No. 11-2235

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED FARM WORKERS, *et al.*,

Appellants-Defendant Intervenors,

v.

NORTH CAROLINA GROWERS' ASSOCIATION, *et al.*,

Appellees-Plaintiff.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA (Osteen, J)

APPELLANTS' REPLY BRIEF

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Settled principles of administrative law counsel reversal of the district court Order and allow entry of summary judgment for Appellant Farmworkers.[1] Citing broad but peripheral principles of administrative law, the briefs of the Agricultural Employers and their amicus, USA Farmers, ask this Court to conceive of the Secretary's actions as a revocation of the 2008 Rule, rather than the temporary, nine month, suspension for nine months that the record reveals. They further ask this Court to set aside case law approving temporary reinstatements of regulations, previously subject to notice and comment rulemaking, without a second round of notice and comments, without adequately explaining how this situation is distinguishable. The Agricultural Employers' brief additionally mistakenly mischaracterizes parts of the record. This reply brief seeks to refocus on the applicable law and facts, and renews the Farmworkers' request that this Court reverse the district court's Order holding invalid duly-considered agency actions based on a novel, and the Farmworkers believe mistaken, interpretation of Section 553 of the Administrative Procedure Act (APA).

[1] The Farmworkers will continue to refer to themselves as "Farmworkers" since seventeen of the eighteen Appellants are farmworkers, either United States citizens, legal permanent residents, or H-2A workers. J.A. at 168-69, 183-85 (Answer at 1-2, Counterclaim Complaint at 16-18 ¶¶2-3). In the interest of continuity, they will continue to refer to Appellees as the "Agricultural Employers."

IV. Reinstatement of a Rule without Notice and Comment, Where the Reinstated Rule had Previously Been Subject to Notice and Comment, Is the Accepted Procedure under the Cases Cited by the Parties and Amici.

a. The Secretary Had the Authority To Suspend the 2008 Rule.

The Agricultural Employers admit that an agency has authority to suspend a rule. See Appellees' Br. at 28, citing Motor Veh. Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 103 S. Ct. 2856 (1983).[2] However, the Agricultural Employers assert that the Suspension Rule was a revocation, although revocation is the permanent reversal of an agency's course. See F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 549, 129 S. Ct. 1800, 1831 (2009) (Breyer, J., dissenting). This argument fails for two reasons discussed below.

First, the record reveals that the Secretary clearly and repeatedly explained that the suspension of the 2008 Rule was temporary, for a period of nine months, and not permanent. See 74 Fed. Reg. at 25,979 (holding the 2008 Rule "in abeyance for nine months"); see also id. at 25,977-78 ("the suspension is of limited duration in both effect and time"); id. at 25,973 (suspending the 2008 Rule for study and "temporar[ily] reinstat[ing] the Prior Rule"). Because nine months is

[2] The district court found no APA violation in the Secretary's suspension of the 2008 Rule. J.A. at 236-259.

neither indefinite nor permanent, the cases cited by the Agricultural Employers involving indefinite suspensions or revocations have little power to persuade.[3]

Second, as discussed in the Farmworkers' Opening Brief and below, the Secretary complied with notice and comment procedures in suspending the 2008 Rule. See Op. Br. at 17-25; see also infra at 10-25.

b. Reinstatement without Notice and Comment Complies with the APA When the Prior Rule Has Been Subject to Valid Notice and Comment Rulemaking.

Section 553 of the APA sets out that notice and comment is required of agency rulemaking. 5 U.S.C. § 553. The case law interpreting Section 553 holds that notice and comment rulemaking is required to suspend a rule, but not to reinstate a rule previously subject to notice and comment. See American Mining Congress v. EPA, 907 F.2d 1179, 1191 (D.C. Cir. 1990) (upholding on APA challenge the reinstatement of a regulation subject to two prior periods of notice and comment without additional notice and comment period); American Fed'n of Gov't Emps., AFL-CIO v. Office of Personnel Mgmt., 821 F.2d 761, 764 (D.C. Cir. 1987) (holding that implementing regulations after suspension expired did not

[3] See Public Citizen v. Steed, 733 F.2d 93 (D.C. Cir. 1984) (indefinite suspension); Action on Smoking & Health v. C.A.B., 713 F.2d 795 (D.C. Cir. 1983) (revocation); Envtl. Def. Fund, Inc. v. Gorsuch, 713 F.2d 802, 809 (D.C. Cir. 1983) (indefinite suspension); Consumer Energy Council of America v. F.E.R.C., 673 F.2d 425 (D.C. Cir. 1982) (repeal); Ranchers Cattlemen Action Legal Fund v. U.S. Dep't of Agric., 566 F. Supp. 2d 995, 1007 (D.S.D. 2008) (indefinite suspension "until further notice").

