UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

BAYOU LAWN & LANDSCAPE SERVICES, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL HISPANIC LANDSCAPE ALLIANCE, PROFESSIONAL LANDCARE NETWORK, SILVICULTURAL MANAGEMENT ASSOCIATES, INC., FLORIDA FORESTRY ASSOCIATION, Plaintiffs v. THOMAS E. PEREZ,* *et al.*, Defendants.	)	No.3:12-cv-00183 MCR

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENTAND SUPPORTING MEMORANDUM OF LAW

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INTRODUCTION

The procedural history and statutory background have previously been briefed by the parties and aptly summarized by the Court of Appeals and this Court.[1]

From the outset, DOL's "rationale for this [Rule] has shifted . . . as this litigation has progressed." *Larson v. Valente*, 456 U.S. 228, 238 (1982). During the preliminary injunction hearing, DOL argued that its authority to issue the H-2B Comprehensive Rule could be inferred from various sections in the INA and later argued that it could be inferred from INA § 1103(a)(6), even though nothing in the rulemaking record identified that latter provision as the source of the agency's inferred authority. After this Court rejected that argument and issued a preliminary injunction on April 26, 2012, the government sought a stay arguing that its rulemaking authority could be inferred not from 1103(a)(6), but rather from the Wagner-Peyser Act and other provisions in the INA. This Court rejected those arguments, as did the Court of Appeals when it found that the Wagner-Peyser Act "cannot be stretched to authorize DOL to issue rules to implement a visa program committed by law to the governance of another agency." *Bayou Lawn & Landscape Servs. v. Solis*, 713 F.3d 1080, 1085 n.5 (11th Cir. 2013).

This theme of ever changing legal theories is continued in DOL's Motion for Summary Judgment, where three new theories—all related to jurisdiction—are presented for beta testing and three old ones--all relating to the merits--are reiterated. These new jurisdictional arguments have no more merit than DOL's previous attempts to defend the authority for its rulemaking.

On the merits of the DOL's authority to issue the rules at issue, this Court and the Court of Appeals have already rejected each of DOL's arguments in the course of

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[1] Plaintiffs incorporate by reference their Local Rule 56.1 Statement, which accompanied their Motion for Summary Judgment.

granting a preliminary injunction. DOL acknowledges that this is the law of the case. Plaintiffs' remaining claims (arbitrary and capricious rulemaking and failure to undertake a proper Regulatory Flexibility Act ("RFA") analysis) are appropriate for summary judgment, but not in Defendants' favor.

ARGUMENT

I. Unknown and Unknowable Future Actions By Other Agencies Do Not Affect this Court's Ability to Remedy the Injury Caused by DOL's Rule

DOL argues that Plaintiffs lack standing because even if the challenged regulation were invalidated, DHS *could* still ask for DOL's advice, that advice *could* mirror what is in the challenged rule, and DHS *could* accept and act on that advice on a case-by-case basis. Therefore, according to DOL, the real culprit is DHS, not because of what it has done, but because of what it could do in future. Because DHS is not before the Court, the argument goes, the Court lacks the ability to redress Plaintiffs' grievances, and therefore, Plaintiffs lack standing. DOL's argument, however, is not tethered to the Complaint as written, but rather to a complaint rewritten by DOL. It also requires the Court to speculate on what another agency might or might not do in the future. Indeed, under DOL's theory of standing, no regulation could ever be challenged because a subsequent regulation might be no better than the challenged one. That, however, is not and never has been the law.

All that is required to satisfy the redressability prong of Article III is that a court is capable of providing the relief sought and that relief can relieve or reduce a discrete injury to Plaintiffs. *See Larson*, 456 U.S. at 244 n. 15 ("[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his every injury.").

DOL cannot deny that its H-2B Comprehensive Rule, if it were to go into effect, would injure Plaintiffs. The uncontroverted evidence so indicates. And DOL cannot deny (and has not denied) that a court can vacate that Rule and enjoin its implementation, thus remedying the injury. That is all that is required to establish redressability and hence, standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

That another agency, such as DHS, *could* take action at some unspecified time in the future that *might* injure Plaintiffs in the same way as the DOL's rule is not germane to the standing analysis in this suit against DOL, the issuer of the challenged rule. Arguments of this type have been consistently rejected by the courts. In *Larson v. Valente*, 456 U.S. at 242-43, plaintiffs—members of a religious organization—challenged a state law that required religious organizations to register if they solicited and collected more than fifty percent of their funds from nonmembers. The State argued, among other things, that plaintiffs lacked standing because even if the fifty percent rule were invalidated, other provisions of the law might compel the Church to register. *Id*. In rejecting this argument and holding that plaintiffs had demonstrated redressability, the Court stated that

