No. 23-2108

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

USA FARM LABOR, INC. *et al.*,

Plaintiffs-Appellants,

v.

JULIE A. SU Acting Secretary, Department of Labor, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of North Carolina
District Court Case No. 1:23-cv-096-MR

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INTRODUCTION

This Court should affirm the district court's denial of Plaintiffs' motion to preliminarily enjoin the enforcement of a regulation designed to protect the wages and working conditions of workers in the United States: the U.S. Department of Labor's ("DOL") *Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States*, effective March 30, 2023. 88 Fed. Reg. 12760 (Feb. 28, 2023) (the "2023 AEWR Final Rule").

The Adverse Effect Wage Rate ("AEWR") is "the minimum hourly wage rate[] that must be paid under the H-2A program" to H-2A and non-H-2A workers in corresponding employment. *North Carolina Growers' Ass'n v. United Farm Workers* (*NCGA*), 702 F.3d 755, 759 (4th Cir. 2012). The purpose of the AEWR is "to ensure that H-2A workers do not have an adverse effect on the wages and working conditions of similarly-employed" workers in the United States. *Id*.

In this action, Plaintiffs contend that the 2023 AEWR Final Rule violates the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2). In the district court, Plaintiffs contended that they were likely to succeed on the merits of their claims because DOL failed to account for the wage-depressive effects of unauthorized workers and failed to calculate the costs to employers accurately. The district court rejected both arguments, finding the first to be a disagreement with DOL's economic

predictions and the second to be a disagreement with DOL's analysis. Because DOL acted reasonably and properly explained its choices, the district court found that Plaintiffs' claims were unlikely to succeed on the merits.

On appeal, Plaintiffs raise two new arguments as to why they are likely to succeed on the merits, both of which are forfeited because they were not presented below, and neither of which is well founded. First, Plaintiffs contend that the primary purpose of the Immigration Reform and Control Act of 1986 ("IRCA")—which created the H-2A program for temporary agricultural workers—was to control illegal immigration, and that DOL was required to consider that purpose in promulgating the 2023 AEWR Final Rule. This contention fundamentally misunderstands the IRCA and the core purpose of the H-2A program, which is to provide temporary, authorized foreign labor to the agricultural sector if U.S. labor is unavailable, and to ensure that the influx of such authorized foreign labor does not depress the wages and working conditions of workers in the United States similarly employed. DOL has never been tasked with controlling illegal immigration through its AEWR regulations nor does the statutory text that provides DOL's authority mention illegal immigration. Second, Plaintiffs contend that DOL should have applied a different methodology in calculating the costs of the 2023 AEWR Final Rule. Because DOL selected a reasonable methodology and properly explained its decision, this argument also fails.

The district court also weighed the hardships and public interest and reasonably found that they favor the Government. This finding by the district court was not an abuse of discretion and provides a separate and independent basis for affirming the decision of the district court.

In sum, this Court should affirm the decision of the district court denying Plaintiffs' request for a preliminary injunction.

JURISDICTIONAL STATEMENT

The District Court for the Western District of North Carolina entered an order denying Plaintiffs' motion for a preliminary injunction on September 26, 2023. JA17. Plaintiffs timely noticed their appeal on October 23, 2023. JA17. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1) over the appeal of a district court's interlocutory order denying a request for preliminary injunctive relief. The district court had jurisdiction under 28 U.S.C. § 1331 because Plaintiffs asserted claims under the Administrative Procedure Act. JA35-43.

ISSUES PRESENTED

1. Did the District Court correctly find that the Plaintiffs had not shown a likelihood of success on the merits of their challenge to DOL's 2023 AEWR Final Rule?

2. Did the District Court abuse its discretion in finding the balance of hardships and public interest—which merge in a case against the government—did not tip in the Plaintiffs' favor?

STATEMENT OF THE CASE

I. Statutory and Regulatory Background

A. Overview of the H-2A Temporary Agricultural Worker Program

The H-2A visa program permits agricultural employers in the United States to hire foreign workers on a temporary basis "to perform agricultural labor or services ... of a temporary or seasonal nature." 8 U.S.C. § 1101(a)(15)(H)(ii)(a).

To hire a temporary agricultural worker through the H-2A program, an employer must file a visa petition with the Department of Homeland Security ("DHS"). But before an employer can file such a visa petition, they must seek a temporary labor certification from DOL that (1) there "are not sufficient workers" able, willing, and qualified to perform the labor at issue and (2) employment of the H-2A worker "will not adversely affect the wages and working conditions of workers in the United States similarly employed." 8 U.S.C. § 1188(a)(1)(A), (B); *see also* 8 C.F.R. § 214.2(h)(5)(i)(A). In enacting the H-2A program, Congress directed DOL to strike a balance between the "competing goals" of "providing an adequate labor supply" and "protecting the jobs of domestic workers." *AFL-CIO v. Dole*, 923 F.2d 182, 187 (D.C. Cir. 1991).

Setting the Adverse Effect Wage Rate ("AEWR") "is one of the primary ways DOL meets its statutory obligation to certify that the employment of H-2A workers will not have an adverse effect on the wages of agricultural workers in the United States similarly employed." 88 Fed. Reg. at 12761. The AEWR "is designed to prevent the potential wage-depressive impact of foreign workers on the domestic agricultural workforce." 75 Fed. Reg. 6884, 6891 (Feb. 12, 2010). In designing the AEWR methodology, DOL sets a "rate [that] will neither ratchet wages upward, driving growers out of business nor perpetuate wage depression." *Dole*, 923 F.2d at 187. Congress has not set a method for calculating the AEWR; rather, "calculating AEWRs has been left entirely to [DOL's] discretion." *AFL-CIO v. Brock*, 835 F.2d 912, 915 (D.C. Cir. 1987). Employers who wish to employ temporary foreign agricultural workers must offer, advertise in their recruitment, and pay a wage that is the highest of the AEWR, the prevailing wage (if one has been issued by DOL after a wage survey), the agreed-upon collective bargaining wage, the federal minimum wage, or the state minimum wage. *See* 20 C.F.R. §§ 655.120(a), (c), 655.122(l).

B. History of the H-2A Program and the AEWR

1. The Immigration and Nationality Act of 1952 and the H-2 Program

Congress first created a program for the employment of temporary foreign workers under the Immigration and Nationality Act of 1952 ("INA"). Section

101(a)(15)(H)(ii) of that Act excluded from the definition of "immigrant" "an alien having residence in a foreign country which he has no intention of abandoning … who is coming temporarily to the United States to perform other temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country."[1] Pub. L. No. 82-414, § 101(a)(15)(H)(ii), 66 Stat. 163, 168. Section 212(a)(14) of the 1952 Act made "[a]liens seeking to enter" the U.S. to "perform skilled or unskilled labor" ineligible for worker visas if the Secretary of Labor certified that "sufficient workers in the United States who [were] able, willing, and qualified [were] available at the time … and place … to perform such skilled or unskilled labor," or if "the employment of such aliens [would] *adversely affect* the wages and working conditions of the workers in the United States similarly employed." Pub. L. No. 82-414, § 212(a)(14), 66 Stat. 163, 183 (Jun. 27, 1952) (emphasis added).

The Immigration and Naturalization Service ("INS") promulgated regulations implementing the INA of 1952. Those regulations included a provision that required employers seeking to employ foreign workers to first obtain certification from DOL that the employment of such foreign workers would not "adversely affect the wages

[1] The term "other temporary services or labor" contrasted with section 101(a)(15)(h)(i) which related to those "of distinguished merit and ability and who is coming temporarily to the United States to perform services of an exceptional nature requiring such merit and ability." Pub. L. No. 82-414, § 101(a)(15)(H)(i), 66 Stat. 163, 168.

and working conditions of workers in the United States similarly employed." 8 C.F.R. § 214.(2)(h)(3) (1986); *see AFL-CIO v. Dole*, 923 F.2d 182, 184 (D.C. Cir. 1991). Pursuant to INS regulations, DOL adopted its own conforming regulations, including regulations defining the AEWR. *See, e.g.*, 41 Fed. Reg. 25017 (Jun. 22, 1976); *Rowland v Marshall*, 650 F.2d 28, 29-30 (4th Cir. 1981); *see also AFL-CIO v. Brock*, 835 F.2d 912, 913 (D.C. Cir. 1987).

