IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Civil Action No. 5:24-cv-527

NORTH CAROLINA FARM BUREAU FEDERATION, INC.; HIGHT FAMILY FARMS, LLC; and TRIPLE B FARMS, INC.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF LABOR; JOSÉ JAVIER RODRIGUEZ, in his official capacity as Assistant Secretary of the United States Department of Labor; and JESSICA LOOMAN, in her official capacity as Administrator, Wage & Hour Division of the United States Department of Labor,

Defendants.

PROPOSED INTERVENOR-DEFENDANTS' PROPOSED OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Table of Contents

I. Plaintiffs' Motion for Summary Judgment is Procedurally Improper 1

II. The Final Rule Does Not Violate the NLRA 3

A. Plaintiffs Overstate the Similarities Between the Final Rule and the NLRA 3

B. The NLRA Does Not Forbid DOL From Providing the Protections in the Final Rule 4

III. DOL Has Statutory Authority to Issue the Final Rule 7

A. Plaintiffs Do Not Challenge Those Aspects of the Final Rule Issued Under DOL's Wagner-Peyser Act Rulemaking Authority 7

B. IRCA Grants DOL Rulemaking Authority 8

i. IRCA Explicitly Authorizes DOL Rulemaking 9

ii. Even if IRCA Did Not Grant DOL Explicit Rulemaking Authority, IRCA Would Do So Implicitly 10

iii. *Alexander v. Sandoval* Has Nothing to Do with This Case 13

C. The Worker Voice and Empowerment Provisions of the Final Rule Are Well Within DOL's Rulemaking Authority to Prevent Adverse Effects on U.S. Workers 14

IV. The Major Questions Doctrine Does Not Apply 15

A. The Final Rule Does Not Decide Any Major Question 15

B. Congress Has Clearly Authorized DOL to Issue the Final Rule 19

V. The Final Rule Is Neither Arbitrary nor Capricious 19

VI. Each Provision of the Final Rule is Severable 21

Table of Authorities

Cases

AFL-CIO v. Dole, 923 F.2d 182 (D.C. Cir. 1991) 15, 19, 21

Alaska Airlines, Inc. v. Donovan¸ 766 F.2d 1550 (D.C. Cir. 1985) 21

Alexander v. Sandoval, 532 U.S. 275 (2001) 13

Am. Bioscience Inc. v. Thompson, 269 F.3d 1077 (D.C. Cir. 2001) 2

Am. First Legal Found. v. Cardona, 630 F. Supp. 3d 170 (D.D.C. 2022) 2

Arizona v. United States, 567 U.S. 387 (2012) 18

Barr v. Am. Ass'n of Pol. Consultants, Inc., 591 U.S. 610 (2020) 22

Bayou Lawn & Landscape Servs. v. Sec'y of Lab., 713 F.3d 1080 (11th Cir. 2013) 9

Bd. of Cnty. Comm'rs v. EPA, 72 F.4th 284 (D.C. Cir. 2023) 21

Bear Invs., LLC v. Penn Nat'l Mut. Ins. Co., No. 5:19-cv-529-FL, 2023 WL 7391490 (E.D.N.C. Nov. 8, 2023) 8

Bud Antle, Inc. v. Barbosa, 45 F.3d 1261 (9th Cir. 1994) 6, 17

Camp v. Pitts, 411 U.S. 138 (1973) 2

Chamber of Com. v. City of Seattle, 890 F.3d 769 (9th Cir. 2018) 5

Chamber of Com. v. Reich, 74 F.3d 1322 (D.C. Cir. 1996) 5, 6, 18

Consumer Energy Council of Am. v. FERC, 673 F.2d 425 (D.C. Cir. 1982) 22

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 17

Folgueras v. Hassle, 331 F. Supp. 615 (W.D. Mich. 1971) 4

Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174, 598 U.S. 771 (2023) 6

Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103 (1989) 5, 6

Grayson O Co. v. Agadir Int'l LLC, 856 F.3d 307 (4th Cir. 2017) 8

Healthkeepers, Inc. v. Richmond Ambulance Auth., 642 F.3d 466 (4th Cir. 2011) 10

Hoffler v. Hagel, 122 F. Supp. 3d 438 (E.D.N.C. 2015) 2

HTH Corp. v. NLRB, 823 F.3d 668 (D.C. Cir. 2016) 10

Juarez-Martinez v. Deans, 108 N.C. App. 486, 424 S.E.2d 154 (N.C. Ct. App. 1993) 4

Kansas v. U.S. Dep't of Lab., __ F. Supp. 3d __, 2024 WL 3938839 (S.D. Ga. Aug. 26, 2024)7, 8

Lodge 76, Int'l Ass'n of Machinists v. Wis. Emp. Rels. Comm'n, 427 U.S. 132 (1976) 5

Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024) 10, 13

Mayor & City Council of Baltimore v. Azar, 439 F. Supp. 3d 591 (D. Md. 2020) 22

Morton v. Ruiz, 415 U.S. 199 (1974) 10, 12

N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC, 76 F.4th 291 (4th Cir. 2023) 17

Nat'l Council of Agric. Emps. v. U.S. Dep't of Lab., No. 22-cv-3569, 2024 WL 324235 (D.D.C. Jan. 29, 2024) 9

NLRB v. Bell-Aerospace Co. Div. of Textron, Inc., 416 U.S. 267 (1974) 12

Outdoor Amusement Bus. Ass'n, Inc. v. Dep't of Homeland Sec., 983 F.3d 671 (4th Cir. 2020) 11, 13

Overdevest Nurseries, L.P. v. Walsh, 2 F.4th 977 (D.C. Cir. 2021) 8

Owusu-Boakye v. Barr, 376 F. Supp. 3d 663 (E.D. Va. 2019) 2

San Diego Bldg. Trades Council, Millmen's Union, Loc. 2020 v. Garmon, 359 U.S. 236 (1959) 6

State v. Lawson, 101 N.C. 717, 7 S.E. 905 (N.C. 1888) 4

United Farm Workers of Am. v. Ariz. Agric. Emp. Rels. Bd., 669 F.2d 1249 (9th Cir. 1982) 5

