Mark Selwyn (SBN 244180)
mark.selwyn@wilmerhale.com
WILMER CUTLER PICKERING
HALE AND DORR LLP
2600 El Camino Real, Suite 400
Palo Alto, California 94306
Telephone: (650) 858-6031
Facsimile: (650) 858-6100

Attorney for Plaintiffs

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 MARTIN J. WALSH, in his official capacity as United States Secretary of Labor,

Defendants.

Case No. 1:20-cv-01690-DAD-JLT

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Hearing on Motion

Date: February 15, 2022
Time 9:30 a.m.
Location: Video
Before: Judge Dale A. Drozd

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on February 15, 2022, at 9:30 a.m., or as soon thereafter as counsel may be heard, Plaintiffs United Farm Workers and UFW Foundation will and hereby do move for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 260. Plaintiffs met and conferred with counsel for Defendants prior to filing, and Defendants indicated that they oppose this motion.

This Motion is supported by the accompanying Memorandum of Points and Authorities, a joint stipulation concerning the factual record relevant to Plaintiffs' motion for summary judgment, 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.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

On November 5, 2020, the Department of Labor ("DOL") promulgated a Final Rule that amended the regulations governing the Adverse Effect Wage Rate ("AEWR") calculation methodology. *Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States*, 85 Fed. Reg. 70,445 (Nov. 5, 2020) ("the Final Rule"). On December 23, 2020, the Court entered a preliminary injunction preventing Defendants from implementing the Final Rule, and ordered Defendants to operate under the prior rule, *Temporary Agricultural Employment of H-2A Aliens in the United States*, 75 Fed. Reg. 6,884 (Feb. 12, 2010) ("2010 Rule"), when calculating AEWRs for the H-2A program. *See* ECF No. 37. In its Order, the Court found that Plaintiffs were likely to prevail on their claims that the Final Rule is arbitrary and capricious and that DOL failed to comply with the notice-and-comment rulemaking requirements in issuing the Final Rule. *Id.* at 9-27. For the reasons stated below, in Plaintiffs' motion for preliminary injunction (ECF No. 5), and in the Court's prior order granting a preliminary injunction, the Court should grant Plaintiffs' motion for summary judgment and vacate and remand the Final Rule.

BACKGROUND

This case—as well as a predecessor lawsuit against the U.S. Department of Agriculture ("USDA")—concerns the government's attempt to unlawfully freeze the wages of H-2A workers and U.S. workers in corresponding employment. On October 13, 2020, Plaintiffs filed a complaint naming the USDA, then-U.S. Secretary of Agriculture Sonny Perdue, and then-Under Secretary of Farm Production and Conservation William Northey, alleging that the Defendants' decision to discontinue the Farm Labor Survey ("FLS") and cease publication of the Farm Labor Report violated the Administrative Procedure Act because it was arbitrary and capricious and was made without the requisite notice-and comment rulemaking procedure. *See UFW v. Perdue*, No. 1:20-cv-1452-DAD-JLT (Oct. 13, 2020), ECF No. 1. Plaintiffs simultaneously filed a Motion for Temporary Restraining Order and Preliminary Injunction to prevent USDA from implementing its decision, *see UFW v. Perdue*, No. 1:20-cv-1452- DAD-JLT (Oct. 13, 2020), ECF No. 3, and on October 28, 2020, the Court granted Plaintiffs' motion, *see UFW v. Perdue*, No. 1:20-cv-1452-DAD-JLT (Oct. 28, 2020), ECF No. 33.

