IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

RICHARD BARTON, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF LABOR, *et al.*,

Defendants.

Civil Action No. 5:24-cv-00249

PROPOSED AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANTS

Odin Millard, Dexter Starks, Willie Shelly, Farmworker Justice, Legal Action of Wisconsin, and the UFW Foundation ("Proposed Amici") urge this Court to deny Plaintiffs' motion for summary judgment (ECF No. 66) and uphold the Final Rule in its entirety. *See* Improving Protections for Workers in Temporary Agricultural Employment in the United States, 89 Fed. Reg. 33,898 (Apr. 29, 2024) ("Final Rule").[1]

CORPORATE DISCLOSURE STATEMENTS

Farmworker Justice, Legal Action of Wisconsin, and the UFW Foundation have no parent corporations and issue no stock. *See* ECF Nos. 44–46 (Rule 7.1 Statements); Fed. R. App. P. 29(a)(4)(A).

[1] No party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E)(i)–(ii). No person other than amici, their members, or their counsel contributed money intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E)(iii).

Proposed Amici's local counsel, Daniel Canon, also serves as local counsel for Proposed Intervenor Familias Unidas por la Justicia. *See* ECF No. 58. Because this Court has not granted Familias Unidas's pending Motion to Intervene, Familias Unidas is not a "party" and thus no party's counsel participated in the drafting of this amicus brief. Should this Court grant Familias Unidas's motion to intervene, Proposed Amici will seek to retain substitute local counsel.

STATEMENT OF AMICI'S INTERESTS

Odin Millard is a South African national who has worked on H-2A visas in Tennessee, North Dakota, and Kansas over the past few years, and intends to return to the United States on H-2A visas in the coming years. ECF No. 38-3 ¶¶ 1–3 (Millard Decl.). He directly benefits from many of the challenged provisions of the Final Rule. *Id.* ¶¶ 4–6.

Dexter Starks and **Willie Shelly** are U.S. citizens and farmworkers who work alongside workers on H-2A visas. ECF No. 38-4 ¶¶ 1–2 (Starks Decl.); ECF No. 38-5 ¶¶ 1–2 (Shelly Decl.). As workers in corresponding employment, they are protected by many of the challenged provisions of the Final Rule. Starks Decl. ¶¶ 3–5; Shelly Decl. ¶¶ 3–4.

Farmworker Justice is a national non-profit organization that serves farmworkers, their families, and their communities across the United States to improve living and working conditions, immigration status, health, occupational safety, and access to justice. ECF No. 38-6 ¶ 2 (Johnson Decl.). In particular, Farmworker Justice took a leadership role among 40 signatories in organizing and preparing extensive comments on the 2023 Proposed H-2A Rule, drawing on decades of experience working to equip farmworkers with the tools to seek high wages and better working conditions, end the selective exclusion of agricultural workers from certain labor law protections, and demand effective enforcement of labor laws, so that farmworkers have the same workplace rights as in other occupations and can exercise them without retaliation. *Id.* ¶ 3.

Legal Action of Wisconsin (LAW) is the largest non-profit law firm in Wisconsin and provides free legal aid to thousands of low-income persons each year in the state's 39 southern counties. ECF No. 38-7 ¶ 2 (Sullivan Decl.) LAW operates the Farmworker Project, which represents agricultural workers protected by the Final Rule. *Id.* ¶¶ 2, 4, 5. LAW's advocates

work to ensure that Wisconsin's agricultural workers, including H-2A workers and those in corresponding employment, receive the wages they have earned, live and work in a safe environment, are recruited lawfully and fairly, and have access to the public benefits to which they are entitled. *Id.* ¶ 2.

The UFW Foundation is a dynamic non-profit organization with the core purpose of empowering communities to ensure human dignity. ECF No. 38-8 ¶ 2 (Iñiguez-López Decl.) Through worker engagement and legislative advocacy, the UFW Foundation seeks to advance the rights of farmworkers. *Id.* In 2023, the UFW Foundation directly served at least 211,000 farmworkers through immigration legal services, COVID-19 pandemic disaster relief, storm recovery services, and a call center for farmworkers whose employers violated employment-related laws, among other services. *Id.* The UFW Foundation's membership includes H-2A workers and corresponding U.S. farmworkers. *Id.* It has advocated for H-2A workers' rights and protections to prevent the depression of U.S. farmworkers' wages and working conditions as well as their displacement. *Id.*

ARGUMENT

Defendants' Opposition to the Motion for Summary Judgment (ECF No. 80) (Defs.' Opp'n) catalogues many of the flaws in Plaintiffs' effort to strike down the Final Rule.[2] Proposed Amici here offer several additional points warranting this Court's attention because they provide independent reasons to deny the Motion for Summary Judgment (ECF No. 66).

[2] The original plaintiffs and intervening state plaintiffs filed a combined Motion for Summary Judgment. *See* ECF No. 66. Proposed Amici refer herein to both sets of plaintiffs collectively as "Plaintiffs" unless otherwise specified.

I. The Final Rule Does Not Violate the NLRA.

Defendants aptly explain why the NLRA does not support Plaintiffs' position. *See* Defs.' Opp'n 21–25. Proposed Amici make two additional points.

