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12 **UNITED STATES DISTRICT COURT**
13 **EASTERN DISTRICT OF CALIFORNIA**
14 **FRESNO DIVISION**

15 UNITED FARM WORKERS and UFW
FOUNDATION,

16 Plaintiffs,

17 v.

18 SONNY PERDUE, WILLIAM NORTHEY, and
19 THE UNITED STATES DEPARTMENT OF
AGRICULTURE,

20 Defendants.

Case No. _____

**PLAINTIFFS' MOTION FOR
TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

ORAL ARGUMENT REQUESTED

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1 **NOTICE OF MOTION AND MOTION**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that at the earliest practical date to be set by the Court, Plaintiffs
4 United Farm Workers and UFW Foundation will and hereby do move the Court to enter a temporary
5 restraining order and preliminary injunction (1) barring Defendants Sonny Perdue, William Northey,
6 and the United States Department of Agriculture (USDA) from discontinuing the USDA Farm Labor
7 Survey (FLS) and ceasing publication of the USDA Farm Labor Report (FLR), as USDA announced
8 on September 30, 2020, and (2) requiring them to maintain the status quo by continuing to conduct
9 the FLS that had previously been scheduled to begin on or around October 19, 2020, and publishing
10 the next edition of the FLR that had been scheduled for November 2020.

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

15 **MEMORANDUM OF POINTS AND AUTHORITIES**

16 **INTRODUCTION**

17 This Administrative Procedure Act (APA) action challenges the abrupt and unjustified decision
18 by the United State Department of Agriculture (USDA) to stop conducting the Farm Labor Survey
19 (FLS) and cease publication of the Farm Labor Report (FLR). For over 100 years, the FLS has been
20 a critical and irreplaceable component of the federal government’s efforts to collect data on
21 agricultural labor markets. Those data directly support substantial programs administered by both
22 USDA and the United States Department of Labor (DOL), and are used by federal and state
23 governments, as well as farm organizations and private parties, to plan and implement policies and
24 programs for farms and farmworkers.

25 Yet on September 30, 2020, USDA published a cursory, one-page notice (the Notice) in the
26 Federal Register announcing that it was discontinuing immediately the FLS—the premier source of
27 information about hiring and wages paid by U.S. farms—and ceasing publication of the biannual FLR.
28 The Notice ended the century-old survey just weeks before it was scheduled to be conducted without

1 providing any rationale or inviting public comment. USDA simply pronounced—without any
2 elaboration—that the public can access other data sources. Significantly, the Notice did not consider
3 the harm the USDA’s decision would inflict on farmworkers or explain why the agency chose to
4 eliminate a survey that so many federal and state entities have relied on for so long.

5 USDA’s decision to discontinue both the FLS (including the survey originally contemplated
6 to begin just days from now, on or around October 19, 2020) and the FLR (including the next
7 publication in November 2020) will hurt hundreds of thousands of U.S. farmworkers and H-2A
8 foreign guestworkers already enduring subsistence incomes. Without FLS data, U.S. and H-2A
9 farmworkers will be paid materially less per hour on average than what is currently permitted under
10 DOL regulations implementing the H-2A foreign guestworker visa program. For the typical,
11 affected farmworker, the losses in annual income will amount to thousands of dollars.

12 USDA’s decision to terminate the FLS and FLR violates the APA for three independent
13 reasons. *First*, USDA failed to consider important aspects of its decision, including the impact
14 eliminating the FLS would have on DOL’s administration of the H-2A program, farmworkers’
15 wages, or the reliance interests of various public agencies and private parties. *Second*, the Notice
16 fails to provide a reasoned explanation to support the decision. *Third*, USDA failed to comply with
17 the APA’s notice-and-comment rulemaking requirements.

18 Preliminary relief is necessary and merited because Plaintiffs’ members and farmworkers
19 across the United States will suffer irreparable harm absent a temporary restraining order and
20 preliminary injunction. USDA was scheduled to conduct the FLS beginning on or around next
21 Monday (October 19) and issue the FLR in late November. DOL ordinarily would have relied on
22 that information to publish the principal minimum wage rate under the H-2A program—Adverse
23 Effect Wage Rates (AEWRs)—for 2021 in mid-December. Without FLS data, which DOL relies
24 on (and is required by regulation to rely on) to determine AEWRs under the H-2A program, DOL
25 will likely authorize thousands of agricultural employers participating in the H-2A foreign
26 guestworker visa program to pay lower wage rates to U.S. farmworkers and H-2A foreign
27 guestworkers. As a consequence, farmworkers on average will be paid less per hour, resulting in
28 material reductions in wages for these individuals. In the absence of immediate injunctive relief,