Util. Air Regul. Grp. v. EPA, 573 U.S. 302 (2014) 19

Wayman v. Southard, 23 U.S. 1 (1825) 10

West Virginia v. EPA, 597 U.S. 697 (2022) 19

Willmar Poultry Co. v. Jones, 430 F. Supp. 573 (D. Minn. 1977) 5

Statutes

8 U.S.C. § 1101(a)(15)(H) 8

8 U.S.C. § 1101(a)(15)(H)(ii)(a)–(b) 11

8 U.S.C. § 1184(c)(1) 11

8 U.S.C. § 1188 ..... 11, 13

8 U.S.C. § 1188(a)(1)(B) 12

8 U.S.C. § 1188(b)(1) 9

8 U.S.C. § 1188(c)(3)(A)(i) 9

8 U.S.C. § 1188(c)(3)(B)(i) 9

8 U.S.C. § 1188(c)(4) 9

29 U.S.C. § 158(a)(5) 3

29 U.S.C. § 160(b) 3

29 U.S.C. § 160(e) 3

29 U.S.C. § 49k 7

Regulations

20 C.F.R. § 655.122(h)(4) 21

20 C.F.R. § 655.135(h)(1)(v) 12

20 C.F.R. § 655.135(h)(2)(i)–(ii), (m) 1

20 C.F.R. § 655.135(h)(2), (m) 14, 21

20 C.F.R. § 655.190 22

29 C.F.R. § 501.10 22

Improving Protections for Workers in Temporary Agricultural Employment in the United States, 89 Fed. Reg. 33,898 (Apr. 29, 2024) ..... passim

Labor Certification Process for the Temporary Employment of Aliens in Agriculture and Logging in the United States, 52 Fed. Reg. 20,496 (June 1, 1987) 17

Summary

This Court should deny Plaintiffs' motion for summary judgment. Initially, Plaintiffs' motion is procedurally improper; they seek to short-circuit this litigation by seeking summary judgment before the administrative record—on which this Court must decide the present motion—has even been compiled.

If this Court reaches the merits, it should nevertheless deny Plaintiffs' motion. To the extent Plaintiffs claim Defendants ("DOL" or "the agency") lack rulemaking authority, they are wrong. DOL has well-recognized statutory authority to make rules governing the H-2A program. Nor does the Final Rule contradict the National Labor Relations Act ("NLRA"). Plaintiffs also invoke the major questions doctrine, but this argument—which largely recapitulates their other erroneous arguments—also fails, because the Final Rule does not implicate a major question, and Congress has clearly authorized DOL to issue the Final Rule. Plaintiffs next cram their arguments into the Administrative Procedure Act's ("APA") arbitrary-or-capricious standard, but the Final Rule is eminently reasonable and reasonably explained, and thus passes muster under the APA's deferential standard.

Finally, Plaintiffs' relief—evisceration of the *entire* rule—is wildly overbroad. They challenge only a tiny sliver of the Final Rule, *i.e.*, the worker voice and empowerment provisions, *see* 20 C.F.R. § 655.135(h)(2)(i)–(ii), (m), but each provision of the Final Rule is severable. Thus, should this Court determine that any part of the Final Rule is unlawful, it should grant relief only as to that particular provision.

I. Plaintiffs' Motion for Summary Judgment is Procedurally Improper

This Court should deny Plaintiffs' motion for summary judgment as premature. Plaintiffs bring suit under the APA. *See* Compl. ¶¶ 67–104, ECF No. 1. Unlike most civil cases, in an APA case, "the district judge sits as an appellate tribunal." *Owusu-Boakye v. Barr*, 376 F. Supp. 3d

663, 667 (E.D. Va. 2019) (quoting *Am. Bioscience Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001)). There is no Rule 26 discovery in APA cases (with rare exceptions not relevant here). Instead, the facts for summary judgment are drawn from the administrative record. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973) ("In applying [the 5 U.S.C. § 706(2)(A)] standard, the focal point for judicial review should be the administrative record . . . ."). Thus, as the U.S. District Court for the District of Columbia has put it:

> when the court is reviewing a final agency action under the APA, the [summary judgment] standard set forth in Rule 56(a) does not apply. Instead of reviewing the record [produced in discovery] for disputed facts that would preclude summary judgment, the function of the district court is a more limited one: to determine whether or not as a matter of law *the evidence in the administrative record* permitted the agency to make the decision it did.

Am. First Legal Found. v. Cardona, 630 F. Supp. 3d 170, 178 (D.D.C. 2022) (cleaned up) (emphasis added); *see Hoffler v. Hagel*, 122 F. Supp. 3d 438, 446 (E.D.N.C. 2015) (same).

Here, Plaintiffs filed their motion for summary judgment before the Defendants even appeared. DOL has not yet compiled the administrative record, so it is not legally possible for this Court to adjudicate Plaintiffs' motion under the applicable standard. Rather than indulging Plaintiffs' effort to jump the gun, this Court should deny Plaintiffs' motion for summary judgment and require them to make a new motion in proper order once the agency compiles the administrative record for this Court's consideration.[1]

[1] Should this Court proceed to consider Plaintiffs' motion, Proposed Intervenor-Defendants have filed with this Proposed Opposition a response to Plaintiffs' statement of undisputed facts, ECF No. 12, in accordance with Local Civil Rule 56.1(a)(2). However, because the agency has not yet compiled the administrative record and no other merits evidence would be admissible in this APA case, Proposed Intervenor-Defendants are unable to "cit[e] to evidence that would be admissible" or attach such evidence in "an appendix" per Local Civil Rule 56.1(a)(4)–(5).

II. The Final Rule Does Not Violate the NLRA

Plaintiffs contend that the Final Rule ensures some agricultural employees enjoy rights that the NLRA forbids DOL from providing. Pls.' Mem. Supp. Mot. Summ. J. 8–12, ECF No. 13 ("Pls.' MSJ Mem."). But the Final Rule does not mirror the NLRA, and the NLRA does not prevent DOL from providing the protections in the Final Rule.