require new notice and comment); Associated Builders & Contractors, Inc. v. Herman, 976 F. Supp. 1, 3 (D.D.C. 1997) (upholding reinstatement of supplanted regulation that had previously gone through notice and comment rulemaking); see also n.3 supra (citing cases holding that suspensions require notice and comment). In this case, the reinstated 1987 Rule had been validly promulgated through notice and comment procedures. See Labor Certification for the Temp. Emp. Of Aliens in Agric. & Logging in the United States, 52 Fed. Reg. 20,496 (June 1, 1987) (interim rule and request for comments); 54 Fed. Reg. 28,037 (July 5, 1989) (Final Rule).

c. The Secretary of Labor Has Previously Exercised Her Discretion To Reinstate an AEWR Formula without Notice and Comment.

The Secretary has previously exercised discretion to reinstate a former wage rate. On January 16, 1981, just prior to the Reagan Administration taking office, the Secretary of Labor published a final rule establishing a new AEWR methodology setting a single, national wage rate for H-2A crop workers. Labor Certification Process for the Temporary Employment of Aliens in Agriculture: Adverse Effect Wage Rate Methodology, 46 Fed. Reg. 4568 (Jan. 16, 1981). The incoming Reagan administration suspended this rule without notice and comment, Notice of Deferral of Effective Dates of Regulations, 46 Fed. Reg. 11,253 (Feb. 6, 1981), then withdrew the rule, again without notice and comment, Labor Certification Process for the Temporary Employment of Aliens in Agriculture: Adverse Effect Wage Rate Methodology; Withdrawal of Revised Rule and

Retention of Existing Rule, 46 Fed. Reg. 32,437 (June 23, 1981). To allow the H-2A program to continue to function during this suspension, the Secretary reinstated the wage methodology used in the immediately previous regulation, again without notice and comment. Labor Certification Process for the Temporary Employment of Aliens in Agriculture: 1981 Adverse Effect Wage Rates, 46 Fed. Reg. 19,110 (Mar. 27, 1981). Using the reinstated regulation, the Secretary calculated the 1981 AEWR by applying the AEWR wage rate methodology that was in effect due to the suspension and reinstatement. Id.

In the present case, the Secretary has similarly reinstated a rule, even if the suspension was instituted after the rule had taken effect. Significant to this discussion is that, even if these situations may differ slightly, they share the proposition that a reinstated rule need not go through notice and comment procedures as would a new rule.

d. Reinstatement is Particularly Appropriate Where Otherwise a Regulatory Void Would Develop.

The Secretary's approach to the H-2A regulations ultimately must accord with controlling statutory requirements. 5 U.S.C. § 706(2). Here, Congress has directed the Secretary to certify H-2A applications and has limited her to doing so only upon a finding of no adverse effect on domestic workers' wages and jobs. 8 U.S.C. § 1188(a)(1). Associated Builders, Allied-Signal, and the cases cited infra stand for the proposition that there should be no regulatory void where Congress

has delegated authority to implement a regulatory program to a federal agency. This principle is equally applicable in the context of an agency imposed suspension. As noted above, agencies have the authority under the APA to suspend their regulations. See State Farm, 463 U.S. at 50 n.15; see also Assoc. Builders, 976 F. Supp. at 3. Without the authority to temporarily reinstate regulations to fill the void, the legal authority to suspend regulations is meaningless.

Had Congress intended to allow the Secretary to create a regulatory void in the H-2A program, it would not have required the Secretary to "certify" applications in 8 U.S.C. § 1188. Such Congressional delegation of authority requires agency action. See Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 843 (1984). Had the Secretary not reinstated the 1987 regulations, the H-2A program would have ground to a halt, leaving some crops unplanted and others to rot while the Secretary took no leadership in the face of her duty under Section 1188 to certify lawful H-2A applications. Therefore, the Secretary reasonably sought to avoid a "regulatory vacuum" by temporarily reinstating the 1987 regulations, see 74 Fed. Reg. at 11,409, an approach which courts favor. See Allied-Signal v. United States Nuclear Regulatory Comm'n, 988 F.2d 146, 151 (D.C. Cir. 1993) (seeking to avoid the "disruptive consequences of vacating"); Rodway v. Dep't of Agric., 514 F.2d 809, 817 (D.C. Cir. 1975) (leaving in place

invalid rule to avoid disruptions to the food stamp program that is of "critical importance" to basic nutrition for more than ten million Americans); Comite De Apoyo A Los Trabajadores Agricolas v. Solis, Case No. 09-240, 2010 WL 3431761, at *25 (E.D. Pa. Aug. 30, 2010) (allowing invalid regulations to remain in place to avoid creating a "large gap" in "a central part of DOL's regulatory scheme");[4] Md. Native Plant Soc'y v. United States Army Corps of Eng'rs, 332 F. Supp. 2d 845, 863 (D. Md. 2004) (remanding rather than vacating to avoid "the disruptive consequences of an interim change").

e. The Cases Cited by the Amicus and the Agricultural Employers Are Not to the Contrary.

