UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE NATIONAL COUNCIL OF AGRICULTURAL EMPLOYERS,

Plaintiff,

v.

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

Defendants.

Civil Action No. 1:22-cv-03569-RC

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiff, the National Council of Agricultural Employers ("NCAE"), has abandoned most of its claims challenging various provisions governing DOL's issuance of "temporary agricultural labor certifications" under the "H-2A" program and narrowed this case to two procedural challenges: that the Office of the Federal Register ("OFR") should have published the 2021 Draft Final Rule and that the Department of Labor ("DOL") should have re-solicited comments before publishing the 2022 Final Rule. Defendants are entitled to summary judgment on both challenges.

As to the first, as this Court has held, Plaintiff lacks standing to challenge the pre-public inspection withdrawal of the 2021 Draft Final Rule. Plaintiff and its members were not injured by OFR's failure to publish that document, which, if published, would have imposed—almost two years earlier—the surety bond increases and prevailing wage methodology changes in the 2022 Final Rule that Plaintiff points to in its complaint. If anything, Plaintiff benefitted from the lack of publication in 2021 because the increased surety bond requirements were deferred for nearly two years. Even if Plaintiff could establish injury, Plaintiff lacks standing because the relief Plaintiff seeks is not redressable. In its motion, Plaintiff does not ask the Court to require publication of the 2021 Draft Final Rule, but instead requests only a declaratory judgment about OFR's obligations—an order that would constitute a mere advisory opinion. Thus, this challenge should be dismissed. If the Court reaches the merits, Defendants are entitled to summary judgment because OFR did not violate any statute or regulation in its handling of the 2021 Draft Final Rule.

As to the second, Defendants are entitled to summary judgment because DOL was not required to offer a second comment period prior to publishing the 2022 Final Rule. DOL complied with the Administrative Procedure Act's process for ensuring that the public has adequate notice of the changes being considered by the agency and a meaningful opportunity to submit feedback by issuing a Notice of Proposed Rulemaking ("NPRM") in 2019, considering the tens of thousands of comments it received in response (including one from Plaintiff), and publishing a final rule in 2022. Unsurprisingly, then, Plaintiff does not argue that DOL wholly failed to solicit comments. Nor does Plaintiff assert that the 2019 NPRM inadequately previewed the changes found in the

2022 Final Rule, an assertion that would fail given that the provisions of the 2022 Final Rule that Plaintiff originally challenged in its complaint were undoubtedly the logical outgrowth of the 2019 NPRM in that they appeared in both the proposed and final rules. Instead, Plaintiff presents a novel argument, unsupported by precedent: that DOL was required to afford the public a *second* opportunity to comment before publishing the 2022 Final Rule.

Plaintiff's argument rests on the flawed premise that the 2021 Draft Final Rule became final, and could not be withdrawn without further notice and comment, even before OFR made it available for public inspection. Plaintiff's novel theory disregards *Kennecott Utah Copper Corp. v. Dep't of Interior*, 88 F.3d 1191 (D.C. Cir. 1996) and misreads *Humane Society of the United States v. U.S. Dep't of Agriculture*, 41 F.4th 564 (D.C. Cir. 2022). Under that precedent, as the D.C. Circuit explained earlier this year, "[u]ntil [OFR makes a document available for public inspection], it may be withdrawn without explanation or notice and comment and is 'not valid' and enforceable against the public at large." *GPA Midstream Ass'n v. U.S. Dep't of Transp.*, 67 F.4th 1188, 1195 (D.C. Cir. 2023). Plaintiff seeks to replace that clear test with one that would require routine wrangling over whether regulated entities had sufficiently "ample notice" to convert a draft rule into a final one. In any event, Plaintiff does not prevail under its own proposed framework because, as the Court has stated, the public did not have notice that the draft rule was final; instead, DOL warned that only "the version published in the Federal Register" would be the official regulation. Such publication never occurred, the draft final rule never became a final one, and the draft final rule was never enforceable—or enforced—by DOL. Thus, DOL was under no obligation to restart the comment period before issuing the 2022 Rule. Defendants are entitled to summary judgment on this claim.

Because Plaintiff abandons the remainder of the claims in its complaint—all of which are without merit, in any event—the Court should deny Plaintiff's motion for summary judgment and enter judgment for Defendants.

BACKGROUND

I. Statutory Framework

The Immigration and Nationality Act ("INA"), as amended by the Immigration Reform and Control Act of 1986, establishes an "H-2A" nonimmigrant visa classification for a worker "having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services . . . of a temporary or seasonal nature." 8 U.S.C. § 1101(a)(15)(H)(ii)(a); *see also* 8 U.S.C. §§ 1184(c)(1), 1188. The statute requires multiple federal agencies to take several steps before foreign workers may be admitted to the United States under this classification. A prospective H-2A employer must first apply to DOL for a certification that:

> (A) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and
> (B) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

8 U.S.C. § 1188(a)(1). Congress prohibits DOL from issuing this certification—known as a "temporary agricultural labor certification"—unless both of the above-referenced conditions are met and none of the conditions in 8 U.S.C. § 1188(b) apply concerning strikes or lock-outs, labor certification program debarments, workers' compensation assurances, and positive recruitment.

Once an employer obtains a temporary agricultural labor certification from DOL, it may then file a petition for a nonimmigrant worker with the Department of Homeland Security ("DHS"). *See* 8 U.S.C. § 1184(c). If the petition is approved, the foreign workers whom the employer seeks to employ must generally apply for a nonimmigrant H-2A visa at a U.S. embassy or consulate abroad, and seek admission to the United States with U.S. Customs and Border Protection.

II. Regulatory Framework

A. Prior Regulatory Framework

Since 1987, DOL has operated the H-2A temporary labor certification program under regulations promulgated pursuant to the INA. The standards and procedures applicable to the certification and employment of workers under the H-2A Program are found in 20 C.F.R. part 655, subpart B, and 29 C.F.R. part 501. Prior to November 14, 2022, most of DOL's regulations governing the H-2A Program had been published in 2010. 75 Fed. Reg. 6,884 (Feb. 12, 2010).

B. July 2019 Notice of Proposed Rulemaking

On July 26, 2019, DOL published an NPRM requesting public comment on proposals intended to modernize and simplify the process by which the Office of Foreign Labor Certification ("OFLC")[1] reviews employers' job orders and applications for temporary agricultural labor certifications for use in petitioning DHS to employ H-2A workers. *See* 84 Fed. Reg. 36,168. DOL also proposed to amend the regulations for enforcement of contractual obligations applicable to the employment of H-2A workers and workers in corresponding employment administered by the Wage and Hour Division ("WHD"),[2] and to amend the Wagner-Peyser Act regulations administered by the Employment and Training Administration ("ETA") to provide consistency with revisions to H-2A Program regulations governing the temporary agricultural labor certification process. *Id.* Of particular relevance here, the NPRM sought comments on changes to the methodology used to determine prevailing wages, which is one of the applicable wage sources in the H-2A Program. *Id*. at 36,171. The NPRM also sought comments on changes to the provision requiring H-2A labor contractors ("H-2ALCs," referred to by Plaintiff as "Farm Labor

[1] The Secretary of Labor has delegated the authority to issue temporary agricultural labor certifications to the Assistant Secretary for Employment and Training, who in turn has delegated that authority to OFLC. *See* 75 Fed. Reg. 66,268 (Oct. 27, 2010).

[2] The Secretary of Labor has delegated the responsibility under 8 U.S.C. § 1188(g)(2) to assure employer compliance with the terms and conditions of employment under the H-2A Program to WHD. *See* 79 Fed. Reg. 77,527 (Dec. 24, 2014).

Contractors" or "FLCs") to submit with their applications proof of their ability to discharge their financial obligations in the form of a surety bond. *Id.* at 36,203.

1. Changes to the Prevailing Wage Methodology

As noted above, before an employer can file an H-2A visa petition with DHS, they must first seek a temporary labor certification that employment of the foreign worker "will not adversely affect the wages and working conditions of workers in the United States similarly employed." 8 U.S.C. § 1188(a)(1)(A), (B). DOL meets Section 1188's requirements, in part, by requiring employers to offer, advertise in their recruitment, and pay a wage that is the highest of the adverse effect wage rate ("AEWR"), the prevailing wage, the agreed-upon collective bargaining wage, the federal minimum wage, or the state minimum wage. *See* 20 C.F.R. §§ 655.120(a), 655.122(*l*). In the NPRM, DOL proposed to revise the AEWR methodology, which is not at issue in the case,[3] and the prevailing wage methodology. 84 Fed. Reg. at 36,180–88.

DOL proposed several revisions to the prevailing wage methodology that State Workforce Agencies ("SWAs") use to conduct prevailing wage surveys. Before the 2022 Rule, SWAs were "required to conduct prevailing wage surveys using standards set forth in [ETA] Handbook 385, which pre-dates the creation of the H-2A [P]rogram and ha[d] not been updated since 1981," and other sub-regulatory guidance. 84 Fed. Reg. at 36,184. Handbook 385 required such surveys to include a "substantial number of personal employer interviews" and be conducted using listed sample sizes that SWAs "should" follow. 84 Fed. Reg. at 36,184–85.

Given resource constraints imposed on SWAs that have developed in the years since DOL issued ETA Handbook 385, DOL found many of these requirements to be "unrealistic." *Id.* at 36,185. "Due to the continued use of these standards, the SWAs are often required to report that the State cannot produce a finding for a given crop activity or agricultural activity because the completed survey cannot meet methodological standards." *Id.* Therefore, DOL found that "the

[3] Generally, DOL proposed to establish separate AEWRs by agricultural occupation—rather than establishing one state or regional AEWR for all H-2A job opportunities for all field and livestock workers combined—to better protect against an adverse effect on the wages of similarly employed workers in the United States. 84 Fed. Reg. at 36,180–84.

current wage methodology both wastes State and Federal resources and fails to produce reliable and accurate prevailing wage rates for employers and workers." *Id.*

In the 2019 NPRM, DOL proposed to "modernize the prevailing wage methodology" to allow "SWAs and other State agencies to conduct surveys using standards that are realistic in a modern budget environment, while also establishing reliable and accurate prevailing wage rates for employers and workers." *Id.* DOL proposed updated requirements for establishing a prevailing wage, including altering the sampling parameters SWAs would be required to use to have their survey validated. *See id.* at 36,265 (*e.g.*, the survey must report "the average wage of U.S. workers in the crop activity or agricultural activity and geographic area using the unit of pay used to compensate at least 50 percent of the workers whose wages are surveyed"; the survey must include at least thirty U.S. workers' wages; the survey must account for at least five employers; one employer cannot account for more than twenty-five percent of sampled wages).

The NPRM invited public comments on the proposed changes to the prevailing wage methodology "as well as any alternate prevailing wage survey requirements." *Id.* at 36,188. DOL was "particularly interested in comments that address how the recommended standard will meet [DOL's] objective to produce reliable and accurate prevailing wage rates for employers and workers in a manner consistent with available resources at the State and Federal levels." *Id.*

2. Surety Bond Requirement and Proposed Changes to Required Surety Bond Amounts

The NPRM also sought comment on changes to the provision requiring H-2ALCs to submit proof of their ability to discharge their financial obligations in the form of a surety bond. *Id.* at 36,203. "This bonding requirement, which became effective in 2009, allows the Department to ensure that labor contractors, who may be transient and undercapitalized, can meet their payroll and other program obligations, thereby preventing program abuse." *Id.* After a final decision that a particular H-2ALC has violated its obligations to workers, the "WHD Administrator may make a claim to the surety for payment of wages and benefits owed to H-2A workers, workers in corresponding employment, and U.S. workers improperly rejected from employment, laid off, or displaced, up to the face amount of the bond." *Id.* Despite increases in wages, the bond amounts

had remained unchanged over the prior decade, ranging from $5,000 to $75,000 depending on the number of H-2A workers employed by the H-2ALC. *Id.* at 36,204 (explaining that, for certifications covering fewer than 75 workers, the bond amounts have been unchanged since 2009; for certifications covering 75 or more workers, the amounts have been unchanged since 2010). In the 2019 NPRM, DOL proposed adjusting the bond amounts "to reflect annual increases in the AEWR and to address the increasing number of certifications covering a significant number of workers (*e.g.,* more than 150 workers)." *Id.* at 36,203. DOL proposed these changes because it had "found that the current bond amounts often are insufficient to cover the amount of wages and benefits owed by labor contractors, limiting the Department's ability to seek back wages for workers." *Id.* at 36,204.