First, Plaintiffs overstate the resemblance between the National Labor Relations Act ("NLRA") and the Final Rule. Although this Court concluded at the preliminary injunction stage that the Final Rule's worker voice and empowerment provisions "amount to collective bargaining rights," ECF No. 49 at 22 (Prelim. Inj. Order 22), Proposed Amici respectfully submit that this Court should revisit that conclusion. Just as they could before the Final Rule, workers on H-2A visas may request that their employer bargain with them collectively. But under the Final Rule, the employer is free to ignore their request. Those H-2A workers could not turn to the National Labor Relations Board ("NLRB") or any similar federal agency for assistance, nor would either the H-2A statute or the Final Rule afford them a private right of action to sue over the employer's refusal to bargain collectively.

Under the NLRA, by contrast, an employer's failure to bargain collectively would be an unfair labor practice. 29 U.S.C. § 158(a)(5). Thus, the NLRA would allow those employees to file a charge with the NLRB, and the Board could issue an order compelling the employer to bargain. *Id.* § 160(b)–(c). If the employer refused, the NLRB's order could then be enforced in an Article III court. *Id.* § 160(e). The Final Rule creates nothing even resembling this extensive framework for enforcing rights to collectively bargain under the NLRA. In short, although the Final Rule contains *anti-retaliation* provisions that, in some ways, resemble certain anti-retaliation protections found in the NLRA, nothing in the Final Rule purports to or does provide agricultural workers with collective bargaining rights.

Second, Plaintiffs' argument is really a *Machinists* preemption claim, which fails under governing precedent. *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Emp.*

Rels. Comm'n, 427 U.S. 132 (1976). Although this Court at the preliminary injunction stage concluded *Machinists* applies only in the context of "economic weapons," Prelim. Inj. Order 19–20, Proposed Amici respectfully note that *Machinists* is also the proper lens for Plaintiffs' arguments that Congress intended to place a category of workers beyond the reach of any labor regulations. Recently, for example, the Ninth Circuit employed the *Machinists* framework to determine whether the NLRA's exclusion of independent contractors represents a congressional judgment that independent contractors may not be provided with labor protections under another source of law. *See Chamber of Com. v. City of Seattle*, 890 F.3d 769, 791–94 (9th Cir. 2018). The Eighth Circuit has similarly inquired whether *Machinists* preempts non-NLRA labor protections for domestic service workers, who like agricultural workers and independent contractors are excluded from the NLRA's definition of "employee." *Greene v. Dayton*, 806 F.3d 1146, 1149 (8th Cir. 2015). Thus, *Machinists* governs not just which labor *tactics* may be regulated by outside the NLRA context, but also which groups of *workers* may be regulated under non-NLRA sources of regulatory authority.

Moreover, *Machinists* applies equally to state and federal regulations of labor relations. The Supreme Court has characterized *Machinists* as "creat[ing] a free zone from which all regulation, '*whether federal or State*,' is excluded." *See Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 111 (1989) (emphasis added) (quoting *Machinists*, 427 U.S. at 153). Thus, there is not "any doubt that *Machinists* 'pre-emption' applies to federal as well as state action." *Chamber of Com. v. Reich*, 74 F.3d 1322, 1334 (D.C. Cir. 1996) (Silberman, J.). Plaintiffs cite no authority for the proposition that *Machinists* applies differently in the federal context, nor are Proposed Amici aware of any such cases.

Because *Machinists* applies to arguments that the NLRA forbids the extension of labor protections to a class of workers, and because *Machinists* applies equally to state and federal actions, *Machinists* is the proper lens to evaluate Plaintiffs' arguments that by excluding agricultural workers from the NLRA's definition of "employee," Congress affirmatively forbade a federal agency from extending labor protections to agricultural employees under a separate source of regulatory authority. This dooms Plaintiffs' arguments, because longstanding precedent makes clear that *Machinists* preemption does not prohibit protections for agricultural employees. *See, e.g.*, *UFW of Am. v. Ariz. Agric. Emp. Rels. Bd.*, 669 F.2d 1249, 1256–57 (9th Cir. 1982); *Willmar Poultry Co. v. Jones*, 430 F. Supp. 573, 578 (D. Minn. 1977).

II. Defendants Did Not Need to Conduct Notice and Comment Rulemaking Before Complying with the Preliminary Injunction in *Kansas v. Department of Labor*.

Plaintiffs believe Defendants needed to provide "advance public notice and opportunity to comment" under the APA before they complied with the preliminary injunction issued by the U.S. District Court for the Southern District of Georgia in the parallel *Kansas* litigation. ECF No. 66-1 at 8 (Pls.' Mem. Supp. Mot. Summ. J.); *see also Kansas v. U.S. Dep't of Lab.*, __ F. Supp. 3d __, 2024 WL 3938839 (Aug. 26, 2024). But as Defendants point out, agencies do not need to conduct notice and comment rulemaking before complying with a court order. *See* Defs.' Opp'n 25–27. Indeed, if Plaintiffs were right, Defendants would have had to engage in lengthy notice and comment proceedings before complying with *this* Court's preliminary injunction. *See* ECF No. 49. In addition to the points Defendants make, the APA did not require notice-and-comment rulemaking here for two independent reasons.