A. *Plaintiffs Overstate the Similarities Between the Final Rule and the NLRA*

Initially, Plaintiffs exaggerate the similarities between the Final Rule and the NLRA. Plaintiffs claim that the "Final Rule[] attempt[s] to extend collective bargaining . . . rights to agriculture employees." Pls.' MSJ Mem. 16. Not so. If workers on H-2A visas request that their employer bargain with them collectively, the employer is free under the Final Rule to ignore their request. In contrast, under the NLRA, an employer's failure to collectively bargain is an unfair labor practice. 29 U.S.C. § 158(a)(5). Unionized employees under the NLRA can file a charge with the NLRB. *Id.* § 160(b). If the NLRB issues an order compelling the employer to bargain and the employer refuses, the agency's order can then be enforced in an Article III court. *Id.* § 160(e). Nothing like this extensive framework for enforcing rights to collectively bargain under the NLRA exists under the Final Rule. *See* Improving Protections for Workers in Temporary Agricultural Employment in the United States, 89 Fed. Reg. 33,898, 33,994 (Apr. 29, 2024) ("[T]he Department's final rule does not require collective bargaining, employer recognition, or any other action by the employer in response to worker organizing.").

The imaginary collective-bargaining provisions in the Final Rule are not the only incorrect comparison between the NLRA and the Final Rule. Plaintiffs also point, for example, to "[t]he Final Rule's requirement that H-2A employe[r]s allow their employees to invite guests to their living quarters." Pls.' MSJ Mem. 11. But the right to accept or invite guests to employer-provided housing arises not only from federal labor law, but primarily from state

landlord-tenant law, which gives a *tenant*, rather than a landlord, the right to exclude. *See, e.g.*, *Folgueras v. Hassle*, 331 F. Supp. 615, 624–25 (W.D. Mich. 1971) (holding agricultural employer lacked right to exclude guests of farmworkers who lived on his property because workers were tenants and "[o]ne of the rights of tenancy with which the landlord may not interfere is the right to invite and associate with guests of the tenant's own choosing" (collecting cases)); *Juarez-Martinez v. Deans*, 108 N.C. App. 486, 494–95, 424 S.E.2d 154, 159 (N.C. Ct. App. 1993) (holding landlord-tenant law governed migrant farmworker's housing on employer's property); *State v. Lawson*, 101 N.C. 717, 717, 7 S.E. 905, 905–06 (N.C. 1888) (explaining tenant may "invite such persons as his business, interest, or pleasure might suggest to come upon the premises").

Plaintiffs' complaint that DOL cannot use the Final Rule to replicate the NLRA thus rests on the faulty premise that the Final Rule *does* replicate the NLRA. The Final Rule does no such thing, and Plaintiffs' assertions to the contrary are strawmen.

B. *The NLRA Does Not Forbid DOL From Providing the Protections in the Final Rule*

Even if DOL had copied and pasted the substantive provisions of the NLRA into the Final Rule, nothing in that statute would forbid DOL from doing so. Plaintiffs argue that because the NLRA does not cover agricultural workers, the Act forbids DOL from providing the worker voice and empowerment protections in the Final Rule. In essence, they say, because the NLRA does not address agricultural labor relations, that issue is unregulatable under any source of statutory authority.

There is a name for the argument that the NLRA represents a congressional decision to leave an area of the economy unregulated: *Machinists* preemption. Under that doctrine, courts read the NLRA as expressing a congressional intent "to leave some activities unregulated and to

be controlled by the free play of economic forces." *Lodge 76, Int'l Ass'n of Machinists v. Wis. Emp. Rels. Comm'n*, 427 U.S. 132, 144 (1976).

Though typically applied to states' regulation of labor relations, *Machinists* preemption is also the correct lens for analyzing horizontal preemption arguments that the NLRA precludes other federal actions affecting some area of labor relations. *See Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 111 (1989) ("The *Machinists* rule creates a free zone from which all regulation, '*whether federal or State*,' is excluded." (emphasis added) (citing *Machinists*, 427 U.S. at 153)); *Chamber of Com. v. Reich*, 74 F.3d 1322, 1334–35 (D.C. Cir. 1996) (noting there is no "doubt that *Machinists* 'pre-emption' applies to federal as well as state action" and applying framework to federal executive action). *Machinists* is thus the proper framework for assessing Plaintiffs' claim that the NLRA's exclusion of agricultural workers indicates a congressional determination that agricultural labor relations should be left unregulated.

Presumably, Plaintiffs do not admit they are making a *Machinists* argument because that precedent is squarely against them. Courts consistently hold that the NLRA's exclusion of agricultural workers does *not* represent a decision to leave agricultural labor relations to "the free play of economic forces." *See Willmar Poultry Co. v. Jones*, 430 F. Supp. 573, 578 (D. Minn. 1977) ("The court has not been directed to, nor has it found, any explicit expression of a national labor policy that agricultural laborers be denied all representational rights. . . . [T]he exclusion of agricultural laborers from the NLRA's coverage standing alone cannot be construed to mean that Congress intended the area to remain unregulated."); *United Farm Workers of Am. v. Ariz. Agric. Emp. Rels. Bd.*, 669 F.2d 1249, 1256–57 (9th Cir. 1982); *Chamber of Com. v. City of Seattle*, 890 F.3d 769, 793 (9th Cir. 2018) ("[T]he fact that a group of workers is excluded from the definition

of 'employee' in [29 U.S.C.] § 152(3), without more, does not compel a finding of *Machinists* preemption" and noting that *Machinists* does not apply to agricultural laborers).

Indeed, Plaintiffs concede that *states* may regulate agricultural labor relations. *See* Pls.' MSJ Mem. 9. They claim only that other federal agencies operating under different authorizing legislation may not do so. But they are unable to point to any text in the statute justifying that distinction between state and federal authority. Moreover, when assessing whether a congressional exclusion from the NLRA represents a decision to silo that area off from regulation, the same analysis applies to state and federal action. *Golden State Transit Corp.*, 493 U.S. at 111; *Chamber of Com.,* 74 F.3d at 1334. Thus, Plaintiffs' concession that states can regulate agricultural labor relations dooms their argument that other federal agencies cannot do so.

Rather than admit that they are invoking *Machinists*, Plaintiffs cite another kind of NLRA preemption called the *Garmon* doctrine. *See* Pls.' MSJ Mem. 8, 9 (citing *San Diego Bldg. Trades Council, Millmen's Union, Loc. 2020 v. Garmon*, 359 U.S. 236 (1959)). But *Garmon* preemption is even less helpful to their position. Under *Garmon*, a state or other federal agency may not regulate conduct that "the NLRA protects, prohibits, or arguably protects or prohibits." *Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174*, 598 U.S. 771, 776 (2023) (citation omitted). *Garmon* has no application here, where the NLRA has nothing to say one way or the other about agricultural workers. *Bud Antle, Inc. v. Barbosa*, 45 F.3d 1261, 1274 (9th Cir. 1994) ("[I]f [a company's] employees are 'agricultural laborers,' then the NLRA does not apply, and the company's conduct is not arguably prohibited under the Act" for *Garmon* purposes.). Plaintiffs cannot rely on *Garmon* because the NLRA does not protect, prohibit, or arguably protect or prohibit any conduct with respect to agricultural labor relations.