> [i]f [the fifty percent rule] is declared unconstitutional as appellees have requested, then the Church cannot be required to register and report under the Act by virtue of that rule. Since that rule was the sole basis for State's attempt to compel registration and that gave rise to the present suit, a discrete injury of which appellees now complain will indeed be completely redressed by a favorable decision of this Court.

Id. at 242-43. In short, the fact that the Church may be compelled by other laws or rules to register and report, "does not affect the nature of the relief that can properly be granted to appellees on the present record [and] does not deprive this Court of jurisdiction to hear the present case." *Id.* at 242.

Similarly, in *K.P. v. LeBlanc*, 627 F.3d 115 (5th Cir. 2010), physicians and an individual challenged a state law under which abortion related malpractice claims fell outside the state's compensation fund. The court held that "redressibility" had been established, even though payment from the compensation fund was not guaranteed and the Board administering the fund "is far from the sole participant in the application of the challenged statute." *Id*. at 123; *see also Lozano v. City of Hazelton*, 620 F.3d 170, 192 (3d Cir. 2010) (injury resulting from local law restricting a landlord's ability to rent to an illegal alien would be redressed by an injunction even though aliens would be subject to actions by other agencies under other laws, including removal under federal law).

DOL suggests that *Lujan* somehow supports its position, but the Court in *Lujan* directed that the very type of speculation championed by DOL in this case should be avoided. At issue in *Lujan* was an interpretative regulation issued by the Department of Interior implementing a provision in the Endangered Species Act that required other agencies to consult with Interior before funding domestic projects and those on the high seas that could affect certain species. Plaintiffs challenged the interpretative rule arguing that it should have included projects funded in foreign nations by any United States agency: "the lack of consultation with respect to certain funded activities abroad 'increas[es] the rate of extinction of endangered and threatened species.'" *Lujan*, 504 U.S. at 562 (quoting from complaint). The Court first held that plaintiffs lacked standing because they could not articulate a concrete and imminent injury: their claim that a lack of consultation between agencies would imperil foreign species was too amorphous for Article III purposes. The Court went to hold that since plaintiffs' alleged injury flowed from the funded projects, they should have attacked—on a project by project basis—those agencies which were funding the projects. According to the Court, "'suits challenging, not specifically identifiable Government violations of law, but the particular

programs agencies establish to carry out their legal obligations . . . [are], even when premised on allegations of several instances of violations of law, . . . rarely if ever appropriate for federal court adjudication.'" *Lujan,* 504 U.S. at 568 (quoting *Allen v. Wright*, 468 U.S. 737, 759-60 (1984)).

Here, Plaintiffs are challenging discrete violations of the law. Indeed, the type of future, hypothetical actions by other agencies that DOL relies upon here, was the very type unsuccessfully relied by the plaintiffs in *Lujan.* In that regard, under *Larson* and its progeny, what other agencies and other regulations might do in the future does not undermine the redress afforded to Plaintiffs by a vacatur, injunction, or declaratory relief now. What is critical, and what DOL ignores, is that the relief sought, if granted, would prevent DOL from enforcing its H-2B Comprehensive Rule, and that is all that is required to satisfy *Lujan*'s redressability prong.[2]

II. DOL's Rulemaking Is Subject to Judicial Review

DOL argues that Plaintiffs are not really challenging DOL's rulemaking authority, but instead, "actually seek to compel DHS to adjudicate petitions without giving determinative effect to DOL's advice under a legislative rule." Defendants' Memorandum of Law in Support of Summary Judgment ("DOL Br.") at 11. According to DOL, Plaintiffs are seeking to interfere with DOL's ability to provide advice to DHS and with DHS's ability to give that advice the weight that it might be due. DOL argues the weight that DHS accords DOL's advice is committed to agency discretion and is therefore not subject to judicial review.

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[2] DOL suggests that even if this Court were to vacate the Rule, it could still enforce the Rule as an "interpretative rule." *See* DOL Br. at 8 n.4. That is not the case. It has labeled the rule as a legislative rule and it is stuck with that moniker because it is in fact a legislative rule. It is not free to change labels in attempt to avoid this Court's injunction.