Specifically, DOL proposed two changes to the required bond amounts. First, DOL proposed to update the required bond amounts to reflect recent increases in farmworker wages as reflected by changes in the AEWR. *Id.* The idea was straightforward: Because a surety bond serves as security for wages and benefits owed to farmworkers, the required bond amount must account for increases in wages owed. In 2010, the bond amounts were set assuming an AEWR of $9.25; as of the 2019 NPRM, the average AEWR was $12.20. *Id.* DOL therefore proposed adjusting the existing required bond amounts to account for that increase and to make annual adjustments going forward. *Id.* Second, DOL proposed increasing the required bond amounts for certifications covering 150 or more workers. *Id.* Previously, bond amounts were determined based on the number of H-2A workers sought in the certification application with the following five tiers: (1) fewer than 25 workers, (2) 25–49 workers, (3) 50–74 workers, (4) 75–99 workers, and (5) more than 100 workers. *Id.* at 36,233. DOL explained that, in recent years, labor certifications were sought for an increasing number of workers. For example, between Fiscal Years 2014 and 2018, labor certifications covering 150 or more workers jumped from 4.7 percent of total certifications to 9.8 percent. *Id.* at 36,204–05. Further, while no certifications covered 500 or more workers in Fiscal Year 2014, several in Fiscal Year 2018 covered nearly 800 workers. *Id.* at 36,205. Together, these proposed changes were meant to keep the required surety bond amounts apace

with two changes in the H-2A Program: higher wages and certifications covering increased numbers of workers. DOL also proposed other changes to the surety bond requirements, including extending the time period in which the bond could be enforced from "no less than [two] years" to three years. *Id.* at 36,204.[4]

3. Request for Comments and NCAE's Comment Letter

The NPRM invited written comments from the public on all aspects of the proposed amendments to the regulations, including "on the specific adjustments proposed, as well as alternative means of adjusting the bond amounts to better reflect risk and ensure sufficient coverage." *Id.* at 36,204. DOL received more than 83,000 comments, including many regarding the proposed changes to the surety bond requirements and prevailing wage methodology. 87 Fed. Reg. at 61,664, 61,733, 61,690–701. Plaintiff submitted a 27-page comment letter. *See* Comment of National Council of Agricultural Employers – Marsh, Michael (Oct. 4, 2019), *available at* https://www.regulations.gov/comment/ETA-2019-0007-0354 (hereinafter "NCAE Comment"). Plaintiff dedicated more than a page of its comments to the proposed changes to the surety bond requirements, stating that, in the absence of additional information, it did not see "the justification for raising surety bond amounts in the fashion proposed by" DOL. *Id.* at 21. Plaintiff therefore "urge[d] the Secretary to carefully reconsider its approach" to the proposed changes to the surety bond provision. *Id.* at 22; *see also* Declaration of Michael Marsh ("Marsh Decl."), ECF No. 12-2, ¶ 10 ("NCAE also offered comment about some damaging things the Department proposed as well[,] explaining the harm that increasing the face value of surety bonds for [H-2ALCs] would have on the industry . . . ."). Plaintiff also commented on the proposed prevailing wage methodology changes. For example, Plaintiff stated that it "*doubts* whether the proposed change, and change in methodology, will result in a true prevailing wage." NCAE Comment at 12 (emphasis in original); *id.* at 12–13 (raising concerns that there "are far too many factors for the

[4] The NPRM addressed a host of other proposed changes to the H-2A Program. This background section focuses on the proposed changes to the surety bond requirements and prevailing wage methodology because those are the provisions of the 2022 Rule that Plaintiff appears to challenge in the Complaint.

Secretary to assess to create an accurate prevailing wage rate" and asserting that "[i]t may be that" and "[i]t could also be that" the proposed methodology would not generate an accurate prevailing wage rate).

C. 2021 Draft Final Rule

At the end of the last administration, on January 11, 2021, DOL transmitted to OFR a draft of an unpublished final rule covering aspects of the NPRM other than those that were addressed in late 2020.[5] ECF No. 26-2 ¶¶ 1–3; *see* ECF 23-2, ¶ 59, Draft Rule, *Temporary Agricultural Employment of H-2A Nonimmigrants in the United States* (Jan. 20, 2021), https://perma.cc/EZK4-JV35 (hereinafter "Draft Rule" or "2021 Draft Final Rule"). On January 14, 2021, in response to a request for "immediate filing" and "emergency publication," OFR informed DOL that "the relentless backlog of regulatory documents" during that period "prevented an emergency editor from picking up" the document. ECF No. 26-2 ¶¶ 4–5. OFR explained to DOL that, "[g]iven [the] backlog, we will not be able to file immediately or publish by" January 19, 2021. *Id*. ¶ 5.

On January 15, 2021, DOL posted the 2021 Draft Final Rule on OFLC's website, asserting that the document was pending publication in the Federal Register with a 30-day delayed effective date. *See* Draft Rule. The 2021 Draft Final Rule included, on every page, a disclaimer that explained that it was not yet the final regulation: "Only the version published in the Federal Register is the official regulation." *Id*. The disclaimer also noted that the 2021 Draft Final Rule had not yet been made available for public inspection. *Id.* ("This regulation has been submitted to [OFR] for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register.").

Upon DOL posting the 2021 Draft Final Rule on its website, in an email sent on January 15, 2021 and later forwarded by Plaintiff's President and CEO to Plaintiff's counsel, one of Plaintiff's members described the Draft Final Rule as "[l]ikely to be caught up in [the] incoming

[5] DOL most recently addressed the methodology by which the agency determines the hourly AEWR for non-range agricultural occupations in a rule published on February 28, 2023. Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States, 88 Fed. Reg. 12,760 (Feb. 28, 2023).

administration's 60-day regulatory freeze," predicting that it was "[h]ighly questionable" whether "it sees the light of day in published form." Marsh Decl. Ex. E; *see also* Marsh Decl. ¶ 15. Plaintiff expected revisions to the 2021 Draft Final Rule before a final regulation was published: "[T]he most unpalatable scenario is that we see the employer-friendly provisions jettisoned, and the tougher enforcement etc. eventually adopted." Marsh Decl. Ex. E. "Nothing will change fast, is the bottom line." *Id.*

As for its contents, the 2021 Draft Final Rule addressed comments received on, among other items, proposed changes to the surety bond and prevailing wage methodology provisions. Regarding the surety bond provision, DOL explained that, "[a]fter carefully considering these comments"—including those submitted by Plaintiff, as described above—DOL "decided to largely adopt the regulatory text proposed in the NPRM . . . ." Draft Rule at 11. The 2021 Draft Final Rule explained that DOL "disagree[d] with commenters arguing that bond amounts should not be increased," noting that, "[b]ased on the Department's enforcement experience, bond amounts are often insufficient to cover the amount of wages and benefits owed by H-2ALCs, limiting the Department's ability to seek back wages for workers." *Id.* at 326. Because "bond amounts have remained the same since 2010," the 2021 Draft Final Rule concluded that "these amounts do not reflect subsequent wage growth or the dramatic increase in the number of workers covered by certifications." *Id.* And, to the extent H-2ALCs "lack the financial resources and/or creditworthiness to obtain the requisite bonds, it may be appropriate for these contractors to hire fewer workers." *Id.* at 327. The 2021 Draft Final Rule also would have changed the period in which claims could be made against the surety from "no less than [two] years" to three years. *Id.* at 320. The 2021 Draft Final Rule described one change to the proposed bond amount increases found in the NPRM: adding an additional bond amount tier for certifications covering fewer than 10 workers. *Id.* at 325. Otherwise, the 2021 Draft Final Rule, had it taken effect, would have adopted the proposed changes to the bond amounts set forth in the NPRM.

As for the prevailing wage methodology, DOL "received comments both in support of and in opposition to [its] proposals." Draft Rule at 122. After considering them, the 2021 Draft Final

Rule explained that DOL would adopt two of the nine requirements "unchanged from the NPRM" as well as the other requirements "with some changes." Draft Rule at 122. Those other changes were "minor revision[s]," *see, e.g.,* Draft Rule at 124–25, or other limited modifications to the proposed rule text addressing technical issues identified by commenters, *see, e.g.,* Draft Rule at 135–52, 155–61. But the 2021 Draft Final Rule would have largely adopted the same requirements as those proposed in the NPRM regarding the prevailing wage methodology.

D. Withdrawal of 2021 Draft Final Rule Prior to Public Inspection

On January 20, 2021, prior to the 2021 Draft Final Rule being published in the Federal Register and prior to OFR making it available for public inspection, DOL requested that OFR withdraw the document from processing "for the purpose of reviewing issues of law, fact, and policy raised by the rule." *See* Announcement, *U.S. Department of Labor Withdraws Forthcoming H-2A Temporary Agricultural Program Rule for Review*, (Jan. 20, 2021), https://perma.cc/CTW2-VH2U; *see also* 87 Fed. Reg. at 61,664 n.11. DOL explained that the 2021 Draft Final Rule "therefore . . . will not take effect." Announcement, *supra*. The withdrawal was publicly announced on DOL's website. *Id*. On or about that same day, Plaintiff's President and CEO learned that DOL had withdrawn the 2021 Draft Final Rule. Marsh Decl. ¶ 19.

E. 2022 Final Rule

On October 12, 2022, after completing its review, DOL published in the Federal Register a final rule addressing all aspects of the NPRM other than those that were addressed in late 2020 with respect to the AEWR methodology. 87 Fed. Reg. 61,660 (Oct. 12, 2022) (the "2022 Rule" or "2022 Final Rule"). Among other issues, the 2022 Final Rule improved the minimum standards and conditions of employment that employers must offer to workers; expanded DOL's authority to use enforcement tools, such as program debarment for substantial violations of program requirements; modernized the process by which DOL receives and processes employers' job orders and applications for temporary agricultural labor certifications, including the recruitment of American workers; and revised the standards and procedures for determining the prevailing wage rate. *Id*.

Among other modifications, the 2022 Final Rule revised the surety bond requirements applicable to H-2ALCs. *See* 87 Fed. Reg. at 61,803–04 (codified at 20 C.F.R. § 655.132). DOL had proposed in the 2019 NPRM two primary changes to the required surety bond amounts: annual wage growth adjustments and a higher ceiling for certifications covering large numbers of workers. Both of those changes were adopted in the 2022 Final Rule as originally proposed in the 2019 NPRM. *Id.* at 61,738. Both of those changes were also found in the 2021 Draft Final Rule and would have taken effect in 2021 had the 2021 Draft Final Rule been published in the Federal Register. *See* Draft Rule at 307, 326–27. And, as proposed in the 2019 NPRM and as set forth in the 2021 Draft Final Rule, the time that a claim can be filed against a surety was extended from "no less than [two] years" to three years. 87 Fed. Reg. at 61,737. Consistent with the 2019 NPRM, though unlike the 2021 Draft Final Rule, the 2022 Final Rule did not add a new tier of bond amounts for certifications covering fewer than 10 workers. *See id.* at 61,786. As noted in the 2022 Final Rule, DOL promulgated these changes only after considering, among others, Plaintiff's comments and those of other trade associations. *See id.* at 61,737.

The 2022 Rule also adopted prevailing wage methodology provisions consistent with those proposed in the 2019 NPRM and appearing in the 2021 Draft Final Rule. *See* 87 Fed. Reg. at 61,796–97 (codified at 20 C.F.R. § 655.120(c)). The prevailing wage methodology provisions that the 2022 Final Rule promulgated at 20 C.F.R. § 655.120(c)(1)(i)–(ix) are substantively identical to those posted on DOL's website in draft format in January 2021. *Compare* 87 Fed. Reg. at 61,696–97, *with*, Draft Rule at 577–79.[6]

The 2022 Rule has been in effect since November 14, 2022. *Id.*; *see also id.* at 61,792–93. Applications for temporary employment certification submitted on or after November 14, 2022

[6] The only technical difference is found in 20 C.F.R. § 655.120(c)(1)(ix). The 2022 Final Rule, which, unlike the 2021 Draft Final Rule, underwent OFR's technical editing process, clarified in 20 C.F.R. § 655.120(c)(1)(ix) that "[t]his paragraph (c)(1)(ix) does not apply where the estimated universe of employers is less than four." 87 Fed. Reg. at 61,797. The 2021 Draft Final Rule, however, stated that "[t]his paragraph does not apply where the estimated universe of employers is less than four," creating a degree of ambiguity with respect to whether the paragraph referred to was paragraph (1)(ix) or all of paragraph (1).

with a start date of need on or after February 13, 2023 have been processed under the provisions of the 2022 Rule.