On November 30, 2020, Plaintiffs filed a complaint and motion for preliminary injunction in the instant action seeking to prevent DOL from implementing its November 5, 2020 Final Rule revising the methodology for calculating AEWRs for the H-2A program. *See* ECF Nos. 1, 5. On December 7, 2020, Defendants filed their opposition to Plaintiffs' motion for preliminary injunction. ECF No. 31. On December 9, 2020, the State of California sought leave to appear as Amicus Curiae in support of Plaintiffs' motion for preliminary injunction, which the Court granted on December 10. ECF Nos. 32, 33. Plaintiffs filed a reply to Defendants' opposition to the motion for preliminary injunction on December 11, 2020. ECF No. 34. On December 14, 2020, the Court held a hearing on the motion for preliminary injunction, ECF No. 36, and on December 23, 2020, the Court granted Plaintiffs' motion, finding that Plaintiffs were likely to prevail on their claims that the Final Rule is arbitrary and capricious and that DOL failed to comply with the notice-and-comment rulemaking requirements in issuing the Final Rule, ECF No. 37 at 8-27. The Court "order[ed] that [D]efendants shall be prevented from implementing the November 5, 2020 Final Rule amending the DOL's

regulations governing the AEWR calculation methodology," and "ordered [Defendants] to operate under the 2010 Rule as it pertains to calculating the AEWRs." *Id.* at 39.

On February 12, 2021, USDA complied with the preliminary injunction entered in *UFW v. Perdue*, No. 1:20-cv-1452-DAD-JLT (E.D. Cal. Oct. 28, 2020), and published the Farm Labor Report originally scheduled for November 2020.[1] The Farm Labor Report confirmed that farmworkers wages continued to increase significantly; indeed, the FLS determined that the gross wage rate for field and livestock workers during the October 2020 reference week had increased six percent year-over-year.[2] Moreover, the annual average gross wage for field and livestock workers—the figure that determines the 2021 AEWRs under DOL's 2010 regulation—rose approximately five percent, to $14.62.[3] On February 23, 2021, DOL published the 2021 AEWRs under the methodology provided in the 2010 Rule, as required by the Court's December 23, 2020 order and January 12, 2021 supplemental order. *See Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States: 2021 Adverse Effect Wage Rates for Non-Range Occupations*, 86 Fed. Reg. 10,996 (Feb. 23, 2021).

In early 2021, DOL announced that it was pursuing a new rulemaking that would revisit the methodology for setting AEWRs under the H-2A program.[4] On August 24, 2021, DOL transmitted to the Office of Management and Budget's Office of Information and Regulatory Affairs a draft Notice of Proposed Rulemaking ("2021 NPRM").[5] While the 2021 NPRM was pending, the parties on several occasions stipulated to extend the deadlines for Defendants' answer and the scheduling conference. *See, e.g.*, ECF No. 87.

---

[1] *See* USDA Nat'l Agric. Statistics Serv. (NASS), *Farm Labor* (Feb. 11, 2021), https://release.nass.usda.gov/reports/fmla0221.pdf.

[2] *See id.* at 1. The wage increases are expressed in nominal terms; since inflation is not considered, it does not reflect real economic terms.

[3] *See id.* at 2.

[4] *See Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States*, Unified Agenda (Spring 2021), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=1205-AC05.

[5] *See Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States*, Pending EO 12866 Regulatory Review (Aug. 24, 2021), https://www.reginfo.gov/public/do/eoDetails?rrid=191913.

On December 1, 2021, DOL published the 2021 NPRM. *See Adverse Effect Wage Rate Methodology for the Temporary Employment of H–2A Nonimmigrants in Non-Range Occupations in the United States*, 86 Fed. Reg. 68,174 (Dec. 1, 2021). The 2021 NPRM recognizes the need for a new rulemaking in light of this Court's orders and DOL's recognition that continuing to rely on FLS data (unlike in the Final Rule) "will better enable the Department to meet its statutory obligation regarding adverse effect." *Id.* at 68,177-78; *see also id.* at 68,180. Indeed, the 2021 NPRM explains that after "review[ing] the policy underlying the 2020 AEWR Final Rule in light of [DOL's] statutory mandate," DOL concluded that "the 2020 AEWR Final Rule d[id] not adequately protect against adverse impact[s]" to U.S. workers because of "(1) [t]he imposition of a 2-year wage freeze for field and livestock workers at a wage level based on the FLS survey published in November 2019 and (2) the use of the BLS [Economic Cost Index ("ECI")], Wages and Salaries, to annually adjust AEWRs for field and livestock workers annually thereafter." *Id.* at 68,178; *see also id.* at 68,184 (recognizing deficiencies with relying on ECI data to adjust AEWRs); *id.* at 68,186 (restating that "[t]he Department has … determined that two major aspects of the 2020 AEWR Final Rule are inconsistent with the Department's statutory mandate to protect the wages of workers in the United States similarly employed against adverse effect"). DOL also reiterates its view that "actual, current wage data [is] the best source of information for determining prevailing wages," and recognizes that "[u]sing a methodology other than actual, current wage data increases the likelihood of permitting employers to pay wages that are not reflective of market wages, which undermines the Department's mandate to prevent an adverse effect on the wages of workers in the United States similarly employed." *Id.* at 68,178.