First, the September 10, 2024, announcement of DOL's two-track system for H-2A employer-applicants inside and outside the *Kansas* injunction is not a legislative rule, but instead a textbook example of an agency policy statement, which need not go through notice and

comment. *See* 5 U.S.C. § 553(b)(A). "An agency action that merely explains how the agency will enforce a statute or regulation—in other words, how it will exercise its broad enforcement discretion or permitting discretion under some extant statute or rule—is a general statement of policy." *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014) (Kavanaugh, J.). This description fits the September 10 announcement like a glove. The "extant . . . rule[s]" here are the Final Rule and the prior set of regulations. *Id.* The "enforcement . . . or permitting discretion" is the agency's 8 U.S.C. § 1188(a)(1) certification authority. *Id.* And the September 10 announcement "explains how the agency will enforce" the regulations in question, *id.*, that is, how it will determine which set of rules applies to a given application, in compliance with the preliminary injunction in *Kansas*.

Second, even if the September 10 announcement were not a policy statement, it would at most be a procedural rule. *See* 5 U.S.C. § 553(b)(A) (exempting from notice and comment "rules of agency organization, procedure, or practice"). Such "procedural rules" "do not themselves alter the rights or interests of parties, although [they] may alter the manner in which the parties present themselves or their viewpoints to the agency." *James V. Hurson Assocs. v. Glickman*, 229 F.3d 277, 280 (D.C. Cir. 2000) (citation omitted); *see also Apogee Coal Co. v. Dir., Off. of Workers' Comp. Programs, U.S. Dep't of Lab.*, 112 F.4th 343, 355 (6th Cir. 2024).

That is the case here. The September 10 announcement "did not create new rights nor liabilities" and "[a]ccordingly, . . . did not require notice and comment rulemaking." *Apogee*, 112 F.4th at 356. Put differently, the announcement "did not change the *substantive standards* by which the [agency] evaluates [H-2A] applications." *Hurson Assocs.*, 229 F.3d at 280 (citation omitted). Outside the injunction states, those applications were subject to the Final Rule's substantive standards; inside the injunction states, such applications were subject to the prior

regulations. The September 10 announcement did not create this regulatory reality; the *Kansas* injunction did. All the September 10 announcement did was advise the public of the procedures the agency would use to determine which set of substantive standards applied to a given application. At most, Plaintiffs complain that the procedures DOL set out in the September 10 announcement are burdensome. *See* Pls.' Mem. Supp. Mot. Summ. J. 8–10. But "an otherwise-procedural rule does not become a substantive one, for notice-and-comment purposes, simply because it imposes a burden on regulated parties." *Hurson Assocs.*, 229 F.3d at 281.

III. This Court Should Not Strike Down the Final Rule Under the Paperwork Reduction Act.

Plaintiffs revive their argument that by asking applicants for information necessary to comply with the *Kansas* preliminary injunction, Defendants violated the Paperwork Reduction Act ("PRA"). They seek to invalidate DOL's September 10, 2024, announcement that H-2A employers would need to provide such information as part of the application process. *See* Pls.' Mem. Supp. Mot. Summ. J. 10–13. But even assuming for the sake of argument that Defendants violated the PRA in requiring H-2A employers to provide information necessary for the agency to determine whether they fell inside or outside the *Kansas* injunction, that is not a basis to vacate the September 10, 2024, announcement. Instead, at most, the proper remedy for this kind of asserted technical violation is remand without vacatur.

"An inadequately supported rule . . . need not necessarily be vacated. The decision whether to vacate depends on the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." *Allied-Signal, Inc. v. Nuclear Regul. Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993) (cleaned up); *Sierra Club v. EPA*, 60 F.4th 1008, 1022 (6th Cir. 2023) (noting *Allied-Signal* rule applies in Sixth Circuit).

Both *Allied-Signal* factors counsel in favor of remand without vacatur here. Initially, Plaintiffs allege a purely procedural defect that could be easily corrected by submitting a collection of information to OMB. And there is no doubt "the agency chose correctly" by asking for the requested information. *Allied-Signal*, 988 F.2d at 150. After all, without that information, there is no way for the agency to know whether the *Kansas* injunction applies to a given application.

As to the second factor, vacating or permanently enjoining the September 10 announcement would be extraordinarily disruptive. If Defendants cannot collect information they need to determine whether the *Kansas* preliminary injunction applies to a given H-2A application, they cannot process H-2A applications *at all* for fear of violating that injunction in the applicable states. Thus, vacating or enjoining the September 10 announcement would effectively freeze the H-2A application process for every agricultural employer in the United States—a result far more disruptive than anything Plaintiffs assert the agency has done here.

IV. Plaintiffs Are Not Entitled to Summary Judgment on their Arbitrary-and-Capricious Claims.

A. *The Final Rule's New Seatbelt Requirement is Lawful.*

The Final Rule requires that employers: (1) maintain seatbelts in good working order if they are transporting workers in a vehicle that was manufactured with seatbelts; and (2) ensure that such vehicles are not used to transport employees unless all passengers and the driver are wearing seatbelts. *See* 20 C.F.R. § 655.122(h)(4)(ii). These requirements are long overdue, as transportation is often the most dangerous part of agricultural work. *See* 89 Fed. Reg. at 33,961 (citing statistics showing "that 271 of 589 fatal workplace injuries suffered by agricultural workers in 2022 were caused by transportation-related incidents"). Despite the obvious health and safety risks the Final Rule addresses, Plaintiffs believe the requirement that employers

ensure passengers are wearing seatbelts is not sufficiently tethered to 8 U.S.C. § 1188(a)(1)(B)'s standard of preventing adverse effects on similarly employed workers in the United States. *See* Pls.' Mem. Supp. Mot. Summ. J. 16. Plaintiffs are incorrect.