III. Procedural Background

On November 23, 2022—22 months after DOL withdrew the 2021 Draft Final Rule from OFR—Plaintiff filed a six-count Complaint against Defendants DOL, OFR, their components, and several official capacity Defendants. ECF No. 1 ("Compl."). Counts 1–2 challenge DOL's withdrawal of the 2021 Draft Final Rule from OFR under the Administrative Procedure Act ("APA"). Compl. ¶¶ 81–88. Count 3 raises APA claims challenging OFR's failure to publish the 2021 Draft Final Rule. *Id.* ¶¶ 89–92 (alleging OFR's actions were "arbitrary, capricious," and "not in accordance" with the Federal Register Act, 44 U.S.C. § 1501 *et seq.* ("FRA")). Counts 4–6 raise APA claims challenging provisions of the 2022 Rule as arbitrary and capricious or promulgated without statutory authority. *Id.* ¶¶ 93–102. The Complaint seeks declaratory and injunctive relief, as well as vacatur. *Id.*, Prayer for Relief.

On November 25, 2022, Plaintiff moved for a temporary restraining order ("TRO") and preliminary injunction. ECF No. 4. After a hearing, the Court denied Plaintiff's motion insofar as it sought a TRO. ECF No. 10. On December 13, 2022, Plaintiff renewed its motion for a preliminary injunction, ECF No. 12, which the Court denied on February 16, 2023, ECF No. 21.

On July 6, 2023, Plaintiff moved for summary judgment. ECF No. 26. In its brief, Plaintiff abandons most of the claims found in its complaint, including Counts 4–6, which pertained to the surety bond and prevailing wage provisions. ECF No. 26-1.

LEGAL STANDARD

"In actions under the APA, summary judgment is the appropriate mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA[.]" *Safari Club Int'l v. Jewell*, 960 F. Supp. 2d 17, 45 (D.D.C. 2013) (citation omitted). The Court "sits as an appellate tribunal to review the purely legal question of whether the agency acted in an arbitrary and capricious manner." *Franks v. Salazar*, 816 F. Supp. 2d 49, 55–56 (D.D.C. 2011) (citation omitted). The Court's review "is limited to the

administrative record," *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 105 (D.D.C. 1995) (citing *Camp v. Pitts*, 411 U.S. 138, 142 (1973)), and its role is restricted to "determin[ing] whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did," *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 90 (D.D.C. 2006) (citation omitted). "'[T]he party challenging an agency's action as arbitrary and capricious bears the burden of proof.'" *City of Olmsted Falls, OH v. FAA*, 292 F.3d 261, 271 (D.C. Cir. 2002) (citation omitted).

SUMMARY OF THE ARGUMENT

Plaintiff cannot prevail on any the six counts in its Complaint, *see* Compl. ¶¶ 81–102, or on the challenge that it now presses in its summary judgment brief, *see id.* ¶ 80.

Counts 1–3—direct challenges to DOL's withdrawal or OFR's failure to publish the 2021 Draft Final Rule—should be dismissed on standing and laches grounds. If the Court reaches the merits on these counts, it should, consistent with D.C. Circuit precedent, enter judgment in Defendants' favor because DOL was not required to use notice-and-comment procedures before withdrawing the 2021 Draft Final Rule or to explain that withdrawal, and because OFR complied with the FRA and OFR's regulations in processing DOL's request to withdraw the document.

Counts 4–6—challenges to the surety bond and prevailing wage methodology provisions of the 2022 Rule—have been abandoned by Plaintiff, and judgment should be entered in Defendants' favor. Count 6 should also be dismissed on standing grounds as Plaintiff has not demonstrated that the changes in the prevailing wage survey methodology will cause any impending injury. If the Court reaches the merits on Counts 4–6, judgment should be entered in Defendants' favor because DOL has statutory authority to set surety bond amounts at an adequate level (Count 5), and because DOL sufficiently explained the changes it made to the surety bond and prevailing wage methodology provisions (Counts 4 and 6).

As to the procedural challenge that Plaintiff presses in its motion, which appears in the factual background section of the Complaint, *see* Compl. ¶ 80, judgment should be entered in Defendants' favor. Because OFR did not make the 2021 Draft Final Rule available for public inspection, it did not become a final regulation and DOL was authorized to withdraw the document

without soliciting comment. Accordingly, DOL was permitted to promulgate the 2022 Rule without seeking a second round of comments on the 2019 NPRM.

ARGUMENT

I. Plaintiff Has Failed to Demonstrate Standing for Each Claim It Seeks to Press and for Each Form of Relief That It Seeks.

Plaintiff has failed to demonstrate standing. "Standing is not dispensed in gross." *Finnbin, LLC v. Consumer Product Safety Commission*, 45 F.4th 127, 136 (D.C. Cir. 2022) (citation omitted). "Rather, a petitioner must establish standing 'for each claim [it] seeks to press and for each form of relief that is sought.'" *Id*. (citation omitted). "[F]or each claim, the petitioner must establish that it has suffered an injury in fact that is traceable to the challenged action and likely to be redressed by a favorable decision." *Id*. Although an organization may assert standing on behalf of their members, they must show that at least one member "would otherwise have standing to sue in [its] own right." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343–44 (1977); *see Summers v. Earth Island Inst.*, 555 U.S. 488, 494–96 (2009). Organizations must therefore "identify members who have suffered the requisite harm." *Id.* at 499; *see also Am. Chemistry Council v. Dep't of Transp.*, 468 F.3d 810, 815, 820 (D.C. Cir. 2006) (same). "At the summary judgment stage of the proceedings, the [plaintiff] 'can no longer rest on . . . 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,' which for purposes of the summary judgment motion will be taken as true.'" *Swanson Grp. Mfg. LLC v. Jewell*, 790 F.3d 235, 240 (D.C. Cir. 2015) (citation omitted).

A. Plaintiff Has Not Demonstrated an Article III Injury from the Prepublication Withdrawal of the 2021 Draft Final Rule.

As the Court has already held, Plaintiff has not shown that it or its members have standing to press any challenge to the January 2021 withdrawal of the 2021 Draft Final Rule. *See NCAE v. DOL*, 2023 WL 2043149, at *4 (D.D.C. Feb. 16, 2023). That includes Counts 1–3 of the Complaint as well as any other claim against OFR regarding the 2021 Draft Final Rule.

Counts 1–3 do not involve claims that the 2022 Rule was unlawfully promulgated; rather, they each raise only direct challenges to DOL's withdrawal of the 2021 Draft Final Rule or OFR's

failure to publish it. *See* Compl. ¶¶ 81–84 (Count 1: DOL unlawfully withdrew the 2021 Draft Final Rule without notice-and-comment procedures); *id.* ¶¶ 85–88 (Count 2: DOL "unlawfully repealed the [2021 Draft Final Rule] without providing any reasoned explanation"); *id*. ¶¶ 89–92 (Count 3: OFR unlawfully failed to publish the 2021 Draft Final Rule).

This Court has already concluded that Plaintiff has not "establish[ed] that any of its members suffered an injury in fact from the withdrawal of the 2021 Rule." *NCAE*, 2023 WL 2043149, at *4. As the Court stated, and as Defendants explained, "according to Plaintiff's own declarations, Plaintiff's members were *better off* for the nearly two years between the withdrawal of the 2021 Draft Final Rule and the promulgation of the 2022 Final Rule because the increased surety bond requirements of which Plaintiff complains would have been applied much earlier." *Id*. (citation omitted); *see also* ECF No. 13 at 12–19. The same is true with respect to OFR not publishing the 2021 Draft Final Rule; if published, the surety bond and prevailing wage provisions that Plaintiff challenges would have taken effect years earlier. Having not identified "some concrete interest that is affected by [the alleged procedural right] deprivation," Plaintiff lacks standing to pursue the claims pleaded in Counts 1–3 of the Complaint. *Summers*, 555 U.S. at 496 (violation of "a procedural right *in vacuo*" insufficient for Article III standing). The Court should therefore dismiss these counts for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(h)(3).

B. Plaintiff's Requested Relief Against OFR Cannot Redress Any Alleged Injuries.

Even if it had suffered an injury, Plaintiff lacks standing because the relief it seeks cannot redress any such harm. Plaintiff seeks a declaratory judgment that "[OFR's] actions in failing to publish the 2021 Rule in accordance with its regulations, the [Federal Records Act], and express instructions from [DOL] principal officers" were in violation of the APA. Proposed Order, ¶ 5. And Plaintiff specifically renounces any further remedy against OFR: "To be sure, NCAE is not requesting the Court order Defendants to now publish the 2021 Rule." ECF No. 26-1 at 17 n.53.

The declaratory relief that Plaintiff seeks is unavailable for two reasons. First, Plaintiff has not suffered any injury due to OFR not publishing the 2021 Draft Final Rule in January 2021. *See* Argument I.A, *supra*. Based on "the facts alleged," therefore, there is not "a substantial

controversy, between the parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Golden v. Zwickler*, 394 U.S. 103, 108 (1969) (citation omitted). Second, even if Plaintiff had suffered some injury at the hands of OFR, the issuance of declaratory relief here would constitute, at most, an advisory opinion. When declaratory relief is appropriate, it is effective because "it must be presumed that [the] federal officials will adhere to the law as declared by the court." *See Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 n.8 (D.C. Cir. 1985). Here, however, there is no ongoing conduct by OFR that Plaintiff challenges which OFR could cease or otherwise modify. While it is plain why Plaintiff does not seek to have the 2021 Draft Final Rule published, given that it contains the allegedly offending provisions that Plaintiff now challenges in the 2022 Final Rule, it cannot both claim a violation of law and disclaim a remedy that could provide redress for that alleged violation. A declaratory order stating that OFR *should have* published the 2021 Draft Final Rule that Plaintiff does not want to see published today would not redress any injury. *See, e.g.*, *Nat. Res. Def. Council, Inc. v. U. S. Nuclear Regul. Comm'n*, 680 F.2d 810, 814–15 (D.C. Cir. 1982) ("In effect, NRDC seeks a declaration from this court that the initial promulgation of the rule was unlawful, an advisory opinion which federal courts cannot provide."). Thus, Plaintiff lacks standing to pursue this declaratory order, and that claim should be dismissed. Fed. R. Civ. P. 12(h)(3).

C. Plaintiff Has Not Demonstrated Standing to Press Its Claims Regarding Changes to the Prevailing Wage Survey Methodology Requirements.

As discussed below, *see,* Argument IV.A, *infra*, Plaintiff has abandoned Counts 4–6 of its complaint, including Count 6, which pertains to the prevailing wage survey methodology requirements. Even if it had not abandoned Count 6, Plaintiff lacks standing to press it.

Unlike as to the surety bond provisions, *see NCAE*, 2023 WL 2043149, at *6, Plaintiff offers no evidence that its members face an ongoing or impending injury due to the prevailing wage survey changes. An injury must "proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 n.2 (1992). Plaintiff has not shown that the prevailing

wage provisions, which merely set forth the methodology that SWAs must use for DOL to validate prevailing wage rate surveys, cause Plaintiff or its members harm. While these provisions allow SWAs or other state entities to conduct wage surveys using different sampling techniques, they do not directly increase employer obligations, for example, by increasing the wage rate paid to farmworkers. Thus, to establish that these changes injure its members and that this injury is redressable, Plaintiff must demonstrate something more—*e.g.*, that the new methodology will necessarily result in surveys that produce higher prevailing wages *and* that the resulting prevailing wages will be higher than the AEWR or other relevant wage such that employers will now be required to pay workers the prevailing wage. *See* 20 C.F.R. §§ 655.120(a), 655.122(*l*) (requiring employers to pay a wage that is, among others, the higher of the AEWR and the prevailing wage). Plaintiff has not made that showing. Accordingly, Plaintiff has not established standing to challenge the changes to the prevailing wage methodology, and that claim—which, in any event, Plaintiff has abandoned—should be dismissed. Fed. R. Civ. P. 12(h)(3).

