NO. 23-2108

In The United States Court Of Appeals For The Fourth Circuit

USA FARM LABOR, INC.; JCP FARMS, LLC; LAZY BS BAR, INC.; B&B AGRI SALES, LLC; HOGGARD FARMS; MASCHING AGRICULTURE, LLC; HUTTO GRAIN; KD FARM & RANCH; CIRCLE D FARMS; TRIPLE T FARMS, INC.; BEBB FARMS; JAMERSON FARMS; BRUCE YOUNG FARMS; SK FARMS INC.; KAUP PRODUCE, INC.; COTEAU TILING, INC.; HAALAND GRAIN FARMS; LINCOLN COUNTY FEED YARD LLC; CDC, INC.; GRAND FARMING ENTERPRISES, INC.; FOUR R'S RANCH LLC; J D LAYMAN FARMS, INC.; MOLITOR BROTHERS FARM; WRIGHT FARMS OF BUTLER CO INC.,

Plaintiffs - Appellants,

v.

JULIE SU, Acting Secretary of Labor, U.S. Department of Labor; BRENT PARTON, Acting Assistant Secretary of Labor Employment and Training Administration, U.S. Department of Labor; BRIAN PASTERNAK, Administrator, Office of Foreign Labor Certification, U.S. Department of Labor,

Defendants - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA AT ASHEVILLE

BRIEF OF APPELLANTS

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 23-2108 Caption: USA Farm Labor, Inc. v. Julie Su, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Plaintiffs (see attached)
(name of party/amicus)

who are appellants, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Mark Stevens Date: November 7, 2023

Counsel for: Plaintiffs

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Attachment to Disclosure Statement

The answers to all the questions on the disclosure statement are the same for all plaintiffs. This disclosure statement is filed on behalf of the following plaintiffs:

USA Farms Labor, Inc.

JCP Farms, LLC

Lazy BS Bar, Inc.

B&B Agri Sales, LLC

Hoggard Farms

Masching Agriculture, LLC

Hutto Grain

KD Farm & Ranch

Circle D Farms

Triple T Farms, Inc.

Bebb Farms

Jamerson Farms

Bruce Young Farms

SK Farms Inc.

Kaup Produce, Inc.

Coteau Tiling, Inc.

Haaland Grain Farms

CDC, Inc.

Four R's Ranch LLC

Grand Farming Enterprises, Inc.

J D Layman Farms Inc.

Lincoln County Feed Yard LLC

Molitor Brothers Farm

Wright Farms of Butler Co Inc.

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GLOSSARY

AEWR	Adverse Effect Wage Rage
APA	Administrative Procedure Act
DOL	U.S. Department of Labor
Final Rule	Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States, 88 Fed. Reg. 12,760-01 (Feb. 28, 2023)
H-2A	The H-2A nonimmigrant agricultural worker visa program. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)
IRCA	The Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat 3359 (Nov. 6, 1986)
NPRM	Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States, 86 Fed. Reg. 68,174-01 (Dec. 1, 2021)
OES/OEWS	Occupational Employment Statistics/Occupational Employment Wage Survey
SOC	The Standard Occupational Classification system
USDA	U.S. Department of Agriculture

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331, federal question jurisdiction. This matter arises under 5 U.S.C. §§ 701-706, the Administrative Procedure Act.

This Court has jurisdiction under 28 U.S.C. § 1292(a)(1), which grants appellate jurisdiction to review interlocutory orders of district courts refusing or dissolving injunctions.

Venue is proper because the decision under review was issued by the U.S. District Court for the Western District of North Carolina, which is within the Fourth Circuit. 28 U.S.C. § 1294(1).

STATEMENT OF THE ISSUES

Whether the district court erred in refusing to enjoin the Department of Labor's new Adverse Effect Wage Rate regulation (88 Fed. Reg. 12,760) due to the Department failing to consider the statutory objective of controlling illegal immigration and failing to consider the cost of the rule?

STATEMENT OF THE CASE

A. Overview of the H-2A Program

The H-2A program provides an essential and effective lifeline to farmers and ranchers unable to hire domestic workers. By offering a mechanism for hiring essential workers, the H-2A program removes any incentive to hire undocumented

workers. The H-2A program serves the national policy of eliminating the unauthorized employment of foreign nationals while avoiding disruption to commodities markets and food supply to the nation's dinner tables. The H-2A program promotes this objective by allowing U.S. farmers and growers to hire foreign nationals as temporary or seasonal agricultural workers if a demonstrated labor shortage exists.

While U.S. immigration law has long included provisions for the temporary or seasonal employment of foreign nationals,[1] the modern H-2A program was created by § 301 of the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat 3359 (Nov. 6, 1986) ("IRCA"), *codified as amended at* 8 U.S.C. § 1188.

IRCA's central concern was combating the employment of unauthorized workers throughout the U.S. economy. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002) ("IRCA forcefully made combating the employment of illegal aliens central to the policy of immigration law.") (quotation and citation omitted); *Egbuna v. Time-Life Libraries*, 153 F.3d 184, 187 (4th Cir. 1998) ("[IRCA] was enacted to reduce the influx of illegal immigrants into the United States by eliminating the job magnet."). The employment of undocumented immigrants had created a "subclass of people who cannot exercise their rights."

[1] *See* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (Jun. 27, 1952), § 101(a)(15)(H)(ii), *codified at* 8 U.S.C. § 1101(a)(15)(H)(ii) (1958).

Cong. Rec. H10598 (daily ed. Oct. 15, 1986) (remarks of Rep. McKinney). "These people live in fear, afraid to seek help when their rights are violated, when they are victimized by criminals, employers or landlords or when they become ill…." H.R. Rep. No. 99-682 (I), 99th Cong., 2d Sess 49 (1986); Cong. Rec. H10596-97 (daily ed. Oct. 15, 1986) (remarks of Rep. Smith) ("We will be bringing people out of a shadow economy, people will be paying taxes, people will be coming out in the sunshine, there will not be the abuse of workers, employers will not be able to provide poor-quality jobs for people, they will not be able to oppress people…."); *see Cal. Rural Legal Assistance, Inc. v. Legal Servs. Corp.*, 917 F.2d 1171, 1177-78, 1178 n. 13 (9th Cir. 1990). The exploitative conditions themselves created an adverse effect on wage and working conditions. *See Patel v. Quality Inn S.*, 846 F.2d 700, 704 (11th Cir. 1988) ("To do otherwise would be counter-productive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment." (citing H.R.Rep. No. 99-682 (II), 99th Cong., 2d Sess. 8-9, *reprinted in* 1986 U.S.Code Cong. & Admin.News, 5649, 5757, 5758)).