Despite DOL's attempt to make the case more than what it is, in reality, it is a simple regulatory challenge to an agency trying to promulgate legislative rules where it has no authority to do so. DOL must accept the complaint as written and as adjudicated by this Court and by the Court of Appeals. "The plaintiff is the master of the complaint," *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 91 (2005), and a defendant is not permitted to recharacterize or rewrite the complaint. *See Danley v. Allen,* 540 F.3d 1298, 1306 (11th Cir. 2008) ("the plaintiff is the master of the complaint" and "[t]he plaintiff selects the claims that will be alleged in the complaint."); *Skelly v. Okaloosa Cnty., Fla. Bd. of Cnty. Commissioners*, 308CV428 MCR/MD, 2010 WL 1192515 (N.D. Fla. Mar. 22, 2010), *vacated on other ground sub nom*., *Skelly v. Okaloosa Cnty. Bd. of Cnty. Comm'rs*, 415 F. App'x 153 (11th Cir. 2011) (same); *Michaels Stores, Inc. v. United States*, 2012 WL 6720675, at *1 (Ct. Int'l Trade 2012) ("Defendant, however, seeks to rewrite plaintiff's complaint to be a challenge to Customs' actions, but that is not what the complaint says.").

In rewriting Plaintiffs' complaint, DOL blurs the line between rulemaking and advice-giving, in part, because it has consistently relied on its authority "to consult" as the source of its rulemaking authority. Having failed to persuade both this Court and the Court of Appeals that its consultation theory provides a statutory basis for its H-2B Comprehensive Rule, DOL now tries to use the provision to insulate its rulemaking from judicial review. But the Court of Appeals has already rejected DOL's reliance on the consultation provision in this area as an "absurd" stretch:

> Under this theory of consultation, any federal employee with whom the Secretary of DHS deigns to consult would then have the "authority to issue legislative rules to structure [his] consultation with DHS." This is an absurd reading of the statute and we decline to adopt it.

Bayou Lawn & Landscape Servs. v. Oates, 713 F.3d 1080, 1084 (11th Cir. 2013). DOL's consultation argument fares no better now, repackaged as a jurisdictional theory.

This Court and the Court of Appeals held that DOL had no legislative rulemaking authority with respect to the H-2B Program. It does not follow from that holding, though, that Plaintiffs are attempting to interfere with DHS' ability to entertain DOL's advice, if it chooses to do so, provided it is truly advice. There is a linguistic and legal difference between "advice," which can be accepted or not, and a "legislative rule" which, by definition, is legally binding and may not be ignored or weighed. Whether DHS has the sole discretion to consider DOL's advice is beside the point and has nothing to do with this litigation.

DOL also appears to argue that if one agency (DOL) provides advice to another agency (DHS), then the advice-giving agency (DOL) is also free to memorialize that advice in a legislative rule and that rule somehow becomes immunized from judicial review. No case is cited for this rather remarkable proposition, as none exists. This Court and the Court of Appeals both rejected DOL's argument that its rulemaking authority can be inferred from its advice-giving authority.

The Administrative Procedure Act embodies the "strong presumption that Congress intends judicial review of administrative action." *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 670 (1986) (permitting judicial review by narrowly interpreting the Medicare Act's provision precluding such review). "[J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (citing cases); *Michigan Academy of Family Physicians*, 476 U.S. at 672-73 (explaining that if Congress intends to exempt agency action from APA review entirely, it must say or do so explicitly). The only two exceptions to this "strong

presumption" are where other statutes preclude judicial review or where the action is committed to agency discretion by law. *See* 5 U.S.C. § 701(a); *see also id.* § 702(2). DOL does not point to any provision in the INA barring judicial review of DOL rulemaking as none exists.[3] DOL, though, does argue that its "advice giving" authority is not subject to judicial review under *Heckler v. Chaney*, 470 U.S. 821, 830 (1985), and 5 U.S.C. § 701(a)(2). As noted above, that is irrelevant since Plaintiffs are not challenging any advice that DOL has yet to provide to DHS or to someone else.

But even if it were relevant, it would not preclude judicial review of a final rule. First, section 701(a)(2) only applies to "agency action;" advice giving is not "agency action" and therefore, section 701(a)(2) does not apply. *See* 5 U.S.C. § 551(13); *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 62 (2004) (narrowly interpreting section 551(13) by limiting "agency action" to the "list of five categories of decisions made or outcomes implemented by an agency—'agency rule, order, license, sanction [or] relief.'").