2. The Immigration Reform and Control Act of 1986 and the H-2A Program

Congress amended the INA in 1986 with the IRCA. Pub. L. 99-603, Nov. 6, 1986. The IRCA sought to deter illegal immigration—specifically the employment of unauthorized foreign workers—through employer sanctions, work authorization verification systems, and increased enforcement. *See id.* at §§ 111-115, 121. The IRCA also sought to reform aspects of the existing immigration system established by Congress and provide a path to lawful status for certain individuals who had entered the United States unlawfully prior to 1982. *See id.* at § 201 *et seq*. (legalization); § 301 *et seq*. (reform).

In addition, the IRCA created the H-2A program for temporary agricultural workers, and the H-2B program for non-agricultural temporary workers. *See id.* at §§ 301-305 (H-2A program); § 311 (H-2B program). Although Congress enacted the H-2A program through the IRCA, it did not do so for the purpose of controlling illegal immigration, it did so to provide authorized foreign workers to the

agricultural industry. Rather, Congress recognized that the U.S. agricultural industry had relied heavily on unauthorized foreign workers for many years and that the new enforcement provisions of the IRCA could impact the U.S. agricultural industry's ability to hire workers. *See* Senate Rep. No. 99-132, at 2 (1985); House Rep. No. 99-682, pt. 1 at 106 (1986); *Me. Forest Products Council v. Cormier*, 51 F.4th 1, 10 (1st Cir. 2022). Thus, Congress created the H-2A program to provide the industry with temporary lawful workers if no U.S. workers were willing, able, and qualified to take the jobs being offered. *See id.*; *see also* 8 U.S.C. § 1188(a)(1)(A). In creating the H-2A program, however, Congress also explicitly instructed DOL to ensure that employing H-2A temporary workers would "not adversely affect the wages and working conditions of workers in the United States similarly employed." 8 U.S.C. § 1188(a)(1)(B); *see also* Senate Rep. No. 99-132 at 14, 38; House Rep. No. 99-682, pt. 1 at 50-51. The "adversely affects" language in this provision of IRCA was not new; it appeared in the 1952 INA and the INS and DOL regulations implementing the INA. Pub. L. No. 82-414, § 212(a)(14), 66 Stat. 163, 183 (1952) (as implemented by INS at 8 C.F.R. § 214(2)(h)(3) (1986)); 8 U.S.C. § 1188(a)(1)(B) (IRCA). As with the INA, the IRCA did not define how to prevent adverse effects but instead left it to the discretion of DOL to choose a reasonable methodology. *Rowland*, 650 F.2d at 30 (pre-IRCA); *AFL-CIO v. Dole*, 923 F.2d 182, 184 (D.C. Cir. 1991) (post-IRCA).

Under the IRCA, before a prospective H-2A employer can petition for temporary worker visas for foreign workers, the employer must first apply to DOL for a certification that establishes: (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 H-2A workers in such labor or services will not *adversely affect* the wages and working conditions of workers in the United States similarly employed." 8 U.S.C. § 1188(a)(1) (emphasis added).

3. The History of the AEWR

"DOL has used a number of methods for calculating the AEWR over the years[.]" *UFW v. Chao*, 227 F. Supp. 2d 102, 108 n.13 (D.D.C. 2002). Though DOL promulgated rules to calculate AEWRs prior to the IRCA, DOL first implemented the IRCA's H-2A provisions, including a methodology for calculating AEWRs, by promulgating an interim final rule in 1987. 52 Fed. Reg. 20496 (Jun. 1, 1987). The interim final rule, which DOL subsequently finalized, 54 Fed. Reg. 28037 (Jul. 5, 1989), stated that AEWRs "shall be equal to the annual weighted average hourly wage for field and livestock workers (combined) for the region, as published annually by the U.S. Department of Agriculture (USDA) based on the USDA quarterly wage survey." 52 Fed. Reg. at 20521. As DOL explained in the preamble of the interim final rule, "USDA publishes the data for the 48 contiguous States and

Hawaii by nineteen agricultural regions, which consist of one or more States." 52 Fed. Reg. at 20504; *see also* 54 Fed. Reg. at 20837.

That AEWR methodology stood (with the exception of two brief interruptions) until DOL promulgated the 2023 AEWR Rule.[2]

4. The 2021 Notice of Proposed Rulemaking and 2023 AEWR Final Rule

On December 1, 2021, DOL issued a notice of proposed rulemaking announcing its intent to amend the regulations governing the methodology to determine the hourly AEWRs for non-range H-2A occupations (*i.e.*, all H-2A occupations other than herding and production of livestock on the range). *See Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States*, 86 Fed. Reg. 68174 (Dec. 1, 2021). Broadly speaking, the Notice of Proposed Rulemaking proposed four main changes to the AEWR methodology.

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[2] From January 17, 2009, through May 29, 2009, and from December 21, 2020, through December 23, 2020, different AEWR methodologies were in effect. In the first instance, DOL itself rescinded the new, and restored the original, methodology. *See NCGA*, 702 F.3d at 759-62. Plaintiffs assert that first departure from the original AEWR methodology increased AEWR rates, *see* Br. 6-7, whereas this Court's decision in *NCGA* made clear that the NCGA sought to keep that methodology in effect because it *lowered* AEWR rates. In the second instance, a court preliminary, then permanently, enjoined and vacated the new methodology at the United Farm Workers' (UFW's) behest. *UFW v. DOL*, 509 F. Supp. 3d 1225 (E.D. Cal. 2020) (PI issued on Dec. 23, 2020); 2021 WL 1946696 (May 14, 2021) (permanent injunction).

First, DOL proposed to continue to use the Farm Labor Survey as the primary wage source for those occupations surveyed and reported by the Farm Labor Survey. In the event the Farm Labor Survey did not report a wage finding for the field and livestock workers (combined) occupational group (*e.g.*, in Alaska, where Farm Labor Survey does not survey), DOL's Bureau of Labor Statistics OEWS survey would serve as a wage source for these occupations. *See id.* at 68179–81. The following six Standard Occupational Classification ("SOC") codes correspond to the field and livestock worker occupations where DOL proposed to set the AEWR based on the Farm Labor Survey, or the OEWS if the Farm Labor Survey is not available: (1) Graders and Sorters, Agricultural Products; (2) Agricultural Equipment Operators; (3) Farmworkers and Laborers, Crop, Nursery and Greenhouse; (4) Farmworkers, Farm, Ranch, and Aquacultural Animals; (5) Packers and Packagers, Hand; and (6) Agricultural Workers – Other. *See* 86 Fed. Reg. at 68179.[3] DOL estimated that only approximately 2% of workers would be employed in H-2A job

[3] "The 2018 Standard Occupational Classification (SOC) system is a federal statistical standard used by federal agencies to classify workers into occupational categories for the purpose of collecting, calculating, or disseminating data. All workers are classified into one of 867 detailed occupations according to their occupational definition. To facilitate classification, detailed occupations are combined to form 459 broad occupations, 98 minor groups, and 23 major groups. Detailed occupations in the SOC with similar job duties, and in some cases skills, education, and/or training, are grouped together." *U.S. Bureau of Labor Statistics, Standard Occupational Classification*, available at https://www.bls.gov/soc/ (last visited January 31, 2024).

opportunities where the AEWR would change under the proposed rule from the current baseline. *See* 86 Fed. Reg. at 68188

Second, the Notice of Proposed Rulemaking proposed using the OEWS to establish the AEWR for those occupations not consistently surveyed by the Farm Labor Survey. *See id.* at 68179, 68181–83. This OEWS-based AEWR would generally apply to higher paid agricultural positions such as farm supervisors/managers, truck drivers, and those employed for contracted services such as construction or equipment operators supporting farm production.

Third, the Notice of Proposed Rulemaking proposed to require employers to pay the highest wage applicable if the job opportunity could not be classified within one occupation. For example, if a job opportunity required the same duties as that of a field and livestock worker as well as duties for that of a construction worker, the employer would have to pay the higher rate among those classifications. *See id.* at 68179, 68183-84.

Fourth, the Notice of Proposed Rulemaking proposed requiring the Office of Foreign Labor Certification Administrator to publish an update to the Farm Labor Survey AEWRs and OEWS AEWRs as a notice in the *Federal Register* at least once per year. *See id.* at 68179.

