otherwise applicable H-2A Final Rule.

Moreover, even if the H-2A Final Rule could authorize the imposition of "special procedures" without notice-and-comment rulemaking, it does not do so with respect to the TEGLs. Section 655.102 is quite clear that "[e]mployers must demonstrate upon written application to [the agency] that special procedures are necessary." The TEGLs do not indicate that employers benefiting from the "special procedures" have submitted such applications with respect to herding occupations, and DOL did not make an explicit finding of necessity in adopting the TEGLs.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's order dismissing the plaintiffs' claim for lack of standing, hold that DOL's issuance of the TEGLs without notice and an opportunity for public comment violated the APA, and remand to the district court for determination of an appropriate remedy.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-face and volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) as follows: The type face is fourteen-point Times New Roman font, and the word count is 5,700.

/s/ Julie A. Murray
Julie A. Murray

CERTIFICATE OF SERVICE

I certify that on October 7, 2013, I caused the foregoing to be filed with the Clerk of the Court through the Court's ECF system, which will serve notice of the filing on all filers registered in this case.

/s/ Julie A. Murray
Julie A. Murray