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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

FRESNO DIVISION

UNITED FARM WORKERS and UFW FOUNDATION, Plaintiffs, v. THE UNITED STATES DEPARTMENT OF LABOR and EUGENE SCALIA, in his official capacity as United States Secretary of Labor, Defendants.	Case No. 1:20-cv-01690-AWI-SAB **NOTICE OF MOTION FOR PRELIMINARY INJUNCTION** **ORAL ARGUMENT REQUESTED** **SCHEDULING STIPULATION TO FOLLOW**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that at the earliest practical date to be set by the Court, Plaintiffs United Farm Workers and UFW Foundation will and hereby do move the Court to enter a preliminary injunction enjoining Defendants United States Department of Labor and Eugene Scalia from implementing or otherwise taking any action to enforce the Final Rule DOL published in the Federal Register on November 5, 2020, which is scheduled to become effective on December 21,

2020.[1]

This Motion is supported by the accompanying Memorandum of Points and Authorities, the Declarations of Mark Selwyn, Teresa Romero (United Farm Workers), and Diana Tellefson Torres (UFW Foundation), and such other written or oral argument as may be presented at or before the time this motion is taken under submission by the Court.

Mindful that the Final Rule is scheduled to become effective on December 21, 2020, the parties have conferred in advance of this filing and have agreed, subject to the Court's approval, to an expedited briefing schedule. The parties have prepared a scheduling stipulation which Plaintiffs plan to file shortly after this motion has been docketed.

DATED: November 30, 2020

Respectfully submitted,

/s/ Mark D. Selwyn

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[1] This Court cited the December 21 effective date of the Final DOL Rule as a basis for denying the United States' motion to Modify and Dissolve the Temporary Restraining Order and Preliminary Injunction in the related case of *United Farm Workers v. Perdue*, No. 1:20-cv-01452-DAD-JLT. *See* Order Denying Defendants' Motion To Modify And Dissolve The Temporary Restraining Order And Preliminary Injunction, No. 1:20-cv-01452-DAD-JLT (E.D. Cal. Nov. 25, 2020) ECF 43 at 6.

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

FRESNO DIVISION

UNITED FARM WORKERS and UFW FOUNDATION,

Plaintiffs,

v.

THE UNITED STATES DEPARTMENT OF LABOR and EUGENE SCALIA, in his official capacity as United States Secretary of Labor,

Defendants.

Case No. 1:20-cv-01690-AWI-SAB

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

This Administrative Procedure Act (APA) action challenges DOL's decision to fundamentally alter its methodology for calculating minimum wages under the H-2A foreign guestworker program in a way that irrationally untethers wages for most agricultural jobs from market wage rates paid to farmworkers—to the detriment of U.S. farmworkers and H-2A foreign guestworkers.

In creating the H-2A temporary foreign worker visa program in 1986, Congress recognized the potential for job losses, wage reductions, and other harms to U.S. farmworkers. While Congress did not limit the number of annual H-2A visas, it charged the U.S. Department of Labor (DOL) with protecting U.S. farmworkers' jobs and wages from the potentially adverse economic consequences posed by employers' access to an unlimited supply of vulnerable, low-cost foreign workers. Accordingly, before U.S. employers can hire foreign labor under the H-2A program, federal law mandates that DOL certify that the hiring of those guestworkers at each employer "will not adversely affect the wages and working conditions of workers in the United States similarly employed."

The statute and DOL's regulations contain several mechanisms to protect against adverse effects. DOL primarily fulfills its statutory mandate with respect to wage rates by establishing for each state an Adverse Effect Wage Rate (AEWR)—a minimum wage that employers must pay to both U.S. farmworkers and foreign guestworkers. Since the H-2A program's inception in 1986 (except for a brief two-year period beginning in 2008), DOL has relied exclusively on data from the U.S. Department of Agriculture (USDA) Farm Labor Survey (FLS) to establish AEWRs. DOL has repeatedly acknowledged that the FLS is its preferred data source because it is "the *only comprehensive survey* of wages paid by farmers and ranchers." 85 Fed. Reg. 70,445, 70,467 (Nov. 5, 2020) (emphasis added). That data allows DOL to establish AEWRs that reflect what farmworkers are actually paid, which protects wages paid to U.S. farmworkers from being depressed or stagnating due to the availability of foreign guestworkers willing to work for less.

Contradicting its own pronouncements that H-2A wages must be closely linked with actual market wages paid to farmworkers to protect against adverse effects, DOL's Final Rule—published on November 5, 2020—untethers the AEWR from any measure of market wages. First, the rule

freezes AEWRs, using FLS wage data from 2019, for two years—meaning that farmworkers' wages will not increase by even the rate of inflation, let alone the higher rates at which farmworkers' wages have been rising for the last several years. Second, the rule announces that starting in 2023, DOL will begin adjusting those frozen AEWRs (still based on FLS wage data from 2019) annually, using the Employment Cost Index (ECI)—a metric that measures the change in the cost of labor by surveying various private industry sectors *except for* the agricultural sector—which DOL selected in part because it has risen more slowly than farmworker wages.[1]

The Final Rule—which becomes effective on December 21, 2020—is unlawful and must be set aside under the APA. *First*, the Final Rule contravenes DOL's statutory mandate because it fails to protect U.S. farmworkers from adverse effects (i.e., wage stagnation or depression) caused by the increasing supply of foreign guestworkers. Instead, the Final Rule directly causes wage stagnation by imposing a two-year wage freeze. *Second*, the Final Rule is arbitrary and capricious because DOL failed to provide a cogent rationale for the rule changes, and instead offered contradictory and inconsistent justifications. *Third*, DOL failed to comply with the APA's notice-and-comment requirements. Although DOL issued a Notice of Proposed Rulemaking (NPRM) in July 2019, the Final Rule is not a logical outgrowth of the initial proposal.

Preliminary relief is necessary because the Final Rule will cause many hundreds of thousands of farmworkers already living on subsistence incomes to be paid significantly less than they otherwise would. The two-year wage freeze will cause workers to be paid more than 4% less on average than they would under DOL's current regulations. In certain states, like California, Oregon, and Washington, those losses would be substantially greater. Indeed, DOL itself quantified that H-2A workers stand to lose over $1.6 billion in wages over the next ten years, with average

[1] Conversely, the Final Rule creates more refined, market-based annual AEWRs for a small set of "higher-skilled" agricultural jobs using the Occupational Employment Statistics (OES) survey. DOL explains that the shift to OES survey data for that subset of jobs is required to ensure that AEWRs accurately reflect actual market wages, which is necessary to protect U.S. farmworkers from adverse effects.

losses totaling $167.76 million per year. *See* 85 Fed. Reg. at 70,472. Plaintiffs' members will be irreparably harmed by those drastic wage reductions.

BACKGROUND

A. The H-2A Foreign Guestworker Visa Program

1. Statutory Framework

The H-2A agricultural guestworker program permits agricultural employers to hire foreign workers to perform agricultural work on a temporary basis under certain circumstances. The H-2A program does not limit the number of H-2A visas that may be granted each year. As DOL itself has recognized, the program can create downward pressure on the wages paid to both U.S. and foreign guestworkers because the introduction of a potentially unlimited supply of low-cost, foreign labor prevents higher wages that would ordinarily result from competition for labor. *See* 75 Fed. Reg. 6884, 6892 (Feb. 12, 2010). With the labor market no longer exerting upward pressure, wage stagnation or depression is likely to occur. *See* 74 Fed. Reg. 45,906, 45,911 (Sept. 4, 2009) (employing large numbers of H-2A workers in a labor market at the prevailing wage "would inevitably keep the prevailing wage improperly low").