III. DOL Has Statutory Authority to Issue the Final Rule

Plaintiffs next attack DOL's statutory authority under IRCA. *See* Pls.' MSJ Mem. 12–16. It is not entirely clear whether Plaintiffs believe DOL lacks any statutory rulemaking authority over the H-2A program, *see, e.g.*, *id*. at 16 (suggesting DOL has only "limited authority to certify H-2A petitions"); *see also Kansas v. U.S. Dep't of Lab.*, __ F. Supp. 3d __, 2024 WL 3938839, at *5–7 (S.D. Ga. Aug. 26, 2024) (considering and rejecting this argument); or whether Plaintiffs believe DOL has rulemaking authority over the H-2A program but cannot exercise that authority in a way Plaintiffs believe resembles the NLRA, *see, e.g.*, Pls.' MSJ Mem. 13 (suggesting DOL may "set[] the 'minimum terms and conditions employ[ers] must offer [H-2A] workers'" (citation omitted)).

Either way, Plaintiffs' argument fails. Initially, Plaintiffs do not argue DOL lacks statutory authority to issue those portions of the Final Rule that rely on the Wagner-Peyser Act. Moreover, to the extent Plaintiffs contend DOL lacks any rulemaking authority over the H-2A program under IRCA, they are wrong. Finally, the worker voice and empowerment provisions of the Final Rule are well within DOL's statutory authority to ensure the hiring of workers on H-2A visas does not adversely affect U.S. workers similarly employed.

A. *Plaintiffs Do Not Challenge Those Aspects of the Final Rule Issued Under DOL's Wagner-Peyser Act Rulemaking Authority*

Though Plaintiffs challenge the Final Rule in its entirety, they argue only that the *Immigration Reform and Control Act* does not grant DOL authority to issue the Final Rule. Pls.' MSJ Mem. 12–16. But much of the Final Rule—specifically, those provisions of the Final Rule amending 20 C.F.R. parts 651, 653, and 658—relies on the *Wagner-Peyser Act*. *See* 89 Fed. Reg. at 33,899–900 (invoking 29 U.S.C. § 49k), 33,902–36 (describing revisions to the Wagner-Peyser Act implementing regulations). That Act explicitly grants DOL rulemaking

authority. *See* 29 U.S.C. § 49k ("The Secretary [of Labor] is authorized to make such rules and regulations as may be necessary to carry out the provisions of this chapter.").

Plaintiffs do not even mention the Wagner-Peyser Act, let alone argue that DOL exceeded its rulemaking authority under that statute. Plaintiffs have therefore waived or forfeited their challenge to the provisions of the Final Rule that were promulgated based on DOL's rulemaking authority under the Act. *Grayson O Co. v. Agadir Int'l LLC*, 856 F.3d 307, 316 (4th Cir. 2017) ("A party waives an argument by failing to present it in its opening brief or by failing to develop its argument—even if its brief takes a passing shot at the issue." (cleaned up)); *Bear Invs., LLC v. Penn Nat'l Mut. Ins. Co.*, No. 5:19-cv-529-FL, 2023 WL 7391490, at *4 (E.D.N.C. Nov. 8, 2023).

Thus, Plaintiffs are not entitled to summary judgment on their claims that those provisions of the Final Rule amending parts 651, 653, and 658 of Title 20 of the Code of Federal Regulations are unlawful. This means that even if this Court accepts Plaintiffs' argument that *IRCA* does not authorize the Final Rule, *see* Pls.' MSJ Mem. 12–16, Plaintiffs cannot succeed in their request to overturn the entirety of the Final Rule.

B. *IRCA Grants DOL Rulemaking Authority*

If Plaintiffs mean to argue that IRCA does not grant DOL any rulemaking authority over the H-2A program, they are wrong. Indeed, a long line of cases recognizes DOL's rulemaking authority under IRCA. *See Kansas*, 2024 WL 3938839, at *8 ("Importantly, the Court does not hold, nor could it, that the DOL is barred from issuing *any* labor regulations governing agricultural workers. Indeed, the IRCA delegates rulemaking authority to the DOL to issue labor regulations governing H-2A workers . . . ."); *Overdevest Nurseries, L.P. v. Walsh*, 2 F.4th 977, 980 (D.C. Cir. 2021) ("Congress directed the Secretary of Labor . . . to promulgate regulations that would set the parameters of the [H-2A] program, particularly for temporary workers coming

'to perform agricultural labor or services.'" (quoting 8 U.S.C. § 1101(a)(15)(H))[2]; *Bayou Lawn & Landscape Servs. v. Sec'y of Lab.*, 713 F.3d 1080, 1084 (11th Cir. 2013) (noting that IRCA "expressly grants DOL rulemaking authority over the agricultural worker H-2A program" (emphasis omitted)); *Nat'l Council of Agric. Emps. v. U.S. Dep't of Lab.*, No. 22-cv-3569, 2024 WL 324235, at *2 (D.D.C. Jan. 29, 2024) ("Congress has delegated authority to promulgate regulations governing the parameters of the H-2A program to the Secretary of Labor."), *appeal docketed*, No. 24-5072 (D.C. Cir.). Proposed Intervenor-Defendants are not aware of any case coming to the contrary conclusion, and Plaintiffs cite none.

i. IRCA Explicitly Authorizes DOL Rulemaking

The foregoing cases correctly interpret IRCA's text, which explicitly contemplates DOL rulemaking in numerous places. *See, e.g.*, 8 U.S.C. § 1188(b)(1) (forbidding agency from issuing a labor certification if "[t]here is a strike or lockout . . . which, *under the regulations*, precludes such certification" (emphasis added)); *id.* § 1188(c)(3)(B)(i) (requiring certain employers to "offer to provide benefits, wages and working conditions required pursuant to this section *and regulations*" (emphasis added)); *id.* § 1188(c)(3)(B)(vi) (exempting employers from liability under an existing regulation "*or any successor regulation*" under certain circumstances (emphasis added)); *id.* § 1188(c)(4) ("Employers shall furnish housing in accordance *with regulations*." (emphasis added)). IRCA also provides that DOL will issue a labor certification if, among other requirements, "the employer has complied with the criteria for certification (including criteria for the recruitment of eligible individuals as prescribed by the Secretary [of Labor])." 8 U.S.C. § 1188(c)(3)(A)(i). Plaintiffs provide no plausible interpretation of "the