As argued above, under the APA, certain agency actions constitute rule-making subject to notice and comment, and others—including reinstatement of formerly valid regulations—do not. Shalala and the other cases cited by USA Farmers at pages 13-14 of the amicus brief are not to the contrary. These cases do not discuss reinstatements of rules previously subject to notice and comment, but rather discuss agency actions that had never been subject to notice and comment

[4] In CATA, the court invalidated DOL's creation of a new methodology to set H-2B prevailing wages. This new wage methodology had never before been subject to notice and comment rulemaking, and DOL did not invite public comment on the methodology in the challenged rulemaking. 2010 WL 3431761, at *25. Despite this "fundamental flaw," the court left in place the invalid rules to avoid disruption of the H-2B program's wage rates that are "of vital interest to both H-2B workers and U.S. workers in the same industries." Id. In the instant case, the reinstatement was far less problematic, because rather than leaving in place an invalid wage rate, it reinstated a validly created rule.

rulemaking. See Shalala v. Guernsey Memorial Hospital, 514 U.S. 87, 100, 115 S. Ct. 1232 (1985) (new agency action not previously subject to notice and comment rule-making did not need to comply with § 553 because it was an interpretive rule); Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Sullivan, 979 F.2d 227, 235 (D.C. Cir. 1992) (discussing new amendments to a rule); Alaniz v. OPM, 728 F.2d 1460, 1468-69 (Fed. Cir. 1984) (amendments to a rule must comply with § 553 notice and comment procedures). These cases are inapposite, because the agency actions challenged here by the Agricultural Employers have all been subject to notice and comment: the suspension of the 2008 Rule was subject to notice and comment in the 2009 NPRM and Final Suspension Rule challenged below, and the reinstated 1987 Rule had been subject to notice and comment when it was propounded in 1987 and amended in 1989.

Similarly, the Agricultural Employers' citation to cases where an agency indefinitely suspended a rule without reinstating a prior rule are inapposite to the question at bar because they do not discuss whether reinstatement of a prior rule would be authorized. In addition, as discussed supra at 2-3 & n.3, these cases challenge indefinite suspensions and revocations of rules, and thus are inapposite to the temporary suspension at issue in this case. Moreover, as discussed supra at 3-7, the reinstatement met any requirements under the APA, since the reinstated

prior rule had already gone through the rigorous requirements of the APA's notice and comment provisions when it was first issued.

f. The Agricultural Employers' distinguishing of *Associated Builders* Misstates the Key Fact on Which They Rely

The Agricultural Employers' attempt to distinguish Associated Builders must fail for inadvertently misstating the fact on which their argument relies. The Employers assert that, in Associated Builders, the rule being reinstated had not been supplanted by a new rule. Appellees' Br. at 33. In fact, in Associated Builders the rule to be suspended *had* supplanted the reinstated rule, having been operational for 19 months over the course of approximately three years. 976 F. Supp. at 4 (revised helper regs in place from February 1991 effective date until April 1991, and again in force from June 1992 to November 1993). In other words, in both Associated Builders and the instant case, the rule that the agency proposed to suspend had become effective and had replaced the rule that the agency sought to reinstate. Nevertheless, the Associated Builders court treated reinstatement no differently than did the courts in American Mining Congress and AFL-CIO. Compare id. with 907 F.2d 1179, 1191 and 821 F.2d 761, 764 (all approving of reinstatements, without additional periods of notice and comment, of rules that had previously gone through notice and comment). What mattered to the courts was not whether the reinstated rule had been supplanted, but whether it had gone through a valid notice and comment rule-making when originally

propounded. American Mining Congress, 907 F.2d at 1191-92 ("an agency does not fail to satisfy the notice-and-comment requirement where, after one full period of notice and comment for a rule, and after withdrawal of the rule in light of congressional action, the agency reinstates a rule without an additional notice and comment period."); AFL-CIO, 821 F.2d at 764 ("Since OPM had already completed notice and comment proceedings, and in fact had published the rules in final form just two days before Congress imposed its ban, . . . implementation could be and was virtually automatic once the ban expired; the unions have identified no additional steps "necessary" to put the rules into effect."); Assoc. Builders, 976 F. Supp. at 9.

V. The Secretary Complied with the APA in the Suspension.

a. The Secretary Engaged with Comments and Explained Why She Chose One Approach Over Alternatives.