D. Plaintiff Has Not Demonstrated Standing to Challenge DOL's Promulgation of Each Provision of the 2022 Final Rule.

Even if Plaintiff's declarations had established that its members were injured by the surety bond or prevailing wage methodology provisions of the 2022 Rule, Plaintiff has made no effort to demonstrate standing to challenge (or to seek relief addressing) DOL's promulgation of other provisions of that rule. The 2022 Rule includes numerous provisions improving the H-2A Program beyond those identified in Plaintiff's complaint. *See* Background II.E, *supra*; 87 Fed. Reg. at 61,665–77. And yet Plaintiff's requested relief includes an order vacating, setting aside, and enjoining enforcement of the entirety of the 2022 Rule. Proposed Order ¶¶ 1-2, ECF No. 26-4. Each portion of the 2022 Rule is severable. 87 Fed. Reg. at 61,663. Courts addressing challenges to agency rules with distinct and severable provisions require the Plaintiff to show an injury caused by each specific provision of the Final Rule that they seek to enjoin. *See, e.g.*, *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Hum. Servs.*, 485 F. Supp. 3d 1, 24–34 (D.D.C. 2020); *see also California v. Texas*, 141 S. Ct. 2104, 2120 (2021) (Plaintiff lacked standing to enjoin

enforcement of statutory provisions that "operate independently" of other provisions that caused it injury). There is no controversy between the parties with respect to provisions of the 2022 Rule that Plaintiff has failed to even allege are causing any identified member an actual or imminent injury, and Plaintiff thus lacks standing to challenge any such provisions.

II. Plaintiff's Claims in Counts 1–3 Are Barred by the Equitable Doctrine of Laches.

In Counts 1–3, Plaintiff brings direct challenges to DOL's withdrawal of and OFR's failure to publish the 2021 Draft Final Rule—events occurring in January 2021. Instead of challenging these actions when they happened, however, Plaintiff waited nearly two years, until after DOL had issued a final rule containing the challenged provisions in nearly identical form to those in the 2021 Draft Final Rule. Even if Plaintiff had standing to press these claims, which it does not, *see* Argument I.A, *supra*, these claims are barred by the equitable doctrine of laches.

Under the APA, the Court has a "duty" to "dismiss any action or deny relief on any" appropriate "equitable ground." 5 U.S.C. § 702(1). The Supreme Court has noted that the equitable "defense of laches could be asserted if the Government is prejudiced by a delay" in cases challenging agency rules. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 155 (1967).[7] Specifically, it may be invoked to bar litigation if the defendant has shown "(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.'" *New York v. Meta Platforms, Inc.*, 66 F.4th 288, 295 (D.C. Cir. 2023) (citation omitted). Both criteria indicate that the Court should not review the claims in Counts 1–3.

First, Plaintiff has inexplicably delayed in challenging the prepublication withdrawal of the 2021 Draft Final Rule. Plaintiff waited nearly two years to bring suit, offering no reasonable explanation for the delay. *See* TRO Hearing Tr. 3:10-11 (Plaintiff's counsel explained that he didn't "think there was a final agency action that we could have challenged at [the] time" of the

[7] The Attorney General's Manual on the APA, "a document whose reasoning [the Supreme Court has] often found persuasive," *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63-64 (2004), explains that "the time within which review must be sought will be governed, as in the past, by relevant statutory provisions or judicial application of the doctrine of laches," Attorney General's Manual on the Administrative Procedure Act 93 (1947).

withdrawal, an explanation in contradiction to Plaintiff's argument that the 2021 Draft Final Rule itself was a final agency action, *see* ECF No. 26-1 at 7, 11–12). The Supreme Court has found similar unexplained delays to satisfy the first part of the laches test. *See, e.g.*, *U.S. ex rel. Arlant v. Lane*, 249 U.S. 367, 371–72 (1919) (20-month delay after conduct giving rise to suit).

Second, Plaintiff's failure to challenge the 2021 withdrawal until after issuance of the 2022 Final Rule prejudices DOL and the public. Any remedy regarding the lawfulness of the withdrawal of the 2021 Draft Final Rule—particularly an order requiring that the draft rule be published, which Plaintiff evidently disclaims—would cause unnecessary regulatory whiplash in the H-2A Program now that DOL has published the 2022 Rule. Plaintiff's delay also risks rendering a waste the time and resources DOL expended considering and responding to the tens of thousands of comments received regarding the 2019 NPRM. To sit on its hands while that process unfolded—especially after Plaintiff knew that the rulemaking was ongoing and nearing completion, *see* Marsh Decl. ¶ 21—is particularly inequitable, and these claims should therefore also be dismissed on laches grounds. *See, e.g.*, *Mac Govern v. Connolly*, 637 F. Supp. 111, 116 (D. Mass. 1986).

III. Both the Withdrawal of the 2021 Draft Final Rule and the Promulgation of the 2022 Rule Complied with the APA's Notice-and-Comment Procedures.

Plaintiff argues that DOL violated the APA's notice-and-comment procedures in promulgating the 2022 Rule. ECF No. 10-22; Compl. ¶ 80.[8] Plaintiff does not argue, however, that DOL failed to request comments or that the 2022 Rule was not a logical outgrowth of the 2019 NPRM. Instead, Plaintiff presses a novel argument that DOL was required to restart the comment period by re-issuing an NPRM and re-soliciting comments from the public. That argument is contrary to binding precedent, and should be rejected.

[8] This claim independently fails because it was not properly plead in the Complaint. The "claim" appears only in the Complaint's background section, Comp. ¶ 80, and is not found in any of the Complaint's six counts, *id*. ¶¶ 81–102. Raising a claim in a summary judgment brief does not cure a failure to plead such claim. *See Taylor v. Mills*, 892 F. Supp. 2d 124, 137 (D.D.C. 2012). Thus, the Court need not address this purported claim.

A. DOL Solicited Comments on the 2019 NPRM and Considered Those Comments in Promulgating the 2022 Rule.

Plaintiff does not—and cannot—argue that DOL wholly failed to request or consider comments prior to promulgating the 2022 Rule. That is because the record clearly demonstrates otherwise. "[T]he APA requires agencies to publish notice of proposed rules in the Federal Register and to accept and consider comments on them from the public." *Am. Federation of Labor & Congress of Industrial Organizations v. NLRB*, 57 F.4th 1023, 1034 (D.C. Cir. 2023) (citing 5 U.S.C. § 553(b) – (c)). DOL did just that: the 2022 Final Rule discusses at length the comments that DOL received and considered on the 2019 NPRM. *See* 84 Fed. Reg. 36,168; 87 Fed. Reg. at 61,664–77 (explaining background and addressing public comments received). Plaintiff acknowledges that the NPRM generated significant public attention and more than 83,000 comments, *see* ECF No. 26-1 at 4, including one from Plaintiff, *see* NCAE Comment.

B. The 2022 Rule Was a Logical Outgrowth of the 2019 NPRM.

Similarly, Plaintiff does not argue that the 2019 NPRM did not adequately preview the changes DOL adopted in the 2022 Rule. For good reason: The challenged provisions of the 2022 Rule were all proposed in the 2019 NPRM. "[A]n agency satisfies the notice requirement, and need not conduct a further round of public comment, as long as its final rule is a 'logical outgrowth' of the rule it originally proposed." *Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 951–52 (D.C. Cir. 2004). Because the challenged provisions in the 2022 Rule were adequately previewed, appearing in almost the same form in the 2019 NPRM, Plaintiff does not, and cannot, contend that the 2022 Rule was not a logical outgrowth of the proposed rule. Accordingly, Plaintiff had a "reasonable opportunity to participate in the rulemaking process." *Forester v. Consumer Product Safety Comm'n*, 559 F.2d 774, 787 (D.C. Cir. 1977). Indeed, Plaintiff commented on both of the provisions it now challenges. *See* NCAE Comment at 12–13, 21–22.

C. Because the 2021 Draft Final Rule Was Not a Final Regulation, No Second Comment Period Was Required Before Promulgation of the 2022 Rule.

Plaintiff nonetheless maintains that DOL issued a final rule in January 2021, ECF No. 26-1 at 11–12, that repeal of that allegedly final rule was invalid because DOL failed to utilize notice-

and-comment procedures, *id.* at 12–21, and that DOL's subsequent promulgation of the 2022 Rule was invalid because DOL did not begin the notice-and-comment process anew, *id.* at 21. Plaintiff's argument runs contrary to D.C. Circuit precedent governing when an agency can withdraw a document submitted to OFR without notice and comment. Under the relevant decisions—*Kennecott* and *Humane Society*—an agency may, without utilizing notice and comment, withdraw a document submitted to OFR unless it has already been made available by OFR for public inspection. Because OFR did not make the 2021 Draft Final Rule available for public inspection, DOL was authorized to withdraw that document from OFR without notice and comment.

Plaintiff proposes an alternative framework unmoored from this binding precedent, asserting that an agency must solicit comment before withdrawing a document submitted to OFR if (1) the "promulgating agency makes a determination which was final and conclusive" and (2) "notice is provided to the public." ECF No. 26-1 at 14 (cleaned up); *see also id.* at 15, 21. Even if this were the applicable standard, it is unclear what type of "notice" that would preclude an agency from withdrawing a document that OFR had not yet made available for public inspection. In any event, even if the Court were to apply this alternative framework, Plaintiff could not prevail because the public did not have notice that DOL had issued a final regulation; rather, it was informed that the document DOL posted was not yet the final rule and the official regulation would be that which appears in the Federal Register. Even Plaintiff's own members understood that, with one member explaining that it was "[h]ighly questionable" whether the 2021 Draft Final Rule "sees the light of day in published form." Marsh Decl. Ex. E; *see also* Marsh Decl. ¶ 15.

1. D.C. Circuit Precedent Allows Withdrawal from OFR of a Document—Like the 2021 Draft Final Rule—Not Yet Filed for Public Inspection.

Pursuant to the D.C. Circuit's decisions in *Kennecott* and *Humane Society*, an agency may withdraw a document from OFR without further notice-and-comment procedures unless OFR has already made the document available for public inspection. OFR did not make the 2021 Draft Final Rule available for public inspection. DOL was therefore required neither to solicit comments before withdrawing it nor to reopen the comment period before promulgating the 2022 Final Rule.

In *Kennecott*, the D.C. Circuit held that the Interior Department lawfully withdrew a document that—like the 2021 Draft Final Rule—had been submitted to OFR for processing but not yet filed for public inspection. The facts of *Kennecott* substantially overlap with the facts here. "[S]hortly before President Clinton's inauguration, [an Interior official] *approved* a set of . . . regulations, . . . and directed a subordinate to send the document to the [OFR] *for publication as final regulations*." *Kennecott*, 88 F.3d at 1200 (emphasis added). "OFR received an original and two copies of these signed regulations," which the *Kennecott* court referred to as the "1993 Document," "sometime after 2:00 p.m. on January 19, 1993," on the eve of the Presidential transition. *Id.* On January 21, "before the OFR filed the document for public inspection," "an Interior employee, at the direction of [a new Interior official], telephoned the OFR to withdraw the document," a request that the "employee confirmed . . . in writing later the same day." *Id.* at 1201. "In accordance with its regulations and internal guidelines, the OFR stopped processing the 1993 Document and returned all three copies to Interior, recording the action in . . . a [] ledger the OFR maintained to keep track of documents withdrawn by agencies." *Id.* More than a year later, after proposing additional provisions, Interior published final regulations. *Id.* ("1994 Regulations").

Against this backdrop, the D.C. Circuit rejected procedural claims similar to those presented here: that OFR was required to publish the 1993 Document before the Presidential transition such that returning it to Interior before publication violated the FRA; that Interior was required to use notice-and-comment procedures before withdrawing the 1993 Document; and that Interior's promulgation of the "1994 Regulations improperly repealed the 1993 Document in violation of the notice and comment requirements of the APA." *Id.* at 1201–02.