In addition to the reasons offered by Defendants, see Defs.' Opp'n 30–31, the new seatbelt rule prevents adverse effects on U.S. workers in corresponding employment during transit alongside other passengers who are not provided or are not wearing their seatbelts. As the agency explained in promulgating the Final Rule, "unbelted passengers in a vehicle pose significant risks to other passengers and the driver; studies have found that unrestrained occupants can become projectiles in a crash and increase the risk of death for other occupants." 89 Fed. Reg. at 33,963; *accord id.* at 33,964 ("Seat belts do not serve their designed purpose when not worn, and, as noted above, an unbelted passenger poses a significant safety risk to other passengers in the vehicle in the case of a crash."). Those "other passengers" described in the Final Rule, *id*., often include U.S. workers "similarly employed," 8 U.S.C. § 1188(a)(1)(B), who work alongside employees on H-2A visas. Many of those H-2A visaholders "come from rural communities in Mexico where seat belt use may not be customary." 89 Fed. Reg. at 33,964. Workers should not suffer the adverse effect of being killed or injured in employer-provided vehicles simply because an employer cannot be bothered to maintain seatbelts in good working order or take a few seconds to ensure all passengers are properly secured. The new seatbelt provision prevents such adverse effects on not just workers on H-2A visas, but also the similarly employed U.S. workers sitting next to them, and therefore is closely tied to 8 U.S.C. § 1188(a)(1)(B)'s adverse-effects standard.

To the extent Plaintiffs also argue the Final Rule's seatbelt requirement is unlawful because it reaches a different result than prior rulemakings, that too is incorrect. When an agency

changes positions, it must acknowledge that it is doing so and explain why it is changing course. But the agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Those requirements are met here. Defendants plainly acknowledged they were changing course; this is not a case in which an agency "depart[s] from a prior policy *sub silentio*." *Id.* And Defendants explained why, in their view, their enforcement experience demonstrated that the prior rules were not adequately protective of workers. 89 Fed. Reg. at 33,963. The new seatbelt requirement "is permissible under the statute" because it is tied to 8 U.S.C. § 1188(a)(1)(B)'s adverse-effects standard; "there are good reasons for" the new rule—including the need to ensure unsecured passengers do not injure other workers in the event of a crash; and "the agency *believes* [the new policy] to be better." *Fox Television*, 556 U.S. at 515. Thus, the new seatbelt requirement passes muster under the APA's deferential standard.

B. *Even If This Court Concludes the Final Rule's New Information-Collection Requirements Are Inadequately Explained, Vacatur is Unwarranted.*

Proposed Amici agree with Defendants that the new information-collection requirements created by the Final Rule are lawful and necessary to prevent bad actors from abusing the H-2A system. *See* Defs.' Opp'n to 31–32. But even if this Court determines the Final Rule's explanation of these provisions' necessity is inadequate, the proper remedy should be remand without vacatur under *Allied-Signal*, 988 F.2d at 150–51; *see also Sierra Club*, 60 F.4th at 1022 (holding *Allied-Signal* factors apply in the Sixth Circuit).

Plaintiffs do not assert that Defendants' effort to collect additional information about H-2A employer-applicants is substantively unlawful. Rather, they assert that Defendants

"fail[ed] to explain how" certain kinds of additional information would be useful in preventing unscrupulous employers from evading enforcement. Pls.' Mem. Supp. Mot. Summ. J. 17. This type of inadequate-explanation challenge is precisely the kind of scenario in which the first *Allied-Signal* factor favors remand without vacatur, so that an agency may "cure a defect in its explanation of a decision." *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 198 (D.C. Cir. 2009). *Allied-Signal* also favors remand without vacatur because vacating this aspect of the Final Rule would disrupt the agency's efforts to ensure bad actors are not circumventing the agency's enforcement measures. Thus, even if this Court is unsatisfied with the agency's explanation of the new information-collection requirements, it should remand to the agency "to rehabilitate its rationale" rather than vacating the Final Rule. *Sierra Club*, 60 F.4th at 1023 (citation omitted).

C. *Plaintiffs Lack Standing to Challenge the Final Rule's Clarification of Preexisting Policy on What Wages Workers Are Entitled To.*

Plaintiffs contend that "[t]he Final Rule removes the ability of employers to determine the method by which they compensate their employees-either on a piece rate or hourly basis." Pls.' Mem. Supp. Mot. Summ. J. 17. That is not correct. As the Ninth Circuit recently recognized, the prior regime *already* required employers to pay the higher of the piece rate or an hourly wage. *Torres Hernandez v. Su*, No. 23-35582, 2024 WL 2559562, at *1 (9th Cir. May 24, 2024). The Final Rule's new language merely "clarif[ies]" that already-extant rule. 89 Fed. Reg. at 33,956.