The Secretary responded to comments and extensively discussed her reasons for her actions in the Final Suspension Rule at 74 Fed. Reg. 25,973-82. To the extent the Agricultural Employers claim to the contrary, the Administrative Record belies their claims. For example, the Agricultural Employers mistakenly assert that DOL "failed to address" comments that claimed that applications were being processed faster under the 2008 Rule. Appellees' Br. at 23. However, in the Suspension Rule, the Secretary responded to these comments, noting that '[d]espite the anecdotal experiences of individual commenters, . . . timely case decisions . . .

decreased" under the 2008 Rule. 74 Fed. Reg. at 25,975. The Secretary gave specific examples of increasing processing delays under the 2008 Rule, including that the percentage of applications exceeding the statutory timeframes for adjudication had increased to 27%-58% under the 2008 Rule, and that the number of days from case receipt to adjudication had similarly increased to worrisome levels.[5] Id.

Additionally, the Agricultural Employers claim that the Secretary "conclusorily stated" that trainings on the 2008 Rule had been insufficient but otherwise did not respond to public comments regarding user confusion under the 2008 Rule. Appellees' Br. at 21. In truth, the Final Suspension Rule gave detailed evidence of user confusion over the 2008 Rule, including receipt of hundreds of questions evincing a lack of basic understanding amongst users and the agency's need to correct 50%, 56%, and 46% of applications received in the first three months of the 2008 Rule, as compared to the need to correct 10%, 16%, and 26% of applications from the same months in 2008. 74 Fed. Reg. 25,976; see generally id. at 25,975-77.

[5] Although the Agricultural Employers take issue with the Secretary's use of median processing delays, Appellees' Br. at 21, the median is a reasonable choice. Indicating the middle point of a range, the median reveals that 50% of the sample falls above the median and 50% falls below. As the Secretary explained, 50% of the applications took longer than 27 days to process in February 2009 and 50% took less time, as compared to 23 days in February 2008 under the 1987 Rule. There is nothing unreasonable about use of the median to point to track the percentage of delayed cases.

Finally, contrary to the Agricultural Employers' assertions, the Secretary clearly explained why she issued the Suspension Rule. In addition to the many details given in the Final Rule and noted in the Farmworkers' Opening Brief at 21-24, the Secretary gave the overarching explanation that the Suspension was needed in order "to determine whether the generally reduced wage rates under [the 2008 Rule] are having a depressive effect on farmworker wages." 74 Fed. Reg. at 25,977. Given that need for study, the Secretary explained that overcoming administrative, technical, and logistical difficulties in implementing the 2008 Rule would be a poor use of public and private resources. Id. at 25,973 ("The Department has determined that the agency's mandate is advanced by evaluating the December 2008 Rule, as opposed to bringing a potentially flawed program into full operation. The suspension will allow the Department to focus its resources in a more efficient manner, and will result in a more thorough determination regarding the best direction for the H-2A program").

There is nothing arbitrary or capricious about the Secretary's justification for her actions, including preserving limited agency resources during a period of study of the 2008 Rule when faced with such need for education as that described in the Suspension Rule. See Associated Builders, 976 F. Supp. at 8 (upholding agency action that the agency justified in part by a desire to avoid a "costly and cumbersome process" that would divert agency resources); Virginia Agric.

Growers Ass'n, Inc. v. U.S. Dept of Labor, 756 F.2d 1025, 1031 (4th Cir. 1985) (upholding agency action supported by a rational basis). The Secretary's publication of the multiple reasons for which she felt that she had to suspend the 2008 Rule, satisfied the "concise statement" required by § 553(c). See, e.g., Virginia Agric. Growers Ass'n v. Donovan, 774 F.2d 89, 93 (4th Cir. 1985) (in a challenge to DOL's proposed change in computing the AEWR, this Court wrote, "far from being deficient, the administrative record in this case amply explains the DOL's reasons for abandoning the prior methodology . . . .").

Where the Secretary provided reasoned bases for her actions and followed APA procedures, the Court must find that the Secretary acted properly. In such circumstances, there will always be dissatisfied parties, but that is not a proper basis for reversing agency action. In Hickory Neighborhood Def. League v. Skinner, this Court pointed to the Supreme Court's "identif[ication of] three factors for the reviewing court to consider" in cases where the actions of an administrative agency are at issue. 893 F.2d 58, 61 (4th Cir. 1990). Citing Overton Park, the Hickory court explained:

> First, the court must determine whether the Secretary acted within the scope of his authority. In making this determination, the court must find that the Secretary could have reasonably believed that there were no feasible and prudent alternatives. Second, the court must determine that the Secretary's decision was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. In deciding whether the decision was arbitrary or capricious, "the court must consider whether the decision was based on a consideration of

> the relevant factors and whether there has been a clear error of judgment." However, the reviewing court may not "substitute its judgment for that of the agency." The final factor to consider is whether the Secretary followed all procedural requirements.