Congress, recognizing the risks of an uncapped visa program, mandated that employers apply and obtain approval from DOL to hire H-2A foreign guestworkers. Federal law charges DOL with certifying petitions requesting foreign guestworkers only where the employer has shown that (a) the domestic agricultural labor market cannot supply enough workers who are "able, willing, and qualified, and who will be available at the time and place needed, to perform the labor" required, *and* (b) the employment of temporary foreign labor "will not adversely affect the wages and working conditions" of domestic farmworkers "similarly employed." 8 U.S.C. § 1188(a)(1); *see also id.* § 1182(a)(5) (mandating that DOL similarly certify most foreign laborers seeking to work in the United States); *id.* § 1184(c)(1) (discussing the non-immigrant labor certification process).

2. H-2A Minimum Wages And The "Adverse Effect Wage Rate"

DOL satisfies its obligation to prevent adverse economic effects on U.S. farmworkers by setting minimum wage rates for H-2A employers. The AEWR is the primary wage rate under the H-2A program, determining the wages of approximately 92% of farmworkers employed by H-2A program employers, because it is higher than the other minimum wages in most circumstances. *See* 84 Fed. Reg. 36,168, 36,179 (July 26, 2019).[2] DOL's current AEWR regulations, promulgated in 2010, require it to set an AEWR for each state using "[t]he annual weighted average hourly wage for field and livestock workers (combined) … as published annually by the U.S. Department of Agriculture … based on its quarterly wage survey," the FLS. 20 C.F.R. § 655.103(b).

The AEWR has been based on FLS data since the H-2A program's inception in 1986 (except for a two-year period starting in 2008), and DOL used FLS data for the H-2A's predecessor program starting in 1953. *See* 54 Fed. Reg. 28,037, 28,039-28,040 (July 5, 1989). Because of DOL's longstanding reliance on the survey, USDA conducts the FLS in cooperation with DOL, *see* Selwyn Decl., Ex. 1 (USDA, *Farm Labor: About the Survey*), and DOL has funded the FLS since July 2011 pursuant to a memorandum of understanding between the agencies, *see* 84 Fed. Reg. at 36,178.

On September 30, 2020, USDA suddenly announced that it was discontinuing the FLS and ceasing publication of the Farm Labor Report (FLR). *See* 85 Fed. Reg. 61,719 (Sept. 30, 2020). USDA did not solicit any public comment or employ formal rulemaking procedures. *See id.* The Notice offers no rationale for USDA's decision. On October 13, 2020, Plaintiffs UFW and UFW Foundation challenged USDA's decision to cancel the FLS and FLR and sought a temporary restraining order and preliminary injunction preventing USDA from implementing its decision. *See* Compl., *United Farm Workers v. Perdue*, No. 20-cv-1452 (E.D. Cal. Oct. 13, 2020), ECF No. 1. Plaintiffs argued that USDA's decision was arbitrary and capricious—in large part because it failed to consider DOL's reliance on the FLS data—and failed to comply with the APA's notice-and-

[2] DOL regulations also permit H-2A employers to pay the local prevailing wage rate for particular jobs, an agreed-upon collective bargaining wage, or the federal or state minimum wage. *See* 20 C.F.R. § 655.120(a). But few prevailing wage surveys are performed, and the other alternatives apply to relatively few workers.

comment requirements. *See* Pls.' Mot. for TRO & Prelim. Inj. 9-21, *United Farm Workers v. Perdue*, No. 20-cv-1452 (E.D. Cal. Oct. 13, 2020), ECF No. 3.

On October 28, 2020, the Court granted Plaintiffs' motion and enjoined USDA from canceling the October 2020 FLS and ceasing publication of the November 2020 FLR. *See United Farm Workers v. Perdue*, No. 12-cv-1452-DAD-JLT, 2020 WL 6318432 (E.D. Cal. Oct. 28, 2020). The Court found that Plaintiffs were likely to prevail on most of their claims, explaining in part that "USDA's cursory, one-page decision provides no indication that the USDA considered the impact on farmworker wages caused by its decision to eliminate the FLS." *Id.* at *10. The Court also found that Plaintiffs' members and farmworkers across the country would "suffer immediate harms in the form of economic hardship that cannot be undone through the payment of back wages." *Id.* at *14. Accordingly, USDA is compelled by court order to conduct the FLS and publish the FLR originally slated for November 2020, meaning that 2020 FLS data will be available to DOL.

B. DOL's Final Rule For The First Time Untethers AEWRs From Market Wages

On November 5, 2020, DOL published a Final Rule in the Federal Register announcing changes to its methodology for establishing AEWRs under the H-2A program. *See* 85 Fed. Reg. at 70,445.[3] The Final Rule fundamentally alters the methodology for calculating AEWRs by untethering wages for most H-2A jobs from farmworkers' real-world wages—a substantial departure from the AEWR regulation proposed in DOL's July 2019 NPRM.[4] The Final Rule freezes the current 2020 AEWRs—based on 2019 FLS wage data—for two years. *Id.* at 70,452. Then, beginning in 2023, DOL will adjust those 2020 AEWRs annually by the previous year's change in the Employment Cost Index (ECI)—an index that measures the change in the cost of labor by surveying various private industries, but notably *excluding* farms and agricultural workers. *Id.*

The Final Rule acknowledges that the FLS provides the most accurate data available for ascertaining farmworkers' market wages. It notes, for example, that "the FLS has been the *only*

[3] Available at https://www.govinfo.gov/content/pkg/FR-2020-11-05/pdf/2020-24544.pdf.
[4] DOL will also establish AEWRs each year—including in 2021 and 2022—for a smaller set of "higher-skilled" agricultural jobs using the annual statewide average hourly gross wage for the occupation based on the OES survey—a program administered by DOL's Bureau of Labor Statistics (BLS) that excludes farms from its data collection. 85 Fed. Reg. at 70,452.

comprehensive survey of wages paid by farmers and ranchers." *Id.* at 70,467 (emphasis added). "[G]iven the comprehensiveness and relevance of the FLS data," DOL concludes that "it is appropriate to use the … results of the FLS published in November 2019[] as the starting point to establish AEWRs for most H-2A job opportunities during calendar years 2021 and 2022 and … in subsequent years." *Id.* at 70,446. However, DOL chose not to use updated FLS data, which must be produced pursuant to this Court's October 28, 2020 Order, to publish AEWRs for 2021.

DOL justifies the decision to abandon the use of FLS data largely by pointing to USDA's decision to end the survey. The Final Rule explains, for instance, that DOL reached its conclusions because "USDA publicly announced its intent to cancel the planned October data collection" and that, as a result, it "may not release its November 2020 report." *Id.* at 70,446. Moreover, DOL repeatedly acknowledges that employers who pay H-2A wages complained that AEWRs based on FLS data were increasing too quickly. *See id.* at 70,451. In fact, "unsustainable wage increases" was the complaint that DOL heard "most often" from employers that commented on the proposed rule. *Id.* DOL concluded that the Final Rule's two-year wage freeze and subsequent reliance on the ECI to adjust wages "best addresse[d]" those commenters' concerns. *Id.* at 70,452.