Defendants are correct that because the Final Rule "clarif[ies]" the preexisting rule, 89 Fed. Reg. at 33,956, it is neither arbitrary nor capricious. Defs.' Opp'n 32–36. But even before that merits question, the lack of any actual change in the rule means Plaintiffs lack Article III standing, because they cannot show the Final Rule's clarifying language caused their asserted injury nor that their requested relief would remedy that injury.

White v. United States, 601 F.3d 545 (6th Cir. 2010), is on point. In *White*, the plaintiffs challenged a federal ban on cockfighting. *Id.* at 548. The Sixth Circuit held the plaintiffs lacked standing, because even if the court blocked the federal ban, "[c]ockfighting is banned to a greater or lesser degree in all fifty states and the District of Columbia." *Id.* at 552. Thus, "the plaintiffs' alleged economic injuries due to restrictions on cockfighting are not traceable only to the" federal ban, and their injuries would not "be redressed by the relief plaintiffs seek, since the states' prohibitions on cockfighting would remain in place." *Id.*; *see also Delta Constr. Co., Inc. v. EPA*, 783 F.3d 1291, 1296 (D.C. Cir. 2015) (where two regulations impose "substantially identical" requirements and plaintiff only challenges one, plaintiff lacks standing); *Kaspersky Lab, Inc. v. Dep't of Homeland Sec.*, 311 F. Supp. 3d 187, 219 (D.D.C. 2018) ("It is a well-established principle that a plaintiff cannot demonstrate redressability when its lawsuit challenges only one of two government actions that both independently produce the same alleged harm.").

Here, even if Plaintiffs succeeded in blocking the Final Rule's new language clarifying that employers must pay the higher of the piece rate or hourly wage, that would merely roll the regulations back to the prior version of 20 C.F.R. § 655.120(a)—which imposed the exact same substantive requirements. *Torres Hernandez*, 2024 WL 2559562, at *1. Whatever this Court does, Plaintiffs will still face the same regulatory requirements regarding what rate they must pay their workers. That means the Final Rule does not cause Plaintiffs' asserted injuries, and those injuries are not redressable by this Court.

V. Plaintiffs' Due Process Claims Are Fatally Flawed.

This Court should reject Plaintiffs' due process claims for the reasons raised in Defendants' brief, *see* Defs.' Opp'n 36–40, and for the following additional reasons.

First, Plaintiffs' due process claims are not ripe. "[A] regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990); *accord Texas v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." (cleaned up)).

Here, Plaintiffs facially challenge the process by which the agency will adjudicate future discontinuation proceedings, prior to such a dispute arising. This challenge is based entirely "upon contingent future events," *Texas*, 523 U.S. at 300, namely, whether any plaintiff commits one of the grounds for discontinuation and whether a state workforce agency obtains evidence that failing to discontinue employment services immediately would substantially harm workers. Such claims are not ripe. *See, e.g.*, *Reno v. Cath. Soc. Servs., Inc.*, 509 U.S. 43, 58–66 (1993) (court could not conclude facial challenge to regulations governing procedures by which INS would determine applicants' eligibility for adjustment of immigration status was ripe, where record did not reflect whether those procedures had been applied to any plaintiff member's application); *Ammex, Inc. v. Cox*, 351 F.3d 697, 706–10 (6th Cir. 2003) (constitutional challenge not ripe where it was not clear government would begin enforcement proceedings against plaintiff); *CBA Pharma, Inc. v. Perry*, No. 22-5358, 2023 WL 129240, at *3–4 (6th Cir. Jan. 9, 2023) (similar). "Under these circumstances, where we have no idea whether or when such a sanction will be ordered, the issue is not fit for adjudication." *Texas*, 523 U.S. at 300 (cleaned up)).

Second, Plaintiffs are wrong to assert that the Final Rule requires discontinuation "based on a mere allegation of a violation of an employment-related law or other regulation and without first providing due process." Pls.' Mem. Supp. Mot. Summ. J. 23. In the Final Rule, the agency "emphasize[d] that a complaint or allegation alone is insufficient to warrant immediate discontinuation." 89 Fed. Reg. at 33,934. Rather, the decisionmaker "must have *information evidencing* that substantial harm to workers will occur if action is *not* immediately taken." *Id.*

Hard evidence of danger that would result from waiting for a pre-deprivation hearing is the textbook case in which due process does not require a pre-deprivation hearing. *See, e.g.*, *Goss v. Lopez*, 419 U.S. 565, 582 (1975) (explaining that although due process applies to school suspensions, "[s]tudents whose presence poses a continuing danger to persons or property . . . may be immediately removed from school" without a pre-suspension hearing). And in the narrow slice of cases in which the Final Rule permits immediate discontinuation based on substantial evidence of danger to workers, employers have the opportunity for a prompt post-discontinuation hearing. 20 C.F.R. § 658.504(a). This satisfies due process. *See Gilbert v. Homar*, 520 U.S. 924, 930 (1997) ("This Court has recognized, on many occasions, that where a State must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause.").

VI. Plaintiffs' Takings Clause Argument Fails on Multiple Grounds.

Defendants correctly explain why background restrictions on property rights, such as the First Amendment, take this case outside of the Supreme Court's holding in *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021). *See* Defs.' Opp'n 40–43. There are two additional reasons this Court must reject Plaintiffs' Takings Clause argument.