Id. (citations omitted). Agricultural Employers do not cite to any authority that would contradict the standard of review set in Overton Park. Secretary Solis plainly acted within her authority, did not abuse her discretion and followed all the procedural requirements in the suspension and reinstatement regulations.[6]

The Agricultural Employers seek to characterize this case in terms of their efforts to prevent the disruption of their settled expectations in reliance on the 2008 Rule's wage rates. However, the record reveals mainly their reluctance to give up profits gained through the 2008 Rule.[7] As a result of the 2008 Rule's lowered wage rates, H-2A employers enjoyed an average 10% reduction in their payroll

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[6] The Agricultural Employers claim that the "DOL never invoked the [good cause] exception…," although DOL did invoke good cause in the court below. See Doc. No. 67, Brief in Support of Defendants' Motion to Stay Grant of Preliminary Injunction (Aug. 4, 2009), North Carolina Growers Association v. Solis (M.D.N.C. No. 1:09 CV 411). Moreover, as discussed in the Farmworkers' Opening Brief, the Secretary adequately invoked good cause in the proposed and final rules.

[7] Based on historical application times, the Department of Labor estimated that 83% of H-2A employers would be grandfathered into being allowed to pay the lower wage rate in the 2008 Rule. See 74 Fed. Reg. at 25,983. To reiterate, the Secretary allowed agricultural employers to "grandfather" into the 2008 regime by filing temporary labor certification applications prior to the effective date of the Suspension Rule. Id. Due to many H-2A employers applying ahistorically early, and just beating the June 29, 2009 cutoff, that 83% estimate is likely lower than the actual percentage of H-2A employers that grandfathered into having their job contracts governed by the terms of the 2008 Rule.

costs, but the record does not show that more than a handful planted more labor-intensive crops. The record shows that employers' windfall came directly out of the pockets of low wage farmworkers – including the U.S. citizen intervenor – who saw an average 10% reduction in their wages. Low-wage farm workers often struggle to provide food, housing, and utilities for their families, and the 10% wage cut deepened this struggle to provide the basic necessities for life. See Record, Doc. No. 37 (Affidavit of Armando Elenes), North Carolina Growers' Association v. Solis (M.D.N.C. No. 1:09 CV 411).[8] The Secretary was more than reasonably concerned that the adverse effect wage rate under the 2008 Rule was failing to

[8] The Agricultural Employers characterize the dramatically lower adverse effect wage rate set under the 2008 Rule as a "more accurate" wage rate for farmworkers. See Appellees' Br. at 8. It cannot be a "more accurate" indicator of farm wages when it was calculated based entirely on surveys of *nonfarm* wages. See 20 C.F.R. § 655.108(e) (setting the AEWR based on the Bureau of Labor Statistics' (BLS) Occupational Employment Statistics (OES) survey); Bureau of Labor Statistics, U.S. Dep't of Labor, BLS Handbook of Methods: Occupational Employment Statistics, ch. 3 at 1, available at *http://www.bls.gov/opub/hom/homch3.htm* ("The Occupational Employment Statistics (OES) survey is a mail survey measuring occupational employment and wage rates of wage and salary workers in nonfarm establishments. . .") (emphasis added) (last visited April 17, 2012). In contrast, the 1987 Rule's wage methodology was based on surveys of average wage rates for field and livestock workers, *i.e.*, the exact occupations filled by H-2A workers. Compare Labor Certification Process for the Temporary Employment of Aliens in Agriculture and Logging in the United States, 52 Fed. Reg. 20,496, 20,504 (June 1, 1987) with Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement, 73 Fed. Reg. 77,110, 77,174 (Dec. 18, 2008); see also Doc. No. 37 at 9-13 (Br. of *Amici Curiae* Representatives Howard Berman, Judy Chu, George Miller, and Lynn Woolsey) (detailing effects on wage methodology of including farm labor contractors but excluding growers).

fulfill its intended purpose -- to protect against an influx of foreign workers driving down U.S. farmworkers' wages. See Williams v. Usery, 531 F.2d 305, 306 (5th Cir. 1976) (finding that the AEWR is designed "to neutralize any 'adverse effect' resultant from the influx of temporary foreign workers. . . . [and to] avoid[] wage deflation"); see also Doc. No. 37 at 9-13 (Br. of *Amici Curiae* Representatives Howard Berman, Judy Chu, George Miller, and Lynn Woolsey).