[2] Though *Overdevest* relied on the since-overturned *Chevron* doctrine for another part of its analysis (whether the rule challenged in that case permissibly interpreted the statute), *see* 2 F.4th at 982–84, the D.C. Circuit did not apply *Chevron* deference to the question at hand here, *i.e.*, whether the agency has rulemaking authority in the first instance, *see id.* at 980.

criteria for certification (including criteria . . . prescribed by the Secretary)" other than as a reference to DOL's rulemaking authority over the H-2A program. *Id.*

Taken together, the only plausible reading of these provisions is that Congress explicitly intended for the agency to issue regulations "to fill up the details" in IRCA's statutory framework. *Wayman v. Southard*, 23 U.S. 1, 43 (1825). Indeed, any other reading would render these references to broad regulations entirely superfluous, a result at odds with elementary principles of statutory interpretation. *See Healthkeepers, Inc. v. Richmond Ambulance Auth.*, 642 F.3d 466, 471–72 (4th Cir. 2011). In short, "the best reading of [IRCA] is that it delegates discretionary authority to [the] agency" to make regulations structuring the H-2A program, and "the role of the reviewing court under the APA is, as always, to . . . effectuate the will of Congress subject to constitutional limits." *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2263 (2024).

ii. Even if IRCA Did Not Grant DOL Explicit Rulemaking Authority, IRCA Would Do So Implicitly

Even if this Court were to disagree that IRCA explicitly grants the agency rulemaking authority, the statute would still do so implicitly. It is black-letter law that "[t]he power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy *and the making of rules* to fill any gap left, *implicitly or explicitly*, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) (emphasis added); *see generally HTH Corp. v. NLRB*, 823 F.3d 668, 679 (D.C. Cir. 2016) (explaining that courts "have recognized that agencies enjoy some powers that were not *expressly* enumerated by Congress," *i.e.*, those powers that are "statutorily implicit" (cleaned up)). Thus, although Plaintiffs are correct that an agency can only make rules if Congress says so, they ignore that the "delegation

[of rulemaking authority] need not be express." *Outdoor Amusement Bus. Ass'n, Inc. v. Dep't of Homeland Sec.*, 983 F.3d 671, 684 (4th Cir. 2020).

The Fourth Circuit's decision in *Outdoor Amusement* is illustrative. That case involved the H-2B program for temporary nonagricultural work. The relevant question was whether the Departments of "Homeland Security or Labor had statutory authority to promulgate" a set of rules that—like the Final Rule challenged here—"establish[ed] the standards governing the labor-certification-application process." *Id.* at 676, 684. The court noted that the H-2B statute "leaves gaps to be filled" by an agency. *Id.* at 684. For instance, like the H-2A program, the government can only issue "an H-2B visa . . . if American workers cannot be found to fill the relevant jobs." *Id.* at 685. But that raises the question "as to how to determine when U.S. workers are available." *Id.* Thus, the visa-issuing agency (for the H-2B program, Homeland Security) "sensibly chose[] to rely on Labor's expertise in the labor market to make a two-part determination for issuing a labor certification: 'whether or not United States workers capable of performing the temporary services or labor are available and whether or not the alien's employment will adversely affect the wages and working conditions of similarly employed United States workers.'" *Id.* Further, "Labor could make rules to define how it would judge whether" a given application for an H-2B worker meets that test—a test that parallels the H-2A standard. *Id.* In short, "[t]he statutory circumstances reveal that Congress implicitly delegated Labor rulemaking authority to administer its labor certifications." *Id.* at 684.

Notably, DOL's rulemaking authority under IRCA for the H-2A program is even clearer than its rulemaking authority for the H-2B program. IRCA split the temporary guestworker program into two parts, the H-2A program for agricultural workers and the H-2B program for nonagricultural workers. 8 U.S.C. § 1101(a)(15)(H)(ii)(a)–(b). For H-2A visas, IRCA codified

DOL as the appropriate agency for consultation, 8 U.S.C. § 1184(c)(1), and delegated to DOL the authority to determine whether hiring foreign workers would adversely affect similarly employed U.S. workers, 8 U.S.C. § 1188. But Congress made no comparable changes to the statutory language governing the H-2B program at issue in *Outdoor Amusement*. The fact that the Fourth Circuit in *Outdoor Amusement* nevertheless had little trouble concluding DOL has rulemaking authority over the H-2B program thus indicates that DOL plainly has such authority over the H-2A program.

If there were any remaining doubt that Congress granted DOL rulemaking authority over the H-2A program, consider the absurdity of the counterfactual: that Congress intended to forbid the agency from using rulemaking to "fill [the] gap[s] left" in the statute. *Morton*, 415 U.S. at 231. If that were the case, the agency would have to use adjudications of individual H-2A applications to ensure that H-2A hiring does not "adversely affect the wages and working conditions of [U.S.] workers." 8 U.S.C. § 1188(a)(1)(B).

Plaintiffs do not contest that, absent a rule, the agency could permissibly conclude in a single adjudication that it must deny a given H-2A application because the employer failed to promise, *e.g.*, not to fire workers for speaking with a medical provider. *See* 20 C.F.R. § 655.135(h)(1)(v). Nor do they appear to contest that even without a rule, the agency could make that same decision in *every* individual adjudication of an H-2A application. But when an agency wishes to "announc[e] new principles" that will apply prospectively, "the choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion." *NLRB v. Bell-Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 294 (1974).