Consistent with those statements, the 2021 NPRM proposes to use the FLS to establish AEWRs for most H-2A jobs, while using Occupational Employment and Wage Statistics ("OEWS") data for occupations where FLS data is unavailable (e.g., for certain states or higher paying jobs that are not captured by FLS data). *See id.* at 68,178. The 2021 NPRM also recognizes that employers must pay the wage for the highest-paid occupation performed by an H-2A worker when their role covers multiple occupation classifications. *See id.* at 68,179; *see also id.* at 68,183-84. The 2021

NPRM explains that DOL "best protects against adverse effect by setting the AEWR applicable to the job opportunity at the highest of the applicable AEWRs." *Id.* at 68,183.

Plaintiffs now move for summary judgment and to vacate and remand the Final Rule, which both this Court, and DOL through the 2021 NPRM, have recognized is legally flawed.

LEGAL STANDARD

Summary judgment should be granted where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In an administrative proceeding under the APA, a district court "is not required to resolve any facts." *Occidental Eng'g Co. v. I.N.S.*, 753 F.2d 766, 769 (9th Cir. 1985). Instead, "the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Id.*

"The APA 'sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts.'" *Dep't of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020). It provides that a "reviewing court shall ... hold unlawful and set aside" agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "in excess of statutory jurisdiction, authority or limitations," or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (C), (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" and provide "a 'rational connection between the facts found and the choice made.'" *Id.* at 43, 48. The arbitrary and capricious standard requires a court to ensure that the agency "has not, for instance, 'relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or [an explanation that] is so implausible that it could not be

ascribed to a difference in view or the product of agency expertise.'" *Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008).

If a reviewing court concludes that a rule is unlawful, vacatur and remand is the standard remedy. *See E. Bay Sanctuary Covenant v. Garland,* 994 F.3d 962, 987 (9th Cir. 2020) ("Because the Rule is 'not in accordance' with 8 U.S.C. § 1158, our obligation as a reviewing court is to vacate the unlawful agency action."); *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015) (recognizing courts "order remand without vacatur only in 'limited circumstances'"); *see also* 5 U.S.C. § 706(2) ("[T]he reviewing court shall … hold unlawful and set aside agency actions" that are "arbitrary [and] capricious"). Only in rare circumstances not implicated here—for example, where the deficiencies of the unlawful rule are minimal or where vacatur would have disruptive consequences—may a reviewing court remand to the agency to correct its errors without vacating the rule. *See United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union v. MSHA*, 925 F.3d 1279, 1287 (D.C. Cir. 2019); *see also Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic & Atmospheric Admin. Nat'l Marine Fisheries Serv.*, 109 F. Supp. 3d 1238, 1242 (N.D. Cal. 2015) ("[C]ourts in the Ninth Circuit decline vacatur only in rare circumstances … [where] vacatur would cause serious and irremediable harms that significantly outweigh the magnitude of the agency's error."). Indeed, courts have repeatedly found that vacatur and remand were appropriate where a rule suffered from deficiencies similar to those presented here. *See, e.g.*, *Ctr. for Sci. in Pub. Int. v. Perdue*, 438 F. Supp. 3d 546, 558 (D. Md. 2020) (vacating and remanding final rule that was not a logical outgrowth of an interim final rule); *Penobscot Indian Nation v. HUD*, 539 F. Supp. 2d 40, 54-55 (D.D.C. 2008) (vacating and remanding final rule that "suffer[ed] from multiple significant infirmities"—including an inadequate explanation and violating notice-and-comment requirements—and finding that "vacatur would not be disruptive in th[e] case because the Final Rule has not yet become effective").