The Secretary explained in the rulemaking that she was acting in response to the great distress the U.S. economy was undergoing. See 74 Fed. Reg. at 25,977. She noted that rising unemployment and severe economic conditions demanded intervention, so as to avoid any negative impacts on workers as a direct result of the December 2008 Rule. Id. As she explicitly noted, it was critical, in particular, to "ensure no adverse effect on the U.S. worker population" by the 2008 Rule, which in practice appeared to encourage the use of foreign H-2A workers over domestic workers. Id.

In addition to its impact on workers, the 2008 Rule was causing what the Secretary believed to be a "disruptive effect" that demanded immediate attention in light of the economic downturn. Citing to the confusion and difficulty both employers and the agency – as well as the SWA's – were experiencing, the Secretary felt it necessary through a temporary suspension and reinstatement of a

regulation already familiar to the regulated community to halt any further administrative disorder the 2008 Rule was creating.

Amicus take issue with the Secretary's claim of urgency or "time pressures necessitating immediate action." Doc. No. 47 at 19 (Br. of *Amicus Curiae* USA Farmers). Amicus mistakenly argues that because the Secretary waited two months after the close of the comment period before publishing the final suspension rule and then took 30 days after publication of the final rule to give effect to the regulations, that this somehow contradicts the urgency with which the Secretary acted. However, the time with which the Secretary promulgated her rules is in accordance with the APA, and further emphasizes the reasonableness and balancing that the Secretary exercised in rulemaking.

First, the fact that the Secretary waited two months after the close of the comment period before publishing final rules shows that she took care in addressing the approximate eight hundred comments received before publishing a final rule in which she responds to those comments in detail. Given that she is required to address all the substantive concerns raised in the comments, two months is not an unreasonable amount of time in which to do so. Arguing that she should have acted faster contradicts the Appellees' other argument that the Secretary should have taken more time to consider comments. Appellees cannot have it both ways.

Second, the APA requires that agencies give 30 days' notice after a final rule is instituted before giving the rule effect. See 5 U.S.C. § 553(d)(3). That the Secretary did not waive this 30 day period reveal the careful balancing of, on the one hand, employers' reliance on the 2008 Rule and, on the other, protections for farmworkers' wages and access to jobs. Without acknowledging this requirement, Amicus unfairly uses this against the Secretary to argue that this somehow undercuts the Secretary's stated emergency rationale.

Upon assuming office in early 2009, as policy makers in the new Administration began to face the severe economic downturn, the Secretary confronted the 2008 Rule's flawed approach to H-2A wage rates and worker protections, and their likely effects on U.S. agricultural employment. She reasonably decided to suspend the 2008 Rule for study.[9]

b. The Timing of the Suspension NPRM and Suspension Rule Was Reasonable

i. *Seasons vary across the country and between crops.*

[9] The Agricultural Employers would have the Court hold the NPRM to the same standard as the Final Rule. See, e.g., Appellees' Br. at 16 (arguing that "[t]he DOL provided no evidence, explanation, or supporting facts for its conclusory statements, which prevented interested parties from providing meaningful comments that might call into question the factual basis for the DOL's conclusions."). This request should be rejected for confusing the requirements for an effective NPRM and a Final Rule. Compare 5 U.S.C. § 553(b) and § 553(c). The APA requires only a Final Rule to explain the agency's chosen course, because the NPRM is by definition a preliminary notice.

The Agricultural Employers repeatedly attack the Department for proposing the Suspension Rule after some farmers had planned their budgets for the year. Yet participation in the H-2A program – with its requirement to pay the AEWR – is a privilege, as the government offers the H-2A program as an option, but not a requirement, subject only to the statutory mandate that importing H-2A workers not drive down domestic farmworkers' wages or impair their access to jobs. 8 U.S.C. § 1188(a)(1).[10] The Agricultural Employers gloss over the Department's description of the optional nature of the H-2A program in the Final Suspension Rule. 74 Fed. Reg. at 25,980 ("Employers always have had the ability to abandon or withdraw pending applications without penalty.").

Further, many Agricultural Employers assert that the comment period granted by the Department occurred during "the worst possible time" for growers

[10] In comments, some agricultural employers claim their finances would be hurt by having to pay a higher AEWR to H-2A workers for whom they had already petitioned prior to getting notice of the Suspension Rule in the March 2009 NPRM, yet this is simply false. An employer can always withdraw an H-2A petition, and need not bring in workers even after DOL approves an H-2A petition. Further, the grandfather clause in the Suspension Rule meant that petitions filed before June 29, 2009 were governed by the lower AEWR and weaker worker protections of the 2008 Rule. 74 Fed. Reg. at 25,979. Comments responding to the NPRM would have been submitted by the March 27, 2009 comment deadline, therefore by definition would have been submitted prior to the June 29, 2009 date on which the Suspension Rule would have replaced the 2008 Rule. The Secretary considered these comments in deciding to grandfather these petitions into the 2008 Rule, id., and the parade of horribles used to describe imposition of a higher AEWR on H-2A workers applied for prior to the NPRM had no basis in reality because these petitions had been grandfathered into the 2008 Rule regime.