Moreover, if DOL lacked rulemaking authority over the H-2A program, employers applying for H-2A positions would go into the application process blind, unsure what practices

DOL thinks are necessary to ensure H-2A hiring does not adversely affect American workers. Where the agency would otherwise have been able to tell employers on the front end what they must show to get a labor certification, in Plaintiffs' world, the agency would have to "use an unstructured ad hoc process" that would do nothing but increase costs and decrease predictability. *Outdoor Amusement Bus. Ass'n*, 983 F.3d at 685. Forcing the agency to reinvent the wheel in every adjudication in which an agricultural employer applies for permission to hire H-2A workers would be disastrous for agricultural employers who depend on a stable and predictable supply of labor to stay afloat. Plaintiffs provide no reason why Congress would have intended to structure the statute so as to frustrate the statutory goals of the H-2A program, presumably because no such reason exists. The "best reading of [the] statute is that it delegates discretionary authority to" the agency, and that discretion includes not only the determination whether an individual H-2A application would have an adverse effect on U.S. workers, but also the discretion to issue rules governing all such determinations. *Loper Bright*, 144 S. Ct. at 2263.

iii. *Alexander v. Sandoval* Has Nothing to Do with This Case

Finally, Plaintiffs rely on a case that has nothing to do with this one: *Alexander v. Sandoval*, 532 U.S. 275 (2001). *See* Pls.' MSJ Mem. 13. But *Sandoval* simply held that agencies lack the authority to create private rights of action in court where Congress has not done so. 532 U.S. at 291. *Sandoval*'s statement that "[s]tatutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons" does not help Plaintiffs. *Id*. at 289 (citation omitted). It simply means that a regulation that bars an entity from doing X does not, without more, grant individuals the right to sue that entity for doing X. But nothing in the Final Rule purports to allow anyone to sue anyone else. Thus, *Sandoval* has no bearing on this case.

C. *The Worker Voice and Empowerment Provisions of the Final Rule Are Well Within DOL's Rulemaking Authority to Prevent Adverse Effects on U.S. Workers*

As described above, DOL has statutory authority under IRCA to issue rules ensuring the hiring of H-2A workers does not adversely affect U.S. workers similarly employed. *See* 8 U.S.C. § 1188. That statutory authority includes the power to issue rules preventing employers from retaliating against workers who advocate for better terms and conditions of employment or refuse to attend captive-audience meetings, and ensuring workers can bring representatives to disciplinary meetings—*i.e.*, those provisions of the Final Rule which Plaintiffs challenge. *See* 20 C.F.R. § 655.135(h)(2), (m); Compl. ¶¶ 56–58, ECF No. 1.

As the agency explained in the Final Rule:

> [S]ome of the characteristics of the H-2A program, including the temporary nature of the work, frequent geographic isolation of the workers, and dependency on a single employer, create a vulnerable population of workers for whom it is uniquely difficult to advocate or organize regarding the terms and conditions of employment or to seek access to certain service providers. The Department also has significant enforcement experience with H-2A workers who have faced retaliation for asserting or advocating for their rights. . . . [T]his vulnerability of the H-2A workforce, and the ability of employers to hire this vulnerable workforce, may suppress or undermine the ability of farmworkers in the United States to negotiate with employers and advocate on their own behalf regarding working conditions in their shared workplaces, in light of the availability of the H-2A workforce. In other words, even if workers in the United States were to raise concerns regarding their terms and conditions of employment, under the current H-2A regulatory framework, employers may turn to the H-2A program for an alternative workforce that faces significant barriers to similar advocacy, thus undermining advocacy efforts by or on behalf of similarly employed workers in the United States.

89 Fed. Reg. at 33,987.

The foregoing passage encapsulates the direct connection between the worker voice and empowerment provisions and the prevention of adverse effects on U.S. workers similarly employed. If H-2A workers cannot advocate for themselves without fear of retaliation, their unique vulnerabilities to exploitation will lead unscrupulous employers to prefer hiring H-2A workers over U.S. workers, thus adversely affecting the U.S. workforce.

Plaintiffs never grapple with this connection. They assert only that DOL cannot use IRCA "to bestow NLRA-style rights." Pls.' MSJ Mem. 14. As described above, however, the Final Rule does not replicate the NLRA, and nothing in the NLRA forbids the Final Rule. Moreover, the worker voice and empowerment provisions are well "within the bounds of [IRCA's] rather broad congressional delegation" to DOL "to balance the competing goals of the statute—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). IRCA authorizes the Final Rule.

IV. The Major Questions Doctrine Does Not Apply

A. *The Final Rule Does Not Decide Any Major Question*

Plaintiffs dramatically overstate the Final Rule's economic and political significance. To start, Plaintiffs misleadingly rely on numbers that encompass the *entire agricultural industry* nationally and in North Carolina. Pls.' MSJ Mem. at 17. They say "agriculture" contributes significantly to both the federal and state GDP, implying that the Final Rule somehow regulates all agriculture. It does not. It deals only with H-2A workers, who constitute a fraction of the country and state's agricultural workforce—as of 2022, only 370,000 of the 2.6 million on-farm jobs nationally, *see* 89 Fed. Reg. at 33,995, n. 79, and roughly 25,600 of the 778,000 agricultural jobs in North Carolina, *see* USDA Economic Research Service, *U.S. H-2A (temporary agricultural employment of foreign workers) positions certified by State, fiscal years 2005–22*, https://perma.cc/Y6TX-F5AL (last visited Nov. 20, 2024); Pls.' Stmt. Undisputed Material Facts ¶ 11, ECF No. 12 (asserting "agriculture is North Carolina's leading economic sector, . . . accounting for approximately 778,000 jobs"). Indeed, if implicating "agriculture" were enough

to trigger the major questions doctrine, then even an individual labor certification for a single H-2A worker would qualify.

Nor does the Final Rule upend American labor law. Plaintiffs claim "the Final Rule . . . constitutes a monumental change to United States labor law" because it "extend[s] collective bargaining and concerted activity rights to agriculture employees." Pls.' MSJ Mem. 17, 16. As described above, however, nothing in the Final Rule extends "collective bargaining" rights to anyone. *See supra* at 3. Moreover, nothing in the Final Rule is even mandatory, since participation in the H-2A program is itself voluntary. For those employers who choose to participate in the H-2A program, the Final Rule simply extends minimal anti-retaliation protections to workers who, for example, wish to speak to their supervisor about unsafe working conditions.