1 those farmworkers will experience substantial economic hardship—including difficulties paying for
2 food, shelter, and other necessities—that cannot be compensated through the payment of back
3 wages. Moreover, even if farmworkers could be fully compensated after the fact for those harms
4 (and they cannot), farmworkers are unlikely to be able to obtain that relief. Preventing those harms,
5 and ensuring that DOL can effectively administer the H-2A program consistent with its statutory
6 obligations, serves the public interest and outweighs any harms USDA would experience by
7 conducting the FLS survey as it has for the last 100 years and as envisioned by its recent agreement
8 with DOL.

9 The Court should enter a temporary restraining order and preliminary injunction enjoining
10 USDA from discontinuing the FLS and ceasing publication of the FLR, pending resolution of this
11 action.

12 BACKGROUND

13 A. The FLS and FLR

14 Every year since 1910, USDA has collected data about farm labor and wages using the FLS.
15 See Decl. of Joseph Taylor Gooch in Support of Motion for Temporary Restraining Order and
16 Preliminary Injunction (“Gooch Decl.”), Ex. 1, at 6 (Daberkow & Whitener, *Agricultural Labor*
17 *Data Sources: An Update* (Aug. 1986)).¹ The FLS collects information directly from farms to obtain
18 timely information about farmworker employment, hours worked, wages paid, and other statistics.
19 See Compl. ¶ 21. The FLS is conducted in April and October by the National Agricultural Statistics
20 Service (NASS)—USDA’s statistical branch—during which time the survey collects wage and
21 employment data for four reference weeks, one in each quarter, from approximately 35,000 farms
22 and ranches in all states except Alaska with \$1,000 or more in annual agricultural sales revenue.
23 See Gooch Decl., Ex. 2, at 1-2 (USDA, *Farm Labor Methodology and Quality Measures* (May 28,
24 2020)). The FLR is normally published the following month, in May and November. The May
25 report includes employment and wage estimates for the first and second quarters, and the November
26

27 ¹ See also USDA, *Farm Labor Releases*, [https://usda.library.cornell.edu/concern/](https://usda.library.cornell.edu/concern/publications/x920fw89s?locale=en&page=67#release-items)
28 [publications/x920fw89s?locale=en&page=67#release-items](https://usda.library.cornell.edu/concern/publications/x920fw89s?locale=en&page=67#release-items) (providing Farm Labor Reports dating
back to 1930).

1 report includes estimates for the third and fourth quarters as well as annualized data. *See id.* at 1.
2 The October 2020 survey was expected to run from roughly October 19 to November 7, 2020, and
3 the FLR was expected to be published around the week of November 23, 2020. *See id.*

4 As recently as two years ago, USDA has recognized that the FLS and the agricultural labor
5 statistics it provides “are an integral part of [NASS’s] primary function of collecting, processing,
6 and disseminating current state, regional, and national agricultural statistics.” *Submission for OMB*
7 *Review; Comment Request*, 83 Fed. Reg. 50631, 50632 (Oct. 2, 2018). The FLS, USDA has
8 explained, “is the *only* timely and reliable source of information on the size of the farm worker
9 population.” *Id.* (emphasis added). The FLS remains a timely source of information to estimate the
10 size of the farmworker population.

11 USDA has also recognized that various federal programs rely on FLS data. For example,
12 DOL uses FLS data to set wages under the H-2A foreign guestworker visa program. *See infra* pp.5-
13 7; *see also* Compl. ¶ 31. Federal agencies also use FLS data “to help ensure federal assistance for
14 farm worker assistance programs supported with government funding,” 83 Fed. Reg. at 50632, and
15 to calculate parity prices and the parity index under the Agricultural Adjustment Act, which protects
16 farms and farmworkers from economic losses caused by volatility in agricultural markets, *see*
17 Gooch Decl., Ex. 3, at 8 (USDA, *Price Program: History, Concepts, Methodology, Analysis,*
18 *Estimates, and Dissemination* (2011)); *see also* Compl. ¶¶ 42-50. FLS data are also used “by
19 additional federal, state, and local government agencies, educational institutions, farm
20 organizations, and private sector employers of farm labor.” Gooch Decl., Ex. 2, at 1; *see also*
21 Compl. ¶¶ 51-53.