The Final Rule recognizes that its rule changes would have a substantial negative impact on farmworkers' wages. For example, DOL recognizes that wages for one of the largest groups of farmworkers (those categorized under SOC 45-2092) would decrease by $61 million and $120 million in 2021 and 2022. *Id.* at 70,472. DOL explains that those lost wages "constitute a transfer payment from H-2A employees to H-2A employers," i.e., employers benefit under the Final Rule by paying farmworkers less. *Id.* Altogether, the Final Rule results in "average annual undiscounted transfers of $167.76 million," with a total "transfer" of $1.68 billion over the next ten years. *Id.*

LEGAL STANDARD

A preliminary injunction is warranted where plaintiffs have shown that they are "likely to succeed on the merits," that they are "likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the public interest." *Winter v. NRDC.*, 555 U.S. 7, 20 (2008). Preliminary relief is also appropriate when "there are serious questions going to the merits—a lesser showing than likelihood of success on the merits,"

"the balance of hardships tips *sharply* in the plaintiff's favor, and the other two *Winter* factors" (irreparable harm and the public interest) "are satisfied." *All. for the Wild Rockies v. Pena*, 865 F.3d 1211, 1217 (9th Cir. 2017) (internal quotation marks omitted). Plaintiffs satisfy both standards.

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

The APA directs courts to "hold unlawful and set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or that is taken "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D). Regulations "that are contrary to clear Congressional intent or frustrate the policy that Congress sought to implement must be rejected." *Earth Island Inst. v. Hogarth*, 494 F.3d 757, 765 (9th Cir. 2007). Moreover, agency action that is not the product of reasoned decisionmaking is arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). To satisfy that requirement, an agency must "cogently explain why it has exercised its discretion in a given manner." *Id.* at 48; *see also id.* at 43 (agencies must provide "a 'rational connection between the facts found and the choice made'").

Plaintiffs are likely to succeed in establishing that the Final Rule was an unlawful agency action for four reasons. *First*, the Final Rule contravenes federal law by failing to set AEWRs with regard to market wages, even though the Final Rule reaffirms DOL's longstanding conclusion that AEWRs must reflect market wages to protect U.S. workers against adverse effects. *Second*, DOL's decision to intentionally depress farmworkers' wages by freezing them for two years and then annually adjusting them with a generic wage index—an index that *excludes* farm labor and is rising more slowly than farmworkers' wages—is arbitrary and capricious. *Third*, DOL failed to analyze adequately the economic impact of its new methodology on U.S. farmworkers. *Fourth*, DOL violated the APA's procedural requirements by promulgating an AEWR methodology that is not a logical outgrowth of the proposal discussed in the July 2019 NPRM.

A. The Final Rule Contravenes Federal Law By Failing To Protect Against Adverse Effects

Plaintiffs are likely to succeed in showing that the Final Rule contravenes federal law because its AEWR methodology undermines DOL's statutory obligation to protect U.S. farmworkers from the adverse effects of admitting agricultural guestworkers. Under the APA, regulations that contravene federal law or that are "'contrary to clear congressional intent'" must be declared invalid and set aside. *Planned Parenthood of Greater Washington & N. Idaho v. U.S. Dep't of Health & Human Servs.*, 946 F.3d 1100, 1112 (9th Cir. 2020); *see also Akhtar v. Burzynski*, 384 F.3d 1193, 1198 (9th Cir. 2004) (similar). The Final Rule contravenes federal law and is contrary to Congress's clear intent because it permits employers hiring guestworkers to pay below-market wage rates that cause U.S. farmworkers' wages to decline or stagnate.

DOL has consistently recognized that AEWRs tied to actual market wages—which prevent employers from paying below-market rates—are necessary to protect farmworkers from the adverse effects of hiring H-2A workers. To start, DOL recognizes that while admitting H-2A workers can address a labor shortage, "[a]bsent an increase of workers under the H-2A program, wages would rise above the currently observed wage in order to dispel the labor shortage." 75 Fed. Reg. at 6891. DOL explained in its 2010 Rule that AEWRs guard against that wage stagnation "[b]y computing an AEWR to approximate the equilibrium wage that would result absent an influx of temporary foreign workers, … put[ting] incumbent farm workers in the position they would have been in but for the H-2A program." *Id.* at 6891-6892. That approach, DOL explained, "avoids adverse effects on currently employed workers by preventing wages from stagnating at the local prevailing wage rate when they would have otherwise risen to a higher equilibrium level over time." *Id.*

The Final Rule reaffirms this reasoning, even as it adopts a contrary policy. For instance, in its rejection of alternatives, DOL repeatedly invokes the necessity of linking AEWRs to local labor market conditions, insisting that "[t]he Department establishes wages based on data related to actual wages paid to workers." 85 Fed. Reg. at 70,461. The Final Rule thus rejects a proposed nationwide wage because it would "not sufficiently relate to the actual wages paid to similarly employed workers" and thus "would not meet th[e] [AEWR's] purpose" of "approximat[ing] the wage paid to

workers in the United States similarly employed," *id.*, and a single nationwide AEWR would inevitably lead to "below market rates in some areas and above market rates in other areas, resulting in all of the associated adverse effects." *Id.* DOL similarly criticized another proposed alternative by stating that it would lead to AEWRs "untethered to actual wages paid to similarly employed workers in the area." *Id.* at 70,464.

Similarly, the Final Rule explains that it must establish AEWRs each year—including in 2021 and 2022—for a smaller set of "higher-skilled" agricultural jobs using the OES survey because using alternative methodologies (even, apparently, FLS data) "may have the effect of depressing wages in higher-paid occupations," which would "cause an adverse effect on the wages of workers in the United States similarly employed, contrary to [DOL's] statutory mandate." *Id.* at 70,458-70,459. DOL explains that even if AEWRs increase because of the change in methodology, relying on OES survey data is still appropriate because "these changes are the result of [DOL's] use of more accurate occupational data that better reflect the actual wage paid, and thus the wage needed to protect against adverse effect." *Id.* at 70,453.[5] In short, DOL has understood federal law to require AEWRs reflecting market wages to prevent adverse effects on U.S. farmworkers.[6]

Nonetheless, the methodology adopted in the Final Rule completely severs the relationship between the AEWR and current farm labor market conditions. For two years, AEWRs for the "overwhelming majority of H-2A job[s]" will remain frozen at 2020 levels, even though recent trends show that agricultural wages have been rising and will likely continue to do so. 85 Fed. Reg. at 70,452; *see also infra* pp.22-23. Then, when the wage freeze lifts in 2023, DOL will begin issuing new AEWRs with annual adjustments based on a generic index of wages from across the economy without ever making up for the wage growth lost during the two-year freeze. Moreover, DOL's chosen index—the ECI—*excludes* farm labor, which is particularly significant because agricultural wages have been rising faster than average wages across the economy. *See* 85 Fed. Reg. at 70,455.

[5] *See also id.* at 70,458 (finding that because "the OES is more accurate than the FLS for [certain] agricultural occupations, such as supervisors, … its use will better protect against adverse effect for those occupations").

[6] DOL has never construed 8 U.S.C. § 1188(a)(1)(B) to allow AEWRs to be set below market wages, or suggested that below-market wage rates prevent adverse effects to U.S. farmworkers.

Even if the ECI were an acceptable proxy for shifts in the farm labor market (and an adequate replacement for FLS data)—which it is not—the new methodology would still not track local labor market conditions because the ECI reflects national trends, not state-wide markets. *See id.* at 70,461 (emphasizing need for AEWR to track state-wide market wages).[7]

In sum, the Final Rule adopts a methodology guaranteed to produce AEWRs untethered from market wages (and at below-market rates), even though DOL has confirmed that AEWRs based on market rates are needed to protect U.S. farmworkers from adverse effects. The Final Rule thus will cause DOL to certify petitions for H-2A workers whose employment will adversely affect the wages and job opportunities of U.S. workers, in violation of 8 U.S.C. § 1188(a)(1)(B).