The agency updated its H-2A regulations not to reorder American labor relations, but because its experience demonstrated that absent these protections, the exceptional vulnerability of H-2A workers threatened to depress wages and working conditions for similarly employed U.S. workers. *See* 89 Fed. Reg. at 33,995 (explaining the Final Rule "seek[s] to expand and improve the tools available to workers protected under the H-2A program to prevent exploitation and to ensure compliance with the law, in light of the Department's program experience and evidence . . . demonstrating that the current framework of protections are insufficient to satisfy the Department's statutory mandate" to prevent adverse effects on U.S. workers). DOL is helping H-2A workers help themselves, in order to prevent a race-to-the-bottom affecting U.S. workers. The agency is well within its statutory authority to do so.

Plaintiffs next run through several "hallmarks" of major questions, relying on *N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC*, 76 F.4th 291, 297 (4th Cir. 2023). But those factors only demonstrate how far afield the Final Rule is from the major questions doctrine.

Initially, Plaintiffs claim "Congress did not mean to regulate the issue in the way claimed." Pls.' MSJ Mem. 18 (citation omitted). This just reiterates their argument that some combination of the NLRA and IRCA forecloses the Final Rule. That argument fails for the reasons described above. *See supra* at 3–15.

Next, Plaintiffs assert there is "a different, distinct regulatory scheme already in place to deal with the issue which would conflict with the agency's newly asserted authority." Pls.' MSJ Mem. 18. (cleaned up). They believe that other regulatory scheme is the NLRA. *Id.* 18–19. This variation of Plaintiffs' NLRA argument is internally incoherent. The NLRA does not "deal with the issue" of agricultural labor relations; indeed, that is the *point* of the NLRA's agricultural employee exclusion. *Id.*; *cf. Bud Antle, Inc.*, 45 F.3d at 1274 (noting that no conduct with respect to agricultural employees is protected, prohibited, or arguably protected or prohibited by the NLRA). Nothing in the NLRA "conflict[s] with," Pls.' MSJ Mem. 18, DOL's authority to ensure the employment of H-2A workers does not harm U.S. workers. *See supra* at 14–15.

Third, Plaintiffs argue this is a "new-found power[] in [an] old statute[]." Pls.' MSJ Mem. 19 (citation omitted). But the H-2A regulations have included anti-retaliation provisions since IRCA's inception. *See* Labor Certification Process for the Temporary Employment of Aliens in Agriculture and Logging in the United States, 52 Fed. Reg. 20,496, 20,517 (June 1, 1987) (anti-retaliation protections in first set of H-2A regulations). Nor has DOL previously disavowed the authority to implement the worker voice and empowerment provisions. *Cf. FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (rejecting agency statutory authority where

agency had "expressly disavowed any such authority since its inception"). The Final Rule's anti-retaliation provisions tweak long-standing regulations; they do not upend a settled understanding of agency authority. Indeed, under Plaintiffs' extreme position, it is difficult to imagine circumstances in which an agency *could* update policies to respond to "experience and evidence . . . demonstrating that the current [regulatory] framework . . . [is] insufficient to satisfy the [agency's] statutory mandate." 89 Fed. Reg. at 33,995.

Finally, Plaintiffs gesture at federalism concerns. This argument fails. For one, the Final Rule does not impose affirmative obligations on unwilling employers. It instead prescribes conditions for receiving a government benefit: The right to hire foreign workers. DOL's voluntary H-2A program is not interfering with any aspect of state employment law, any more than does any contract term that differs from the default rules provided by state law. For another, although states can regulate the employment relationship, the federal government retains authority over matters of immigration—including over the employment of non-U.S. workers. *See generally Arizona v. United States*, 567 U.S. 387, 403–07 (2012). When an employee is not a U.S. citizen, the federal government's power over immigration gives it substantial authority to regulate the employment relationship.

Moreover, this federalism argument repackages Plaintiffs' claim that by excluding agricultural workers from the NLRA, Congress left agricultural labor relations exclusively to the states and preempted any other federal regulation. That contention fails because, once again, when a plaintiff claims that the NLRA signifies a congressional intent to leave an area unregulated, the same inquiry applies whether the regulation in question is state or federal. *See supra* at 5; *Chamber of Com.*, 74 F.3d at 1334.

B. *Congress Has Clearly Authorized DOL to Issue the Final Rule*

The major questions doctrine does *not* prevent agencies from issuing rules touching on important issues. Instead, if a regulation implicates a major question, that doctrine only requires an agency to identify "'clear congressional authorization' for the power it claims." *West Virginia v. EPA*, 597 U.S. 697, 723 (2022) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

Congress has clearly authorized DOL to issue the Final Rule. As described above, *see supra* at 8–15, Congress has given DOL "a rather broad congressional delegation" to make "policy decision[s] . . . to balance the competing goals of the statute—providing an adequate labor supply and protecting the jobs of domestic workers." *AFL-CIO*, 923 F.2d at 187. Nothing in IRCA, the NLRA, nor any other statute carves out labor relations from that otherwise crystalline delegation of authority. Thus, Congress has clearly authorized DOL to implement any requirements it deems necessary to prevent the H-2A program from adversely affecting the wages or working conditions of U.S. workers. And that includes requiring would-be H-2A employers to agree not to retaliate against workers who speak up about employer abuses.

In short, even assuming *arguendo* that the major questions doctrine applies, the Final Rule is nevertheless lawful.

V. The Final Rule Is Neither Arbitrary nor Capricious

Finally, Plaintiffs reiterate their arguments under the guise of an arbitrary-and-capricious challenge. Pls.' MSJ Mem. 20–24. These repackaged contentions—namely, that the NLRA forecloses the Final Rule and that the Final Rule offends our federalist structure—fail for the same reasons, whether they are phrased as an arbitrary-and-capricious claim or an argument that DOL lacks statutory authority to issue the Final Rule. *See* Pls.' MSJ Mem. 20–24.

Begin with Plaintiffs' NLRA/arbitrary-and-capricious argument. They claim that DOL fails "to assert a plausible explanation for the Final Rule's obvious conflict with the NLRA," and thus the Final Rule is arbitrary and capricious. Pls.' MSJ Mem. 21. Of course, this assumes there is a "conflict with the NLRA"—which there is not. *See supra* at 3–6. Similarly, Plaintiffs repeat their argument that "the Final Rule flips North Carolina's law upside down" by forcing employers to collectively bargain. Pls.' MSJ Mem. 23. Again, nothing in the Final Rule requires any employer to collectively bargain. Plaintiffs are suing over a rule DOL did not promulgate.