On the first question, the D.C. Circuit explained that OFR had not violated the FRA or its regulations when it did not publish the 1993 Document before the Presidential transition. The court carefully marched through the relevant FRA and regulatory provisions. *See id.* at 1205–06 (discussing 44 U.S.C. §§ 1501–06 and 1 C.F.R. §§ 17.1–17.7). The court explained that the FRA "provides only that, at some point after an agency transmits documents to the OFR, the documents 'shall be filed' (including being stamped with the day and time) and, upon filing, the document

shall 'immediately' be made available to the public." *Id.* at 1206. But the FRA "says nothing about the OFR's power to review or return documents either between the time of transmittal and 'filing' (i.e., being stamped with the date and time) or between the moment of filing and the time 'immediately' thereafter when the document is made available for public inspection." *Id.* (explaining legislative history silent on "OFR's role in processing documents, including its authority to return documents to the issuing agency before they are made public").

These questions were addressed by OFR's regulations, which the court found to be "substantively reasonable." *Id.* OFR's regulations provide "for a 'confidential processing' period to take place *after* an agency transmits a document to the OFR and *before* the OFR makes the document available for public inspection." *Id.* at 1205 (emphasis in original); *see also* 1 C.F.R. §§ 17.1–17.2. These regulations state that, "[u]pon receipt, each document shall be held for confidential processing *until it is filed for public inspection*." 1 C.F.R. § 17.1 (emphasis added). As the court explained, for documents received after 2 p.m.—like the 2021 Draft Final Rule—the confidential processing period typically lasts three days: documents received after 2 p.m. "are *usually* made available for public inspection three days later and sent to the Government Printing Office for publication on the fourth day." *Kennecott*, 88 F.3d at 1205 (emphasis added) (citing 1 C.F.R. § 17.2). If the Director of the Federal Register "concurs with a request" for emergency handling and such handling "is feasible," 1 C.F.R. § 17.4(a); *id.* § 17.6(a), the period can be shorter, *see* 1 C.F.R. § 17.4(c) ("document assigned to the emergency schedule shall be published as soon as possible"); *id.* § 17.6(c) ("document approved for emergency filing for public inspection shall be filed as soon as possible following processing and scheduling"). In other instances, "when there are technical difficulties or a document is unusually long, as it was in this case, the OFR may take longer than three days." *Kennecott*, 88 F.3d at 1205 (citing 1 C.F.R. § 17.7, which explains the circumstances in which "a document may be assigned to the deferred schedule"). If OFR will not be able to complete the confidential processing period in three days, the only requirement is for OFR "staff [to] notify the agency" of that fact. 1 C.F.R. § 17.7(b). The court further explained that, pursuant to its Document Drafting Handbook, OFR "permits an agency to withdraw a

document by telephone at any time before the OFR made the document available for public inspection, provided that the agency follows up with a letter confirming the withdrawal." *Kennecott*, 88 F.3d at 1206 (citing OFR, NARA, Document Drafting Handbook 66 (1991 ed.)).

Accordingly, the court held that OFR properly permitted Interior to withdraw the 1993 Document during the confidential processing period before the document was made available for public inspection. *Id.* The court explained that "[a]llowing agencies to withdraw documents during the relatively brief processing period is consistent with the [FRA's] purpose—establishing an orderly process for filing and publishing government regulations." *Id.* "By permitting agencies to correct mistakes *and even to withdraw regulations until virtually the last minute before public release*, the government's approach helps assure that regulations appearing in the Federal Register are as correct as possible in both form and substance." *Id.*

On the second question—whether Interior "improperly rescinded the 1993 Document without complying with the [APA's] notice and comment provisions," *id.* at 1201—the court determined that it lacked jurisdiction to consider the claim because it was brought under a judicial review provision that permitted review of any "regulation promulgated" under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), Pub. L. No. 96-510, 94 Stat. 2767 (1980). The court explained that it had previously "interpreted 'regulation' to mean a statement that has 'general applicability' and that has the 'legal effect' of 'binding' the agency or other parties." *Kennecott*, 88 F.3d at 1207 (cleaned up). Kennecott argued that the withdrawal of the 1993 Document was a "regulation promulgated" under CERCLA because it constituted an "indefinite postponement" of that alleged regulation. *Id.* The D.C. Circuit rejected that argument. Unlike when an agency postpones "the effective date of [a] duly promulgated regulation[]," Interior had not promulgated the 1993 Document and so was not repealing or postponing a regulation when it withdrew it. *Id.* "Because [Interior's] decision to withdraw the document did not alter substantive legal obligations under previously published regulations, the agency's decision to withdraw the document did not constitute a 'regulation' . . . ." *Id.*

Finally, on the third question—whether Interior's "final 1994 Regulations themselves repealed and modified the 1993 Document without offering the opportunity for notice and comment required by the APA," *id.* at 1207—the court again determined that the 1993 Document that was withdrawn from OFR before public inspection was not a final regulation, *see id.* As the D.C. Circuit explained, "the 1994 Regulations did not repeal or modify the 1993 Document for the simple reason that the 1993 Document never became a binding rule requiring repeal or modification." *Id.* at 1208. "Rather, the 1994 Regulations replaced certain provisions in the then-current version of the Code of Federal Regulations." *Id.* Even when an agency "internally approve[s] a draft version of the final regulations," the APA does not "prevent agencies from discarding those documents without again requesting public comment." *Id.*

As in *Kennecott*, DOL here was not required to "again request[] public comment" before withdrawing the 2021 Draft Final Rule. *Id.* DOL properly withdrew, without further notice-and-comment procedures, the 2021 Draft Final Rule before it had been made available for public inspection and before OFR had completed its confidential processing of the document—just like the 1993 Document that Interior was permitted to withdraw in *Kennecott*.

Plaintiff asserts that the 2021 Draft Final Rule nonetheless became a final regulation "when designated agency officials . . . sign[ed] and sen[t] that final agency action to OFR on January 11, 2021," ECF No. 26-1 at 11, or at least that they "*intended* the 2021 Rule to be just that, a final rule," *id.* at 12 (emphasis added). After all, "[g]overnment agencies are not," according to Plaintiff, "in the business of sending non-final regulations to OFR." *Id.* But the Interior officials who caused the 1993 Document to be transmitted to OFR in *Kennecott* manifested a similar intent: "[S]hortly before President Clinton's inauguration, [an Interior official] *approved* a set of . . . regulations" and "directed a subordinate to send the document to [OFR] *for publication as final regulations*." *Kennecott*, 88 F.3d at 1200 (emphasis added). Despite that intent, however, the D.C. Circuit held that "the 1993 Document never became a binding rule." *Id.* at 1208. So too with the 2021 Draft Final Rule. Applying that reasoning to this case, although outgoing DOL officials may have "*intended* to regulate" and "to have published in the Federal Register" the 2021 Draft Final Rule,

"as well as to bind the users of the H-2A [P]rogram," that intent was never realized, and DOL was thus free to withdraw the 2021 Draft Final Rule from OFR and to promulgate the 2022 Final Rule without again seeking public comment. *See* ECF No. 26-1 at 12.

Plaintiff also attempts unsuccessfully to distinguish *Kennecott* on the basis that "the document there was withdrawn two days after submission," but here the document was submitted "5 working days before the new administration took office," purportedly "well outside the regulatory 'confidential processing' period." ECF No. 26-1 at 18. First, the confidential processing period only begins to run after OFR determines that the submitted document "meet[s] the requirements of [Chapter 1 of Title I]." 1 C.F.R. § 17.2(b). Second, even after it begins, the confidential processing period can extend beyond three days, as the D.C. Circuit recognized. *See Kennecott*, 88 F.3d at 1205 ("when there are technical difficulties or a document is unusually long, as it was in this case, the OFR may take longer than three days"); *see also* 1 C.F.R. § 17.7. Because OFR told DOL as much on January 14, 2021, DOL knew the 2021 Draft Final Rule would not be filed for public inspection within three days. *See* ECF No. 26-2 ¶¶ 4–5 ("Given [the] backlog, we will not be able to file immediately or publish by" January 19, 2021.). And, a day later, on January 15, 2021, one of Plaintiff's members predicted the same. *See* Marsh Decl. Ex. E (2021 Draft Final Rule "[l]ikely to be caught up in [the] incoming administration's 60-day regulatory freeze," predicting that it was "[h]ighly questionable" whether "it sees the light of day in published form"). In any event, the confidential processing period is deemed to continue until a document is made available for public inspection: "Upon receipt" by OFR, "each document shall be held for confidential processing *until* it is filed for public inspection." 1 C.F.R. § 17.1 (emphasis added). Therefore, even if OFR's regulations required that it complete confidential processing in three days in all instances—and they do not—the failure to meet such a regulatory deadline would not alter the fact that the 2021 Draft Final Rule had not yet been made available for public inspection and that DOL therefore had the authority to withdraw it without further notice and comment. *See In re Barr Lab'ys, Inc.*, 930 F.2d 72, 74 (D.C. Cir. 1991) ("[T]he 'proper remedy' of a party seeking to enforce a statutory deadline is not to challenge the legitimacy of post-deadline agency actions.");

see also Brock v. Pierce Cnty, 476 U.S. 253, 259 (1986) (even if regulation "speaks in mandatory language, it nowhere specifies the consequences of a failure to" abide by regulatory deadline).

The Court should also reject Plaintiff's flawed argument that "[t]he D.C. Circuit in *Humane Society* conclusively overruled" aspects of the *Kennecott* decision. ECF No. 26-1 at 13. First, *Humane Society* did not overrule *Kennecott.*[9] Rather, the decision in *Humane Society* purports to be in accord with *Kennecott*. *See Humane Society*, 41 F.4th at 573–74. Second, Plaintiff mischaracterizes the court's holding in *Humane Society*, a decision that reinforces that DOL was authorized to withdraw the 2021 Draft Final Rule without a second comment period.

The D.C. Circuit addressed a narrow question in *Humane Society*: "whether an agency must provide notice and an opportunity for comment when withdrawing a rule that has been filed for public inspection but not yet published in the Federal Register." *Id.* at 565. The court held that it is the filing of a document for public inspection that establishes "when a rule passes [the] regulatory point of no return" triggering "the APA's requirement to undertake notice and comment to repeal it." *Id.* at 568. Reviewing the same provisions analyzed in *Kennecott*, *see id.* at 569 (discussing 44 U.S.C. §§ 1503, 1507 and 1 C.F.R. § 17.1), the court explained:

> Rather than set the critical date at the date of publication, the [FRA] sets it at the date a rule is filed for public inspection. That is the "day and hour" the statute requires be noted for posterity. 44 U.S.C. § 1503. It is then that a rule becomes "valid" against the public at large. 44 U.S.C. § 1507. And it is filing a document for public inspection, not publication in the Federal Register, that the statute deems "sufficient to give [constructive] notice" of the document to affected parties. *Id.* Making a rule available for public inspection, then, provides notice to the public and carries legal consequences.

[9] In the D.C. Circuit, a later panel cannot overrule a prior one unless the later panel decision contains an *Irons* footnote, which is "a special footnote appear[ing] in the panel opinion explaining that the prior panel's decision has been overruled by consideration of the full D.C. Circuit." *Agudas Chasidei Chabad of United States v. Russian Fed'n*, No. 1:05-CV-1548-RCL, 2023 WL 2239257, at *6 (D.D.C. Feb. 27, 2023) ("a prior panel's decision is binding on a latter panel unless that opinion is overruled by the procedures of the D.C. Circuit or by the Supreme Court") (citing *Maxwell v. Snow*, 409 F.3d 354, 358 (D.C. Cir. 2005)). The *Humane Society* decision contains no such footnote and there is no other indication *Kennecott* was overruled.

Id. at 570; *see also id.* at 573 (distinguishing *Kennecott* on the basis that, "[u]nlike the rule here, the document in *Kennecott* was never made available for public inspection"). Plaintiff asserts that the 2021 Draft Final Rule was a final regulation because two DOL officials "sign[ed] and sen[t]" the document "to OFR on January 11, 2021." ECF No. 26-1 at 11. But what the *Humane Society* court referred to as the "critical date"—the "date a rule is filed for public inspection"—never occurred as to the 2021 Draft Final Rule. 41 F.4th at 570. Plaintiff admits as much. Compl. ¶ 56.