ARGUMENT

I. THE FINAL RULE IS ARBITRARY AND CAPRICIOUS

The Final Rule is arbitrary and capricious, and therefore unlawful, for two independent reasons. First, the Final Rule contravened the Immigration and Nationality Act ("INA") 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. *See Earth Island Inst.*, 494 F.3d at 765. Second, the Final Rule failed to justify its imposition of a two-year wage freeze.

A. The Final Rule Contravenes the INA By Failing To Protect U.S. Workers Against Adverse Effects To Their Wages And Working Conditions

The Final Rule undermines DOL's statutory obligation to protect U.S. farmworkers from the adverse effects of admitting agricultural guestworkers, and conflicts with DOL's prior interpretation of its statutory obligations. The INA requires that "the employment of [H-2A guest workers] … will not adversely affect the wages and working conditions of workers in the United States similarly employed." 8 U.S.C. § 1188(a). 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. In the 2010 Rule, for instance, DOL recognized that without the protections afforded by AEWRs set at regional or state-wide market rates, farmworkers "would be adversely affected by lowered wages as a result of an influx of temporary foreign farm workers." 75 Fed. Reg. at 6891. The Final Rule reaffirms this reasoning when rejecting alternative proposals, repeatedly invoking 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; *see also* ECF No. 5 at 8-9. However, the Final Rule severs the relationship between the AEWR and current farm labor market conditions. *See* ECF No. 5 at 9-10. And the Final Rule fails to "'forthrightly distinguish[] or outrightly reject[]' [the] contradictory precedent" as required given the Final Rule's departure from accurate livestock and fieldworker market wage data and the choice to intentionally depress and stagnate the wages of those workers. *AFL-CIO v. Brock*, 835 F.2d 912, 918 (D.C. Cir. 1987).

In short, the Final Rule contravenes the INA, as well as DOL's prior interpretation of its statutory obligation under the INA, and is thus unlawful.

DOL itself admits in the recently published 2021 NPRM that the Final Rule is "inconsistent with the Department's statutory mandate to protect the wages of workers in the United States similarly employed against adverse effect." 86 Fed. Reg. at 68,186. Specifically, the 2021 NPRM recognizes that the Final Rule is inconsistent with DOL's mandate under the INA because the rule "impos[ed] … a 2-year wage freeze for field and livestock workers at a wage level based on the FLS published in November 2019, and … us[ed] the BLS ECI solely to adjust AEWRs annually thereafter." *Id.*; *see also id.* at 68,178 (concluding that "the 2020 AEWR Final Rule d[id] not adequately protect against adverse impact[s]" to U.S. workers). That concession supports Plaintiffs' instant motion and request for vacatur of the Final Rule.

B. The Final Rule Failed To Offer A Reasoned Explanation For The Wage Freeze

The Final Rule is arbitrary and capricious because it fails to justify the two-year wage freeze. 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. *See* ECF No. 5 at 8-9, 13-14. The Final Rule claimed that relying on the 2020 FLS to set the 2021 AEWRs "would only serve to perpetuate the very wage volatility that the Department seeks to ameliorate through this rule." 85 Fed. Reg. at 70,453. However, the Final Rule does not explain why freezing wages was necessary to address that supposed volatility, which primarily took the shape of "wage increases," *see id.* at 70,452, or how eliminating "volatility" that mirrored market wages would protect against the adverse effects of hiring agricultural guestworkers. For that reason, the Final Rule is arbitrary and capricious.

The Court has already considered these arguments and found them persuasive. For each of the above arguments, the Court concluded that "[P]laintiffs ha[d] demonstrated a likelihood of success on the merits of [their] claim[s]." ECF No. 37 at 9; *see also id.* at 13 ("[D]efendants have failed to 'forthrightly distinguish[] or outrightly reject[] [the] contradictory precedent' as required since the Final Rule departs from accurate livestock and fieldworker market wage data and

intentionally depresses and stagnates the wages of those workers." (quotation marks omitted)); *id.* at 18 ("[D]efendants have failed to explain the decision to freeze H-2A wages below market rate for two years."). Because the Final Rule and the relevant agency record remains unchanged, the same conclusions are warranted on summary judgment.