On February 28, 2023, DOL published the 2023 AEWR Final Rule, amending the methodology for determining the AEWR. *See* 88 Fed. Reg. 12760, 12760. After

careful consideration of comments from the public, the 2023 Rule adopted the proposals in the 2021 Notice of Proposed Rulemaking described above without substantive change, finalizing changes to 20 C.F.R. §§ 655.103(b), 655.120(b)(1), (2), and (5). The 2023 Rule became effective on March 30, 2023.

In the 2023 AEWR Final Rule, DOL explained its cost analyses for employers, including an estimate of the number of H-2A certifications that would be subject to the OEWS wage rates, the average cost per certification, and the average cost per worker. 88 Fed. Reg. at 12875. DOL determined that of 25,150 certifications issued in the prior two fiscal years, 732 of them, or approximately 2.9%, would have been subject to the OEWS wage rates under the 2023 AEWR Final Rule, with an average cost per worker for those 732 certifications of $5,117. *Id.* DOL also certified that the regulation would "not have a significant economic impact on a substantial number of small entities." Using H-2A filing data and commercial data, DOL identified H-2A filers that qualified as small entities and then determined how many of those would incur costs under the 2023 AEWR Final Rule that exceeded 3% of total revenues. DOL determined that only 2.6%-3.5% of small employers would see a cost exceeding 3% of revenues and also determined that many small employers do not even hire H-2A workers in the affected job responsibilities. 88 Fed. Reg. at 12801, 12800 & Table 10.

II. Factual Background and Procedural History

A. The Plaintiffs

There are 24 Plaintiffs challenging the 2023 AEWR Final Rule. Twenty-three Plaintiffs are farms or agricultural businesses in the United States that utilize the H-2A program and employ, or seek to employ, H-2A temporary workers. The remaining Plaintiff-Appellant, USA Farm Labor, is an H-2A filing agent that does not hire or use H-2A workers itself, but instead assists others with the labor certification and visa petitioning processes. JA25-27.

B. Procedural History

The Plaintiffs filed the operative complaint on May 24, 2023, alleging that the 2023 AEWR Final Rule was contrary to statute, arbitrary and capricious, and not the product of reasoned decision-making, in violation of the APA, 5 U.S.C. § 706(2). JA33-35. The Plaintiffs sought to enjoin the 2023 AEWR Final Rule to prevent DOL from enforcing it. JA43.

The Plaintiffs eventually moved for a preliminary injunction on May 26, 2023, and DOL opposed. JA12, JA13. On August 4, 2023, DOL moved to dismiss the Second Amended Complaint on the ground that the Plaintiffs lacked an impending injury sufficient to confer Article III standing. JA16. Subsequently, Plaintiffs also moved for a Temporary Restraining Order ("TRO"). JA17.

On September 26, 2023, the district court issued a 38-page decision denying the Plaintiffs' request for preliminary injunctive relief and a TRO. JA382-420. The court also denied DOL's motion to dismiss, finding the Plaintiffs had established standing. *Id*.

The court concluded that the Plaintiffs failed to show a likelihood of success on the merits of their claims. JA401-416. The district court rejected Plaintiffs' arguments that OEWS wage data was an inappropriate data source simply because it included non-agricultural wage sources, finding that DOL had reasonably explained that OEWS survey data better captured wages for certain skilled H-2A occupations such as managers, truck drivers, and construction workers. JA 403-405. Plaintiffs do not challenge this holding on appeal.

The district court considered but rejected Plaintiffs' contention that the 2023 AEWR Final Rule failed to consider employer costs. JA410. The district court quoted from the 2023 AEWR Final Rule's cost analysis at length. JA410-411. The district court found that the Plaintiffs disagreed with DOL's analysis because they believed it did not adequately account for workers' assigned SOC codes being reclassified under the 2023 AEWR Final Rule, but that they had not "shown that the DOL was willfully blind to what data would be needed or failed to diligently pursue the information on which one would rationally base such a determination." JA412-413. The district court also rejected Plaintiffs' arguments that DOL should have used

a different dataset in its cost analysis, finding that DOL made a prediction based on available data. JA 412.

Finally, the district court considered Plaintiffs' argument that because of costs, the 2023 AEWR Final Rule would cause an increase in hiring of unauthorized workers that would in turn depress U.S. worker wages. JA414-415. The district court found that Plaintiffs' argument was a mere disagreement with DOL's economic prediction about the effects of the 2023 AEWR Final Rule on wages. JA415. Accordingly, the district court found Plaintiffs had not shown a likelihood of success on the merits. JA416.

The court also found that the balance of hardship and public interest factors weighed in the government's favor. JA417-419. The court found that an injunction would inject uncertainty into the entire H-2A program, that it would harm works at least as much as the absence of an injunction would harm the plaintiffs, and that the public interest is served by the enforcement of laws enacted by duly-elected representatives, particularly in the immigration context. *Id*. Plaintiffs timely noticed their appeal of the district court's interlocutory decision. JA17.

SUMMARY OF THE ARGUMENT

The district court correctly determined that the Plaintiffs failed to demonstrate a likelihood of success on the merits and thus were not entitled to a preliminary injunction.

The district court correctly rejected Plaintiffs' argument that the 2023 AEWR Final Rule would depress U.S. worker wages because employers would hire more unauthorized workers. On the record before it, the district court found the Plaintiffs failed to establish that DOL's predictions were arbitrary or capricious, and on appeal, Plaintiffs do not argue otherwise.

The district court also correctly rejected Plaintiffs' argument that DOL failed to consider the costs of the 2023 AEWR Final Rule to employers. The Final Rule contained detailed analyses of the predicted costs, based on DOL's own dataset of labor certifications and other information. DOL explained its choice of dataset and its analysis of the data were entitled to deference. The district court held that Plaintiffs' argument that DOL should have considered different data amounted to a disagreement with DOL's reasonable and reasonably explained choice of data and did not show a likelihood of success on the merits. Plaintiffs also do not challenge this holding of the district court, and thus concede this point as well.

Finally, the district court's analysis of the equities was well within its discretion. The court reasonably concluded that the balance of hardships and public interest factors did not tip in Plaintiffs' favor because an injunction would inject uncertainty into the entire H-2A program and would cause at least as much harm to H-2A workers who would not receive wages owed, as the absence of an injunction would cause to Plaintiffs. Plaintiffs do not dispute this point. Further, an injunction

would prevent enforcement of a rule that implements a statutory mandate enacted by duly elected representatives of the people, a concern that is heightened in the immigration context. Plaintiffs argue that if they succeed on likelihood of success on the merits, they should also succeed on the balance of equities and public interest, but that would impermissibly conflate the distinct prongs of the preliminary injunction analysis.

Moreover, Plaintiffs' arguments on appeal present fundamentally new questions not presented to, or considered by, the district court. This Court should reject those arguments as forfeited.

First, Plaintiffs assert for the first time that the IRCA requires DOL to consider whether the AEWR methodology will increase or decrease illegal immigration to the United States because, according to Plaintiffs, the primary purpose of the IRCA was to "control illegal immigration." But that is not the case. First, the text of the IRCA establishes only two considerations for DOL in reviewing an application for H-2A certification: 1) whether there are U.S. workers who are willing and able to perform the temporary agricultural job that the employer seeks to fill with a foreign worker; and 2) whether the use of H-2A workers will adversely affect the wages and working conditions of workers in the United States similarly employed. 8 U.S.C. § 1188(a). Second, although the legislative history of the IRCA indicates that *one* purpose of the statute is the control of illegal immigration, it shows that Congress

intended to achieve that objective through Title I of the IRCA by delegating authority to the former INS and the immigration courts (not DOL) to assess penalties and take immigration enforcement actions. Under the IRCA, the H-2A program, which was set forth in Title III, was created to provide U.S. agricultural employers with access to authorized temporary foreign labor without adversely affecting the wages and working conditions of agricultural workers in the United States. It was not part of the IRCA's sections regarding control of illegal immigration. Plaintiffs' arguments are thus contrary to both the text and legislative history of the IRCA and cannot establish any APA violation.

Second, Plaintiffs now argue that DOL should have used a *different methodology* to analyze its dataset when determining the costs of the 2023 AEWR Final Rule. This is a fundamentally different argument than Plaintiffs made below, where they argued that DOL should have used a *different dataset* to analyze costs of the 2023 AEWR Final Rule. The district court found that DOL's methodology did not violate the APA and this Court should affirm that decision. If this Court decides to hear this new argument, it should reach a similar conclusion in favor of DOL. In accordance with the APA, DOL adequately explained its choice of dataset (the H-2A certification data in its possession) and its chosen method of cost analysis. Plaintiffs' disagreement with DOL's choice of dataset and its cost analysis provides no legal basis to second-guess DOL's sound reasoning and thorough analysis.