Kennecott and *Humane Society* stand for the proposition that an agency may withdraw a document submitted to OFR without soliciting public comment so long as OFR has not yet filed that document for public inspection. A recent D.C. Circuit decision confirms that straightforward reading: "A final rule is not duly fixed at least until it is filed for public inspection with the Office of the Federal Register." *GPA Midstream Ass'n*, 67 F.4th at 1195. "*Until then*, it may be withdrawn without explanation or notice and comment and is 'not valid' and enforceable against the public at large." *Id.* (emphasis added). Because OFR never filed the 2021 Draft Final Rule for public inspection, DOL was not required to use notice-and-comment procedures to withdraw it. And DOL therefore was not required to solicit comments a second time before promulgating the 2022 Final Rule.

2. Plaintiff's Alternative Framework Is Contrary to Precedent and Is Not Satisfied in Any Event.

As the discussion of *Kennecott* and *Humane Society* demonstrates, Plaintiff's proposed alternative framework for when a document submitted to OFR becomes a final rule that cannot be withdrawn without further notice-and-comment procedures is unmoored from the relevant precedent and should be rejected on that basis alone. The framework, which would require notice and comment if (1) the "promulgating agency makes a determination which was final and conclusive" and (2) "notice is provided to the public," ECF No. 26-1 at 14 (cleaned up); *see also id.* at 15, is also unclear; Plaintiff does not purport to delineate what type of notice would suffice. In any event, even if this alternative framework were to be applied, the 2021 Draft Final Rule would not meet it. The 2021 Draft Final Rule did not mark the end of the rulemaking process nor

did legal obligations flow from that document. Most importantly, the public was on notice that the version available on DOL's website was not the final regulation.

The first part of Plaintiff's alternative framework encompasses the test for what constitutes final agency action for purposes of judicial review under the APA. "An agency action is final 'if two independent conditions are met: (1) the action marks the consummation of the agency's decisionmaking process and is not of a merely tentative or interlocutory nature; and (2) it is an action by which rights or obligations have been determined, or from which legal consequences will flow.'" *Soundboard Ass'n v. FTC*, 888 F.3d 1261, 1267 (D.C. Cir. 2018) (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)). Both prongs must be satisfied independently. *Id.* at 1271. The *Humane Society* majority did not refer to this well-known test so there is no indication that the court thought it applied to the question at hand, which the court explained was answered by the FRA and OFR's regulations. The dissent in *Humane Society* did refer to this test, but concluded that it demonstrated publication in the Federal Register typically marks the point at which a document submitted to OFR becomes a final rule: "For the purposes of exercising judicial review, we have consistently understood publication in the Federal Register as the relevant moment a substantive rule becomes final agency action." *Humane Society*, 41 F.4th at 579 (Rao, J., dissenting) (citations omitted). Accordingly, the test for final agency action does not control here, but, even if it did, Plaintiff would not prevail.

As to the first prong of the final agency action test, the 2021 Draft Final Rule was not the end of the line for the rulemaking process. *See Soundboard Ass'n*, 888 F.3d at 1267–68, 1271 (considering "whether the action represents the culmination" of the rulemaking process or is instead still "tentative" in nature). Plaintiff asserts that the 2021 Draft Final Rule was a final agency action because two DOL employees "sign[ed] and sent [the document] to OFR on January 11, 2021." ECF No. 26-1 at 11–12. But that submission does not mean the process was over. As this Court has recognized, a draft final rule transmitted to OFR "may undergo meaningful changes" as well as technical changes that may "substantially alter the meaning and effect" of a regulation "between when it is sent to OFR and when it is made available for public inspection[.]" *NCAE*,

2023 WL 3043149, at *9; *see also Humane Society*, 41 F.4th at 575 (agencies must use "internal OFR processing" period to "ensure typographical errors and any defects in form are corrected"). OFR regulations confirm the tentative nature of documents that have not yet been filed for public inspection, explaining that such documents "may be withdrawn from publication or corrected by the submitting agency." 1 C.F.R. § 18.13(a). An agency can correct or withdraw a document for any reason; the regulations distinguish between the bases for changes only for purposes of dictating the process by which such changes are effectuated. *Id.* ("[w]ithdrawals or minor corrections": agency can send "timely letter"; "[e]xtensive corrections": "agency withdrawal of the document from publication" may be required). After an agency submits a document to OFR, the rulemaking process is nearing the finish line, but it is not quite there yet. The disclaimer included on every page of the 2021 Draft Final Rule—"[o]nly the version published in the Federal Register is the official regulation"—confirms that the document had not reached the end of the rulemaking road. *See* Draft Rule.

As to the second prong, the 2021 Draft Final Rule did not "cause 'direct and appreciable legal consequences'" to anyone, including Plaintiff or its members. *Racing Enthusiasts & Suppliers Coalition v. EPA*, 45 F.4th 353, 358 (D.C. Cir. 2022) (quoting *U.S. Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590, 598 (2016)). In making that determination, courts often look to post-action "events to determine whether the agency has applied the [action] as if it were binding on regulated parties." *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 253 (D.C. Cir. 2014). Here, the 2021 Draft Final Rule was never enforceable—or enforced—against anyone. "The [FRA] also sets forth the legal consequences of each step in this process." *Humane Society*, 41 F.4th at 569. While Plaintiff contends in a footnote that "there is nothing special about OFR-provided public inspection," ECF No. 26-1 at 21 n.58, the *Humane Society* court held otherwise: "Making a document available for public inspection 'is sufficient to give notice of the contents of the document to a person subject to or affected by it.'" *Id.* (quoting 44 U.S.C. § 1507). "A document 'is not valid as against a person who has not had actual knowledge of it until . . . [it is]

made available for public inspection.'" *Id.*[10] Because OFR had not yet made the document available for public inspection, the 2021 Draft Final Rule was "'not valid' and enforceable against the public at large." *GPA Midstream*, 67 F.4th at 1195. Plaintiff nonetheless argues that the 2021 Draft Final Rule might have had legal effect for those who had notice of it. *See* ECF No. 26-1 at 21 ("DOL gave NCAE and the regulated community ample actual notice of the 2021 [Draft Final] Rule" and "NCAE's actual notice is all that was required under *Humane Society*"). But, again, the document of which NCAE and its members had notice was one that stated that it was not yet the official regulation. Marsh Decl. Ex. E; *see also* Marsh Decl. ¶ 15. Further, Plaintiff offers no evidence that the 2021 Draft Final Rule was ever enforced against NCAE, is members, or any other entity. That is not surprising as DOL did not enforce the 2021 Draft Final Rule and would not have known which entities had actual notice of it, illustrating why the constructive notice provided by public inspection is so critical. *See* 87 Fed. Reg. at 61,664 n.11 (DOL "withdrew this document from the Office of the Federal Register, prior to the document being made available for public inspection"; "[t]herefore, the unpublished draft rule . . . never took effect").

Lastly, even if the 2021 Draft Final Rule constituted final agency action, Plaintiff's alternative test requires that "notice [of that final rule be] provided to the public." ECF No. 26-1 at 14. Elsewhere, Plaintiff asserts that "[w]hat counts for purposes of enforcement of a yet-to-be published regulation is notice, nothing else." ECF No. 26-1 at 17. "But," as this Court rightly asked, "a predicate question for purposes of Plaintiff's claim is: notice of what?" *NCAE*, 2023 WL 3043149, at *9. Here, unlike the agency action in *Humane Society*, *see* Ex. A. to Compl., *Humane Society of the U.S. v. U.S. Dep't of Agric.*, No. 1:19-cv-02458, ECF No. 1-1 (D.D.C. Aug.

[10] The Freedom of Information Act, 5 U.S.C. § 552 *et seq.*, indicates that a document does not have legal effect until publication in the Federal Register: "Except to the extent that a person has actual and timely notice of the terms" of "a substantive rule[] of general applicability[,]" "a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." 5 U.S.C. § 552(a). The *Humane Society* court nonetheless concluded that "the date a rule is made available for public inspection" is when that rule is "give[n] legal effect." 41 F.4th at 570. Under no circumstances, however, does the FOIA or the FRA give legal effect to a document not yet made available by OFR for public inspection.

13, 2019), which did not include a warning as to its not-yet-final nature, the 2021 Draft Final Rule "explicitly and repeatedly states," *see Soundboard Ass'n*, 888 F.3d at 1268, the following disclaimer on every page of the draft rule: "This regulation has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. Only the version published in the Federal Register is the official regulation." Draft Rule. The last sentence signaled to the public that a final, official regulation had not yet issued. Accordingly, there is no doubt that the public was on notice that the 2021 Draft Final Rule was *not* a final regulation. "According to DOL itself, the posted version of the 2021 [Draft Final] Rule was subject to change." *NCAE*, 2023 WL 2043149, at *9. Public notice of such a document cannot tie the hands of the issuing agency from revisiting the not-yet-final regulation prior to it being made available for public inspection.

On this last point, Plaintiff relies on Judge Leventhal's opinion in *Industrial Union Dep't, AFL-CIO v. Bingham*, 570 F.2d 965, 971 (D.C. Cir. 1977) to argue that the notice afforded to the regulated community establishes the 2021 Draft Final Rule's finality and the need to have used notice-and-comment procedures to withdraw it. *See* ECF No. 26-1 at 19–20. That reliance is misplaced. First, Plaintiff wrongly treats Judge Leventhal's opinion as the majority's rationale. *See Horsehead Resource Dev. Co., Inc v. EPA*, 130 F.3d 1090, 1094, 1094 n.5 (D.C. Cir. 1997) (*Industrial Union* involved "sharply-splintered court" in which "each [judge] wrote (and reasoned) separately"; "*per curiam* opinion [] states only a result; it does not identify any agreed upon analysis supporting the result"). Second, *Industrial Union* is distinguishable on its facts. *See NCAE*, 2023 WL 2043149, at *10 (citing *Indus. Union*, 570 F.2d at 967 & n.1). Third, many of these race-to-the-courthouse cases do not squarely address the question of when notice-and-comment procedures are required. *See Humane Society*, 41 F.4th at 574. Finally, other of these cases more closely aligned with the facts of this one undermine Plaintiff's position. *See City of Gallup v. FERC*, 702 F.2d 1116, 1119, 1122 (D.C. Cir. 1983) (holding that "no decision had been made as yet and [draft order] was not 'binding' on anyone" even after agency held public meeting

where it "made a draft order available to the public"); *see also Horsehead*, 130 F.3d at 1093 (rejecting argument that "signing the final rule is sufficient to open [a statutory] filing window").

Judge Leventhal's opinion was right about one thing: the administrative morass courts would confront if Plaintiff's rule were adopted. *See Indus. Union*, 570 F.2d at 970–71. If the D.C. Circuit's administrable rule were replaced with Plaintiff's nebulous framework, it would generate a host of disputes akin to those Judge Leventhal encouraged agencies to avoid. As he wrote, it is "incumbent upon agencies to make an effort to deal with the problem" of disputes over when a "major agency action" is promulgated and explaining that "[t]he existence of . . . a regulation[] making clear exactly what constitutes the issuance or promulgation of a standard . . . would [avoid] lengthy and complex wrangling . . . we have seen in this case." 570 F.2d at 970–71. Ruling in Plaintiff's favor would lead to much "wrangling" over whether regulated entities had sufficiently "ample notice" to convert a draft final rule into a binding final regulation. Under *Kennecott* and *Humane Society*, the inquiry is straightforward: Has the agency document at issue been made available by OFR for public inspection? Because the 2021 Draft Final was not, DOL was not required to seek comment before withdrawing it, or to re-solicit comment before promulgating the 2022 Final Rule.

D. In Any Event, Plaintiff Fails to Establish Prejudicial Error.

Even if Plaintiff's alternative test applied and the Court determined that the public had notice of a final regulation notwithstanding the included disclaimer, Plaintiff has not demonstrated that it has suffered any "prejudicial error." 5 U.S.C. § 706. "[T]he rule of prejudicial error is treated as an 'administrative law . . . harmless error rule[.]" *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2385 (2020) (citation omitted); *see also Nat'l Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1115–16 (D.C. Cir. 2019). Under the APA, "it is the plaintiff's responsibility to show that any error is harmful." *Ctr. for Biological Diversity v. U.S. Int'l Dev. Finance Corp.*, --- F.4th ---, 2023 WL 4378303, at *8 (D.C. Cir. 2023).