To eliminate the job magnet of agricultural employment, Congress wanted to assure farmers and growers access to a legally authorized and reasonably available workforce through § 301 of IRCA (the H-2A program), thereby eliminating the temptation to hire unauthorized workers. H.R. Rep. 99-682(I), 83, 1986 U.S.C.C.A.N. 5649, 5687.

B. The H-2A Program Sets Minimum Wages For The Employment Of H-2A Workers

In broad terms, the H-2A regulatory scheme is straightforward. When a farmer wants permission to hire a foreign worker under the H-2A program, the Secretary of Labor is required to make a factual investigation into two questions: whether domestic workers are available or not and whether employing the foreign nationals would depress wages (have "adverse effect") for already employed domestic workers. 20 C.F.R. § 655.0. The result of this investigation is referred to as a "labor certification." *See* 8 U.S.C. §§ 1188(a)(1)(A), (B); 20 C.F.R. § 655.0.

The second of these inquiries – "adverse effect" – is the focus of this appeal. However, for many years, DOL viewed the market test and the adverse effect test to be related. It established certain minimum terms and conditions that farmers had to offer on the theory that it would be unreasonable to expect a U.S. worker to accept employment on lesser terms.[2] DOL's minimum conditions included a minimum wage rate. Because these conditions were supposed to reflect the actual labor market (as nearly as it could be discerned), offering a wage lower than what DOL prescribed was deemed to depress wages or have an adverse effect.[3] This minimum wage rate

[2] *See*, *e.g.*, Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States; Adverse Effect Wage Rate Methodology, 54 Fed. Reg. 28,037-01, 28,044 (July 5, 1989).
[3] *Supra* note 2, 54 Fed. Reg. at 28,044.

became known as the "adverse effect wage rate" or AEWR. This approach simplified DOL's administrative burden: if a farmer offered less than the AEWR,[4] it could presume that U.S. workers would be available at the actual market price and that paying that wage would have an adverse effect.

In this system, it is evident that obtaining good information about actual conditions in the agricultural labor markets was essential. DOL, however, was not equipped to do this because it did not specialize in agricultural issues – that role was played by the United States Department of Agriculture ("USDA"). Congress therefore enacted a permanent authorization of funds for USDA to carry out its duties under § 1188. *See* 8 U.S.C. § 1188(g)(4). To define market conditions, DOL used USDA's Farm Labor Survey as its standard. "The National Agricultural Statistics Service publishes quarterly and annual estimates for the United States as a whole, each of 15 multi-state labor regions, and the single-state regions of California, Florida, and Hawaii. NASS conducts the Farm Labor Survey in cooperation with the U.S. Department of Labor."[5] DOL has long considered the Farm Labor Survey to

[4] The actual minimum wage is set by using the highest of one of five possible wage standards. The AEWR is the most common wage standard and the one that is the subject of this appeal. The others are: prevailing wage, collective bargaining wage, and federal or state minimum wage. 20 C.F.R. § 655.120(a).

[5] U.S. Department of Agriculture, "Surveys" Oct. 17, 2022, https://www.nass.usda.gov/Surveys/Guide_to_NASS_Surveys/Farm_Labor/.

be the gold standard for obtaining timely, accurate information about U.S. agricultural labor markets for the purpose of setting the AEWR. "DOL regulations have required the DOL to use the FLS to calculate the AEWR for the H-2A program since the program's inception in 1986, and the DOL has used FLS data for the H-2A's predecessor program since 1953." *United Farm Workers v. Perdue*, No. 20-CV-01452, 2020 WL 6318432, at *2 (E.D. Cal. Oct. 28, 2020). DOL preferred the Farm Labor Survey because "it is the only comprehensive wage survey that collects data from farm and ranch employers." *Id.* (citation omitted).

C. DOL Experiments With Alternative Regulatory Schemes To Replace The Farm Labor Survey

In late 2008, DOL promulgated a regulation that changed the method for calculating the AEWR. It announced it would no longer use the Farm Labor Survey as its source for information about farm labor. Henceforth, it would use DOL's own "Occupational Employment Statistics" or OES survey because it led to higher wages, which DOL felt was appropriate.[6] DOL's experiment with the OES survey lasted only a few months because DOL found out that using OES was a complex, new regulatory program that was disruptive and confusing to DOL and stakeholders,

[6] Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement, 73 Fed. Reg. 77,110-01, 77,173-74 (Dec. 18, 2008).

and DOL wanted to save the country from this burden during challenging economic times. *N.C. Growers' Ass'n v. UFW*, 702 F.3d 755, 761 (4th Cir. 2012). DOL reversed itself and the Farm Labor Survey once again became the basis for setting the AEWR.

D. DOL's Search For A Methodology To Increase Adverse Effect Wage Rates Leads To The Present Litigation

DOL may have abandoned the OES survey in 2010, but DOL did not stop seeking methodologies to increase the AEWR. DOL took until 2020 to find a way to revive the OES survey. In a final rule promulgated that year, DOL observed that, unlike the Farm Labor Survey, the result of the OES survey depended on the occupation of a particular worker. If a person were, for example, a commercial pilot versus a bush pilot, the OES survey would produce different results.[7] DOL introduced three innovations in 2020. First, it decided that it would revive the previously discredited OES survey.[8] Second, it would use a combination of duties rule to classify workers into high wage occupations. DOL would review a workers' job duties and tasks. If those duties or tasks could fit into more than one occupation, DOL would choose the highest paying occupation.[9] Thus, a ranch hand who injected

[7] Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States, 85 Fed. Reg. 70,445-01, 70,448 (Nov. 5, 2020).
[8] *Supra* note 7, 85 Fed. Reg. at 70,446.
[9] *Supra* note 7, 85 Fed. Reg. at 70,460.

vitamins into a steer or mixed antibiotics into feed would be deemed a veterinarian and receive a veterinarian's wage. Finally, to mitigate the harmful impact of its new methodology, DOL imposed a short-term freeze on wage increases.[10]

DOL forecast steep wage increases under the new rule.[11] For construction laborers, DOL estimated increases of anywhere from 28% to 148%, depending on state. For first-line supervisors of farm workers, DOL estimated wage increases of 86% to 157%. For heavy truck drivers, DOL forecast increases of 75% to 118%. The steepest rise was for a supervisor in New York, whose wage would go up 157% to $30.05 per hour (plus housing, utilities, and transportation). However, farm worker advocates sued to block this new regulation and obtained injunctive relief. DOL was forced back to the drawing board. *United Farm Workers v. DOL*, 598 F. Supp. 3d 878, 888 (E.D. Cal. 2022).