STANDARD OF REVIEW

This Court reviews the district court's denial of a preliminary injunction for abuse of discretion. *Dewhurst v. Century Aluminum Co.*, 649 F.3d 287, 290 (4th Cir. 2011). The factual findings underlying the district court's order are reviewed for clear error, while the district court's legal conclusions are reviewed *de novo*. *Id.* If the district court "applied a correct preliminary injunction standard, made no clearly erroneous findings of material fact, and demonstrated a firm grasp of the legal principles pertinent to the underlying dispute," no abuse of discretion occurred. *Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 192 (4th Cir. 2013) (en banc).

ARGUMENT

A preliminary injunction is "an extraordinary remedy never awarded as of right." *Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008). "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id.* A preliminary injunction requires the movant to establish: 1) that they are likely to succeed on the merits of their claims; 2) that they are likely to suffer irreparable harm in the absence of preliminary relief; 3) that the balance of equities tips in their favor; and 4) that an injunction would be in the public interest. *Winter*, 555 U.S. at 20. When the government is the nonmovant, the last two factors merge. *Miranda v. Garland*, 34 F.4th 338, 365 (4th Cir. 2022). Moreover, under the law of this Circuit, the movant

must satisfy all four of the *Winter* factors to prevail. *Henderson v. Bluefield Hosp. Co., LLC*, 902 F.3d 432, 439 (4th Cir. 2018).

Here, the district court did not abuse its discretion when it correctly found that Plaintiffs failed to meet their "extraordinary" burden. *See Winter*, 555 U.S. at 24.

I. The District Court Did Not Abuse Its Discretion in Denying the Preliminary Injunction Because Plaintiffs Did Not Show a Likelihood of Success on the Merits.

The Plaintiffs sought to preliminarily enjoin the enforcement of DOL's 2023 AEWR Final Rule based on a variety of unsound arguments, which the district court correctly rejected. Of the arguments presented to the district court, two are of particular relevance here.[4] *First*, the Plaintiffs argued that the AEWR Final Rule would cause wage depression for workers in the United States similarly employed—rather than preventing it—because farmers would hire unauthorized workers to avoid paying a higher AEWR to authorized workers. JA61-62. *Second*, Plaintiffs argued that because DOL stated in the 2023 AEWR Final Rule that certain data was not readily accessible to it, it should have used other, publicly-available data sets, to conduct a predictive analysis of how many labor certifications would be reclassified

[4] As explained in detail in Section II, *infra*, Plaintiffs rely on these two prior arguments to suggest that they previously presented their current appeal arguments to the district court. Thus, it is necessary to briefly address these two arguments in this Answering Brief to show that while there are some superficial similarities, the arguments and questions presented below were fundamentally different from the arguments and questions presented on appeal.

under the 2023 AEWR Final Rule and thus subject to the higher wage rates, because that would better estimate the costs to employers JA64.

As explained below, the district court correctly rejected both arguments, and that decision should be affirmed.

A. The District Court Correctly Found that Plaintiffs' Disagreement with DOL's Predictions Regarding the Impact of the Final Rule on the Wages of U.S. Workers was Insufficient to Show a Likelihood of Success on the Merits.

The district court found on the record before it that Plaintiffs were unlikely to succeed on the merits of their claim that the 2023 AEWR Final Rule was arbitrary and capricious because it would increase the use of unauthorized workers which in turn would depress wages for workers in the United States. JA414-415. This ruling by the district court is correct. The Final Rule states that it was designed to "provide appropriate wage increases for many highly skilled workers in positions like construction labor and first-line supervisors" as well as to provide a "wage floor" for job opportunities with mixed duties to "guard against adverse effect on the wages of workers in the United States similarly employed." 88 Fed. Reg. at 12775, 12778. It did so by using OEWS wages in certain circumstances, because DOL determined that the OEWS data was an appropriate data source for the AEWR when Farm Labor Survey data was not available, and because OEWS wage data was more reliable for occupations not consistently surveyed by the Farm Labor Survey and would therefore better protect against adverse effects. 88 Fed. Reg. at 12770-72. DOL

predicted that the 2023 AEWR Final Rule would guard against an adverse effect on wages of workers in the United States similarly employed, particularly with respect to skilled occupations such as "tractor-trailer truck drivers, farm supervisors and managers, logging workers, construction workers, and many occupations in contract employment." It made that prediction while also acknowledging that some employers would see higher wage costs as a result. *Id.* at 12777, 12785, 12795,12796; JA415-416. Thus, DOL provided a rational connection between the facts found and the choices made in the 2023 AEWR Final Rule, in compliance with the APA. *See Motor Vehicle Manufacturers Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

Plaintiffs argued in the district court that DOL's prediction was incorrect. According to Plaintiffs, the increased wage costs under the new methodology would "strongly discourage employers from using the H-2A program and thus ha[ve] a predictable effect of increasing the employment of unauthorized workers, which would itself depress wages." JA61-62. Plaintiffs cited their own economic expert, Madeleine Zavodny, Ph.D., in support. *Id.*

The district court correctly rejected this argument as a disagreement with the agency's economic prediction. JA414-415. When an agency "is making predictive judgments about the likely economic effects of a rule," courts are "particularly loath to second-guess its analysis." *Newspaper Ass'n of Am. v. Postal Regul. Comm'n*,

734 F.3d 1208, 1216 (D.C. Cir. 2013). That is particularly true here, as Dr. Zavodny conceded in her opinion that although there are millions of unauthorized workers in the United States, the effects of the AEWR on the use of unauthorized workers are unclear. JA88. That concession is consistent with DOL's prior rulemaking, which noted the same. *See, e.g.,* 75 Fed. Reg. 77110, 77168 (2008) (indicating that "evidence of wage depression in the agricultural sector was inconclusive" and that "[e]vidence developed during the last 20 years has not added any additional clarity [to] the issue").

Plaintiffs' argument amounts to little more than a belief that DOL was required to predict the extent to which employers will choose to violate the law by hiring unauthorized workers to avoid paying higher wages in certain occupations. Even if DOL could make such a prediction, it is reasonable for the Department to presume that most employers will comply with the rule of law. Thus, in establishing the 2023 AEWR Final Rule, DOL explained that the "purpose of this rulemaking effort is to establish an AEWR methodology that guards against potential wage depression among similarly employed workers *in areas where employers hire H–2A workers in accordance with H–2A program requirements*." JA415 (quoting 88 Fed. Reg. at 12765 (emphasis added)). DOL acknowledged the comments regarding unauthorized workers and was sensitive to the concerns, 88 Fed. Reg. at 12765, but

in promulgating its Final Rule, the Department was not required to evaluate lawlessness among employers.

Ultimately, Plaintiffs could not substantiate their argument that a higher AEWR for certain H-2A occupations would depress wages for workers in the United States similarly employed. On the record before the district court, Plaintiffs presented nothing more than a disagreement with DOL's economic prediction that the revised AEWR methodology would prevent wage depression in certain occupations. JA414-415.

Accordingly, the district court correctly found that Plaintiffs' disagreement with DOL's economic prediction regarding the effect of the AEWR on wages did not show an APA violation, and the district court did not abuse its discretion in holding that Plaintiffs failed to demonstrate a likelihood of success on the merits of this claim. *See Speech First, Inc. v. Sands*, 69 F.4th 184, 202 (4th Cir. 2023). Notably, on appeal, Plaintiffs do not contest the District Court's holding on this point. As a result, this issue is conceded. *See Stokes v. Stirling*, 64 F.4th 131, 137 (4th Cir. 2023).