B. The Final Rule Is Arbitrary and Capricious Because DOL Failed To Offer A Reasoned Explanation For Intentionally Deflating Farmworker Wages

The Final Rule is unequivocal about its effect: its purpose is to allow employers to pay farmworkers substantially less than under DOL's current methodology. The Final Rule itself estimates that H-2A workers will suffer wage losses totaling over $1.6 billion over ten years, a figure that would increase substantially if it included U.S. farmworkers' lost wages. *See* 85 Fed. Reg. at 70,472. Indeed, DOL suggests that the rule's primary objective was to lower wages by preventing increases to AEWRs that reflect market rates. *See id.* at 70,457 (conceding that AEWR increases and the "economic hardship to farmers" "led [DOL] to consider alternatives" to FLS data). DOL further admits that the Final Rule will accelerate the H-2A program's unprecedented recent growth at the expense of U.S. farmworkers. *See id.* at 70,472 (recognizing that the Final Rule "may further encourage U.S. employers to use more H-2A workers" because more U.S. farmworkers will be rendered "unavailable" by requesting market wages). Those admissions underscore the arbitrariness of DOL's decisions.

Plaintiffs are likely to succeed on their claim that the Final Rule is arbitrary and capricious for several reasons. *First*, the Final Rule fails to adequately justify its imposition of a two-year

[7] The ECI is reported nationally and regionally. ECI's data are divided into four regions—Northeast, South, Midwest, and West—and then further divided to reflect certain large metropolitan areas (*e.g.*, Los Angeles-Long Beach, CA CSA). None of these figures provides the tailored data required to track state-wide agricultural labor market conditions.

wage freeze, thereby violating the "'fundamental requirement of administrative law … that an agency set forth its reasons for decision.'" *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014). *Second*, the Final Rule irrationally replaces FLS data with a generic wage index to adjust AEWRs starting in 2023. DOL's attempt to rationalize its move from FLS data to a less accurate data source because of supposed unpredictability contradicts DOL's statements about the importance of using market data. *Third*, the Final Rule's failure to analyze the economic effects of the new AEWR methodology on U.S. workers means that DOL "entirely failed to consider an important aspect of the problem" before it. *State Farm*, 463 U.S. at 43.

1. DOL Failed To Offer A Sufficient Explanation For Its Decision To Freeze H-2A Wages for Two Years

The Final Rule arbitrarily decides to freeze H-2A wages for two years, stagnating wages in a manner wholly at odds with the AEWR's purpose and DOL's statutory mandate. Agency regulations are regularly found to be arbitrary and capricious when an agency's explanation is "'internally inconsistent and inadequately explained.'" *Banner Health v. Price*, 867 F.3d 1323, 1349 (D.C. Cir. 2017). DOL's justification for the two-year wage freeze is inadequate because it contradicts the reasoning offered elsewhere in the Final Rule (and in prior rulemakings), ignores recent trends in agricultural labor markets, and fails to address critical aspects of the rule.

First, to the extent DOL justifies its Final Rule by relying on USDA's decision to end the FLS, that reasoning renders the wage freeze arbitrary and capricious. As an initial matter, the July 2019 NPRM expressed DOL's clear intent to continue relying on FLS data to establish AEWRs, explaining that "[t]he FLS [remained] the Department's preferred wage source for establishing the AEWR because it is the only comprehensive wage survey that collects data from farm and ranch employers." 84 Fed. Reg. at 36,180.[8] And the Final Rule continues to defend the FLS's accuracy, responding to commenters' complaints about the volatility of AEWRs by rejecting "suggestions that

[8] *See also* 85 Fed. Reg. at 70,468 ("[T]he FLS has been the only comprehensive survey of wages paid by farmers and ranchers that has enabled the Department to establish hourly rates of pay for H-2A opportunities."); 75 Fed. Reg. at 6899 (explaining that the FLS's "broader geographic scope makes the FLS more consistent with both the nature of agricultural employment and the statutory intent of the H-2A program").

the FLS survey results were flawed." 85 Fed. Reg. at 70,456. Indeed, even as DOL abandons the FLS for annual AEWR adjustments, the Final Rule uses 2019 FLS results "as the starting point to establish AEWRs for most H-2A job opportunities" moving forward, "given the comprehensiveness and relevance of FLS data." *Id.* at 70,446.

Nonetheless, DOL chose to abandon the use of FLS data for even 2021, explaining that it reached its conclusion because "USDA publicly announced its intent to cancel the planned October data collection" and that, as a result, it "may not release its November 2020 report." 85 Fed. Reg. at 70,446. DOL similarly asserts that "USDA's recent announcement regarding the FLS" means that relying on old FLS data instead of current FLS data is "appropriate in order to promote greater certainty in the setting of AEWRs in future years." *Id.*[9] That justification ignores that this Court ordered USDA to conduct the FLS and issue the November 2020 FLR *before* DOL issued the Final Rule, *see United Farm Workers v. Perdue*, No. 12-cv-1452-DAD-JLT, 2020 WL 6318432 (E.D. Cal. Oct. 28, 2020), meaning that FLS data will be available to DOL to publish 2021 AEWRs under its current methodology. Thus, DOL's statements in the Final Rule that the FLS "has been suspended for October 2020," 85 Fed. Reg. at 70,468, and that the availability of 2020 FLS data remains "uncertain," *id.* at 70,449, are simply wrong.[10] "[A]n agency cannot ignore evidence that

[9] *See also id.* at 70,446 ("The Department has determined that this uncertainty regarding the near-term and long-term future of the FLS also weighs in favor of the Department establishing now a revised methodology for determining the AEWR[.]"); *id.* at 70,452 (suggesting that the new rule is justified "in light of uncertainty about the immediate availability of FLS wage data"); *id.* at 70,455 (suggesting the new rule is reasonable "given uncertainty about the future of the FLS"); *id.* (stating that freezing AEWRs for two years and then adjusting those wage rates using the ECI was "particularly [appropriate] given uncertainty about the future of the FLS"); *id*. at 70,457 (expressing "concern[s] about using a data source beyond its control and which is subject to an uncertain future, demonstrated by the recent suspension of data collection"); *id.* at 70,458 (concluding that relying on OES survey data is appropriate because of "the continued uncertainty about ongoing availability of FLS data, including to set the 2021 AEWRs"); *id.* (noting that DOL "does not control the production of new wage data from the FLS and recognizes the continued uncertainty about ongoing availability of FLS data").

[10] While the Final Rule does mention the injunction entered against USDA, it ignores the scope of the injunction issued against USDA by suggesting that FLS data have been ordered *collected*, but refusing to acknowledge that the order requires FLS data to be compiled, edited, and published in the FLR as normal. *See* 85 Fed. Reg. at 70,446 ("[T]he district court recently ordered USDA to proceed with the collection of FLS data for 2020.").

undercuts its judgment; and it may not minimize such evidence without adequate explanation." *Genuine Parts Co. v. EPA*, 890 F.3d 304, 346 (D.C. Cir. 2018). Therefore, DOL's failure to adequately explain why it is appropriate to end its reliance on FLS data (by freezing 2020 AEWRs) renders the rule arbitrary.