What emerged from the drawing board was the enjoined 2021 regulation shorn of the wage freeze. *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. 68,174-01 (Dec. 1, 2021) (hereafter "NPRM"). What

[10] *Supra* note 7, 85 Fed. Reg. at 70,467.
[11] Hall Law Office, PLLC, Comments on Proposed Rulemaking, Docket No. ETA-2021-0006-0092, 29 (Feb. 7, 2022), https://downloads.regulations.gov/ETA-2021-0006-0092/attachment_2.pdf.

remained was DOL's use of the OES, now renamed the Occupational Employment Wage Survey ("OEWS"). DOL also retained the combination of duties rule to generate AEWRs for occupations seemingly bearing little relation to actual agricultural labor markets. NPRM, 86 Fed. Reg. at 68,183-84. The ranch hand mixing antibiotics would still be treated as a veterinarian. DOL explained that using the Farm Labor Survey without the combination of duties rule would cause adverse effect to the veterinarian, since the ranch hand would be paid less than a veterinarian who also injected vitamins and antibiotics into cattle. NPRM, 86 Fed. Reg. at 68,183. Because they shared a single duty, DOL deemed the veterinarian and the ranch hand to be similarly employed in a broad sense. Because DOL viewed its duty as preventing wage depression rather than just investigating to see if wage depression existed, *see* 20 C.F.R. § 655.0, DOL invited comment on the proposed rule.

DOL received 92 comments on the proposed rule. *See* Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States, 88 Fed. Reg. 12,760-01, 12,765 (Feb. 28, 2023) (hereafter "Final Rule"). Commenters explained that DOL's combination of duties rule was artificial and bore no relationship to the realities of agricultural labor markets. Final Rule, 88 Fed. Reg. at 12,778-79, 12,781. The ranch hand was not a veterinarian, and mixing antibiotics into feed did not change that. Commenters

proposed several approaches to link occupational classifications more closely to the realities of agricultural labor markets. Final Rule, 88 Fed. Reg. at 12,781 (occupation categories are sometimes called "SOC codes" after the "Standard Occupational Classification" system).

DOL adopted the proposed rule without change on February 28, 2023. Final Rule, 88 Fed. Reg at 12,766 ("Accordingly, the Department is adopting the methodology proposed in the 2021 AEWR NPRM without change."). DOL explained the premises of the new rule at 88 Fed. Reg. 12,761. It first claimed that using the Farm Labor Survey caused adverse effect. It reasoned that the survey did not include wages for non-agricultural occupations like supervisors, construction, logging, and tractor-trailer truck drivers. *Id.* These jobs, DOL noted, were "more specialized or higher paid job opportunities." *Id.* Therefore, using the Farm Labor Survey did not "adequately guard against adverse effect on the wages of agricultural workers similarly employed in the United States in these SOC codes." *Id.* Put in concrete terms, the veterinarian's wages were depressed because a "similar" worker, the ranch hand, was paid less. In effect, the existence of a wage differential between an agricultural and a non-agricultural job alone proves adverse effect. Combined with DOL's alleged mandate to stop adverse effect, DOL deemed it necessary to adopt the Final Rule. *Id.*

E. The District Court Denies Plaintiffs-Appellants' Motions for Injunctive Relief

Plaintiffs-Appellants are a group of 23 mostly small farms and agri-businesses and one H-2A filing agent. Several Plaintiffs-Appellants only hire a few H-2A workers per year. JA107, JA126. The most H-2A workers employed by any Plaintiff-Appellant is 25. JA111, JA117. All Plaintiffs-Appellants felt their businesses endangered by the Final Rule. One farmer wrote, "With the enaction of this rule, DOL is effectively wiping my family's ability to operate a farm off the map." JA106. One farmer estimated his workers would receive a raise of $9 per hour. JA124. One small farm with only three workers estimated its costs would go up by over $50,000 annually. JA128-129. One of the larger farms estimated it would pay $713,000 more in wages annually. JA118. In addition to these higher wages, farmers would also have to continue paying for workers' housing, utilities, and transportation as well as various fees, which totaled $15,000 per worker annually in one farmer's estimate." JA109.

Plaintiffs-Appellants filed this lawsuit on April 10, 2023, asserting that the Final Rule violated the APA in several distinct ways. Plaintiffs-Appellants moved for a preliminary injunction in May 2023. JA382. Plaintiffs-Appellants moved for a temporary restraining order in September 2023. The procedural history of the case is accurately summarized by the district court opinion at JA382-385.

The district court denied the injunction motions. JA420. The district court held that Plaintiffs-Appellants had standing to challenge the Final Rule, JA401, and then proceeded to the merits. The court then summarized DOL's argument. It understood DOL to be arguing that there were some occupations where "the skills, qualifications, and tasks of the occupation are the same in both an agricultural context and nonagricultural context." JA403. Because nonagricultural wages were not covered by USDA's survey of agricultural labor markets, "the AEWR for H-2A positions that have substantial overlap with nonagricultural positions might be artificially depressed." JA403.

The court then analyzed and rejected Plaintiffs-Appellants' first challenge to the rule. Plaintiffs-Appellants argued that DOL exceeded its statutory authority to treat agricultural positions as being "similar" to nonagricultural positions. JA404-405. The court rejected this argument because "the Agency explained that it determined that in order to prevent wage depression for *agricultural workers* it is necessary to consider some nonagricultural wages." JA404. The court did not assess the rationality of this assertion: neither it nor DOL explained why paying an H-2A ranch hand the same wages as every other ranch hand caused wage depression for veterinarians and why it was therefore necessary to pay him or her the wages of a veterinarian.