B. The District Court Correctly Found that Plaintiffs' Disagreement with DOL's Cost Analysis Was Insufficient to Show a Likelihood of Success on the Merits

The district court also correctly found that contrary to Plaintiffs' contention, DOL did in fact consider the costs of the rule to employers at length. JA410. The

district court quoted portions of the 2023 AEWR Final Rule that explained that DOL was aware there would be increased costs to employers, as described in the "transfer payments" analysis, but that DOL had analyzed the impact and determined it was acceptable. JA 410-411 (quoting 88 Fed. Reg. at 12785). DOL explained in the 2023 AEWR Final Rule that it used actual wage data from fiscal years 2020 and 2021 "to determine the most accurate impact of the revised AEWR structure in the final rule." *Id.* In particular, DOL analyzed 25,150 certifications from those fiscal years to determine what SOC codes had been assigned. *Id.* For each labor certification it issues, DOL assigns an SOC code to the job opportunity based on the facts contained within the employer's application. 88 Fed. Reg. at 12779. DOL has long used SOC codes in its labor certification process. *Id.* at 12761. DOL's review of those 25,150 labor certifications showed that only 732 certifications (or 2.91%) had been classified under SOC codes that would be subject to the higher OEWS wage rates for skilled labor. JA 410-411 (quoting 88 Fed. Reg. at 12785). For those 732 certifications, the average cost per worker was determined to be $5,117. *Id.* The district court noted that the 2023 AEWR Final Rule also calculated a 10-year cost to employers. *Id.* DOL also addressed the effect of the 2023 AEWR Final Rule on small businesses, finding that most small businesses would not be affected at all, and only 2.5-3.5% would have an impact to their revenues of greater than 3%. 88 Fed. Reg. at 12799-12801. Thus, DOL conducted a reasonable cost analysis which explained

the dataset used, the analysis conducted, and the results found, to show that the Final Rule's cost to employers was acceptable. That analysis complied with the requirements of the APA. *See State Farm*, 463 U.S. at 43.

In estimating the number of 2020 and 2021 labor certifications that would have been subject to the OEWS-based AEWR under the 2023 AEWR Final Rule, DOL identified reasons that the number could be higher or lower than the estimate under the 2023 AEWR Final Rule. First, DOL did not review the facts underlying each of the 25,150 labor certifications to determine whether under the Final Rule, the SOC code would change because such data was not readily accessible. 88 Fed. Reg. at 12785 & n.95. Second, noting that only about 80% of the H-2A positions certified in 20202 and 2021 had H-2A visas associated with them, DOL did not account for the 20% of positions that went unfilled or were filled by U.S. workers—which likely resulted in an overstatement of the estimated costs. *Id*. at 12795-96. Third, DOL noted that in view of the 2023 AEWR Final Rule, employers could seek to alter their H-2A filing practices, to file more H-2A applications with discrete job duties, or to redefine job opportunities to avoid having multiple duties. *Id*. at 12779. Thus, DOL acknowledged the limitations of its cost estimate and explained the reasons for its adoption. *Id.* Agencies have discretion to arrive at a cost figure within a "broad zone" of reasonable estimates. *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012) (quoting *Nat'l Wildlife Fed'n v. EPA*, 286 F.3d

554, 563 (D.C. Cir. 2002)). DOL explained its methodology and the reasons for it, as required by the APA. *Id.*

Nonetheless, in the district court Plaintiffs took issue with DOL's cost estimates, arguing that DOL "ignore[d] the direct costs to H-2A employers of its Final Rule" and that "[t]he percentage of reclassification is essential to estimating the cost of the Final Rule." JA64. Plaintiffs claimed that "DOL has no idea what that percentage is and did not even try to figure it out." *Id.* But as explained, DOL *did* analyze the costs to employers and the number of applications that would be subject to OEWS data. Plaintiffs simply did not like the explanation.

Plaintiffs argued that DOL should have used different data but failed to show how the Department's use of its internal dataset was unreasonable. First, Plaintiffs argued that one commenter, the American Farm Bureau Federation, "estimated that 10% of workers would be reclassified, based on publicly available sources," and that the 2023 AEWR Final Rule should be vacated so that DOL could consider the data used by American Farm Bureau Federation. JA64. The district court rejected this argument because even though the American Farm Bureau Federation used different a dataset, it applied *the same methodology as DOL*—it analyzed how many prior applications were already classified under an SOC code that would be subject to OEWS data. JA412.

Second, Plaintiffs argued that DOL should have looked at "publicly available data sources"—which they do not identify—and then asserted that "there is sound reason to believe that DOL has access to more data than the public has[.]" JA64. Regardless of the DOL's purported "access" to additional data on this issue, the Department's choice was reasonable. And this Court has held that an agency's selection of data is afforded great deference so long as the selection falls within a zone of reasonableness. *Kennecott v. U.S. Envtl. Prot. Agency,* 780 F.2d 445, 450 (4th Cir. 1985). Here, the DOL's reliance on SOC codes applied to labor certifications in the prior two fiscal years falls within a zone of reasonableness because it related to the labor certifications DOL issued, it was close in time to the 2023 AEWR Final Rule, and it addressed the issue of what H-2A job opportunities were being sought by employers. *See* 88 Fed. Reg. at 12785. Other than the data of one commenter (the American Farm Bureau Federation, which analyzed its data using the same methodology as DOL), Plaintiffs did not identify a particular dataset that was more appropriate, did not identify errors in DOL's dataset, and did not explain why DOL's selection fell outside the zone of reasonableness. JA64. At bottom, Plaintiffs disagreed with the way DOL analyzed costs. But the district court correctly found that such disagreement, without more, did not establish an APA violation or a likelihood of success on the merits. JA412-415. On appeal, Plaintiffs do not challenge the district court's conclusion that they failed to establish a

likelihood of success on the merits on this basis. *See Stokes*, 64 F.4th at 137. Rather, as discussed *infra*, Plaintiffs raise a new disagreement with DOL's analysis (Br. 28), which was not presented to the district court. Thus, in the absence of any argument to the contrary, this Court should find that the district court did not abuse its discretion in reaching this decision.

II. Plaintiffs' Arguments on Appeal Were Not Raised Below and Are Forfeited.

Rather than addressing the reasoning and decision of the district court, Plaintiffs now for the first time on appeal raise two new arguments.

First, they contend that the purpose of the IRCA was to control illegal immigration and thus DOL was required to consider the effects of the 2023 AEWR Final Rule on illegal immigration. Br. 19-26. This is a change from their argument in the district court that the 2023 AEWR Final Rule would depress wages because employers would hire more unauthorized workers at a lower wage. JA414-415; *see supra* Section I.A. Now on appeal, they argue that "controlling illegal immigration is the primary purpose of the IRCA" (Br. 19), that DOL changed course because "DOL has placed controlling illegal immigration at the core of H-2A policy ever since the passage of IRCA" and the 2023 AEWR Final Rule is a change in policy (Br. 21, 26), that the 2023 AEWR Final Rule makes "H-2A labor unaffordable" and thereby "incentivizes employment of undocumented immigrants, thus increasing illegal immigration" (Br. 16), and that DOL's failure to consider the effects the

AEWR methodology could have on illegal immigration was "a violation of DOL's duty to consider important factors" (Br. 26). None of these arguments was presented to the district court, and to the extent Plaintiffs cite to perfunctory or vague references to illegal immigration or statutory purpose, those are not sufficient to preserve the arguments on appeal. *See Beaudett v. City of Hampton,* 775 F.2d 1274, 1278 (4th Cir. 1985) ("fleeting references" do not preserve questions on appeal), *cert. denied*, 475 U.S. 1088 (1986).

Second, Plaintiffs contend that DOL could have differently analyzed its dataset of fiscal year 2020 and 2021 labor certifications to better estimate employer costs. Br. 33. After providing an explanation of the AEWR methodology for assigning SOC codes and a summary of comments on the methodology (Br. 28-32), Plaintiffs arrive at their core contentions: "when DOL says that it does not have any data 'readily available,' DOL actually means it had too much data" and "DOL could have prepared an estimate by analyzing a subset of cases, say 100 or 500." Br. 33.

A. This Court Should Not Consider Plaintiffs' New Arguments.

At the threshold, this Court should not consider these two new arguments on appeal. *See De Simone v. VSL Pharm., Inc.*, 36 F.4th 518, 528 (4th Cir. 2022) ("It is well established that this court does not consider issues raised for the first time on appeal absent exceptional circumstances"). This Court only considers those theories "plainly encompassed by the submissions in the underlying litigation." *Volvo*

Constr. Equip. N. Am., Inc. v. CLM Equip. Co., 386 F.3d 581, 604 (4th Cir. 2004). Here, neither of these two new arguments was "plainly encompassed" in the arguments that Plaintiffs raised in district court. Plaintiffs may try to assert that their new arguments are "variations" on their arguments below. *See United States v. Boyd*, 5 F.4th 550, 556 (4th Cir. 2021) (recognizing that "variations on arguments made below may be pursued," but only "so long as the appealing party asked both courts to evaluate the *same fundamental question.*") (emphasis added) (citations omitted). But this is incorrect.