Second, the Supreme Court has consistently held that the exception to judicial review in section 701(a)(2) is "very narrow" and "is only applicable in those rare instances where 'statutes are drawn in such terms that in a given case there is no law to apply.'" *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (quoting legislative history of APA at S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Here, of course,

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[3] DOL points only to 8 U.S.C. § 1252(a)(2)(B)(ii), which precludes judicial review of "any other decision or action of the Attorney General or Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security." First, on its face this provision does not apply to DOL (or DOL rulemaking). Second, it does not even apply to DHS rulemaking; section 1252 is entitled "judicial review of orders of removal," and its scope it is so limited.

there is an abundance of applicable law including the INA and the APA, both of which this Court and the Court of Appeals applied with ease to this case, making resort to section 701(a)(2) both inappropriate and unnecessary.

Third, under DOL's theory of a neutered APA, no one could ever challenge any rule if that rule reflected advice given to another agency.[4] There is no language in the INA to suggest that DOL's regulations, as opposed to those issued by DHS, are somehow immune from judicial review and DOL has pointed to none. It would be odd, and indeed illogical, to insulate rules issued by an agency with no rulemaking authority from judicial review. Yet this is precisely what DOL is seeking to do.

III. Petitioning for Rulemaking Is Not a Prerequisite for Judicial Review

Finally, DOL argues that this Court lacks jurisdiction because Plaintiffs did not exhaust their administrative remedies: they should have petitioned DHS for rulemaking under 5 U.S.C. § 553(e) rather than instituting suit against DOL. But Plaintiffs were not required to petition DHS before challenging the final agency action taken by the DOL.

Under the APA, "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. "Once there is 'final agency action,' exhaustion has occurred and judicial review is appropriate[,]" unless the agency's organic legislation requires otherwise. *McKeen v. U.S. Forest Serv.,* 615 F.3d 1244, 1253 (10th Cir. 2010) (quoting 5 U.S.C. § 704). "[T]he hallmarks of APA finality" are: (1) the agency "determined rights or obligations;" (2) "legal consequences flow" from the agency action; and (3) the agency action "marks the consummation of the agency's decision-making process."

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[4] All rules issued by non-independent agencies must receive clearance from the Office of Management and Budget ("OMB") and as part of that clearance process, OMB invites interested and relevant agencies to provide their advice. Executive Order 12866 at 58 Fed. Reg. 51735 (Oct. 4, 1993).

Sackett v. EPA, 132 S.Ct. 1367, 1371-72 (2012) (internal quotation marks omitted) (ellipsis omitted).

The issuance of DOL's H-2B Comprehensive Rule clearly satisfies these prerequisites for finality, and DOL does not contend otherwise. *See Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1178 (D.C. Cir. 1979) ("If a proceeding should eventuate in a rule that a party opposes, the party may challenge the final action adopting the rule"); *see also Alto Dairy v. Veneman,* 336 F.3d 560, 568 (7th Cir.2003).

Here, DOL issued a final rule that, if it were to go into effect, would immediately and adversely affect Plaintiffs. There is no suggestion from DOL that its decision-making process did not conclude with its rulemaking, nor could it; the consummation of the H-2B rulemaking constitutes final agency action subject to immediate judicial review. There is no requirement in any statute, and DOL has pointed to none, that would require one to petition a second agency for rulemaking before challenging a rule issued by the first agency.

Further, 5 U.S.C. § 704 limits the "availability of the doctrine of exhaustion of administrative remedies to that which the statute or rule clearly mandates." *Darby v. Cisneros,* 509 U.S. 137, 146 (1993); *see also Alto Dairy*, 336 F.3d at 568. Although § 553(e) requires the agency to provide interested persons the opportunity to petition for the repeal of a rule, it does not state that an interested entity must appeal the rule within the agency before review, or that the rule is inoperative during the review proceedings. *See Alto Dairy,* 336 F.3d at 568-69 (citing *Darby,* 509 U.S. at 146). As such, section 553(e) is not a precondition to suit. *See Sherwin v. Secretary of Health and Human Servs.,* 685 F.2d 1, 4-5 (1st Cir. 1982); *Novelty, Inc. v. Tandy*, 1:04 CV 1502 DFH TAB, 2006 WL 2375485 (S.D. Ind. Aug. 15, 2006). Moreover, the concept of exhaustion, which relates to intra-agency proceedings, does not even apply in the theoretical sense to

DOL's argument, which would require one to petition DHS for rulemaking before a court would be able to entertain an APA challenge to DOL's rule.