The court then moved on to address Plaintiffs-Appellants' arguments why the Final Rule was arbitrary and capricious. It rejected them all. Plaintiffs-Appellants challenged DOL's decision to ignore a job's primary duty – what the employee actually does – in favor of the combination of duties rule. The district court rejected this argument because it was not "illogical" to use the combination of duties rule due to concerns about administrative burden. JA409. Next, the court rejected Plaintiffs-Appellants' argument that DOL did not perform a reasoned analysis because it disregarded available facts. The court noted: "The upshot of the Plaintiffs' argument appears to be that they *disagree* with the Agency's cost analysis because it did not include an analysis of the impact on workers who, under the new rule, will be reclassified, assigned multiple SOCs, and paid the highest applicable AEWR." JA411. The court then quoted the section of the Preamble stating that the "Department does not have any data readily available to estimate the number of workers that may have their SOC codes reclassified as a result of the final rule, and commenters did not provide such data in their comments on the NPRM." JA411. The court viewed this statement as showing that DOL used the "best data available" and as not supporting the idea that DOL could have accessed the data it had in its H-2A application database. The court rejected Plaintiffs-Appellants' contention because "[t]he Plaintiffs have 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. The court rejected Plaintiffs-Appellants' argument that DOL refused to consider the impact on food prices. JA413-414. The district court cited the portion of the Final Rule where DOL states that it "does not have data to quantify impacts on food inflation" but (contradictorily) still "does not expect this final rule alone will cause a general increase in food prices because" other factors affect food prices too. JA414 (quoting Final Rule, 88 Fed. Reg. at 12,786). The court rejected Plaintiffs-Appellants' argument that DOL failed to consider the impact of the Final Rule on illegal immigration, faulting Plaintiffs-Appellants for not showing that consideration of this factor would have led to a different outcome. JA415.

Having rejected these arguments, the court concluded that Plaintiffs were unlikely to succeed on the merits.

The court found, however, that the Final Rule would cause irreparable injury to Plaintiffs-Appellants. JA417. But "[w]ithout a showing that they are likely to succeed on the merits of their claims, the Plaintiffs' showing of irreparable harm does not warrant the injunctive relief requested." JA417. Finally, the court found that, due to the lack of likelihood of success on the merits, the balance of equities and public interest did not favor injunctive relief. JA417-419.

SUMMARY OF ARGUMENT

This Court should reverse the lower court's denial of Plaintiffs-Appellants' motions for injunctive relief. The Final Rule was not the product of reasoned decision-making mandated by the Administrative Procedure Act ("APA"). Rather than the cogent explanation required by law, DOL offered little more than a string of dogmatic policy pronouncements supported by reasoning no more rational that "because we said so." The final rule falls well below the minimum level of rationality mandated by the APA as this Court and the Supreme Court have construed it. This Court should find that the Final Rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), enter preliminary injunctive relief or vacate the district court's decision denying relief, and remand for further proceedings.

For the purpose of this appeal, Plaintiffs-Appellants will focus on just two of the many deficiencies in DOL's reasoning. The first is DOL's refusal to consider the effect its chosen methodology will have on IRCA's core statutory purpose: controlling illegal immigration. IRCA aimed to control illegal immigration by shutting off the "job magnet" that, Congress believed, was drawing undocumented immigrants to the United States. Before IRCA was passed, farmers had abundant access to labor, but it was undocumented labor. The purpose of the H-2A program

was to stop farmers from hiring undocumented immigrants by giving them access to a lawful alternative. But by making H-2A labor unaffordable, the Final Rule undermines IRCA's central purpose: it incentivizes the employment of undocumented immigrants, thus increasing illegal immigration. DOL completely ignored IRCA's core statutory purpose. The district court found that DOL gave adequate consideration to this issue by merely saying it was "sensitive" to it, but the APA requires much more. The district court also erred by faulting Plaintiffs-Appellants for not proving that consideration of this factor would have led to a different outcome. This reasoning misallocates the APA's burden to consider all the relevant factors of an issue, which rests upon the agency, not the public. DOL's failure to consider the central purpose of the implementing statute is enough on its own to justify a decision that Plaintiffs-Appellants are likely to succeed on the merits.

The second deficiency is DOL's failure to properly assess the cost of the Final Rule. Reaching a reasonable baseline cost estimate is critical to reasoned decision-making because if one does not know the costs, one cannot properly balance those costs against competing interests. DOL made no effort to estimate how many workers would be assigned higher OEWS wages due to the "overlapping duties" rule, which was a new paradigm that has no analogue in any other visa program.

DOL blindly relied on data from prior years to estimate the number of workers, but that data set was not subject to the overlapping duties rule. DOL could have sampled the data set, applied its rule to a certain number of prior applications, and come up with a reasonable estimate. But DOL refused to do so, saying a cost estimate was not readily available because the agency would have had to analyze all 25,150 applications from the prior two years. But DOL could have analyzed a sample of cases to come up with a reasonable estimate. When faced with too much data, DOL chose to review none of it. This is a failure of reasoned decision-making. By disregarding the facts and making no effort to extract the necessary information from its database, DOL acted arbitrarily and capriciously. The Final Rule should therefore be enjoined pending completion of the district court proceedings.

ARGUMENT

Standard of Review

"We review the decision to grant or deny a preliminary injunction for an abuse of discretion. We review factual determinations under a clearly erroneous standard and legal conclusions *de novo*." *Safety-Kleen, Inc. v. Wyche*, 274 F.3d 846, 859 (4th Cir. 2001) (citation omitted).

> The exercise of a power so far-reaching ought to be subject to effective, and not merely perfunctory, appellate review…. Of course, a judge's discretion in granting or denying relief is not boundless and an appellate court will overturn a district court's decision if made under an improper

> legal standard. Factual findings under the abuse of discretion standard are reversed only if the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

Direx Israel, Ltd. v. Breakthrough Med. Corp., 952 F.2d 802, 815 (4th Cir. 1991), citing *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 358 (4th Cir. 1991).

"A district court per se abuses its discretion when it makes an error of law or clearly errs in its factual findings." *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 317 (4th Cir. 2006); *see also Morris v. Wachovia Sec., Inc.*, 448 F.3d 268, 277 (4th Cir. 2006) ("A district court has abused its discretion if its decision is guided by erroneous legal principles or rests upon a clearly erroneous factual finding.").