As to illegal immigration, the question presented in the district court—whether DOL's 2023 AEWR Final Rule fails to address potential wage depression because DOL did not consider that employers may resort to hiring more unauthorized workers which could in turn depress wages—is a fundamentally different question from the question Plaintiffs raise on appeal: whether DOL must consider a statutory purpose of the IRCA to control illegal immigration, when such purpose is notably absent from the text of the provision granting DOL authority to determine the AEWR. The former question poses a disagreement with DOL's economic predictions as to whether the 2023 AEWR Final Rule would address DOL's statutory purpose of preventing adverse effects on wages and working conditions of workers in the United States similarly employed, and that is the basis on which the district court denied Plaintiffs' request for preliminary injunctive relief.

JA414-415. The latter question delves into the legislative history of the IRCA and canons of statutory construction to determine whether DOL must consider effects beyond the wages and working conditions of workers in the United States similarly employed when setting the AEWR. Thus, the two questions are fundamentally different. *See Boyd*, 5 F.4th at 556.

Likewise, Plaintiffs' argument on appeal that DOL should have conducted a different analysis on its own dataset raises a fundamentally different question from that presented to the district court: whether DOL should have used a different dataset altogether. *See Boyd*, 5 F.4th at 556. As a result, this argument was forfeited.

In sum, on appeal, Plaintiffs present only new and fundamentally different arguments as to why this Court should reverse the district court's denial of their request for a preliminary injunction. Under the law of this Circuit, this Court should reject Plaintiffs' new arguments and affirm the district court's decision.

B. Even if the Court were to Consider Plaintiffs' Argument that DOL Should Have Considered Controlling Illegal Immigration in Determining its AEWR Methodology, that Argument Fails on the Merits.

Plaintiffs argue on appeal that the Final Rule is arbitrary and capricious because DOL failed to consider the statutory objective of "controlling illegal immigration" when determining the AEWR methodology. Br. 26. Plaintiffs are wrong because the plain language of the statute does create any such obligation.

Statutory construction begins, and frequently ends, with the plain words of the statute. *Rotkiske v. Klemm*, 140 S. Ct. 355, 360 (2019). Congress provided DOL with the express authority to certify that an employer's importation of H-2A temporary workers will not depress the wages and working conditions of similarly employed workers in the United States in 8 U.S.C. § 1188(a), which states:

> (a) Conditions for approval of H–2A petitions
>
> (1) A petition to import an alien as an H–2A worker (as defined in subsection (i)(2)) may not be approved by the Attorney General unless the petitioner 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.

8 U.S.C. § 1188(a). Thus, Congress articulated the factors DOL is to consider in certifying an H-2A application, namely worker availability, and whether employment of such worker will adversely affect the wages and working conditions of similarly employed U.S. workers. *Id.*; *see also AFL-CIO v. Dole*, 923 F.2d 182, 187 (D.C. Cir. 1991) (discussing competing goals). Notably absent from this express grant of authority in Section 1188(a) is any requirement that DOL "control" illegal immigration.

Congress did not define the meaning of "will not adversely affect the wages" in the IRCA, a phrase retained from the prior H-2 legislation in the 1952 INA, where it was also undefined. *See* Pub. L. No. 82-414, § 212(a)(14), 66 Stat. 163, 183 (Jun. 27, 1952). Instead of defining a specific formula for DOL to apply in carrying out the requirements of Section 1188(a), Congress expressly delegated to DOL the authority to determine what methodology it would select. *See* Pub. Law 99-603, § 301(e) (delegating to the Attorney General, in consultation with the Secretary of Labor and the Secretary of Agriculture, the approval of "all regulations to be issued implementing sections 101(a)(15)(H)(ii)(a) and 218" of the INA) (codified at 8 U.S.C. § 1188, notes); *see also United Farm Workers v. Solis*, 697 F. Supp. 2d 5, 6 (D.D.C. 2010) ("Congress delegated the certification of H–2A petitions to the Secretary of Labor.").

The 2023 AEWR Final Rule is consistent with the statutory text because it seeks to prevent the employment of H-2A workers from causing adverse effects—depression or stagnation—on the wages of workers in the United States similarly employed. *See* 88 Fed. Reg. 12761 and n.7.[5] Notably, Plaintiffs do not assert that the 2023 AEWR Final Rule is inconsistent with the plain meaning of the statute. Indeed, Plaintiffs make no mention of the statutory text at all. Instead, Plaintiffs focus solely

[5] Footnote 7 of the 2023 AEWR Final Rule contains an incorrect citation to 68 Fed. Reg. 11460, 11464 (April 9, 1987). The correct citation is 52 Fed. Reg. 11460, 11464 (April 9, 1987).

on their characterization of the legislative history behind the IRCA. Br. 18-21. But there is no reason to "resort to legislative history to cloud a statutory text that is clear." *South Carolina v. U.S.s Army Corps of Engin'rs*, 66 F.4th 189, 197 (4th Cir. 2023); *see Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund v. Allen*, 152 F.3d 283, 288 (4th Cir. 1998) (similar); *U.S. v. Gonzales*, 520 U.S. 1, 6 (1997) (similar).

Here, under the express language of Section 1188(a), DOL has no obligation to consider the "control" of illegal immigration when it establishes its methodology for setting the AEWR in the H-2A program. Plaintiffs present no argument to why this Court should disregard this express language. Thus, there is no need to consider Plaintiffs' arguments regarding the legislative history and purported "purpose" of IRCA in determining whether Plaintiffs demonstrated a substantial likelihood of success on the merits.

Moreover, even if this Court were to consider this legislative history, Plaintiffs' argument still fails. The IRCA had multiple purposes, not a single "primary purpose." The purposes of the IRCA are evident from the structure of the statute itself, the statutory text, and the legislative history, and DOL's Rulemaking is entirely consistent with the purpose of the H-2A program.

One purpose of the IRCA was to control illegal immigration, which it sought to achieve through new penalties on employers who used unauthorized foreign

workers, a system to verify employment authorization, new penalties for bringing unauthorized workers into the United States, and greater enforcement efforts. *See* Pub. Law 99-603 at §§ 111-115, 121. Those provisions were contained in Title I of the IRCA which was entitled "Control of Illegal Immigration." *Id.* Section 111(a) is instructive as to the immigration control program created by the Act:

> (a) TWO ESSENTIAL ELEMENTS.—It is the sense of Congress that two essential elements of the program of immigration control established by this Act are—
>
> (1) an increase in the border patrol and other inspection and enforcement activities of the Immigration and Naturalization Service and of other appropriate Federal agencies in order to prevent and deter the illegal entry of aliens into the United States and the violation of the terms of their entry, and
>
> (2) an increase in examinations and other service activities of the Immigration and Naturalization Service and other appropriate Federal agencies in order to ensure prompt and efficient adjudication of petitions and applications provided for under the Immigration and Nationality Act.

Pub. L. 99-603 § 111(a) (1986), codified at 8 U.S.C. § 1101 note. Thus, Congress intended, in Title I of the IRCA, to prevent and deter illegal entry and to ensure prompt and efficient adjudication under the INA. Consistent with Section 111(a), Section 111(b) provided appropriations to the former INS and the Executive Office for Immigration Review. *Id.* at § 111(b).

A second purpose of the IRCA was to provide a pathway to lawful status for those already present in the United States, which was contained in Title II, "Legalization." *Id.* at §§ 201-203.

A third purpose was to improve aspects of the system for legal immigration, and that purpose was set forth Title III, entitled "Reform of Legal Immigration." *Id.* at §§ 301-315. Title III was divided into two subparts. Subpart A addressed the H-2A program for temporary agricultural workers, and Subpart B addressed the H-2B program for other temporary workers. *See id.* The Attorney General, in consultation with the Secretaries of Labor and Secretary of Agriculture, was given regulatory authority to implement the H-2A program. *Id.* § 301(e).

