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)

TABLE OF AUTHORITIES

Cases

Labor Certification Process for the Temporary Employment of Aliens in

ARGUMENT

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, 514 (2009). [illegible]

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").

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

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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

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

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

f.

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

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

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

> 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

[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, s65(e39327(s65(e23501(c65.2371(u)35.23657( )1.)3.32624(d)-5.2371(.(i30057(p)-5.2.32624(d)-

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 t

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

The Agricultural Employers repeatedly attack the Department for proposing the Suspension Rule after some farmers had planned their budgets for the year.

agency decisionmakers is immaterial as a matter of

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

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 B

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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