IV. The Eleventh Circuit's Conclusion that the Wagner-Peyser Act Does Not Confirm Rulemaking Authority on DOL Is the Law of the Case

On the merits, Defendants renew their claim that the Wagner-Peyser Act provides the basis for their rulemaking even though they acknowledge, as they must, that the Eleventh Circuit rejected this claim and that the holding constitutes the law of the case. DOL Br. at 15 n.8 (stating that the Eleventh Circuit's holding that DOL lacks rulemaking authority "is now law of the case," and citing *This That and the Other Gift & Tobacco, Inc. v. Cobb County*, 439 F.3d 1275 (11th Cir. 2006)). Defendants insist that the Eleventh Circuit's decision is incorrect and therefore reassert—almost verbatim—their arguments solely to preserve them for purposes of appeal. *Compare* Defendants-Appellants' Brief at 13-21, *Bayou Lawn & Landscape Servs. v. Solis*, No. 12-12569 (11th Cir. July 9, 2012), *with* DOL Br. at 15-19.

There is no reason to disturb the Eleventh Circuit's decision and Defendants have offered none to this Court. The Eleventh Circuit rejected DOL's argument that its rulemaking authority can be inferred from the "relationship between the Wagner-Peyser Act and the INA." *Bayou Lawn & Landscape Servs.*, 713 F.3d at 1085 n.5, citing Defendants-Appellants' Brief at 14, 19. The Court held that DOL waived the argument by failing to present it timely to the district court, but, even if not waived, "the reliance on a statute that is limited to the funding, operation and coordination of state unemployment offices cannot be stretched to authorize DOL to issue rules to implement a visa program committed by law to the governance of another agency." *Bayou Lawn & Landscape Servs.*, 713 F.3d at 1085 n.5.

The Eleventh Circuit's decision is binding on this Court, as Defendants acknowledge. Even if the Court could consider the argument now, in the context of a permanent injunction, it is unavailing on the merits for the very reasons offered by the Court of Appeals.

In addition, Defendants cannot rely on a new source of statutory authority that they did not invoke at the rulemaking stage or on post-hoc rationalizations for agency action. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983); *Camp v. Pitts*, 411 U.S. 138, 142-43 (1973); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962); *Luminant Generation Co., LLC v. EPA*, 675 F.3d 917, 925 (5th Cir. 2012). Rather, an APA review is a "record review" that is limited to the administrative record that was before the agency when it made its decision." *Voyageurs Nat'l Park Ass'n v. Norton*, 381 F.3d 759, 766 (8th Cir. 2004); *accord Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 420. Thus, "[e]ven if other statutory provisions could support the Commission's asserted authority, we cannot supply grounds to sustain the regulations that were not invoked by the Commission below[.]" *The Business Roundtable v. SEC*, 905 F.2d 406, 417 (D.C. Cir. 1990). Indeed, acceptance of Defendants' after-the-fact reliance on the Wagner-Peyser Act would permit Defendants to circumvent the APA's notice and comment provisions, which requires an opportunity to comment on the agency's asserted basis for its authority. 5 U.S.C. § 553(b).

Neither DOL's historical reliance on the Wagner-Peyser Act nor its identification in the Code of Federal Regulations as one of the legislative sources for the H-2B rules at part 655, is relevant. What counts for APA purposes is what DOL listed in its two Federal Register notices, as required by the APA. In any event, and contrary to its assertion, DOL has never relied on the Wagner-Peyser Act for its H-2B rules, other than

when referencing State Workforce Agencies. The substantive aspects of the H-2B Program Rules rest firmly on the INA, as acknowledged by DOL in its Federal Register notices. Finally, Defendants' assertion that its reference to 8 U.S.C. § 1184(c)(1) was sufficiently precise to inform Plaintiffs that it was relying on the Wagner-Peyser Act is as far off the mark now as it was when it presented the argument to the Eleventh Circuit. Defendants have never explained why, if the Wagner-Peyser Act's applicability were so obvious, DOL did not mention it until after the preliminary injunction was entered despite two earlier challenges to its rulemaking authority. Because neither the INA nor the Wagner-Peyser Act cross reference each other, it is difficult to understand how reference to Title 8 (*i.e.*, the INA) would somehow alert Plaintiffs that what was really meant was a provision in Title 29 of the United States Code (*i.e.*, the Wagner-Peyser Act).