If ever there were a case for application of the prejudicial error rule, this is it. Plaintiff does "not come close to demonstrating that it experienced any harm" from the purported error. *See*

Little Sisters, 140 S. Ct. at 2385. "The object [of notice and comment], in short, is one of fair notice,'" *id*. (citation omitted), and Plaintiff certainly had notice and an opportunity to comment here. Plaintiff nonetheless argues that it "was not given the opportunity to comment on the 2022 Rule." ECF No. 26-1 at 10. But the APA does not afford the public with an opportunity to comment on *final* rules; it requires that agencies offer the public the chance to comment on *proposed* rules. And Plaintiff already had that chance, submitting a comment that was critical of the surety bond requirement and prevailing wage methodology provisions that first appeared as proposals in the 2019 NPRM. *See* Marsh Decl. ¶ 10. Ultimately, after consideration of Plaintiff's comment and the thousands of others that DOL received, the provisions that Plaintiff now challenges were included in the 2021 Draft Final Rule and 2022 Final Rule.

Accordingly, any error was "non-prejudicial because all that is necessary . . . is that the agency had an opportunity to consider the relevant views. In other words, the concepts of logical outgrowth and harmless error merge if the final rule is, in fact, anticipated." *See Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014); *cf. NRDC*, 680 F.2d at 813–15; *Save Our Cumberland Mountains, Inc. v. Watt*, 558 F. Supp. 22, 24 n.3 (D.D.C. 1982). The 2022 Final Rule was anticipated, Marsh Decl. ¶ 21, DOL had an opportunity to consider Plaintiff's views, *id*. ¶¶ 9–10, and the 2022 Final Rule was the logical outgrowth of the proposed rule, *see* Argument III.B, *supra*; *see NCAE*, 2023 WL 2043149, at *10 n.12. Plaintiff does not explain how, having submitted a comment on the 2019 NPRM that DOL considered, it suffered any prejudicial harm.

IV. Defendants Are Entitled to Judgment on Count 3 Because OFR Did Not Violate the FRA or Its Own Regulations.

Defendants are entitled to judgment on Count 3 for a myriad of reasons. First, Plaintiff lacks standing to bring claims, like Count 3, directly challenging the withdrawal or lack of publication of the 2021 Draft Final Rule. *See* Argument I.A, *supra*. Unlike Plaintiff's procedural claim against DOL—which alleges inadequacies involving, rather than a direct challenge to, the withdrawal of the draft rule—Plaintiff's claims against OFR only challenge the January 2021 events preceding DOL's withdrawal of the draft rule, which benefitted Plaintiff in that the

challenged provisions did not take effect until nearly two years later. Second, the declaratory judgment that Plaintiff seeks against OFR would not redress any injury suffered. *See* Argument I.B, *supra*. Third, laches bars these nearly two-year-old claims. *See* Argument I.C, *supra*.

Even if these threshold obstacles did not apply and the Court reached the merits of Plaintiff's claims against OFR, Defendants would be entitled to judgment. In Plaintiff's brief, it alleges that OFR failed "to follow the FRA and OFR's own rules." ECF No. 26-1 at 22. Plaintiff asserts that the FRA requires OFR to "*immediately*" make documents "available for public inspection," citing 44 U.S.C. § 1503 and 1 C.F.R. § 17.2(b). *Id.* (emphasis by Plaintiff). Plaintiff misreads the FRA and the regulations. As the D.C. Circuit has twice explained, *see* Argument III.C.1*, supra*, the FRA first "requires agencies to transmit to OFR the original and copies of any document required to be published in the Federal Register," "the document is then 'held for confidential processing until it is filed for public inspection,' 1 C.F.R. § 17.1," and "[t]hen, OFR must make a copy 'immediately available for public inspection in the Office' and 'cause to be noted on the original and duplicate originals or certified copies of each document the day and hour of filing,' 44 U.S.C. § 1503." *Humane Society*, 41 F.4th at 569; *see also Kennecott*, 88 F.3d at 1205 ("'confidential processing' period [occurs] *after* an agency transmits a document to the OFR and *before* the OFR makes the document available for public inspection") (emphasis in original).

Plaintiff also lobs baseless accusations at OFR staff, which it calls "rulemaking kings," alleging that they "ignore[d] or decline[d] to follow the requests of principal officers of the United States" when they did not deliver on the request from DOL's then-leadership to instantly publish the 2021 Draft Final Rule. *See* ECF No. 26-1 at 2, 23. Count 3—the one count directed at OFR—does not plead these claims and Plaintiff's complaint does not include allegations pertaining to Plaintiff's factual misstatement that OFR is "an independent agency protected from Presidential oversight."[11] *Id.* at 23; *see also id.* at 2 n.3. A "plaintiff is not permitted to raise new claims at the

[11] National Archives and Records Administration ("NARA") is not an "independent agency" of the type Plaintiff suggests. *See* ECF No. 26-1 at 2 n.3, 23. NARA is not a cabinet-level agency and, unlike the independent agencies involved in the cases Plaintiff cites in footnote

summary judgment stage, where those claims were not pleaded in the complaint." *Taylor v. Mills*, 892 F. Supp. 2d at 137. Even if these claims were properly raised, the record is clear that OFR's actions were reasonable: On the eve of the Presidential transition, OFR unsurprisingly confronted a "relentless backlog of regulatory documents" that it was receiving in the final days of President Trump's administration, which "prevented an emergency editor from picking up" DOL's submission. ECF No. 26-2 ¶¶ 4–5. OFR then explained that, "[g]iven [the] backlog, we will not be able to file immediately or publish by" January 19, 2021. *Id*. ¶ 5. "[T]he time agencies take to make decisions must be governed by a 'rule of reason,'" *In re Barr*, 930 F.2d at 74, and OFR's explanation was eminently reasonable. OFR's conduct also complied with its regulations regarding when emergency handling is available. *See* 1 C.F.R. §§ 17.4, 17.6 (available only if Director of Federal Register "concurs with a request" for emergency handling and such handling "is feasible," and, even then, publication is made "as soon as possible"). Contrary to Plaintiff's baseless claims, the onslaught of last-minute agency filings preceding the Presidential transition—not intentional delays by OFR staff—led to OFR not being able to expedite publication of the 2021 Draft Final Rule.

Thus, even if the Court reaches the merits, Defendants are entitled to judgment on Count 3.[12]

3, it answers directly to the President and is subject to all Executive orders, guidance, and memoranda issued by the Office of Management and Budget and the Office of Information and Regulatory Affairs. Moreover, the Archivist serves at the pleasure of the President rather than being confirmed for a fixed period as in the case with leadership at many independent agencies.

[12] The arguments Plaintiff press in its summary judgment brief against OFR are somewhat distinct from those pleaded in its complaint. In its complaint, Plaintiff alleges that OFR's regulations "allow for withdrawal of documents prior to publication only where necessary to correct extensive errors" and that OFR violated its regulations by allowing withdrawal "for a reason other than error-correction." Compl. ¶¶ 35, 90. That argument is belied by the text of OFR's regulations. The relevant regulation, 1 C.F.R. § 18.13(a), states that a "document that has been filed for public inspection with the Office of the Federal Register but not yet published, may be withdrawn from publication or corrected by the submitting agency." 1 C.F.R. § 18.13(a). There are no limitations governing the basis for which an agency can withdraw such a document. The regulation continues, but merely to explain the mechanics for different scenarios: for "[w]ithdrawals or minor corrections," an agency can send a "timely letter"; for "[e]xtensive corrections," "agency withdrawal of the document from publication" may be required. *Id.*

V. The Remainder of the Challenges Raised in the Complaint Have Been Abandoned.

A. Plaintiff Has Abandoned the Challenges to the 2022 Final Rule Pleaded in Counts 4–6.

Plaintiff has abandoned the other challenges to the 2022 Final Rule that are pleaded in the Complaint. In now its third brief—first a motion for a TRO and preliminary injunction, next a renewed preliminary injunction motion, and now a motion for summary judgment—Plaintiff has not advanced any argument as to these claims. Because "'the party challenging an agency's action as arbitrary and capricious bears the burden of proof,'" *City of Olmsted Falls,* 292 F.3d at 271 (quoting *Lomak Petrolium, Inc. v. FERC*, 206 F.3d 1193, 1198 (D.C. Cir. 2000)), and it is neither Defendants' nor this "[C]ourt's duty to identify, articulate and substantiate [an APA] claim for the petitioner," *Nat'l Exchange Carrier Ass'n Inc. v. FCC*, 253 F.3d 1, 4 (D.C. Cir. 2001), "grounds alleged in the complaint but not relied upon in summary judgment are deemed abandoned,'" *TitleMax of Delaware, Inc. v. Weissmann*, 24 F.4th 230, 236 n.5 (3d Cir. 2022) (quoting *Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995)).

Plaintiff includes no argument in its summary judgment briefing articulating and substantiating any of the claims in Counts 4–6 of the Complaint. For that reason alone, Plaintiff fails to satisfy its burden of proof and persuasion as to those claims; they should be disregarded or judgment on them should be entered for Defendants. *See Nat'l Exchange Carrier Ass'n*, 253 F.3d at 4; *see also Nat'l Wildlife Fed. v. U.S. Army Corps of Engineers*, 170 F. Supp. 3d 6, 9 n.1 (D.D.C. 2016); *Visinsccaia v. Beers*, 4 F. Supp. 3d 126, 134 (D.D.C. 2013).

B. Plaintiff Has Abandoned Its Standalone Claims in Counts 1–2 That DOL's Withdrawal of the 2021 Draft Final Rule Caused It Harm.

Plaintiff has also abandoned standalone procedural challenges aimed at DOL's withdrawal of the 2021 Draft Final Rule (Counts 1 and 2), relying on that draft rule only for purposes of arguing that it was actually a final rule and therefore the 2022 Final Rule could not be promulgated without additional notice-and-comment procedures. *See generally* ECF No. 26-1. As the Court has already explained at the preliminary injunction stage, "[f]aced with Defendants' lengthy argument that the lack of separate notice-and-comment did not cause injury to any of Plaintiff's

concrete interests, Plaintiff's reply appears to retract any claim of procedural injury from the withdrawal of the 2021 [Draft Final] Rule." *NCAE*, 2023 WL 2043149, at *5 (citation omitted). In its summary judgment brief, Plaintiff takes the same approach, abandoning any claim that DOL's withdrawal of the 2021 Draft Final Rule itself—separate and apart from the eventual promulgation of the 2022 Rule—caused it harm.

VI. The Abandoned Claims Are Without Merit.

A. DOL Acted Within the Bounds of Its Statutory Authority When It Increased the Surety Bond Requirement (Count 5).

Even if not abandoned, Defendants are entitled to judgment on Count 5 because the 2022 Rule's increase in surety bond rates falls comfortably within DOL's authority to take such actions that may be necessary to assure employer compliance with the conditions of employment under 8 U.S.C. § 1188. Count 5 alleges that the surety bond amount increase must be held unlawful under § 706(2)(C). Compl. ¶¶ 97–99. "[T]he question in every [§ 706(2)(C)] case is, simply, whether the statutory text forecloses the agency's assertion of authority, or not." *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 301 (2013). Here, Congress vested DOL with broad authority to take such actions that "may be necessary to assure employer compliance with terms and conditions of employment" under the H-2A Program, including the employment of admitted temporary H-2A workers and workers in corresponding employment. 8 U.S.C. § 1188(g)(2).[13] Congress also vested DOL with a mandate not to approve H-2A labor certifications if employment of H-2A workers would adversely affect the wages and working conditions of workers in the United States that are similarly employed. 8 U.S.C. § 1188(b), (a)(1).