Discussion

A. DOL FAILED TO CONSIDER THE STATUTORY OBJECTIVE OF CONTROLLING ILLEGAL IMMIGRATION

DOL failed to consider the impact of the Final Rule on Congress's objective of controlling illegal immigration, which is the primary purpose of IRCA, the statute that created the H-2A program. *Egbuna v. Time-Life Libraries*, 153 F.3d 184, 187 (4th Cir. 1998). Congress intended to eliminate illegal immigration because it created a subclass of people uniquely subject to abuse and exploitation. *See* H.R. Rep. No. 99-682 (I), 99th Cong., 2d Sess 49 (1986); *see Cal. Rural Legal Assistance, Inc. v. Legal Servs. Corp.*, 917 F.2d 1171, 1178 n.13 (9th Cir. 1990) ("When Congress passed IRCA, it recognized that undocumented aliens had historically

been victims of exploitation and deprivation of legal rights. One of the primary reasons for the passage of IRCA was that '(a) subclass of people who cannot exercise their rights has been created.' Cong. Rec. H10598 (daily ed. Oct. 15, 1986) (remarks of Rep. McKinney.").

An agency acts arbitrarily and capriciously if it fails to consider an important aspect of the problem before it. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Mayor of Balt. v. Azar*, 973 F.3d 258, 275 (4th Cir. 2020). The impact of a regulation on the achievement of Congress's objectives is such "an important aspect." *Sierra Club v. United States DOI*, 899 F.3d 260, 294 (4th Cir. 2018); *Ohio River Valley Envtl. Coal., Inc. v. Kempthorne*, 473 F.3d 94, 103 (4th Cir. 2006). The inquiry into DOL's reasoning is limited to the rationale, if any, offered by the agency. Neither this Court nor the district court nor DOL's lawyers may advance a rationale that DOL itself did not offer when it promulgated the rule. *N.C. Growers' Ass'n v. UFW*, 702 F.3d 755, 767 (4th Cir. 2012) ("And, manifestly, we may not supply a reasoned basis for the agency's action that the agency itself has not given." (quotation marks and citation omitted)).

Controlling Illegal Immigration is the Primary Purpose of IRCA

Controlling illegal immigration is the primary purpose of IRCA. This is evident from the very name of the statute, the Immigration Reform and *Control* Act.

Congress believed that undocumented immigrants were drawn to the United States by the availability of jobs, and eliminating the job magnet would reduce illegal immigration. *Egbuna v. Time-Life Libraries*, 153 F.3d 184, 187 (4th Cir. 1998). "IRCA was primarily designed to reduce illegal immigration…." *AFL-CIO v. Dole*, 923 F.2d 182, 184 (D.C. Cir. 1991). "IRCA was enacted to reform the nation's immigration laws, largely by controlling illegal immigration into the United States through, *inter alia*, penalizing employers of undocumented aliens." *Wint v. Yeutter*, 902 F.2d 76, 77-78 (D.C. Cir. 1990). "IRCA, passed in 1986, imposed civil and criminal penalties upon employers who hire illegal aliens. Congress, through that approach, sought to discourage illegal immigration into the United States and to make it difficult for undocumented aliens to remain in the country." *Ayuda, Inc. v. Thornburgh*, 880 F.2d 1325, 1326 (D.C. Cir. 1989).

Eliminating the job magnet ran headlong into an unfortunate reality: the agricultural industry depended on undocumented labor. "Agricultural interests, particularly western growers of perishable agricultural commodities (basically, fresh fruits and vegetables) have come to rely heavily on the existence of an undocumented work force." H.R. Rep. 99-682(I), 83, 1986 U.S.C.C.A.N. 5649, 5687. Farmers had access to labor before IRCA, it was just undocumented labor. Western growers feared losing access to foreign labor. Growers opposed

immigration reform, creating a "long-standing log-jam" obstructing efforts to control illegal immigration. H.R. Rep. 99-682, 209, 1986 U.S.C.C.A.N. 5649, 5746.

To truly address undocumented immigration, and to win the support of growers for immigration reform, farmers would need an alternative to undocumented labor. The alternative was the H-2A program. An oft-cited guide to the purpose of the H-2A program is the testimony of Deputy Secretary of Agriculture John R. Norton III before the Subcommittee on Immigration, Refugees, and International Law in 1985:

> In agriculture, undocumented workers are primarily engaged in seasonal harvest work throughout the U.S. As we move toward implementation of employer sanctions, we must at the same time prevent labor shortfalls and dislocations which have the potential to disrupt harvests and interfere with marketing process. The national economy and the American consumer depend upon a stable and adequate supply of agricultural labor to maintain commodity supplies at reasonable price levels.

Id. To prevent labor shortfalls and protect the food supply, farmers were given access to a lawful source of labor in the H-2A program.

Prior Rulemakings Have Appropriately Focused on Controlling Illegal Immigration

DOL has placed controlling illegal immigration at the core of H-2A policy ever since the passage of IRCA.

In 1989 DOL recognized that "AEWRs, if set too high, might be a disincentive to the use of H-2A and U.S. workers, and could undermine efforts to eradicate the employment of illegal aliens."[12]

In 2008, DOL recognized that the need to discourage the employment of undocumented immigrants remained as pressing as ever, stating in a proposed rule, "One unfortunate reality of modern American agriculture is that the majority of the foreign workers assisting with the year's harvest are undocumented."[13] The 2008 proposed rule contained several pages of analysis on the interplay between access to H-2A labor and controlling undocumented immigration.[14] DOL noted that the H-2A program "continues to be regarded with trepidation by many agricultural employers who continue to make the unacceptable choice to employ an undocumented workforce rather than face the program's many complexities."[15] The 2008 proposed rule justified an overhaul of the H-2A program based on the need to control illegal immigration.[16]

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[12] Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States; Adverse Effect Wage Rate Methodology, 54 Fed. Reg. 28,037-01, 28,044 (July 5, 1989).
[13] Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement, 73 Fed. Reg. 8,538-01, 8,540 (Feb. 13, 2008).
[14] *Supra* note 13, 73 Fed. Reg. at 8,540-8,542.
[15] *Supra* note 13, 73 Fed. Reg. at 8,542.
[16] *Supra* note 13, 73 Fed. Reg. at 8,540-8,542.

The final rule that resulted from the 2008 proposed rulemaking also placed controlling illegal immigration at the center, noting that "The H-2A program was created by Congress to be the alternate source of choice for agricultural labor. The program is clearly failing to fill the role envisioned for it, however, as approximately ten times more undocumented workers than H-2A workers are employed in the agricultural sector today."[17] The rule contained several pages of analysis on illegal immigration.[18]

Controlling illegal immigration was at the core of AEWR policy as recently as 2020:

> Setting AEWRs that are too high in any given area will harm U.S. workers indirectly by providing an incentive for employers to hire undocumented workers. The Department remains cognizant of the fact that the clear congressional intent was to make the H-2A program usable, not to make U.S. producers non-competitive and that unreasonably high AEWRs could endanger the total U.S. domestic agribusiness, because the international competitive position of U.S. agriculture is quite fragile.[19]

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[17] Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement, 73 Fed. Reg. 77,110-01, 77,171 (Dec. 18, 2008).