First, even assuming *arguendo* the Final Rule effected a taking, Plaintiffs are not entitled to their requested relief because they have not demonstrated that they lack an adequate remedy at

law. Plaintiffs seek vacatur under the APA or injunctive relief. *See* Pls.' Mem. Supp. Mot. Summ. J. 39–40. The APA allows for review of "final agency action *for which there is no other adequate remedy in a court*." 5 U.S.C. § 704 (emphasis added). Similarly, a court may not award injunctive relief unless a plaintiff demonstrates "there is no other adequate remedy at law." *United States v. Miami Univ.*, 294 F.3d 797, 816 (6th Cir. 2002). Thus, to obtain their sought-after relief, Plaintiffs have the burden of demonstrating they lack any other adequate remedy.

But in this case, Plaintiffs *do* have an adequate remedy at law: damages, by means of an inverse condemnation claim under the Tucker Act (or the Little Tucker Act). *See* 28 U.S.C. § 1491(a)(1) (Tucker Act); *id.* § 1346(a)(2) (Little Tucker Act); *United States v. Causby*, 328 U.S. 256, 267 (1946) (Tucker Act provides damages remedy for takings). Such a claim for compensation would provide complete relief for a taking, and thus forecloses Plaintiffs' requests for vacatur or injunctive relief.

As the Supreme Court recently noted in *Knick v. Township of Scott*, 588 U.S. 180 (2019), "because the federal . . . government[] provide[s] just compensation remedies to property owners who have suffered a taking, equitable relief is generally unavailable. As long as an adequate provision for obtaining just compensation exists, there is no basis to enjoin the government's action effecting a taking." *Id.* at 201.[3] "Given the availability of post-taking compensation" under the Tucker Act, "barring the government from acting will ordinarily not be appropriate." *Id.* at 202. Moreover, "[f]or the same reason, the Federal Government need not worry that courts will set aside agency actions as unconstitutional under the Administrative Procedure Act." *Id.* at

[3] This rule also applies to declaratory judgments, which are similarly barred under *Knick* outside the context of a damages claim. *See Baptiste v. Kennealy*, 490 F. Supp. 3d 353, 391 (D. Mass. 2020) (holding that because plaintiffs did not seek "money damages," a "declaration that the Act is a violation of the Takings Clause . . . would be the functional equivalent of an unwarranted injunction against the enforcement of the Act" which is foreclosed by *Knick*).

205. Simply put, "[f]ederal courts will not invalidate an otherwise lawful uncompensated taking when the property owner can receive complete relief through a Fifth Amendment claim brought under the Tucker Act." *Id.*; *see also Colo. Livestock Ass'n v. Colorado*, No. 23-CV-495, slip op. at 7–8 (Colo. Dist. Ct. May 10, 2024), https://perma.cc/QSK5-FHN6 (rejecting effort to invalidate state law permitting key service providers to access agricultural employer property to meet with farmworkers on grounds that plaintiff sought impermissible injunctive and declaratory relief, rather than damages), *appeal docketed*, 24-CA-1153 (Colo. Ct. App. June 26, 2024).

Second, *Cedar Point* recognizes that "many government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights." 594 U.S. at 160. As Defendants note, one such restriction is the First Amendment. Defs.' Opp'n 41–42; *see also Rivero v. Montgomery Cnty.*, 259 F. Supp. 3d 334, 345–48 (D. Md. 2017) (holding legal assistance organization had First Amendment right to go onto agricultural employer's property to speak with migrant farmworkers living there, and noting those farmworkers had a corresponding First Amendment right to receive information offered by plaintiffs).

In addition to that federal constitutional background restriction, another longstanding background principle of property law applies here: the right to exclude belongs to a tenant, not their landlord.[4] The regulation cannot "take" an H-2A employer's right to exclude, because by

[4] The challenged provision of the Final Rule, 20 C.F.R. § 655.135(n), applies only to "employer-furnished housing." This distinguishes the Final Rule from the regulation at issue in *Cedar Point*, on which Plaintiffs rely. *Cedar Point* made clear that "none of [the workers at issue] live[d] on the property." *Id.* at 144–45. Thus, it was undisputed "that, without the access regulation, the growers would have had the right under [state] law to exclude union organizers from their property." *Id.* at 155. By contrast, with or without the Final Rule, elementary "background principle[s] of property law" mean Plaintiffs never had a right to exclude in the first place. *Id.* at 162.

entering a landlord-tenant relationship with his or her workers, the employer transfers that right to the tenant-employees. *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)); *Odumn v. United States*, 227 A.3d 1099, 1104–07 (D.C. 2020) (summarizing caselaw around the country); *State v. Dixon*, 725 A.2d 920, 922–23 (Vt. 1999) ("The common law is clear that the landlord may not prevent invitees or licensees of the tenant from entering the tenant's premises by passing through the common area."); *State v. Schaffel*, 229 A.2d 552, 561 (Conn. Cir. Ct. App. Div. 1966) ("The implication which necessarily flows from the tenant's control and possession is that it is the tenant, not the landlord, who has the final word as to the person or persons who may enter upon the demised premises. The landlord has neither the power of exclusion nor the power of selection" (collecting cases)). No Plaintiff has alleged or shown that their property is in a jurisdiction where this "traditional background principle of property law" is inapplicable. *Cedar Point*, 594 U.S. at 162. Thus, they have failed to demonstrate their entitlement to summary judgment.