Finally, as it did before the Eleventh Circuit, Defendants renew their argument that their oversight with respect to the Wagner-Peyser Act was harmless error, citing *Shinseki v. Sanders*, 556 U.S. 396, 408-10 (2009). *Shinseki* did not involve rulemaking or notice and comment. Courts "must exercise great caution in applying the harmless error rule in the administrative rulemaking context." *Paulsen v. Daniels,* 413 F.3d 999, 1006 (9th Cir. 2005). This is so because "notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested parties notice and an opportunity to comment." *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979); *see also Sanders*, 556 U.S. at 411-12 (stating that in evaluating an agency's error for harmlessness, a reviewing court could consider "the error's likely effects on the perceived fairness, integrity, or public reputation of judicial proceedings"). And, here, if the injury is the issuance of a rule that is legally infirm, then Plaintiffs' uncontroverted evidence of irreparable injury is sufficient harm. If Defendants' theory is that the injury

must spring from its failure to notify anyone that the Wagner-Peyser Act was the real source of DOL's regulatory authority, then no person could ever challenge any procedurally defective rule. Under the APA's "record rule," harm is demonstrated based on that record. If Defendants are free to concoct a new theory after the record has been closed, suit has been filed, evidence has been presented, and an appealable order has issued, then judicial review would be meaningless. The APA was designed to promote openness; not to foster a "hide the ball" mentality.

V. DOL's Rule Is Arbitrary and Capricious Because It Lacks Explanation and Is Unsupported by the Data

Defendants seek summary judgment on Count III of the Complaint, arguing that (1) the APA does not require Defendants to produce empirical evidence or data to justify the Rule and (2) that the Rule is justified by the abuse of the H-2B program by some employers and that Defendants adequately considered and responded to the comments it received on the Rule. Neither of these claims supports summary judgment for DOL.

A. An Agency's Obligation Under the APA Encompasses More Than the *Ipse Dixit* Rationale Provided by Defendants

Defendants argue (DOL Br. at 20) that DOL was not obligated to produce empirical evidence or data, and was required to provide only a "concise general statement of the[] basis and purpose" of the "relevant matters presented," a standard it claims was not meant to be particularly demanding. Defendants accordingly assert (DOL Br. at 21) that DOL "more than satisfied this lenient standard." In Defendants' view, "because I said so," is good enough. The courts have seen it differently: "Judicial review cannot be halted when the government's rationale is simply 'because I said so.'" *Cantley v. Jail & Correctional Facility Auth.*, 728 F. Supp. 2d 803, 814 (S.D. W. Va. 2010). *See also Tool Box v. Ogden City Corp.*, 315 F.3d 1167, 1174 (10th Cir. 2003) (rejecting a "because-I-

said-so" approach because it conferred "absolute, limitless, boundless and measureless" discretion); *Nichols v. Dancer*, 657 F.3d 929 (9th Cir. 2011).

Although "an agency may have discretion to decide," it is `arbitrary or capricious' for an agency not to take into account all relevant factors in making its determination." *Appalachian Power Co. v. EPA*, 477 F.2d 495, 507 (4th Cir. 1973). Defendants' announcement that DOL's mandate to protect the domestic labor force justified any rule it believed would accomplish that end without regard to the underlying data, the impact of the rule on domestic labor or anything else is not sufficient. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (requiring agency to consider all relevant factors in its rulemaking).

B. Defendants' Did Not Satisfy their Obligation Under the APA to Explain Why DOL Adopted this Rule

Plaintiffs challenged the H-2B Comprehensive Rule because DOL failed to explain why it imported the rules applicable to the H-2A agricultural program into the H-2B program when Congress repeatedly and consistently declined to adopt that approach. Plaintiffs further argued that DOL failed to identify—let alone to examine—the relevant data and failed to explain its action or provide a "rational connection between the facts found and the choice made," as required to save a rule from being vacated as arbitrary or capricious. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