The legislative history confirms these multiple purposes of the IRCA. The Senate Judiciary Committee Report, for example, explained that the IRCA (1) sought to reduce the availability of job opportunities for unauthorized workers through enforcement and employer penalties, (2) sought to amend the legal immigration system by providing special benefits to certain categories of persons, (3) sought to amend the law relating to nonimmigrant H-2 workers, and (4) provided an opportunity to adjust status for those already present in the U.S. without authorization. *See* S. Rep. 99-132 (1985) at 1-2. Similarly, the House Judiciary Committee Report explained that the purposes of the IRCA were to "control illegal immigration to the U.S., make limited changes in the system for legal immigration,

and provide a controlled legalization program for certain undocumented aliens who have entered this country prior to 1982." *See* H. Rep. 99-682, Part I, at 45 (1986). Thus, Plaintiffs are wrong that DOL was obligated to consider the effect of the AEWR methodology on illegal immigration as the "primary purpose" of the IRCA, even considering the IRCA's structure and legislative history, as these demonstrate that Congress considered the control of illegal immigration and the creation of the H-2A program as separate purposes of the statute situated in different tiles of the legislation, with control of illegal immigration left to the former INS and the immigration courts, not to DOL.

Plaintiffs are therefore also wrong that DOL's rulemaking was arbitrary and capricious for failing to consider how its AEWR methodology would increase or decrease illegal immigration. The statutory text is clear that controlling illegal immigration was the purview of the former INS (now DHS), not DOL. As noted, section 111(a) of the IRCA explained that the sense of Congress was to control illegal immigration at the borders and through the former INS, as well as with action on immigration petitions and applications by the Executive Office for Immigration Review. *See* Pub. L. 99-603 § 111(a) & (b). Furthermore, committee reports from the legislative history explain that Congress recognized that the agricultural industry relied on unauthorized workers and anticipated that the availability of such unauthorized workers would decrease as enforcement increased. *See* Senate Rep.

No. 99-132 (1985) at 2 ("The H-2 temporary worker program is revised in order to assist agricultural employers in adjusting to the reduced availability of illegal foreign workers."); House Rep. No. 99-682, pt. 1 (Judiciary Committee) at 106 (views of Department of Justice) ("It is acknowledged that some of the labor needs of the farm sector of our economy have been filled for many years by a sizable number of illegal aliens, who did not enter under temporary worker provisions. As we prohibit the employment of illegal aliens, it is important that we also provide a legal mechanism for agricultural employers to hire temporary foreign workers when they are unable to find American workers."). Congress created the H-2A program to provide the agricultural industry with needed, lawful workers. The H-2A program was designed to fill the gap left by the enforcement provisions; it was not intended as an enforcement mechanism.

Not only is the 2023 AEWR Final Rule consistent with the plain language of Section 1188(a) and the structure of the IRCA, but it is also consistent with the legislative history of the IRCA, which with regard to the H-2A program, noted that the legislation was motivated in part over concerns of adverse effects on the wages and working conditions of U.S. workers in the long run, including "unemployment and less favorable wages and working conditions" which was believed to cause harm to those directly affected, their families, taxpayers, and society as a whole. *See* S. Rep. 99-132 at 6. Plaintiffs fail to cite any portion of the legislative history that

instructs DOL to consider the control of illegal immigration when promulgating regulations to implement the H-2A program.

In short, Plaintiffs allege that in promulgating the 2023 AEWR Final Rule, DOL had to consider what effect that regulation would have on illegal immigration because that was the "primary purpose" of the statute. Br. 18-21. But Plaintiffs cite no statutory language, and point to nothing in the legislative history, that mandates such a reading of Section 1188(a). This Court, therefore, should reject Plaintiffs' argument.

C. DOL's Prior Rulemakings Focused on Adverse Effects, Not Controlling Illegal Immigration.

Plaintiffs also argue that DOL changed course in that it previously placed "controlling illegal immigration at the core of H-2A policy ever since the passage of IRCA." Br. 21, 26. But this argument similarly fails. After the IRCA of 1986, DOL promulgated AEWR methodology rules in 1987, 1989, 2008, 2010, and 2020. Each time, the primary focus was to balance the competing goals of Section 1188 to provide U.S. agricultural employers with an adequate labor supply while protecting the jobs, wages, and working conditions of domestic workers. *See* 8 U.S.C. § 1188(a); *see also AFL-CIO v. Dole*, 923 F.2d 182, 187 (D.C. Cir. 1991) (discussing competing goals). In 1989, DOL explained that "DOL's efforts to set Statewide AEWRs have always been in response to instances where it was thought that wage depression existed in specific crops or activities." 54 Fed. Reg. 28037 (1989). DOL

explained that the "IRCA amendments to the INA do not change the role and effect of the statutory policy to protect the wages of similarly employed U.S. agricultural workers from the adverse effect which may result from the employment of alien workers." *Id.* In 2008, DOL quoted 8 U.S.C. § 1188 and explained, "the Department is firmly committed to the principle that the wage rates required by the H-2A program should ensure that the wages of U.S. workers will not be adversely affected by the hiring of H-2A workers, and therefore declines to jettison the 'adverse effect wage rate' concept." 73 Fed. Reg. 77110, 77167 (2008). In 2010, DOL again focused on adverse effects, as required by statute: "The requirement that imported foreign temporary workers be paid no less than the highest of the AEWR, the local prevailing wage, the collectively bargained wage, or the applicable legal minimum wage ensures that domestic workers receive the greatest potential protection from adverse effects on their wages and working conditions…" 75 Fed. Reg. 6884, 6893 (2010). In 2020, DOL explained, "Further, by setting the 2020 AEWR as the starting point from which future ECI adjustments will occur, the Department is ensuring that workers' wages will not be lower than their 2020 wages and will then adjust according to the ECI. The Department believes that this approach effectively balances concerns about wage volatility and adverse effects on workers." 85 Fed. Reg. 70445, 70453. DOL's focus has always been balancing the need for an

authorized pool of temporary workers with protecting the wages and working conditions workers in the United States similarly employed.

Plaintiffs cite a few sentences in some prior rules to argue that DOL placed the "control" of illegal immigration at the "core" of its AEWR policy and rules. Br. 22-23. But Plaintiffs are mistaken and mischaracterize the passages they cite. Under the IRCA, "controlling" illegal immigration is achieved through penalties and enforcement. *See* Pub. Law 99-603 at §§ 111-115, 121. DHS is tasked with controlling illegal immigration, not DOL. *See* 6 U.S.C. § 542; 6 U.S.C. § 557 (2002); 8 U.S.C. § 1551. DOL has never focused on controlling illegal immigration in setting the AEWR. The passages that Plaintiffs cite do show that DOL was cognizant of the unauthorized workers present in the country and commentors' concerns surrounding them. But DOL was also cognizant of the fact that whether unauthorized workers in the United States depressed wages of U.S. workers was unclear from the literature. *See* 54 Fed. Reg. 28037 (1989) (adopting the USDA data despite finding that "the data and literature as inconclusive on the issue of adverse effect or wage depression from the presence of illegal alien workers on the USDA data series."); 75 Fed. Reg. 77110, 77168 (2008) ("In 1989, the Department concluded that evidence of wage depression in the agricultural sector was inconclusive. …Evidence developed during the last 20 years has not added any additional clarity on the issue of wage depression."); 85 Fed. Reg. 70445, 70453 (2020) ("The Department understands that

unpredictable changes in the AEWR can result in harm to U.S. workers by encouraging some employers to reduce employment opportunities and work hours and still others to hire undocumented foreign workers willing to accept employment at much lower wages …"); 88 Fed. Reg. at 12765 (2023) ("a variety of commenters asserted that there is no reason to change the methodology, or objected to the proposed changes by themselves without balancing them with other program changes or addressing the undocumented workforce….the Department is sensitive to the commentors general concerns…"). Thus, in the earlier years DOL explained that it set the AEWR without considering wage depression from already-present unauthorized workers because the data surrounding the effects of unauthorized workers on U.S. worker wages was uncertain. By 2020, it no longer provided that explanation, but that did not change the outcome. DOL did not "change course" in 2023 (Br. 21, 26); it remained consistent with the analysis of its prior rules.

Finally, none of the passages cited by Plaintiffs suggest that DOL considered whether the AEWR methodology established by the regulation would increase illegal immigration. Rather, they considered whether unauthorized workers would depress the wages of U.S. workers. Plaintiffs cite no portion of any rule in which DOL considered whether the AEWR would cause more foreign nationals to enter the United States without authorization. Indeed, the effect on illegal immigration, if any, is a fundamentally different question from whether DOL must consider the

control of illegal immigration in setting the AEWR. The former was considered by the district court and rejected. JA414-415. The latter is simply wrong, for the reasons already stated.