II. THE FINAL RULE FAILED TO ADHERE TO NOTICE-AND-COMMENT REQUIREMENTS

The Final Rule is also unlawful because DOL failed to follow the requirements of notice-and-comment rulemaking. For the notice and opportunity to comment provided by the APA to be meaningful, an agency must publish a Notice of Proposed Rulemaking ("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 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,'" *Env't 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).

Here, the underlying Notice of Proposed Rulemaking (*Temporary Agricultural Employment of H-2A Nonimmigrants in the United States*, 84 Fed. Reg. 36,168 (July 26, 2019) ("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 rely on the ECI to make future adjustments. To start, the word freeze (or something similar) does not appear once in the 2019 NPRM's 134 pages. 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. Further, the 2019 NPRM never suggested that FLS data was in any way problematic, and instead stated that "the FLS will

continue to be the basis for the AEWRs covering the vast majority of H-2A workers." 84 Fed. Reg. at 36,182. Finally, the Final Rule's departure from agricultural labor market data is not a logical outgrowth of the 2019 NPRM. The 2019 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." *Id.* at 36,179. Farmworkers therefore could not have known that a fundamental break with decades of DOL policy was being considered, 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. *See also* ECF No. 5 at 18-21.

In light of those notice-and-comment defects, this Court has already concluded that "plaintiffs in this case could not have anticipated that a complete departure from the FLS was 'open for consideration,' despite the 'mere mention' that the USDA may at some point terminate the FLS." ECF No. 37 at 26. It further recognized that the 2019 "NPRM explicitly stated that it had already provided an alternative solution and would offer an additional opportunity for the public to comment if the agency had to adjust the AEWR based on methodological changes to the FLS by the USDA." *Id.* Those factors "support[ed] the conclusion that a fair reading of the notice conveyed that the DOL did not intend to invite comment on removing the FLS from the methodology, at least for the final rule arising from this NPRM." *Id.* The Court similarly did "not read the [2019] NPRM's reference to using the ECI in lieu of unavailable FLS data as suggesting any intention to completely supplant the FLS data with ECI and OES data." *Id.* Accordingly, the Court concluded that Plaintiffs had "shown that they are likely to prevail on their claim that the DOL failed to comply with the notice-and-comment rulemaking requirements in issuing the Final Rule." *Id.* at 27.

The same conclusions are warranted now. DOL failed to comply with the notice-and-comment rulemaking requirements in issuing the Final Rule, rendering the Final Rule unlawful. For

that reason, and the other reasons provided above, the Court should vacate and remand the Final Rule to DOL for further rulemaking consistent with the Court's order and the 2021 NPRM.[6]

CONCLUSION

Plaintiffs respectfully request that the Court declare the Final Rule arbitrary, capricious, and unlawful and vacate it on that basis, with remand to the agency for further rulemaking proceedings consistent with the Court's order and the 2021 NPRM.

Dated: January 5, 2022

By: /s/ *Mark D. Selwyn*
MARK SELWYN (SBN 244180)
Wilmer Cutler Pickering Hale and Dorr LLP

*Attorney for Plaintiff*s

[6] Notably, the 2021 NPRM proceeds under the assumption that the 2010 Rule, and not the 2020 Final Rule, is the baseline against which any proposed rule changes should be measured. *See* 86 Fed. Reg. at 68,186 (explaining the analysis in the 2021 NPRM uses the 2010 Rule as a baseline "because the 2020 AEWR Final Rule has been preliminarily enjoined by a federal district court … and there is uncertainty as to whether the 2020 AEWR Final Rule will be vacated prior to the issuance of this final rule"); *see also id.* (explaining the "need for regulation" was based in part on this Court's order enjoining the Final Rule). Accordingly, vacatur and remand would not interfere with those ongoing rulemaking proceedings.