DOL has long required H-2ALCs to secure a surety bond as proof of their ability to discharge their financial obligations under the H-2A Program, and that requirement "fits neatly within the language of the statute." *See Biden v. Missouri*, 142 S. Ct. 647, 652 (2022). After all, "[t]he surety bond is simply a device to ensure the Department has reasonable assurance that the

[13] Workers in corresponding employment are non-H-2A workers employed by an H-2A employer in any of the work included in the H-2A job order, or in any other agricultural work also performed by H-2A workers. 20 C.F.R. 655.103.

labor contractor will adhere to its program obligation[],” to pay worker wages, 73 Fed. Reg. at 77,163, and therefore adequate surety bonds are required because they “may be necessary to assure employer compliance with terms and conditions of [H-2A] employment.” 8 U.S.C. § 1188(g)(2). Ensuring employer compliance with obligations to pay H-2A workers and workers in corresponding employment their earned wages is also essential to preventing adverse effects on “the wages and working conditions of workers in the United States similarly employed.” 8 U.S.C. § 1188(a)(2). Especially given that H-2ALCs can be transient and undercapitalized, 87 Fed. Reg. at 61,734; 73 Fed. Reg. at 77,163, “[b]y ensuring that [H-2ALCs] can meet their payroll and other program obligations, the Department is better able to . . . limit any adverse effect on U.S. workers.” 87 Fed. Reg. at 61,734–35; *see also* 87 Fed Reg. at 61,734-37.[14] DOL therefore had the authority to ensure that the surety bonds required of H-2ALCs are adequate in light of increased wages and other changes to the H-2A Program. Defendants are entitled to judgment on Count 5.

B. DOL Satisfied the Requirements of Reasoned Decisionmaking (Counts 4 and 6).

Even if not abandoned, Defendants are entitled to judgment on Counts 4 and 6 because DOL easily satisfied the APA’s requirements for reasoned decisionmaking when it increased the surety bond amounts and modified the prevailing wage survey requirements. The arbitrary-and-capricious standard is highly “‘deferential’” and “requires courts to ensure ‘that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision.’” *Intelligent Transp. Society of Am. v. FCC*, 45 F.4th 406, 411 (D.C. Cir. 2022) (quoting *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021)). To satisfy that standard, the agency must “display awareness that it *is* changing position”

[14] Moreover, DOL’s interpretation of the statute is “longstanding and reasonable.” *See Little Sisters*, 140 S. Ct. at 2398 (Kagan, J., concurring). Courts “normally accord particular deference to an agency interpretation of longstanding duration.’” *Barnhart v. Walton*, 535 U.S. 212, 219 (2002) (cleaned up). Here, DOL’s reading has been stable “[o]ver the course of [four] administrations.” *See Little Sisters*, 140 S. Ct. at 2397. DOL first required surety bonds in the Bush administration, 73 Fed. Reg. at 77,163, and the policy was continued by the Obama administration after review, 75 Fed. Reg. at 6,920. DOL then proposed raising required surety bond amounts in the Trump administration, 84 Fed. Reg. at 36,203, and finalized the increases in the Biden administration, 87 Fed. Reg. at 61,735–38.

and "the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one[.]" *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). DOL acknowledged the changes it was implementing to the required surety bond amounts as well as the prevailing wage methodology, and provided a reasoned explanation for those changes. No more is necessary. *See Overdevest Nurseries, L.P. v. Walsh*, 2 F.4th 977, 985 (D.C. Cir. 2021).

DOL provided a reasoned explanation for increasing surety bond amounts. "The bonding requirement for H-2ALCs was created because, in [DOL's] experience, these employers can be transient and undercapitalized, making it difficult to recover the wages and benefits owed to their workers when violations are found." 84 Fed. Reg. at 36,204. Before the 2022 Rule, required bond amounts ranged from $5,000 to $75,000 based on the number of H-2A workers to be employed under the labor certification, with the highest amount required for certifications covering 100 or more workers. *Id*. DOL thoroughly explained why it was necessary to change the surety bond amounts. First, based on DOL's "enforcement experience, bond amounts [were] often insufficient to cover the amount of wages and benefits owed by H–2ALCs, limiting the Department's ability to seek back wages for workers." 87 Fed. Reg. at 61,738. Second, and relatedly, "as bond amounts have remained the same since 2010, [the prior] amounts [did] not reflect subsequent wage growth or the dramatic increase in the number of workers covered by temporary agricultural labor certifications." *Id*. The required bond amounts under the 2010 rule were based on an estimate of two weeks of unpaid wages per H-2A worker, calculated using an AEWR of $9.25/hour. 84 Fed. Reg. at 36,204. By 2018, however, average AWERs were $12.20. *Id*. Third, DOL explained that increasing the surety bond amounts consistent with wage growth and the increase in the number of workers covered by temporary agricultural labor certifications reflected the agency's value judgment; the change was "necessary to ensure fairness among labor contractors and for workers." 87 Fed. Reg. at 61,738. Although the change could result in some labor contractors hiring fewer workers or exiting the market, "[t]o the extent that some labor contractors lack the financial resources and/or creditworthiness to obtain the requisite bonds, it may be appropriate for these

contractors to hire fewer workers." *Id.* Accordingly, the 2022 Rule acknowledged a change and provided "explanations [that] were more than sufficient to satisfy the Department's burden under *Fox Television Stations*." *See Overdevest Nurseries*, 2 F.4th at 985.

DOL also provided a reasoned explanation for changing the prevailing wage survey methodology. Before the 2022 Rule, DOL used ETA Handbook 385, a document last updated in 1981, and other sub-regulatory guidance, to establish prevailing wage rates for all agricultural job orders. As the NPRM stated, that prevailing wage methodology was outdated and did not meet the policy goal of producing reliable prevailing wage rates. 84 Fed. Reg. at 36,184–85. The 1981 guidelines included burdensome requirements that were not "realistic in a modern budget environment" for SWAs, including the requirement for SWAs themselves to conduct surveys through in-person interviews even though similar DOL surveys instead rely solely on employer-reported data. *Id*. at 36,185. The Handbook also set burdensome sample size requirements. *Id*. at 36,184–85.

The 2019 NPRM and 2022 Rule explained why revisions to the survey methodology were required. 84 Fed. Reg. at 36,186-88; *see also* 87 Fed. Reg. at 61,689–99 (explanation in final rule). For example, the revised "standards [would be] more effective in producing a prevailing wage and more appropriate in a modern budget environment." 84 Fed. Reg. at 36,187; *see also id.* (prior standards "often result[ed] in 'no finding'[15] from a prevailing wage survey," which "waste[d] [] government resources and fail[ed] to meet the goal of producing reliable and accurate prevailing wage rates"). DOL also explained that it was "concerned that employers may be incentivized not to respond to a survey under the [prior] methodology because the OFLC Administrator does not issue a prevailing wage if the sample is too small." *Id*. DOL also explained that it was "broaden[ing] the categories of State entities that may conduct prevailing wage surveys to encourage more prevailing wage surveys to be conducted by reliable sources, independent of

[15] The reports of "No Finding" are included on the list of publicly available materials in the administrative record. ECF No. 23-2 (#171 U.S. Dep't of Labor, *Agricultural Online Wage Library*, https://www.foreignlaborcert.doleta.gov/aowl.cfm).

employer or worker influence." *Id*. at 36,186. These explanations more than satisfy the APA. *See Fox Television Stations,* 556 U.S. at 515; *Overdevest Nurseries*, 2 F.4th at 985.

C. Defendants Are Entitled to Judgment on Counts 1 and 2.

For the reasons set forth above, *see* Argument III.C, *supra*, DOL lawfully withdrew the 2021 Draft Final Rule prior to OFR making it available for public inspection. Because the 2021 Draft Final Rule had not yet been made available for public inspection and was not yet enforceable, *see* Argument III.C.2, *supra*, it could be "withdrawn *without explanation* or notice and comment[.]" *GPA Midstream*, 67 F.4th at 1195 (emphasis added).

VII. Plaintiff is Not Entitled to the Extraordinary Remedies Demanded.

Though Plaintiff's principal claim is that it should have been able to file an additional comment prior to DOL's issuance of the 2022 Rule, Plaintiff seeks exceedingly disproportionate equitable relief, including a permanent injunction barring any enforcement of the 2022 Rule and universal wholesale vacatur. Plaintiff has not established that any of these remedies are warranted.

Plaintiff has not demonstrated that it is entitled to a permanent injunction. *See* ECF No. 26-4 ¶ 2. "Success on an APA claim does not automatically entitle the prevailing party to a permanent injunction." *In re Federal Bureau of Prisons' Execution Protocol Cases*, 980 F.3d 123, 137 (D.C. Cir. 2020) (describing required showing). Plaintiff does not meet the high bar required to be awarded such an injunction let alone one enjoining DOL from enforcing the 2022 Rule against all affected employers, *see* ECF No. 26-4 ¶ 2, rather than against any specific, identifiable members of Plaintiff's organization who are able to demonstrate concrete and particularized imminent irreparable injury due to the challenged rule's enforcement while DOL again solicits comments on the provisions in the 2019 NPRM. *See Gill v. Whitford*, 138 S. Ct. 1916, 1921, 1933–34 (2018); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994).

Further, vacatur is not warranted under D.C. Circuit precedent.[16] "The decision whether to vacate depends on 'the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.'" *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 151-52 (D.C. Cir. 1993). Should the Court ultimately determine remand is appropriate, which it should not for the reasons explained above, both factors favor remand without vacatur.

First, for the reasons explained above as to why any error here was not prejudicial, *see* Argument III.D, *supra*, vacatur is inappropriate. Although notice-and-comment violations "'normally' require[] vacatur of the rule," *Heartland Regional Med. Ctr. v. Sebelius*, 566 F.3d 193, 199 (D.C. Cir. 2009), in this case, DOL has not "evad[ed] altogether the notice and comment requirements," *see Natural Resources Defense Council v. Wheeler*, 955 F.3d 68, 85 (D.C. Cir. 2020) (citation omitted). There is no dispute DOL took comment after the 2019 NPRM and that the 2022 Rule was the logical outgrowth of that NPRM. Plaintiff's argument is, instead, that DOL was required to re-solicit comments before promulgating the 2022 Rule. Accordingly, there is "at least a serious possibility," *see Allied-Signal*, 988 F.2d at 151, that DOL "would 'reach the same conclusion and reinstitute the same action' on remand," because the agency has already considered comments, including Plaintiff's, on the 2019 NPRM, *see Stand Up for California! v. U.S. Dep't of Interior*, 879 F.3d 1177, 1190–91 (D.C. Cir. 2018). (For these same reasons, remand without vacatur to consider additional comments is also inappropriate because any procedural violation did not cause prejudicial error. *See* Argument III.D, *supra*.)

Second, the consequences of vacating the 2022 Rule at this stage would be disruptive and would "risk significant harm" to workers who would no longer be protected by surety bonds that are sufficient to cover their wages. *Cf. State of Wisconsin v. EPA*, 938 F.3d 303, 336 (D.C. Cir.

[16] Although the D.C. Circuit has concluded that vacatur is an "ordinary practice" in certain APA cases, *e.g., United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019), vacatur is not a remedy authorized by the APA, and even if it were, wholesale vacatur of rules is a remedy more extraordinary than injunction warranting even more limited application. *See United States v. Texas*, 142 S. Ct. 1964, 1981 (2023) (Gorsuch, J., concurring).

2019). That is particularly true given that "the status quo ante cannot be restored." *Am. Great Lakes Ports Ass'n v. Zukunft*, 301 F. Supp. 3d 99, 105 n.2. (D.D.C. 2018). H-2ALCs have been procuring surety bonds at amounts required under the 2022 Rule covering wages for people that began working on or after February 13, 2023, and it is not clear how those bond purchases can now be unwound, if at all. *See Am. Great Lakes Ports Ass'n v. Schultz*, 962 F.3d 510, 519 (D.C. Cir. 2020) (remand without vacatur "appropriate when vacatur would disrupt settled transactions"). At most, then, the Court should remand without vacatur. But, for the reasons stated throughout, Plaintiff is not entitled to any of its requested remedies, and judgment should be entered for Defendants.[17]

CONCLUSION

The Court should deny Plaintiff's motion for summary judgment and grant Defendants' cross-motion for summary judgment.

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Respectfully submitted,

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[17] Plaintiff's request for fees, ECF No. 26-4 ¶ 6, is unsupported and premature. A claimant seeking fees under section 2412(d) must submit an application "within 30 days of final judgment." 28 U.S.C. § 2412(d)(1)(B); *see also Melkonyan v. Sullivan*, 501 U.S. 89, 96 (1991).