Second, the Final Rule departs without explanation from DOL's longstanding conclusion that AEWRs can only protect against adverse effects where they reflect current wages set in the relevant agricultural labor markets. It is well established that "the requirement that an agency provide reasoned explanation for its action … demand[s] that it display awareness that it *is* changing position." *FCC v. Fox Television Stations Inc.*, 556 U.S. 502, 515 (2009). Thus, "[a]n agency may not … depart from a prior policy *sub silentio* …. And of course the agency must show that there are good reasons for the new policy." *Id.* And where, as here, the "new policy rests upon factual findings that contradict those which underlay its prior policy … [i]t would be arbitrary or capricious to ignore such matters … [because] a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Id.* at 515-516.

DOL posits that it "believes that its new methodology meets the statutory requirement to protect workers in the United States similarly employed to H-2A workers from adverse wage effects." 85 Fed. Reg. at 70,454. That conclusion, however, is left unexplained and contradicts other aspects of the Final Rule. As explained above, *see supra* Part I.A, the Final Rule reaffirms DOL's longstanding position that effective protection against adverse effects requires AEWRs to reflect agricultural market conditions. The two-year wage freeze, however, completely severs any relationship between AEWRs and market wages—directly contradicting the Final Rule's recognition that below market wage rates would adversely affect U.S. farmworkers. This disconnect between DOL's decision to freeze wages and the rationale underlying AEWRs is accentuated because agricultural labor markets have experienced consistent wage increases in recent years, as measured by the FLS—the accuracy of which DOL defends. *See* 85 Fed. Red. at 70,455-70,456. DOL fails to explain how its new approach—which directly stagnates wages—adequately protects U.S. farmworkers from the adverse effects of hiring H-2A workers. That failure renders the rule arbitrary and capricious. *See AFL-CIO v. Brock*, 835 F.2d 912, 918 (D.C. Cir. 1987) (holding that

a "sparse discussion in the Federal Register does not sustain such a basic change in [DOL's] interpretation of its statutory mandate" to protect against adverse effects).

Third, DOL's unsubstantiated conclusion that the wage freeze protects U.S. farmworkers from adverse effects is also belied by evidence that demonstrates that farmworkers' market wages are already above the level of the wage freeze. "'An agency action is arbitrary and capricious if the agency has … offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *WildEarth Guardians v. EPA*, 759 F.3d 1064, 1069 (9th Cir. 2014). The Final Rule would freeze wages for 2021 and 2022 at the wage levels measured by the 2019 FLS and established as 2020 AEWRs. But as employers' complaints about increasing H-2A wages reflect, AEWRs were expected to be higher in 2021 than in 2020. *See* 85 Fed. Reg. at 70,456 ("AEWR increases have averaged as much as 9.5 percent annually in recent years."). Indeed, the May 2020 FLR indicated that the market wages for field and livestock workers combined (the data used to establish AEWRs) in the January and April 2020 reference weeks had increased 3% year-over-year, confirming that the trend of increasing farmworker wages is continuing. *See* Selwyn Decl., Ex. 2, at 1 (USDA, *Farm Labor* 1 (May 28, 2020)). Data also show that wage increases were even greater in certain states, including California. *See infra* p.22. Those data—which the Final Rule maintains are accurate, *see* 85 Fed. Reg. at 70,456—confirm that the level of the wage freeze is *already* lower than farmworkers' market wages. This gap will only increase if the AEWRs remain frozen through the end of 2022. The Final Rule does not explain how freezing AEWRs at a level *already below* market wages could protect against adverse effects.

DOL's stated justification for the Final Rule—a desire to depress farmworker wages to provide cost savings to employers—further underscores the disconnect between the real-world impact of the Final Rule and DOL's conclusion that it protects U.S. farmworkers against adverse effects. The Final Rule explains that DOL purportedly chose not to set 2021 AEWRs using FLS data because "recent FLS data has introduced a substantial amount of variability in wages"—primarily in the form of wage increases. 85 Fed. Reg. at 70,457. Indeed, DOL explained that employers "most often" expressed "concerns that the 2010 Final Rule methodology produced

unsustainable wage *increases*," and that DOL crafted the Final Rule to "best address[] [those] concerns." *Id.* at 70,452 (emphasis added). Elsewhere, DOL recognizes that the Final Rule effectively accomplishes that goal by facilitating a "transfer payment from H-2A employees to H-2A employers" that totals more than $1 billion dollars over ten years. *Id.* at 70,472. DOL fails to explain how allowing employers to pay farmworkers over $100 million less per year protects against the adverse effects of hiring agricultural guestworkers.

Fourth, DOL fails to explain why the two-year wage freeze serves as a "transition period" needed to "provide[] employers with a reasonable amount of time to plan their labor needs and agricultural operations under the new wage requirements." 85 Fed. Reg. at 70,467. Even if DOL wanted to depart from reliance on FLS data eventually (and that departure was justified), it could have best ensured continuity for employers and farmworkers alike by leaving the *existing* methodology in place during the next one to two years, using the FLS data that USDA is enjoined to produce. Certainly, continued application of the existing AEWR formula would have been the *most* predictable outcome for employers. DOL's failure to explain why a "transition" is necessary (other than to depress farmworker wages) renders the wage freeze arbitrary and capricious.[11]

2. DOL Failed To Offer A Sufficient Explanation For Its Decision To Use A Generic Wage Index To Adjust AEWRs Starting In 2023

The Final Rule adopts a new methodology for adjusting AEWRs starting in 2023, after the two-year wage freeze. The new methodology would replace reliance on the FLS—which DOL acknowledges is still accurate and remains the best source of data about agricultural labor markets—

[11] Nor does the Final Rule rationally explain why it could not have immediately started adjusting wage rates to account for market wage increases or inflation. DOL states that adjusting AEWRs immediately might "cause additional disruption of the kind this [rule] seeks to avoid," and argues that the freeze addresses "commenters' concerns that recent accelerations in the wage rates are, in their view, attributable to flawed survey results and have caused artificially surging wage increases." 85 Fed. Reg. at 70,456. But the rule never explains how "additional disruption" would result from immediate implementation of wage adjustments, which (depending on the metric used) likely would have resulted in smaller AEWR increases than the FLS-based methodology employers are accustomed to. *See id.* at 70,455. Nor does the rule explain why complaints about the reliability of FLS data supports its decision, when DOL "disagrees with the commenters' suggestions that the FLS survey results were flawed." *Id.* at 70,456.

with a system of annual adjustments to the 2020 AEWRs using the ECI, a generic index of labor costs that *excludes workers on farms*. This change is arbitrary and capricious for two reasons.

First, the Final Rule does not explain how a metric with no connection to the farm labor market adequately protects U.S. farmworkers from adverse effects. The ECI is a generic measure of wages across the *nonfarm* economy. *See* Selwyn Decl., Ex. 3, table 1 n.2 (BLS, *Employment Cost Index* (Oct. 30, 2020)). Thus, DOL chose to base the AEWR—a wage paid to farmworkers—on a metric that specifically *excludes* agricultural labor markets in its measurement of employment costs. The Final Rule does not acknowledge this mismatch, let alone justify it.