Thus, even if this Court were inclined to entertain Plaintiffs' arguments that the 2023 AEWR Final Rule is arbitrary and capricious because DOL did not consider the control of illegal immigration, the argument fails on the merits.

D. Even if this Court were to Consider Plaintiffs' New Argument that DOL's Cost Calculation Was Arbitrary and Capricious, that Argument Similarly Fails.

As explained in Section I.B., *supra*, in the district court, Plaintiffs argued that DOL failed to consider the cost of the 2023 AEWR Final Rule to employers, and that DOL's rulemaking was flawed because it should have relied on different data sets to calculate the percentage of job opportunities that would be subject to the higher OEWS-based AEWRs under the 2023 AEWR Final Rule. JA64. The district court rejected that argument because DOL *did* consider cost data extensively, explaining its choice of data, how it calculated costs, and the factors that could increase or decrease costs in the future. JA314-315. DOL's analysis was rational and adequately explained. *See State Farm,* 463 U.S. at 43.

On appeal, Plaintiffs now argue that to accurately determine costs to employers, DOL should have reexamined the facts underlying all 25,150 H-2A labor certifications issued in 2020 and 2021, or at the very least re-analyzed a sample of

them, to determine whether the facts presented in those applications would, if analyzed under the 2023 AEWR Final Rule, result in reclassification from a field and livestock workers (combined) SOC code to a different SOC code that would yield an OEWS-based AEWR. Br. 33. Thus, Plaintiffs no longer challenge the dataset itself; they challenge DOL's analysis of it. This new argument is a dispute about methodology—and an agency's methodology is entitled to deference on issues within its expertise. *See City of Rockingham v. FERC*, 702 F. App'x 106, 111 (4th Cir. 2017) (agencies are entitled to select their own methodology as long as that methodology is reasonable). DOL has been setting the AEWR and approving H-2A labor certifications for decades. It is well within DOL's expertise to determine how best to analyze the labor certification data upon which it relies.

As explained in Section I.B above, DOL analyzed the labor certifications it issued in 2020 and 2021 and determined how many were assigned SOC codes that would be subject to the higher wage rates under the 2023 AEWR Final Rule. DOL explained in the 2023 AEWR Final Rule that the underlying data in all 25,105 applications was not readily accessible to it. 88 Fed. Reg. at 12785 & n.95. It further explained that the true number could be higher or lower based on application of the 2023 AEWR Final Rule and employer filing practices under the 2023 AEWR Final Rule. 88 Fed. Reg. at 12779. Indeed, as the District Court noted, one commentor to the Notice of Proposed Rulemaking—the American Farm Bureau Federation—

applied the same methodology to a different dataset. JA412. Thus, in accordance with the APA, DOL reviewed the relevant data and articulated a rational connection between the facts found and the choices made. Plaintiffs may think DOL should have proceeded differently, but the Department's choice is entitled to deference. *City of Rockingham*, 702 F. App'x at 111. This Court should reject Plaintiffs' new argument that DOL should have applied a different methodology and it should affirm the district court's decision.

* * *

For these reasons, the district court correctly denied the Plaintiffs' request for preliminary injunctive relief because Plaintiffs failed to show a likelihood of success on the merits, and this Court should affirm that decision.

III. The District Court Did Not Abuse Its Discretion in Balancing the Hardships and Public Interest and Finding that They Favor the Government.

The final two *Winter* factors "merge when the Government is the opposing party." *Miranda*, 34 F.4th at 365. Courts must "pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312–13 (1982). Moreover, preliminary relief is not warranted where the harm to the two respective parties constitute "two sides of the same coin." *See MicroStrategy Inc. v. Motorola, Inc.*, 245 F.3d 335, 339 (4th Cir. 2001) (holding that the district court did not abuse its discretion when "the grant of

an injunction would cause at least as much harm to the defendant … as its denial would to the plaintiff"); *see also Allina Health Servs. v. Sebelius*, 756 F. Supp. 2d 61, 69 (D.D.C. 2010) ("The balance of equities weighs against an injunction as the alleged irreparable economic injury suffered by the Plaintiffs would be offset by the corresponding economic injury to the [government] or [third parties].").

Here, the district court correctly held that Plaintiffs failed to demonstrate—as they must—that the threatened irreparable injury outweighs the threatened harm that a preliminary injunction would cause DOL and unrepresented third parties (both H-2A and corresponding domestic workers), and that granting the injunction would be in the public interest. JA417-418. Specifically, the district court found that granting the injunction would cause at least as much harm to these third-party workers (who would be deprived of wages required by the 2023 AEWR Final Rule) as a denial would harm the Plaintiffs (who would potentially avoid having to pay these wages). JA417-418. Because this finding is correct and fully consistent with this Court's precedent, *see MicroStrategy*, 245 F.3d at 339, the district court did not abuse its discretion in concluding that the equities did not tip in favor of Plaintiffs.

Plaintiffs fail to provide any meaningful response to the district court's analysis of the last two *Winter* factors. *See* Br. 37. Instead, in a single, conclusory paragraph, Plaintiffs assert that "the balance of equities and the public interest favor an injunction" because there is "no public interest in perpetuating an unlawful

government program." *Id*. But this misses the point because a district court "considering whether to impose preliminary injunctions must separately consider each *Winter* factor." *See Pashby v Delia*, 709 F.3d 307, 321 (4th Cir. 2013). Thus, the question of whether Plaintiffs have demonstrated a substantial likelihood of success on the merits is distinct from the question of whether the balance of equities and public interest weigh in their favor. *See id*. at 330 (recognizing that the district court applied an incorrect legal standard "when it combined the likelihood of success and public interest factors …").

Furthermore, the district court, in explaining its decision, recognized that the balance of the equities did not tip in Plaintiffs' favor for an additional reason: the grant of a preliminary injunction would inject a degree of uncertainty into the H-2A program because employers would not know how much money they would owe if DOL ultimately prevails. JA418 (citing *Di Biase v. SPX Corp*., 872 F.3d 224, 235 (4th Cir. 2017)). It was eminently reasonable for the district court to consider these real-world consequences of an injunction in weighing the equities and the public interest. *See Di Biase*, 872 F.3d at 235-36 (denying a preliminary injunction, in part, based on such concerns).

Plaintiffs fail to provide any meaningful response to this rationale, contending, in a single sentence, "This Court is the last appeal of right in this matter, so this Court can provide more certainty than the district court." Br. 37. This is a

non-sequitur. It is true that this Court, as an appellate body, plays a different role than a district court. But the differences between circuit and district courts alluded to by Plaintiffs simply have no bearing on the question of whether the district court abused its discretion in considering the practical consequences of an injunction in finding that the balance of the equities and public interest did not favor the issuance of such an injunction. *See Speech First*, 69 F.4th at 202 (recognizing that the district court's determinations are entitled to deference).

Moreover, the district court further reasoned that a preliminary injunction is not appropriate here because an injunction that prohibits the enforcement of a statute enacted by the people's elected representatives constitutes an irreparable injury, JA417 (citing *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977)), and that this concern weighs particularly heavily with respect to the enforcement of immigration laws, which implicate the Government's "sovereign prerogative." JA417-418 (citing *Miranda*, 34 F.4th at 365-66; *Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d 1211, 1221 (D.C. Cir. 1981)). For these additional reasons the district court found that the equities do not tip in Plaintiffs' favor. *See id*.

This analysis by the district court is on point. Here, Congress enacted 8 U.S.C. § 1188(a)(1) specifically to protect domestic workers and entrusted DOL to promulgate regulations to carry out this legislative objective. *See Rowland,* 650 F.2d at 29. DOL employed notice-and-comment rulemaking to select what it reasonably

concluded is the best approach for accomplishing congressional intent. Granting an injunction that would effectively substitute a court's judgment for that of DOL as to the proper methodology for calculating the AEWR would be a particularly grave injury and weighs heavily against the grant of injunctive relief. *See Miranda*, 34 F.4th at 365-66.

In sum, there is no basis for concluding that the district court abused its discretion in weighing the equities and public interest.

CONCLUSION

This Court should affirm the district court's denial of Plaintiffs' request for a preliminary injunction.

Dated: January 31, 2024

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed on January 31, 2024, through the ECF system, and that it will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

Dated: January 31, 2024

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