[18] *Supra* note 17, 73 Fed. Reg. at 77,169-77,173.

[19] Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States, 85 Fed. Reg. 70,445-01, 70,455 (Nov. 5, 2020).

The Final Rule Failed to Consider Illegal Immigration, Ignoring the Statutory Objective

When DOL published the Notice of Proposed Rulemaking that led to the current rule, it omitted any mention of illegal immigration.[20] In response, several commenters raised concerns that steep wage increases would price farmers out of the H-2A program, leading them back into using undocumented labor. Farmer Law PC commented that if the price of labor increases by over 20% as forecast, general contractors would have to increase prices over 20% for farmers, but farmers could not afford that, so the only choice would be to "use subcontractors that use illegal labor because they will be the only employers unaffected by the increased AEWR."[21] The comment also said that the proposed rule would cause "skyrocketing wage rates…[and] significantly increase the number of undocumented workers performing this type of work."[22] Wafla, an association of over 1,000 farms in the pacific northwest, commented:

> The reality for job seekers from Mexico and Central America is that if they are not able to secure a job through the H-2A or a similar visa program, the alternative is undocumented immigration… Making the H-2A program unaffordable to American farmers will only make this problem worse, not better. The reality is that the AEWR is putting

[20] Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States, 86 Fed. Reg. 68,174-01 (Dec. 1, 2021).
[21] Farmer Law PC, Comments on Proposed Rulemaking, Docket No. ETA-2021-0006-0067, 5 (Feb. 1, 2022), https://downloads.regulations.gov/ETA-2021-0006-0067/attachment_1.pdf.
[22] Farmer Law PC, *supra* note 21 at 1.

> farmers out of business, encouraging undocumented immigration, and further promoting the offshoring of the U.S. food supply.[23]

Hall Law Office, PLLC, on behalf of Plaintiff-Appellant USA Farm Labor, Inc., commented that making labor unaffordable would turn the job magnet back on and undermine Congress's goal of controlling illegal immigration, "Congress also recognized that agricultural employers needed a secure, legal channel through which to staff their farms and ranches when they could not find U.S. workers. Without this channel, the incentive to employ unauthorized aliens would remain. For law abiding agricultural employers, the lack of a workforce would be devastating."[24]

Despite the pleas to consider illegal immigration, the Final Rule barely mentioned it. The topic arose only once in the Final Rule, "[A] variety of commenters…objected to the proposed changes by themselves without…addressing the undocumented workforce." Final Rule, 88 Fed. Reg. at 12,765. DOL dismissed this concern (and a number of other concerns) by stating that the rulemaking was only about the AEWR methodology, not about the real-world impact of that methodology. DOL's only response was the following, "Although the Department is sensitive to the commenters' general concerns, the Department notes the purpose

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[23] Wafla, Comments on Proposed Rulemaking, Docket No. ETA-2021-0006-0076, 2 (Feb. 1, 2022), https://downloads.regulations.gov/ETA-2021-0006-0076/attachment_1.pdf.

[24] Hall Law Office, PLLC, Comments on Proposed Rulemaking, Docket No. ETA-2021-0006-0092, 7 (Feb. 7, 2022), https://downloads.regulations.gov/ETA-2021-0006-0092/attachment_2.pdf.

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." Final Rule, 88 Fed. Reg. at 12,765. The single word "sensitive" is the only nod to IRCA's objective throughout the 73-page Final Rule. DOL flatly refused to consider the primary statutory objective of controlling illegal immigration.

This is a violation of DOL's duty to consider important factors, since nothing could be more important than the statutory objectives. Nothing more is required to establish a likelihood of success on the merits. "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress had not intended it to consider [or] entirely failed to consider an important aspect of the problem…." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). "An agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *Id.* at 30. This Court has struck down agency action that disregarded the objectives of the implementing statute. For example, this Court reversed an action by the Secretary of the Interior for "ignoring any actual effect that the change might have on" a West Virginia coal mining regulatory program:

> OSM acknowledged that the change may have weakened the program, but did not explain why an amendment with the potential to alter the CHIA process in a way that may make it less environmentally protective is nevertheless consistent with SMCRA's minimum requirements. Instead, it avoided the question. In doing so, it failed to

> provide a reasoned explanation based on the evidence before the agency and ignored an important aspect of the problem.

Ohio River Valley Env't Coal., Inc. v. Kempthorne, 473 F.3d 94, 103 (4th Cir. 2006); *see also Sierra Club v. United States Dep't of the Interior*, 899 F.3d 260, 294 (4th Cir. 2018). Here, DOL has ignored the real-world impact of the Final Rule on the statutory objective of IRCA, choosing instead to avoid the question.

Dr. Madeline Zavodny, economist for Plaintiffs-Appellants, explained that increased use of temporary worker visas like the H-2A program is associated with a 1:1 reduction in employment of undocumented workers, and the converse is likely true as well. JA88-89. When Plaintiffs-Appellants pointed out that the Final Rule failed to consider illegal immigration, DOL's only response was to argue that IRCA may not even allow the agency to consider it. "[I]t is far from clear that 8 U.S.C. § 1188(a)(1) even empowers DOL, in determining a methodology for setting an AEWR, to consider what impact the AEWR will have on the use of undocumented laborers." JA151. DOL appears to be ignorant of IRCA's objective, even though the agency derives its power from that statute.

The district court took the issue in a different direction, finding that DOL actually *did* consider illegal immigration, even though DOL's attorney claimed it did not do so and was even forbidden from doing so. The district court found that DOL adequately considered the issue by stating that it was "sensitive" to the concern. JA415. The district court then faulted Plaintiffs-Appellants for not presenting evidence that considering illegal immigration would have led to a

different rule, "However, [plaintiffs] have failed to present evidence to show the impact of the pool of unauthorized worker [sic], or that the DOL ignored a substantial factor. Simply arguing that consideration of some other factor would render a different result is not a substitute for presenting evidence showing the likelihood of proving such." JA415. This reasoning misallocates the APA's burden of reasoned decision-making. The duty is on the agency to consider the relevant factors. *State Farm*, 463 U.S. at 43. If the agency has not considered the appropriate factors, then its action is invalid and must be enjoined. *Kempthorne*, 473 F.3d at 103. The inquiry proposed by the district court is impossible: no member of the public can show that an agency would have acted differently if it had considered a different factor. The hypothetical, subjective states of mind of agency decision-makers are not appropriate subjects of an APA inquiry. The duty rests on an agency to consider Congress's objectives and all important aspects of the problem before it.