That failure is particularly problematic because farmworker wages have been increasing faster than wages in the nonfarm economy. DOL itself recognizes that the ECI has had an average annual increase of 2.78% over the past decade, whereas FLS data reflects that farmworker wages have regularly increased between 3-5% per year. *See* 85 Fed. Reg. at 70,456. The Final Rule lauds this difference, stating that reliance on the ECI would lead to "greater stability" (read: lower labor costs) for employers, *id.*, but nowhere does the Final Rule explain why ECI data are an economically valid proxy for agricultural labor market outcomes. This silence is notable because when DOL previously used nonfarm labor market data to calculate wages for agricultural guestworkers, it recognized the mismatch and justified its decision as necessary to address adverse effects from temporary foreign labor. *See AFL-CIO*, 835 F.2d at 914. In that instance, under H-2A's predecessor program, DOL used *higher* manufacturing sector wages as the base for guestworkers' minimum wage rates, and then adjusted those rates over time using USDA data on agricultural wages, "on the theory that farm wages had stagnated because of the enormous past influx of Mexican workers" through the Bracero program. *See id.*

Here, by contrast, DOL celebrates its switch to ECI data because it yields a "reduction in wage growth relative to the previous methodology," 85 Fed. Reg. at 70,456, a goal at odds with the very purpose of preventing adverse effects on U.S. farmworkers' wages. Confronted with this presumptively harmful effect on U.S. farmworkers, DOL had to justify its choice to use ECI data rather than a source reflecting farmworker wages. The Final Rule, however, does not explain why

these nonfarm data adequately reflect agricultural labor markets or how these below-market adjustments can prevent adverse effects. DOL's decision to rely on ECI data was therefore arbitrary.

Second, the Final Rule is arbitrary and capricious because DOL neither acknowledges nor justifies its decision to sever the connection between the AEWR and the wages actually paid to farmworkers. Past AEWR methodologies have always been premised on the need to set minimum H-2A wages at market rates to prevent wage stagnation or depression. *See supra* Part I.A. Indeed, when DOL briefly switched from FLS data to OES survey data in 2008, it argued that OES survey data better reflected farmworkers' market wages. *See* 73 Fed. Reg. 77,110, 77,173 (Dec. 18, 2008). But here, the Final Rule's new methodology rests on the conclusion that an AEWR can adequately prevent adverse effects to U.S. farmworkers' wages even when it is *not* based on wage data from state-wide or regional agricultural labor markets. The Final Rule does not recognize this policy change and instead continues to emphasize the importance of AEWRs reflecting actual farmworker wages, as determined by the relevant labor market. That failure and internal inconsistency renders the Final Rule arbitrary and capricious. *See Fox Television*, 556 U.S. at 515-516.

3. DOL Failed To Analyze Harm To U.S. Farmworkers

Plaintiffs are also likely to succeed in showing that DOL's inexplicable failure to analyze the economic harm to U.S. farmworkers—the workers whom DOL is statutorily obligated to protect—renders the Final Rule arbitrary and capricious. The Final Rule admits that it will harm U.S. farmworkers by depressing their wages and encouraging the replacement of domestic farmworkers with agricultural guestworkers. And it admits that depressing AEWRs for "H-2A workers represents an important transfer from non-H-2A workers [i.e., U.S. farmworkers] in corresponding employment to agricultural employers." 85 Fed. Reg. at 70,472. Yet the Final Rule addresses those harms to U.S. workers by simply labelling them "Unquantifiable Transfer Payments," accompanied by a bare assertion that DOL lacks the data "about the number of [U.S.] workers in corresponding employment and their wage structure." *Id.*[12]

[12] This assertion is belied by the various data sources available to DOL through its administration of the H-2A program. *See, e.g.*, 20 C.F.R. § 655.156 (recruitment reports).

Consideration of *the* central issue underlying DOL's rule—whether an AEWR methodology prevents adverse effects on U.S. farmworkers—requires more than merely conceding harm and asserting that it is "unquantifiable." DOL's failure is not excused by the bare assertion that "it lacked sufficient data." *NRDC v. Rauch*, 244 F. Supp. 3d 66, 71 (D.D.C. 2017). In *Rauch*, the National Marine Fisheries Service attempted to justify its failure to meaningfully analyze whether a species was endangered by stating that "it lacked sufficient data." *Id.* The court rejected that assertion, finding that the Service "fail[ed] to show that it considered the issue, much less that it reached a reasoned conclusion," and it set aside the relevant determination. *Id.* at 71, 100. Here, DOL similarly purports to address the critical issue—the adverse effect determination—but provides "no evidence that the [agency] actually researched or analyzed this question." *Id.* at 100. Such a conclusory statement acknowledging the legally relevant issue "do[es] not show that the [agency] *considered*" the question, as the APA requires. *Id.* at 99 (emphasis added).

DOL thus "failed to consider [this] important aspect of the problem," *State Farm*, 463 U.S. at 43, and in so doing violated the requirement that an agency "pay[] attention to the advantages *and* the disadvantages of [its] decisions," *Michigan v. EPA*, 576 U.S. 743, 753 (2015).[13]

C. DOL Failed To Comply With The APA's Notice-And-Comment Requirements

Plaintiffs are also likely to succeed on their claim that DOL violated the APA's notice-and-comment requirement because the Final Rule is not a logical outgrowth of its proposal in the July 2019 NPRM. Such agency actions, taken "without observance of procedure required by law," are unlawful and should be vacated. 5 U.S.C. § 706(2)(D).

For the notice and opportunity to comment provided by the APA to be meaningful, an agency must publish an NPRM that alerts affected parties to the agency's plans. *See* 5 U.S.C. § 553(b)(3). Agencies should be responsive to comments received and changed circumstances after

[13] Even if DOL "considered" harm to U.S. farmworkers, its thinly reasoned conclusion about adverse effects is irrational given the absence of any economic analysis of the harm. As in *Rauch*, the information DOL has provided "if anything, works *against* the [Department]." 244 F. Supp. 3d at 100. Without analyzing this "important" harm to U.S. workers, it was irrational to conclude that the "new methodology meets the statutory requirement to protect workers in the United States similarly employed to H-2A workers from adverse wage effects." 85 Fed. Reg. at 70,454.

publication of the NPRM, but "the final rule the agency adopts must be 'a logical outgrowth of the rule proposed,'" *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007), and "'in character with the original proposal,'" *Envt'l. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 851 (9th Cir. 2003). A final rule is therefore invalid where "part[ies] should [not] have anticipated that a particular requirement might be imposed." *Id.* That determination hinges on "whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule." *Id.* If a final rule is not a logical outgrowth of an initial proposal, and an agency fails to provide additional notice and comment, the final rule "is arbitrary or an abuse of discretion." *NRDC v. EPA*, 279 F.3d 1180, 1186 (9th Cir. 2002).