Plaintiffs also assert that "the Final Rule intrudes on the authority of . . . States to balance the relationship between farmers and their employees." *See* Pls.' MSJ Mem. 22. But once more, the H-2A program is not mandatory. Growers are free not to participate if they wish "not to accommodate or facilitate their employees' interest in self-organizing." *Id.* at 23. In short, nothing in the Final Rule forces employers to act differently than they would be allowed to under state law because nothing in the Final Rule forces employers to hire H-2A workers. On the flip side, state law *allows* employers to agree not to interfere with workers' rights to engage in concerted action for mutual aid or protection—which is what employers agree to when they apply to hire H-2A workers. *Id.* (conceding that "farmers . . . [may] enter into collective bargaining agreements, if they agree to do so"). This is not a case in which complying with federal law requires violating state law, or vice versa.

Plaintiffs further complain that the Final Rule allows states to provide greater protections than those found in the H-2A regulations. Pls.' MSJ Mem. 22–23. In addition to contradicting Plaintiffs' purported concern for state sovereignty, this misses the point of the H-2A program. Allowing states to go beyond the floor set by the Final Rule is entirely in line with the Final Rule's purpose. As described above, DOL reasonably concluded that under the H-2A program as

structured before the Final Rule, workers on H-2A visas were exceptionally vulnerable to employer abuse, and absent additional protections—including the worker voice and empowerment provisions Plaintiffs challenge—the employment of H-2A workers would adversely affect U.S. workers. *See* 89 Fed. Reg. at 33,987 (explaining how the anti-retaliation protections of the Final Rule prevent an adverse effect on U.S. workers given "characteristics of the H-2A program . . . [that] create a vulnerable population of workers for whom it is uniquely difficult to advocate or organize regarding the terms and conditions of employment").

Thus, to the extent the Final Rule provides greater protections than does state law, that is entirely in line with the purpose of the Final Rule and DOL's obligations under the H-2A program. But if states decide to provide H-2A workers with greater protections than those found in the Final Rule, that advances—rather than detracts—from the purpose of preventing an adverse effect on U.S. workers. DOL's careful calibration makes perfect sense; moreover, it "is a judgment call which Congress entrusted to the Department of Labor." *AFL-CIO* , 923 F.2d at 187. Plaintiffs provide no good reason to upset the Final Rule.

VI. Each Provision of the Final Rule is Severable

Even if this Court determines Plaintiffs are entitled to summary judgment as to a given portion of the wide-ranging Final Rule, it should vacate *only* that segment of the Final Rule. Plaintiffs' request to invalidate the entirety of the Final Rule is unjustified, because Plaintiffs have not even come close to meeting their burden of demonstrating that the portions of the Final Rule they challenge are inseverable from the remainder of the regulations.

"[R]egulations—like statutes—are presumptively severable." *Bd. of Cnty. Comm'rs v. EPA*, 72 F.4th 284, 296 (D.C. Cir. 2023). "[T]he burden is placed squarely on" Plaintiffs to overcome that presumption. *Alaska Airlines, Inc. v. Donovan* , 766 F.2d 1550, 1560 (D.C. Cir. 1985). To carry their burden, Plaintiffs must demonstrate that "severance of [an invalid]

subsection would impair the function of the statute as a whole, so that the regulation would not have been passed but for its inclusion." *Mayor & City Council of Baltimore v. Azar*, 439 F. Supp. 3d 591, 614 (D. Md. 2020) (cleaned up). "This two-part inquiry involv[es] (1) an examination of the functional independence of the section to determine whether it is an integral part of the whole, and (2) an examination of the agency's intent in enacting the regulations." *Id*. at 615 (citation omitted).

First, if any given provision of the Final Rule were held invalid, the unrelated provisions of the rule could still function perfectly. For instance, if this Court were to block the worker voice and empowerment provisions, *see* 20 C.F.R. § 655.135(h)(2), (m), there is no reason the provisions requiring certain employer-provided transports to have seatbelts could not function as intended, *see* 20 C.F.R. § 655.122(h)(4), or vice versa. Plaintiffs offer no reason to think that any assertedly invalid provision is so deeply intertwined with the remainder of the regulation that severance would leave behind an unadministrable regulatory mess.

Second, we need not guess what "the agency's intent in enacting the regulations" was, *see Baltimore*, 439 F. Supp. 3d at 615, given the agency's explicit statement that "it is the Department's intent that all provisions and sections be considered separate and severable and operate independently from one another." 89 Fed. Reg. at 33,952. Indeed, the agency made sure its intent was unmistakable by codifying that judgment in multiple severability clauses. *See* 20 C.F.R. § 655.190; 29 C.F.R. § 501.10; 89 Fed. Reg. at 33,952–53, 34,041. These severability clauses, "which expressly set[] forth [the agency's] intent that a [regulation] stand in the event one of its provisions is struck down, make[] it extremely difficult for a party to demonstrate inseverability." *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 441 (D.C. Cir. 1982); *see also Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 624 (2020) ("[A] severability

. . . clause leaves no doubt about what the enacting Congress wanted if one provision of the law were later declared unconstitutional.").

VII. Conclusion

For the foregoing reasons, this Court should deny Plaintiffs' motion for summary judgment.

Respectfully submitted this 22nd day of November, 2024.

/s/ *Nathan Leys*
Nathan Leys (CT 442014)
**Appearing under Loc. Civ. R. 83.1*
FarmSTAND
712 H St. NE, Suite 2534
Washington, D.C. 20002
Phone: (202) 630-3095
Fax: (978) 845-2282
Email: nathan@farmstand.org

/s/ *Clermont F. Ripley*
Clermont F. Ripley, N.C. Bar No. 36761
Carol L. Brooke, N.C. Bar No. 29126
NORTH CAROLINA JUSTICE CENTER
P.O. Box 28068
Raleigh, NC 27611
Phone: (919) 856-2154
Fax: (919) 856-2175
Email: carol@ncjustice.org
Email: clermont@ncjustice.org

CERTIFICATE OF SERVICE

I certify that on November 22, 2024, I caused the foregoing Proposed Opposition and associated Proposed Response to Plaintiffs' Statement of Undisputed Material Facts to be served on all parties via the CM/ECF e-filing system.

/s/ *Clermont F. Ripley*
Clermont F. Ripley