Defendants' explanations still run counter to the data in the underlying rulemaking record. Instead of responding to the specific issues identified in the Complaint and public comments, Defendants insist that their goal of protecting the domestic labor market gives them carte blanche to enact rules to achieve that goal without regard to the burdens it imposes on small businesses and without regard to the fact established by uncontradicted declarations that it jeopardizes domestic jobs or the concerns raised by the Small Business Administration ("SBA") that DOL's analysis

understated the impact of the Rule. *See* Comments of Winslow Sargent and Janis Reyes, Office of Advocacy, SBA at ETA-2011-0001-0438 (May 17, 2011). An agency is not free to ignore relevant information no matter how laudable its goal may be. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

Defendants admittedly either failed to measure or did not take the time to measure many of the adverse effects of the Rule. 77 Fed. Reg. 10,038, 10,115 (col. c) (Feb. 21, 2012). Defendants apparently believe (DOL Br. at 21) that SBA's concerns, the uncontradicted declarations of economic harm, and the underlying facts take a back seat to Defendants' desire to protect the domestic labor market. And, in their memorandum (DOL Br. at 21-23), they now recharacterize the evidence on the cost of participating in the H-2B program as "equivocal" when it is, in fact, clear; and the DHS regulation that is at odds with the Rule as "consistent" when they are, in fact, in tension. This is the kind of post-hoc decision-making that the courts have regarded as arbitrary and capricious. *See, e.g.*, *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1578 (10th Cir. 1994) (holding that an agency's action cannot be upheld based on a mischaracterization of the record and summary conclusion by the agency). DOL's decision to abandon the current system for the H-2B Program is not supported by the record before it. The rulemaking record is devoid of evidence to support the overhaul of the H-2B program.

The underlying data demonstrate that DOL's new Rule will reduce the number of job opportunities available to everyone by increasing the cost of employing H-2B workers. *See* 76 Fed. Reg. at 15,162; 77 Fed. Reg. at 10,131. *See also* http://www.flcdatacenter.com/CaseH2B.aspx (last viewed April 13, 2012); http://www.foreignlaborcert.doleta.gov/quarterlydata.cfm (certification statistics for FY 2006 through Q2 2011) (last viewed April 13, 2012) (showing DOL's own regulatory experience that U.S. workers are hired first, but additional employees still are needed to

meet seasonal demands). These data were confirmed by testimony presented to Congress that similarly disclosed that limiting the availability of H-2B workers will result in significant losses both in terms of the number of jobs and the effect on small and seasonal businesses. *See The Economics of Mandating Benefits for H-2B Workers: The H-2B Guestworker Program and Improving the Department of Labor's Enforcement of the Rights of Guestworkers*, Domestic Policy Subcomm., House Oversight and Government Reform Comm. (April 23, 2009) (testimony of Patrick A. McLaughlin); 152 Cong. Rec. S2699, 2710 (daily ed. April 3, 2006) (statement of Sen. Mikulski). These data were available to DOL, some of it was DOL's own data, yet DOL failed to respond to comments that raised these concerns and invoked these data. That failure precludes granting summary judgment in Defendants' favor; rather, it is a violation of the APA. *See Lloyd Noland Hosp. & Clinic v. Heckler*, 762 F.2d 1561, 1566 (11th Cir. 1985).

Defendants' attempt to harmonize the Rule with DHS' rule also fails. DOL's Rule defines "temporary" employment as nine months or less. DHS, in 8 C.F.R. § 214.2(h)(6)(ii)(B), defines "temporary" as "a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year," *i.e.*, up to three years. 73 Fed. Reg. 49,109, 49,115 (Aug. 20, 2008). *See also* 73 Fed. Reg. 78,104, 78,118 (Dec. 19, 2008) (noting the definition would "allow U.S. employers and eligible foreign workers the maximum flexibility allowed under this program"). DHS further explained that "[u]nder the final rule, the validity period of an H-2B petition will therefore be tied to the nature and period of the employer's temporary need and not to any specific time period." *Id.*

Whereas DHS created a "more flexible definition" of "temporary" that would give employers "maximum flexibility," DOL's restriction of the time period to nine months provides minimal or no flexibility. Whereas DHS' rule was not tied "to any

specific time period," and that the outer limit was "possibly as long as three years," DOL's redefinition of temporary to mean only nine months or less is tethered to a specific time period, and a much shorter one than contemplated by DHS. DOL's Rule is thus incompatible with DHS's rule. That there may be no tension between the two rules if the temporary employment lasts nine months or less does not explain DOL's departure from DHS' rule when the period exceeds nine months. A rule that is mutually inconsistent with another operative rule is necessarily arbitrary and capricious. *Cf. Missouri Pub. Serv. Comm'n v. FERC*, 601 F.3d 581, 582 (D.C. Cir. 2010) (finding that agency's action that is "plainly inconsistent" with its prior actions is arbitrary and capricious).