The Final Rule is unlawful because DOL's July 2019 NPRM failed to provide the public with adequate notice that DOL would untether AEWRs from market wages by freezing AEWRs for two years and then relying on the ECI to make future adjustments. Farmworkers could not "'have known that [this] issue in which they were interested in was 'on the table.'" *Id.*

To start, the NPRM gave no indication that DOL was considering freezing wages under the H-2A program. In fact, the word "freeze" does not appear once in the NPRM's 134 pages. Nor would DOL have had any reason to address a potential freeze: USDA did not announce its decision to cancel the FLS (in October 2020) until *after* DOL issued its NPRM (in July 2019). Interested parties therefore could not have anticipated that they needed to comment on why it was inappropriate to freeze AEWRs or offer alternatives to such a freeze.[14] Nor did the NPRM suggest that AEWRs based on FLS data were volatile, unpredictable, or otherwise problematic. To the contrary, the NPRM explained that DOL anticipated that it would be able to use FLS data "to establish AEWRs for most States and regions" in occupational categories that "would represent 89 percent of workers in the H-2A program," which meant that "the FLS w[ould] continue to be the basis for the AEWRs covering the vast majority of H-2A workers." 84 Fed. Reg. at 36,182. To be

[14] Interested parties were similarly unaware that DOL may need to end its reliance on the FLS to establish AEWRs. As discussed, DOL explained that it anticipated using FLS data to establish most AEWRs. Moreover, the NPRM downplayed concerns that FLS data would be unavailable, stating that "USDA is committed to this survey" and that USDA increased its FLS funding to facilitate its "expansion to collect more granular data." 84 Fed. Reg. at 36,178.

sure, had DOL raised the potential to freeze wages in the NPRM, Plaintiffs would have highlighted the many shortcomings of that methodology. *See* Declaration of Teresa Romero, President, UFW ("UFW Decl.") ¶ 27; *City of Waukesha v. EPA*, 320 F.3d 228, 246 (D.C. Cir. 2003) (holding that the potential for interested parties to submit different comments weighs in favor of concluding that a final rule is not a logical outgrowth of an earlier proposal).[15] Because "the [proposed] rule makes no mention of an important component of the final rule that is promulgated"—a component that did not even materialize until *after* DOL issued the NPRM—"the final rule is not a 'logical outgrowth' of the proposal on which the public had the opportunity to comment." *Alameda Health Sys. v. Ctrs. for Medicare & Medicaid Servs.*, 287 F. Supp. 3d 896, 919 (N.D. Cal. 2017).

Nor is the Final Rule's turn away from agricultural labor market data a logical outgrowth of DOL's July 2019 proposal. The NPRM stressed the importance of establishing AEWRs based on market wages, explaining that the AEWR protects U.S. farmworkers from adverse effects "because it is the wage rate that is determined from a survey of actual wages paid by employers." 84 Fed. Reg. at 36,179.[16] Farmworkers therefore could not have known that a fundamental break with decades of DOL policy was "on the table," and a new round of notice and comment would have provided farmworkers their first opportunity to persuade DOL not to scuttle that decades-old policy.

Courts have previously invalidated rate-setting rules that made methodological changes never suggested by the relevant NPRM. For instance, the D.C. Circuit vacated a new methodology for settling rail rate disputes because the agency failed to provide adequate notice that the final rule would permit benchmarks to be drawn from the past four years' worth of data; instead, the NPRM indicated that the agency would only consider benchmarks from the prior year's data. *CSX Transp.,*

[15] That Plaintiffs' lengthy comments submitted in response to the July 2019 NPRM did not address the potential for a wage freeze confirms that the public was not made aware of that potential rule change. *See* Selwyn Decl., Ex. 4 (Farmworker Advocacy Organizations, Comment Letter on DOL's July 26, 2020 Proposed Rule (Sept. 24, 2020)). Plaintiffs also would have provided comments on DOL's failure to calculate the harm to U.S. workers or the farm labor market more broadly. *See* UFW Decl. ¶ 27; UFW Foundation Decl. ¶ 11.

[16] *See also id.* at 36,180 ("[B]ecause the AEWR is generally based on data collected in a multi-State agricultural region and an occupation broader than a particular crop activity or agricultural activity, … the AEWR protects against localized wage depression that might occur in prevailing wage rates.").

Inc. v. Surface Transp. Bd., 584 F.3d 1076, 1081 (D.C. Cir. 2009). The changes to the AEWR methodology—which for the first time creates a disconnect between H-2A minimum wages and market rates—is far more significant than expanding a data sampling window. Accordingly, because DOL "nowhere even hinted" that it would impose a wage freeze or cease its reliance on agricultural labor market data, additional notice and comment is required. *Id.* at 1082.

Moreover, DOL itself recognized that it would need to provide the public with additional notice and comment opportunities in the event that it had to "adjust the AEWR calculation [methodology] based on methodological changes by USDA." 84 Fed. Reg. at 36,183. USDA's decision to eliminate the FLS is more consequential than a simple change in methodology. And DOL repeatedly references USDA's decision to end the FLS to justify the wage freeze and other aspects of the Final Rule. *See supra* p.12 & n.9. Even by its own terms, then, the NPRM requires DOL to conduct additional notice and comment to adopt the methodology in the Final Rule.

II. PLAINTIFFS' MEMBERS AND FARMWORKERS ACROSS THE COUNTRY WILL BE IRREPARABLY INJURED ABSENT IMMEDIATE INJUNCTIVE RELIEF

Farmworkers across the United States will suffer material wage reductions under the new AEWR methodology provided in the Final Rule. While purely monetary damages typically are not irreparable, courts have recognized an exception where "'the plaintiff is so poor that he would be harmed in the interim by the loss of the monetary benefits.'" *Lee v. Christian Coal. of Am., Inc.*, 160 F. Supp. 2d 14, 31 (D.D.C. 2001); *see also Kildare v. Saenz*, 325 F.3d 1078, 1083 (9th Cir. 2003) ("[E]conomic hardship constitutes irreparable harm."); *Jensen v. IRS*, 835 F.2d 196, 198 (9th Cir. 1987) (substantial income garnishment of a low-income individual constituted irreparable harm). For low-income individuals, economic loss can mean inadequate access to "food, shelter [and] other necessities." *Kildare*, 325 F.3d at 1083; *cf. Paxton v. Sec'y of Health & Human Servs.*, 856 F.2d 1352, 1354 (9th Cir. 1988) ("When a family is living at subsistence level, the subtraction of any benefit can make a significant difference to its budget and to its ability to survive"). Courts have widely recognized that the inability to afford necessities such as food or medical care constitutes irreparable harm because those losses, even if temporary, cannot be remedied by back payments. *See District of Columbia v. U.S. Dep't of Agric.*, 444 F. Supp. 3d 1, 43 (D.D.C. 2020)

("Going without food is an irreparable harm."); *Haskins v. Stanton*, 794 F.2d 1273, 1276-1277 (7th Cir. 1986) ("[T]he deprivation of food 'is extremely serious and is quite likely to impose lingering, if not irreversible, hardships.'").

Plaintiffs' members, including both U.S. and H-2A farmworkers, will be irreparably harmed absent a preliminary injunction. DOL explicitly acknowledges that its decision to freeze AEWRs in 2021 will cause farmworkers to be paid less. *See supra* p.6. Recent wage data confirms that admission. For instance, recent FLS data suggests that the California AEWR would have increased to approximately $15.58 in 2021. *See* Selwyn Decl., Ex. 2, at 5, 7 (reporting January and April 2020 California wages of $15.40 and $15.76). Under the Final Rule, however, those wages would be frozen at $14.77—the amount that farmworkers were paid in 2019. *See* Selwyn Decl., Ex. 5, at 25 (USDA, *Farm Labor* (Nov. 21, 2019)). Because most of Plaintiffs' members working at H-2A employers are paid the AEWR, those members working in California will be paid approximately $0.81 less per hour—totaling $139.32 per month and $1,393.20 over a ten-month farming season—as a result of DOL's unlawful action. Farmworkers in Oregon and Washington will experience similar losses. The latest FLS data suggests that the Oregon and Washington AEWR would have increased by approximately $0.45 per hour in 2021. *See id.* at 5, 7, 13, 15 (documenting that January and April wages in Oregon and Washington increased by $0.60 and $0.30 between 2019 and 2020). The Final Rule thus causes most farmworkers working for H-2A employers in those states to be paid $77.40 less per month, totaling $774 in lost wages over a ten-month farming season.