preparing their crops. However, the Secretary must implement a national H-2A program that applies to agricultural employers in all fifty states. The Farmworkers request this Court to take notice of the fact that growing and harvest seasons vary across the country and between crops. It would be difficult, if not impossible, for the Secretary to ever find a comment period that avoids seasonal peaks for one or more industries or areas affected.[11]

In fact, even the North Carolina farmers who claim the most prejudice from the timing responded vigorously to the NPRM. Comments from more than 400

[11] See, e.g., J.A. 316 (Domtar comment) (logging harvest season begins "about June 1"); J.A. 483 (Comment of Jeff Aiken) (Tennessee farmer's harvest season is August through September); J.A. 504 (ALTA Citrus comment) ("December is the beginning of the Citrus Harvesting Season in Florida"); United States v. Ninety-Five Barrels More or Less Alleged Apple Cider Vinegar, 265 U.S. 438, 440, 44 S. Ct. 529, 530 (1924) ("During the apple season, from about September 25 to December 15. . ."); Aguilar Murillo v. Servicios Agricolas Mex., Inc., Case No. 07-2581, 1012 WL 1030084, at *1 (D. Ariz. March 27, 2012) (Arizona citrus harvest season "from approximately late August or early September of one year to late February or early March of the following year"); Jean v. Torrese, Case No. 10–22467, 2011 WL 5563446, at *7 (S.D. Fla. Nov. 15, 2011) (Florida bean picking season "from approximately November 15, 2009 through May 15, 2010"); Napoles-Arcila v. Pero Family Farms, LLC, Case No. 08-80779, 2009 WL 1585970, at *X (S.D. Fla. June 4, 2009) (Florida vegetable harvest from October through May); Silva-Arriaga v. Texas-Express, Inc., 222 F.R.D. 684, 687 (M.D. Fla. 2004) (Florida lemon harvest runs July until September); Antuñez v. G & C Farms, Inc., Case No. 92–0308, 1993 WL 451344, at *1 (D.N.M. Aug. 9, 1993) (New Mexico chile harvest is "[f]rom October … through January"); Leach v. Johnston, 812 F. Supp. 1198, 1201 (M.D. Fla. 1992) (Florida vegetable harvest including cabbage, cucumbers, squash, peppers and potatoes ran from late November until late May or early June).

North Carolinians appear in the Administrative Record.[12] Absent a showing of prejudice, the APA is not violated. 5 U.S.C. § 706. The Agricultural Employers cannot show the prejudice required by Section 706 where they participated in the rulemaking process. See Columbia Venture LLC v. S.C. Wildlife Fed'n, 562 F.3d 290, 295 & n.5 (4th Cir. 2009) (finding no prejudice where plaintiff was involved in the administrative process).

ii. The ten-day comment period was reasonable in a temporary suspension context

Agricultural Employers concede that the ten-day comment period is not a *per se* violation of the APA. Appellees' Br. at 38. In fact "the APA mandates no minimum comment period." Riverbend Farms, Inc. v. Madigan, 958 F.2d 1479, 1484 (9th Cir. 1992); see also 5 U.S.C. 553(b)(B).[13] The Agricultural Employers

[12] See Administrative Record at DOL000046 – 2282, North Carolina Growers Association v. Solis (M.D.N.C. No. 1:09 CV 411). A sample of comments from North Carolinians are in the joint appendix, see J.A. at 343-344 (North Carolina State Grange); 347-348 (David Davenport); 387-390 (Scott Tyson Comment); 398-421 (NCGA); 460-464 (North Carolina Commissioner of Agriculture); 467-469 (Frank Hobson); 470-471(John Carter/Carter Farms); 472-473 (Brent Jackson/JFC Melons); 474-475 (Sue Leggett); 476-480 (North Carolina Farm Bureau); 489-491 (Charles Wainwright); 507-508 (North Carolina Pickle Producers Ass'n); 582-585 (North Carolina Agribusiness Council Comment); 586-588 (North Carolina Christmas Tree Ass'n).