VI. Defendants' Economic Analysis Under the RFA Is Legally Erroneous

Finally, DOL seeks summary judgment with respect to its analysis under the RFA. In its initial analysis, DOL declared that its proposed rules were "not likely to impact a substantial number of small entities and, therefore, an Initial Regulatory Flexibility analysis is not required by the RFA." 76 Fed. Reg. at 15,166 (col. c). This conclusion was based on DOL's belief that employment in the H-2B program represented a "very small fraction of the total employment in the U.S. economy, both overall and in the industries represented in the H-2B program." *Id.* at 15,167 (col. a). It looked to the "top five industries" that hired H-2B employees in FY 2007 to FY 2009, and concluded that there would be no significant impact on small businesses in those industries because "the H-2B program represents a small fraction of the total employment even in each of the top five industries in which H-2B workers are found." *Id.* at (col. b). It repeated these same conclusions and data in the final rule. *See* 77 Fed. Reg. at 10,132 (col. b) ("[T]his rule is not likely to have a significant impact on a substantial number of small

entities and, therefore, a Final Regulatory Flexibility Analysis (FRFA) is not required by the RFA.").

The SBA correctly noted, however, that DOL used the wrong denominator in its substantive analysis under the RFA. *See* SBA Letter at 4. DOL's reliance on a pool of over one million small businesses as the denominator minimized the economic impact of the rule; the universe of potentially affected entities for RFA purposes should have included only those small entities in the regulated community, *i.e.,* the entities that use the H-2B program. *Id.*

Two courts had rejected RFA analyses conducted by the Department of Commerce that relied on a similar attempt to lessen the economic impact of a proposed rule by using too great a universe to measure the economic impact. *S. Offshore Fishing v. Daley,* No. 97-1134-CIV-T-23C (M.D. Fla. Oct 16, 1998); *N. Carolina Fisheries Ass'n, Inc. v. Daley,* 27 F. Supp. 2d 650 (E.D. Va. 1998).

By DOL's own admission, its analyses were limited because, in its view, "pursuing a statistically valid survey would not only have been prohibitively time-consuming given the Department's time constraints, but also would have required a lengthy clearance process under the Paperwork Reduction Act." 77 Fed. Reg. at 10,134 (col. b). Nor did Defendants assess the cross-effects of the various requirements (*e.g.*, the impact of three-fourths hour guarantee on corresponding employment requirement). Rather, DOL simply said that if its requirements became too burdensome, businesses could simply decline to participate in the program. *Id.* at 10,144.

Defendants claim that there was nothing wrong with their RFA analysis because their economic analysis covered fourteen pages in the Federal Register. Compliance is not demonstrated by the length of the analysis, whether it covers two pages or two hundred pages. It is the substance that counts. The only response to the substantive

criticism of Defendants' analysis is their insistence that *Southern Offshore Fishing* and *North Carolina Fisheries Association* are inapplicable or distinguishable. DOL argues that in *Southern Offshore* and *North Carolina Fisheries*, the agency used the incorrect number of regulated entities. *See* DOL Br. at 24. Likewise here, DOL has engaged in a similar effort to obscure the real impact of the Rule by miscounting the number of entities that should have gone into the denominator.

Under the RFA, agencies are required to consider the potential impact of their regulations on small businesses, such as Plaintiffs and Plaintiff Associations' members in this case, regardless of the subject matter or the agency's directive. Thus, DOL was required to ascertain the economic impact that its Rule will have on small entities, to set out the less onerous alternatives considered, and to discuss its rationale for declining to adopt these less costly alternatives. *See* 5 U .S.C. §§ 603-604. It was required to do so regardless of its mandate with regard to the domestic labor market.

As a last gasp, Defendants suggest in a footnote (DOL Br. at 23 n.5), that the RFA does not provide for judicial review of its initial analysis. But they do not and cannot argue that this Court may not review the final analysis, so the point provides no reason to grant summary judgment to them.

CONCLUSION

For the foregoing reasons, the Defendants' Motion for Summary Judgment should be denied in its entirety.

Respectfully submitted,

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