These depressed wages will cause substantial economic hardship for many of Plaintiffs' members. Farmworkers are already among the lowest-paid workers in the United States, which means that in many circumstances they are earning a subsistence income. UFW Decl. ¶ 17; Declaration of Diana Tellefson Torres, Executive Director, UFW Foundation ("UFW Foundation Decl.") ¶ 6. Reducing farmworkers wages by approximately 4% (or more than 5% in California) would cause substantial harm to Plaintiffs' members and their families. *See* UFW Decl. ¶¶ 11-16. Farmworkers who already struggle to meet basic necessities will find that this wage depression will only place further financial strain on their ability to obtain food, shelter, and other necessities. Many of Plaintiffs' members, and other farmworkers across the United States, already struggle to pay for

necessities like shelter and medical care, *see* UFW Decl. ¶ 18; UFW Foundation Decl. ¶¶ 6-7, and many farmworkers already struggle with food insecurity and rely on emergency food programs, *see* Selwyn Decl., Ex. 6, at 49 (Ip *et al*., *Profiles of Food Security for US Farmworker Households and Factors Related to Dynamic of Change*, 105 Am. J. Pub. Health 42 (Oct. 2015)) (finding that 49% of farmworkers fell into a state of food insecurity over a 2-year period); *see also* UFW Foundation Decl. ¶ 6. By preventing wages from increasing along with the market, DOL increases the risk that farmworkers will struggle to afford these necessities which have prices that—unlike the farmworkers' wages—are not frozen. A decrease in wages will necessarily lead to greater food insecurity among this already vulnerable population. *See* UFW Foundation Decl. ¶ 9.

Farmworkers' inability to afford basic necessities will be exacerbated by the substantial increases in consumer prices over the last year. *See* UFW Decl. ¶ 19. The cost of food, for example, has increased by 3.9% over the last twelve months. *See* Selwyn Decl., Ex. 7 (BLS, *Consumer Price Index*). And the cost of medical care increased by 4.1% between 2019 and 2020. *See* Selwyn Decl., Ex. 8 (Girod *et al*., *2020 Milliman Medical Index* (May 21, 2020)). Those harms are further exacerbated by reduced hours caused by the pandemic, leaving an already impoverished population even more vulnerable. *See* UFW Foundation Decl. ¶ 8. Thus, in the absence of immediate injunctive relief, farmworkers will suffer immediate harms in the form of economic hardship that cannot be undone through the payment of back wages.

Plaintiffs' U.S. farmworker members would also be irreparably harmed through the loss of their jobs. The "'loss of opportunity to pursue … chosen professions' constitutes irreparable harm." *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014) (alterations omitted).[17] "The irreparable nature of [that] injury is heightened by [farmworkers'] fragile socioeconomic position." *Id.* DOL acknowledges that the lower minimum wages that employers are permitted to pay foreign guestworkers under the Final Rule make it more likely that those employers will hire H-2A workers at the expense of U.S. farmworkers. *See* 85 Fed. Reg. at 70,472 (recognizing that

[17] *See also Carson v. Am. Brands, Inc.*, 450 U.S. 79, 89 n.16 (1981) (recognizing that the loss of "job opportunities" constitutes "serious or irreparable harm"); *Lee*, 160 F. Supp. 2d at 32 (finding job loss for subsistence workers constitutes irreparable harm).

the Final Rule "may further encourage U.S. employers to use more H-2A workers" instead of hiring U.S. farmworkers). Under the H-2A program, an employer seeking an H-2A labor certification need only offer the minimum H-2A wage rate. *See* UFW Decl. ¶ 9; *Hernandez Flecha v. Quiros*, 567 F.2d 1154, 1156 (1st Cir. 1977). Any qualified U.S. worker who applies for the job but requests a higher wage rate may be rejected as unavailable and the slot may be filled with a guestworker. *See* 85 Fed. Reg. at 70,472. Those lost job opportunities will cause substantial, incurable hardship for Plaintiffs' members. *See* UFW Decl. ¶ 26; UFW Foundation Decl. ¶ 9.

A preliminary injunction is also necessary because, even if back pay could fully address the harm caused by the Final Rule (it cannot), farmworkers will be unable to obtain those higher wages when they prevail. Once an employer's H-2A petition is certified by DOL, it will be difficult if not impossible to obtain retroactive pay. *See* UFW Decl. ¶ 22. Farmworkers also lack the resources needed to obtain such legal relief. *See id.* ¶¶ 23-24.

III. THE REMAINING EQUITABLE FACTORS FAVOR GRANTING IMMEDIATE INJUNCTIVE RELIEF

The remaining equitable factors also favor granting preliminary relief. In assessing whether preliminary relief should be granted, courts must weigh the irreparable harm to Plaintiffs' members against the benefits to the public and harm to the government. *See E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1280 (9th Cir. 2020); *id*. at 1271 ("When the government is a party, the last two factors (equities and public interest) merge."). "Relevant equitable factors" for assessing whether the public interest is served by an injunction "include the value of complying with the APA, the public interest in [avoiding the harm caused by the agency action], preserving congressional intent, and promoting the efficient administration of our immigration laws." *Id.* at 1280.

While Plaintiffs' members and farmworkers across the country will suffer irreparable injury as demonstrated above, "[t]here is generally no public interest in the perpetuation of unlawful agency action," whereas there "is a substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations." *League of Women Voters v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) (citations omitted). Here, DOL's "failure to comply with the APA"—including the failure to protect U.S. farmworkers pursuant to its statutory mandate,

provide a reasoned explanation for the Final Rule, and adhere to notice-and-comment requirements—"weighs in favor of granting injunctive relief." *E. Bay*, 950 F.3d at 1281.

The public interest is also served by preventing U.S. farmworkers' wages from falling and by facilitating the effective administration of the H-2A foreign guestworker visa program. *See Gerstein v. CIA*, No. C-06-4643, 2006 WL 3462659, at *5 (N.D. Cal. Nov. 29, 2006) (recognizing public interest is served by promoting Congress's "core purpose" in enacting regulatory program). When Congress created the H-2A program, it sought to protect U.S. farmworkers from the adverse effects of importing abundant, low-cost labor into the United States. *See supra* p.3. Allowing DOL to completely freeze farmworker wages, while disregarding data showing that farmworkers' market wages were steadily increasing, contravenes DOL's statutory mandate to protect U.S. farmworkers' wages and employment prospects. *See supra* Part I.A. As the Ninth Circuit explained, the public interest "in the 'efficient administration of the immigration laws,'" which includes the H-2A program, "is 'weighty.'" *E. Bay*, 950 F.3d at 1281 (citations omitted).

Moreover, injunctive relief would serve the public interest by preserving the status quo. Plaintiffs are not asking the Court to compel DOL to use a new methodology to compute AEWRs. Instead, Plaintiffs ask only that DOL continue to establish AEWRs under its current methodology. The public interest is served by maintaining that status quo during the pendency of this litigation, rather than permitting DOL to fundamentally alter its historical practices. *See Doe #1 v. Trump*, 957 F.3d 1050, 1069 (9th Cir. 2020) (holding "the public interest favors preserving the *status quo*"). Those interests are particularly strong where an agency's practice has "for countless decades" allowed the government to administer "a stable immigration system." *Id.* at 1068.

CONCLUSION

The Court should enter a preliminary injunction preventing DOL from implementing the regulatory changes announced in its Final Rule. DOL should instead be ordered to issue AEWRs for 2021 using its current methodology.

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Respectfully submitted,

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