The Final Rule fails because DOL did not consider its impact on controlling illegal immigration, the primary objective of the implementing statute.

B. DOL FAILED TO CONSIDER THE COST OF THE FINAL RULE

The second independent reason the Final Rule must be enjoined is that DOL did not assess its cost. Rather than analyzing the data in its possession related to costs, DOL instead used an arbitrary assumption for how many workers would receive higher wages.

An agency acts unlawfully when it uses arbitrary assumptions as a baseline for its analysis and disregards available evidence that would likely contradict its preferred conclusion. *See Mayor of Balt. v. Azar v. Azar*, 973 F.3d 258, 282 (4th Cir. 2020) (en banc); *Friends of Back Bay v. U.S. Army Corps of Eng'rs*, 681 F.3d 581, 588 (4th Cir. 2012) ("An unjustified leap of logic or unwarranted assumption, however, can erode any pillar underpinning an agency action, whether constructed from the what-is or the what-may-be.").

The Final Rule provides a two-tiered wage system: workers in six occupations would continue to receive wages based on the Farm Labor Survey, as they had before. But other workers would receive higher wages based on the OEWS. The costs imposed by the Final Rule derive from assigning certain workers the higher OEWS wages. The more workers who receive OEWS wages, the higher the cost for farmers. The mechanism for determining which workers will receive OEWS wages is the overlapping duties rule. Final Rule, 88 Fed. Reg. at 12,778-12,782. If a job description contains even a single job duty that overlaps with an occupation outside of the six protected categories, the worker will receive an OEWS wage. Even if the worker only performs that job duty 5% of the time, the worker will still be assigned a higher wage. For example, a crop picker who drives a truck to a grain elevator once per week would receive the same wage as a full-time, long haul truck driver. Final Rule, 88 Fed. Reg. at 68,184. Taken to its logical extreme, a ranch hand who

delivers hormone injections to cattle every Saturday should receive the same salary as a veterinarian. The overlapping duties rule does not consider what a worker's primary job duties are, nor how they spend most of their time. DOL made it clear that even minor, intermittent job duties would shift the job to an OEWS wage. Final Rule, 88 Fed. Reg. at 12,781.

Farmers were alarmed at the new system for assigning occupations, which has no counterpart in any other visa program.[25] Farmers wanted to know how many workers would be assigned the new, higher wages, so they could have some sense of how much the new rule would cost them. DOL asserted that very few applications—only two percent—would receive OEWS wages. The remaining 98% of jobs would continue to receive wages based on the Farm Labor Survey, "The efficiency impact of the final rule is limited only to the 2 percent of H-2A workers whose wages the final rule will effect, while there would be no change to the

[25] For every other visa program, DOL follows the SOC Classification Principles and Coding Guidelines. The second coding guideline is that when a worker could be coded in more than one occupation, they receive the occupation with the highest skill level. If there's no difference in skill levels, they receive the occupation in which they spend the most time. Bureau of Labor Statistics, "2018 SOC User Guide – Classification Principles and Coding Guidelines" 2, Nov. 2017, https://www.bls.gov/soc/2018/soc_2018_class_prin_cod_guide.pdf. In the Final Rule, DOL adopted the SOC occupation categories but discarded the SOC system's rules for assigning occupations, a deep incongruity. Also, the first SOC classification principle is that each occupation is assigned to only one category, so the premise for the overlapping duties rule is false, further adding to the confusion and the need for a valid cost estimate of the Final Rule. *Id.* at 1; JA79.

[deadweight loss] for the other 98 percent of H-2A workers." Final Rule, 88 Fed. Reg. at 12,789. DOL repeatedly justifies its rule using this estimate. DOL mentions the 2% or 98% estimate 14 times throughout the Final Rule. For example, one commenter noted that OEWS wages would be updated mid-season, and DOL did not account for the costs that mid-season adjustments would impose. DOL "reiterate[d] that 98 percent of the job opportunities subject to the AEWR methodology in this final rule will be subject to FLS-based AEWRs only…and will not be impacted by OEWS adjustments." Final Rule, 88 Fed. Reg. 12,785. The two percent estimate served as the basis for DOL's conclusion that the regulation was not "economically significant," allowing DOL to avoid stricter scrutiny under Executive Order 12,866. Final Rule, 88 Fed. Reg. at 12,784 – 12,785.

Since DOL justified its rule based on the two percent or 98% estimate, one would expect the estimate to be well-founded, but it was not. The estimate is based on this sentence, "Of the 25,150 certifications between FY 2020 and FY 2021 only 732 (2.91%) have wage impacts from the final rule." Final Rule, 88 Fed. Reg. at 12,789 n106. In prior years, only 2.91% of jobs were assigned to occupations outside of the six protected categories. DOL improperly rounded 2.91% down to 2% for rhetorical effect. But the deeper problem with relying only on historical data is that applications from prior years were not subject to the overlapping duties rule.

DOL failed to estimate how many workers would be affected by its new paradigm for assigning occupations.

Farmers took notice, and alerted DOL to its lapse. "Several commenters asserted that the Department underestimates the impact of the revised AEWR structure because it does not consider classifications of workers to new (higher wage) SOC codes as a result of the requirement to pay the highest of applicable SOC code AEWRs. One commenter asserted that all farm work overlaps and classifications should not be based on intermittent activities and others assert that workers should not receive higher wages if they only minimally perform the higher classification." Final Rule, 88 Fed. Reg at 12,785.

DOL admitted that it failed to estimate the impact of the overlapping duties rule:

> The Department understands that we may have underestimated the impact of the revised AEWR structure due to the final rule's new requirement to pay the highest of applicable SOC code AEWRs. However, the Department does not have any data readily available to estimate the number of workers that may have their SOC codes reclassified as a result of the final rule, and commenters did not provide such data in their comments on the NPRM.

Final Rule, 88 Fed. Reg. at 12,785 (emphasis added). DOL goes on to explain that, although it had data available, it did not want to do the work of analyzing it:

> Commenters are correct that the specific incidences are case-specific and require detailed analysis to assign codes. To determine the number of potentially reclassified certifications would require review of each

> case in the certification dataset. As such, the number of workers who may have their SOC codes reclassified because of this final rule is not readily accessible to the Department.