VII. Defendants Have Statutory Rulemaking Authority.

This Court correctly concluded at the preliminary injunction stage that 8 U.S.C. § 1188 grants DOL statutory rulemaking authority to balance the agency's "dual mandate" of ensuring an adequate supply of agricultural labor and preventing adverse effects on U.S. workers. Prelim. Inj. Order 13–17. Undaunted, Plaintiffs now revive their incorrect arguments to the contrary. Pls.' Mem. Supp. Mot. Summ. J. 27–31. Defendants again note the flaws in Plaintiffs' arguments. *See* Defs.' Opp'n 15–21. Proposed Amici add three additional points.

First, Plaintiffs seek to invalidate the entire Final Rule, not just those aspects of the Final Rule for which DOL relied on its rulemaking authority under 8 U.S.C. § 1188. *See* Pls.' Mem. Supp. Mot. Summ. J. 39 ("[T]he Final Rule should be scrapped in its entirety."). 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* for rulemaking authority, *not* 8 U.S.C. § 1188. *See* 89 Fed. Reg. at 33,899 (invoking 29 U.S.C. § 49k), 33,902–36 (describing revisions to the Wagner-Peyser Act implementing regulations). And there can be no doubt the Wagner-Peyser 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."). Thus, even if 8 U.S.C. § 1188 did not grant DOL rulemaking authority, Plaintiffs' request to invalidate the entire Final Rule on that basis is wildly overbroad.

Second, Plaintiffs do not contest that absent a rule, the agency could permissibly conclude in the course of adjudicating an individual certification application that it must deny the application because the employer failed to promise, for example, not to fire workers for speaking with a medical provider. *See* 20 C.F.R. § 655.135(h)(1)(v). Plaintiffs also do not contest that even without a rule, the agency could make that same decision in *every* individual adjudication of an H-2A application. Plaintiffs argue only that the agency cannot use a rule to announce such a policy prospectively. 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).

Plaintiffs' position—that Defendants can only use adjudications, but not rules, to structure the H-2A application process—would have absurd consequences. Forcing the agency to

reinvent the wheel in every adjudication in which an agricultural employer applies for permission to hire H-2A workers would trade the stability and predictability of rulemaking for "an unstructured ad hoc process or return to informal guidance letters, both of which could lead to further delays, costs, and reduced accountability through shifting determinations." *Outdoor Amusement Bus. Ass'n, Inc. v. Dep't of Homeland Sec.*, 983 F.3d 671, 685 (4th Cir. 2020) (holding DOL has parallel rulemaking authority under H-2B program). That would be disastrous for agricultural employers who depend on a stable and predictable supply of labor to stay afloat. Plaintiffs provide no reason Congress would have structured the statute to frustrate these goals of the H-2A program, presumably because no such reason exists.

Third, even if Plaintiffs might once have been able to argue that Congress did not give DOL rulemaking authority through 8 U.S.C. § 1188, that ship has long since sailed. The agency has been issuing regulations governing the agricultural guestworker program since before Congress even enacted the modern H-2A statute. *See, e.g.*, *Williams v. Usery*, 531 F.2d 305 (5th Cir. 1976) (describing regulations under predecessor to H-2A program). In the decades since, Congress has repeatedly revisited the H-2A statute and indicated its awareness of DOL's exercise of rulemaking authority, all without touching DOL's ability to promulgate rules. Under these circumstances, Congress has ratified and acquiesced in DOL's exercise of rulemaking authority. *See CFTC v. Schor*, 478 U.S. 833, 846 (1986) ("It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." (cleaned up)).

Here, Congress has obviously known about the agency's exercise of rulemaking authority. Indeed, Congress copied the statutory two-prong test for whether DOL can approve a

labor certification directly from a 1978 Department regulation on guestworkers that predates the modern H-2A program itself. *See AFL-CIO v. Brock*, 835 F.2d 912, 914 (D.C. Cir. 1987). And the H-2A statute on its face repeatedly references DOL regulations, leaving no doubt Congress is aware of DOL's exercise of rulemaking authority. *See, e.g.*, 8 U.S.C. §§ 1188(b)(1), 1188(c)(3)(B)(i), 1188(c)(3)(B)(vi), 1188(c)(4).

Moreover, while fully aware DOL reads § 1188 to allow the agency to promulgate rules, Congress has repeatedly legislated in this area without ever disturbing that rulemaking authority:

- 1986: Congress passes IRCA, ratifying prior Department regulations as discussed above. *See* Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986).
- 1987: DOL promulgates by regulation the first set of rules under the H-2A program, establishing an AEWR and various other protections that form the basis of the current regulations. *See* 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). The agency relies on the same statutes it does in the Final Rule: 8 U.S.C. §§ 1101(a)(15)(H)(ii)(A), 1184(c), and 1188.[5] *Compare* 52 Fed. Reg. at 20,507, *with* 89 Fed. Reg. at 34,059 ("The authority citation for [20 C.F.R.] part 655 continues to read as follows: . . . Subpart B issued under 8 U.S.C. [§§] 1101(a)(15)(H)(ii)(a), 1184(c), and 1188; and 8 C.F.R. § 214.2(h).").
- 1988: Congress revises and reenacts what is now 8 U.S.C. § 1188, including some technical corrections and renumbering the section, but without making any substantive change. *See* Pub. L. No. 100-525, § 2(*l*), 102 Stat. 2609, 2612 (Oct. 24, 1988).
- 1989: The agency by regulation updates its methodology for computing AEWRs, again citing 8 U.S.C. §§ 1101(a)(15)(H), 1184(c), and 1188 for its authority to do so. *See* 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, 28,046 (July 5, 1989).
- 1991: Congress makes technical corrections to 8 U.S.C. § 1188, again without disturbing any agency regulatory authority. Pub. L. No. 102-232, §§ 307(*l*)(4), 309(b)(8), 105 Stat. 1733, 1756, 1759 (Dec. 12, 1991).