[13] To ensure there is no confusion, agencies are required to allow thirty days to pass between the time the final rule is published and the time it takes effect. 5 U.S.C. § 553(d). The Secretary complied with this provision by setting an effective date 30 days after the publication of the Final Suspension Rule. 74 Fed. Reg. at 25,979.

cite the same cases that the DOL cited in the Suspension Rule, at 74 Fed. Reg. 25,978, where courts have found short comment periods valid, only reinforcing that the Secretary did in fact have authority to issue a 10-day comment period where it found urgent action was necessary. See generally Omnipoint Corp. v. FCC, 78 F.3d 620 (D.C. Cir. 1996); Florida Power and Light Co. v. United States, 846 F.2d 765 (D.C. Cir. 1988); Northwest Airlines, Inc. v. Goldschmidt, 645 F.2d 1309 (8th Cir. 1981).[14] Agricultural Employers cite no authority to the contrary. As the Court reviews the Secretary's decision here, the Farmworkers urge it to conclude that "[t]he [suspension and reinstatement] rule rationally balances the need for an adequate seasonal labor force with the goal of protecting the wages and conditions of domestic workers similarly employed." Virginia Agric. Growers Ass'n, Inc. v. U.S. Dept. of Labor, 756 F.2d 1025, 1031 (4th Cir. 1985).

c. The Administrative Record Constitutes the Record on Review

The reasonableness of the agency's actions is judged on the Administrative Record, rather than a party's characterizations of the agency's motives. See In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency, 156 F.3d 1279, 1279-1280 (D.C. Cir. 1998) ("the actual subjective motivation of

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[14] The Agricultural Employers seek to distinguish these cases by pointing out that the urgency in those cases involved either congressional mandate to act promptly or an external force requiring quick action. However, the Secretary adequately explained her need to act quickly in this case. See supra at 15-17.

agency decisionmakers is immaterial as a matter of law…."); Virginia Agric. Growers Ass'n, Inc. v. Donovan, 774 F.2d 89, 92-93 (4th Cir. 1985). Judicial review of agency action will not focus on a party's dissatisfaction with the results of the suspension or suppositions of the Secretary's motives without a "strong showing of bad faith." Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420, 91 S. Ct. 814, 825 (1971) overruled on other grounds by Califano v. Sanders, 430 U.S. 99 (1977).

Secretary Solis's concern for the effects for the 2008 Rule on farmworkers' wages, and access to jobs in no way evidences bad faith in her suspension of the 2008 Rule. Rather it shows that the Secretary assumed a strong commitment to ensuring that wage regulations serve their statutory purpose of supporting fair wages for farmworkers, a valid concern for any public official, especially the Secretary of Labor. See 8 U.S.C. § 1188(a)(1). The Agricultural Employers' characterizations of the Secretary's motives find no support in the record, and the Farmworkers urge the Court to reject these characterizations of the Secretary's motives as improper.

VI. Interpreting "Agriculture" to Exclude Christmas Tree Farming Did Not Violate the APA.

Agricultural Employers mistakenly argue that the effect of the Suspension Rule on the interpretation of Christmas tree growing as "non-agriculture" was arbitrary and capricious. Appellees' Br. at 42-44. Agricultural Employers further

describe the Secretary's interpretation of the term "agriculture" to exclude Christmas tree production as a "regulatory fiat" in contravention of the FLSA. Appellees' Br. at 44. Farmworkers disagree with this analysis, as the Final Suspension Rule makes clear that the Secretary carefully considered her actions and wanted to ensure "an opportunity for additional review with an explicit focus on the ramifications of the rule on the implementation of the FLSA" and to understand "the impact of this change on child labor protections" 74 Fed. Reg. at 25982. The Secretary herself assured the community that "[g]iven the longstanding nature of the Department's prior position on this issue, and the removal of FLSA wage and child protections that the December 2008 Rule triggered, . . . a suspension of the December 2008 Rule in its entirety is appropriate to provide an opportunity for a more complete review of this important regulatory issue." Id. These important considerations cannot be characterized as arbitrary or capricious.

Critical to this discussion is that the Secretary acknowledged the necessity of complying with the decision in NCGA while balancing and considering the "adverse impacts that the December 2008 Rule's FLSA regulatory changes might have on our Nation's most vulnerable workers, including low wage workers and youth," as an eventual final rule was promulgated. Id. Therefore, the Secretary's

action merits proper deference as to this issue, as the effect of the Suspension was temporary in nature, and was reasonable and within her scope of authority.

CONCLUSION

For the reasons stated herein and in the Opening Brief, the Farmworkers respectfully request this Court to reverse the Order at bar, vacate the summary judgment grant to the Agricultural Employers, enter summary judgment for the Farmworkers, and remand for further proceedings.

Respectfully submitted this 30th day of April, 2012.

s/ Naomi Tsu
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Counsel for Appellant Farmworkers

CERTIFICATE OF COMPLIANCE

This brief complies with the requirements of Rule 32. This brief contains 6,398 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Signed this 30th day of April, 2012.

s/ Naomi Tsu
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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2012, I caused the foregoing to be electronically filed with the Clerk of Court using the CM/ECF system which will send notification to the following: William Randolph Loftis, Jr. and Robin E. Shea.

This is the 30th day of April 2012.

s/ Naomi Tsu

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