In DOL's view, to estimate the impact of the rule it would have had to analyze every single case adjudicated in prior years. This is simply untrue. DOL could have prepared an estimate by analyzing a subset of cases, say 100 or 500. The Final Rule uses the word "estimate" or some variation of it 90 times, and yet when it came to judging the cost of its rule, DOL feigned ignorance of the concept of an estimate. Thus, when DOL says that it does not have any data "readily available," DOL actually means it had too much data. Because there was too much data, DOL refused to analyze any of it.

Farmers deserve to know how much this rule will cost them. DOL, however, cannot say. It cannot say because it did not look at the data it had. This data is accessible – something DOL has not contradicted during the litigation. Nor has DOL explained why, with a database of applications, DOL could not take a statistically sufficient sample and make inferences. DOL did none of this. Rather, it just ignored the data at hand. This failure makes it impossible to balance policy choices. After all, one has to properly weigh the various factors before deciding their relative importance. DOL did not do this. Rather, DOL assumed no or minimal cost so that cost issues would not outweigh its preferred result of establishing higher AEWRs.

That is not reasoned decision-making; it is arbitrary and capricious decision-making in violation of the APA.

Economist Madeline Zavodny estimated that 10% of workers would be reclassified as truck drivers, suggesting that DOL's estimate (or non-estimate) was far off. Dr. Zavodny also explained that the data necessary to do this calculation is readily available to DOL. JA77-78. The American Farm Bureau Federation estimated that at least 10% of workers would be impacted, and the percentage would be even higher due to the overlapping duties rule:

> Using the available FLS data, 90% of surveyed workers were classified as working one of the six job codes that will remain under the single AEWR structure. The remaining 10% of workers would now be subject to wages set by utilizing the OEWS source. Each SOC job code has a separate AEWR. However, these numbers could skew greater towards the OEWS wage determination as the proposed rule contains damaging language that requires agricultural employers to pay the highest applicable wage if the job opportunity can be classified within more than one occupation when those occupations are subject to different AEWRs.[26]

Experts may differ on the details of the estimate, but the problem is that DOL did not even try to estimate the cost of the central feature of its new rule, when even a little effort could have easily produced a result. With no sense of what the rule will

[26] American Farm Bureau Federation, Comments on Proposed Rulemaking, Docket No. ETA-2021-0006-0001, 2 (Feb. 2, 2022), https://downloads.regulations.gov/ETA-2021-0006-0086/attachment_1.pdf (JA422).

cost, DOL cannot even begin to weigh the costs against the benefits and analyze how its new rule squares with Congress's goals.

The assessment of a regulation's costs is a core component of APA-mandated reasoned decision-making:

> One would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits. In addition, 'cost' includes more than the expense of complying with regulations; any disadvantage could be termed a cost.

Michigan v. EPA, 576 U.S. 743, 752 (2015); *see also id.* at 752-56. When agency action is based on unjustified cost estimates, the action must be enjoined. This Court, sitting *en banc*, affirmed an injunction against a rule requiring abortion services to be physically separate. The Department of Health and Human Services had estimated that this physical separation requirement would cost providers $30,000 each. "There is no justification in the Final Rule for the $30,000 amount…. For all we can tell, this number was pulled from thin air." *Mayor of Balt. v. Azar v. Azar*, 973 F.3d 258, 282 (4th Cir. 2020) (en banc). By failing to justify its cost estimate, HHS failed to consider an important aspect of the problem and offered an explanation that ran counter to the evidence before the agency. *Id.* (citing *State Farm*, 463 U.S. at 43). DOL acted similarly by refusing to examine the data and come up with a reasonable cost estimate. No amount of deference can overcome the agency's failure to ground the Final Rule in evidence. "Even according the greatest

respect to the Secretary's action, however, deference cannot fill the lack of an evidentiary foundation on which the Final Rules must rest." *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 643 (1986).

C. THE REMAINING REQUIREMENTS FOR AN INJUNCTION ARE SATISFIED

The district court based its decision primarily on Plaintiffs-Appellants' alleged failure to show likelihood of success on the merits, and this brief has similarly focused on that element. However, the other requirements for an injunction are also satisfied. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

Plaintiffs-Appellants have shown that they would suffer irreparable harm in the form of lost profits, losing access to the H-2A program, scaling back operations, and even going out of business due to the Final Rule. JA67-71. Plaintiff-Appellant USA Farm Labor surveyed its clients, and 65% of respondents said they would stop using the H-2A program if the Final Rule takes effect. JA97. Russ Hoggard of Hoggard Farms in Missouri wrote, "[W]e may be forced to cut back or quit farming altogether" if the Final Rule takes effect. JA101. Joel Layman, the President of J.D. Layman Farms, Inc. in southwestern Michigan, wrote, "The new rule, if enacted, would likely eliminate my ability to use H2A, and would ultimately see me rolling back my organic crop farm by 75%." JA105. Further irreparable harm is documented at JA67-71. The district court found that "Plaintiffs have made at least

a preliminary showing of irreparable harm…." JA417. In light of the district court's holding, this brief will not belabor the topic.

Plaintiffs-Appellants also showed that the balance of equities and the public interest favor an injunction. The public interest favors ensuring that federal agencies act within the lawful bounds set by the APA. There is no public interest in perpetuating an unlawful government program, and there is a strong public interest in ensuring agencies abide by the law. *League of Women Voters of United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016). The district court ruled against Plaintiffs-Appellants on these two elements for three reasons. First, an injunction would deprive farmworkers of higher wages they would receive under the Final Rule. JA417-418. However, if the rule is unlawful, then farmworkers are not entitled to elevated wages. Second, the district court wished to avoid uncertainty in the H-2A program if DOL should prevail in this litigation. This Court is the last appeal of right in this matter, so this Court can provide more certainty than the district court. Third, the district court believed an injunction against the enforcement of a statute would damage the sovereign interests of the United States. But to enforce a statute, agencies must comply with the APA. When an agency has not complied with the APA, there can be no proper enforcement.

CONCLUSION

The Court should enter a preliminary injunction barring Defendants-Appellees from applying the Final Rule to any H-2A job order submitted by or on behalf of Plaintiffs-Appellants. Alternatively, the Court should vacate the district court's order and remand with instructions to enter a preliminary injunction.

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