[5] The agency cited 8 U.S.C. § 1186, which Congress transferred to 8 U.S.C. § 1188 the following year.

- 1994: Congress amends 8 U.S.C. § 1188, and—once again—says nothing about rulemaking authority. *See* Pub. L. No. 103-416, § 219(z)(8), 108 Stat. 4305, 4318 (Oct. 25, 1994).
- 1999: Congress amends 8 U.S.C. § 1188, this time by adjusting certain timelines, and without touching the agency's rulemaking authority. Pub. L. No. 106-78, § 748, 113 Stat. 1135, 1167 (Oct. 22, 1999).
- July 2000: The agency promulgates a rule implementing the DOJ's delegation of authority to adjudicate H-2A petitions. The Department lists 8 U.S.C. § 1188 as statutory authority. *See* Labor Certification and Petition Process for the Temporary Employment of Nonimmigrant Aliens in Agriculture in the United States; Delegation of Authority to Adjudicate Petitions, 65 Fed. Reg. 43,538, 43,542 (July 13, 2000).
- December 2000: Congress amends 8 U.S.C. § 1188 to tweak when the agency must determine that employer-provided housing is adequate. In a now-familiar pattern, Congress says nothing whatsoever about rulemaking authority—even though the agency had long-since published regulations governing the adequacy of employer-provided housing. *See* Pub. L. No. 106-554, § 105, 114 Stat. 2763, 2763A-11 (Dec. 21, 2000).[6]

The July 2000 rulemaking and December 2000 legislation noted above are particularly instructive. In addition to amending § 1188's timeline for determining the adequacy of housing, Congress also forbade the agency from implementing the July 2000 rule. *See* Pub. L. No. 106-554, § 104, 114 Stat. 2763, 2763A-11 (Dec. 21, 2000). But Congress expressed no skepticism of the agency's general ability to make rules under § 1188. Far from it. Congress included a proviso stating "[t]hat nothing in this section shall prohibit the development or revision of such a rule, or the publication of any similar or successor proposed or final rule . . . or other activities necessary and appropriate in preparing to implement such a rule with an effective date after September 30, 2001." *Id.* In other words, Congress told the agency it could not promulgate the July 2000 regulation now, *but it could do so later*—a legislative instruction completely at odds with Plaintiffs' theory that the agency cannot regulate in this space at all.

[6] Congress last amended 8 U.S.C. § 1188 in 2000.

In short, Congress has been fully aware that DOL interprets 8 U.S.C. § 1188 to grant the agency rulemaking authority, and has repeatedly returned to that statute without so much as hinting at disagreement with the agency's reading. Congress has thus ratified and acquiesced in DOL's interpretation, eliminating any residual doubt as to the agency's authority to issue rules under 8 U.S.C. § 1188.

VIII. Plaintiffs Have Failed to Demonstrate the Challenged Provisions of the Final Rule are Inseverable.

Defendants are correct that the challenged provisions of the Final Rule are severable. Defs.' Opp'n 49–50. Proposed Amici make one additional point. "[R]egulations—like statutes—are *presumptively* severable." *Bd. of Cnty. Comm'rs v. EPA*, 72 F.4th 284, 296 (D.C. Cir. 2023) (emphasis added). And "the burden is placed squarely on" Plaintiffs to overcome that presumption. *Alaska Airlines, Inc. v. Donovan*, 766 F.2d 1550, 1560 (D.C. Cir. 1985). Thus, the question is not merely whether the challenged provisions of the Final Rule are severable (they are), but whether Plaintiffs have met their burden of rebutting the presumption of severability. Plaintiffs have not even tried to do so.

In promulgating the Final Rule, the agency said repeatedly that it intended the challenged provisions to be severable and believed they could function independent of the rest of the Final Rule. *See* 20 C.F.R. § 655.190; 29 C.F.R. § 501.10; 89 Fed. Reg. at 33,952–53, 34,041. These explicit 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).

Plaintiffs do not reckon with their burden of overcoming the presumption of severability, nor with the Final Rule's severability clauses. Instead, they assert in a single sentence in their

conclusion "that the Final Rule should be scrapped in its entirety." Pls.' Mem. Supp. Mot. Summ. J. 39. But their brief is devoid of any explanation why the unchallenged provisions of the Final Rule could not function independent of the provisions with which they take issue, nor any effort to argue the agency would not have promulgated the Final Rule absent those challenged provisions. Under these circumstances, Plaintiffs have not met their burden to overcome the presumption of severability.

CONCLUSION

For the foregoing reasons, and the reasons listed in Defendants' brief, this Court should deny Plaintiffs' Motion for Summary Judgment.

Respectfully submitted this 12th day of March, 2025.

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