22 Recent FLRs demonstrate that the FLS collects critical data about hundreds of thousands of
23 farmworkers. The November 2019 FLR, for example, disclosed that 809,000 workers were hired
24 directly by farm operators during the week of October 6-12, 2019. The combined field and livestock
25 worker gross wage was \$14.21 per hour during the October 2019 reference week, up 4% from
26 October 2018. Gooch Decl., Ex. 4, at 1 (USDA, *Farm Labor Report* (Nov. 21, 2019)). The
27 November 2019 FLR also stated that for hired workers the 2019 “annual average gross wage rate
28 was \$14.91 per hour, up 5 percent from the 2018 annual average gross wage rate.” *Id.* The most

1 recent FLR, published on May 28, 2020, reported that there were 688,000 workers hired directly by
2 farm operators during the week of April 12-18, 2020. Gooch Decl., Ex. 5, at 1 (USDA, *Farm Labor*
3 *Report* (May 28, 2020)). The gross wage rate for field and livestock workers combined was \$14.16
4 per hour during the April 2020 reference week, up 3% from the prior year for the same survey
5 period. *Id.*

6 **B. The H-2A Program And Farmworker Wages**

7 The United States critically depends on roughly two to three million farmworkers located in
8 rural communities from coast to coast to produce the nation's food supply and its agricultural
9 exports. Although they are essential to ensure continuity of the food supply that Americans
10 consume every day, these farmworkers are highly vulnerable to wage decline, job loss, or other
11 economic dislocation. *See* Declaration of Teresa Romero, President, United Farm Workers ("UFW
12 Decl.") ¶ 7. Their jobs typically offer only subsistence wages, are often seasonal, and are vulnerable
13 to economic shocks to agricultural markets. *See* UFW Decl. ¶ 17. Indeed, farmworkers are already
14 among the lowest-paid workers in the United States, with average annual family incomes ranging
15 from approximately \$20,000 to \$24,999. Gooch Decl., Ex. 6, at 36 (JBS International, *Findings*
16 *from the National Agricultural Workers Survey (NAWS) 2015-2016: A Demographic and*
17 *Employment Profile of United States Farmworkers* (Jan. 2018)). Moreover, roughly 33% of
18 farmworker had family incomes below poverty. *Id.* Congress has charged Defendant USDA, and
19 DOL and other federal agencies with ensuring the economic security of farmworkers and the
20 stability of agricultural production. *See* Compl. ¶¶ 36-50.

21 The H-2A foreign guestworker visa program permits employers to hire foreign workers to
22 perform agricultural work on a temporary basis when the domestic labor market cannot supply
23 adequate labor. Employers are only authorized to hire foreign guestworkers, however, if DOL
24 certifies that the foreign workers' temporary employment "will not adversely affect the wages and
25 working conditions of workers in the United States similarly employed." 8 U.S.C. § 1188(a). And
26 DOL has recognized, as a general matter, that the introduction of foreign guestworkers increases
27 the likelihood that U.S. farmworkers' wages will decrease. *See Temporary Agricultural*
28 *Employment of H-2A Aliens in the United States*, 75 Fed. Reg. 6884, 6892 (Feb. 12, 2010).

1 Notwithstanding those concerns, DOL has approved employers' requests to hire hundreds of
2 thousands of H-2A guestworkers in recent years. In 2019, for example, DOL approved the hiring
3 of over 250,000 H-2A foreign guestworkers. *See Gooch Decl., Ex. 7 (DOL Office of Foreign Labor*
4 *Certification, H-2A Temporary Agricultural Labor Certification Program-Selected Statistics, FY*
5 *2019 (Sept. 30, 2019)).* These H-2A workers were employed in 2019 by approximately 13,000
6 agricultural employers in the United States. *Id.*

7 Agricultural employers have continued to rely heavily on the H-2A program in 2020, and
8 their substantial use of the program will likely continue in 2021. During the first three quarters of
9 the 2020 fiscal year, DOL received 12,351 applications from employers seeking certification for
10 232,362 H-2A workers and approved the hiring of 224,290 of those workers. Washington State
11 employers received approvals to hire 24,785 H-2A workers, and California employers received
12 approvals to hire 21,337 H-2A workers. *See Gooch Decl., Ex. 8 (DOL Office of Foreign Labor*
13 *Certification, H-2A Temporary Agricultural Program-Selected Statistics, Fiscal Year 2020 Q1-Q3*
14 *(June 30, 2020)).*

15 To avoid adverse effects to U.S. workers' wages, DOL regulations require that employers
16 participating in the H-2A program pay a wage to both U.S. and foreign guestworkers that is the
17 highest of (i) the Adverse Effect Wage Rate (AEWR), (ii) the prevailing wage rate,² (iii) an agreed-
18 upon collective bargaining wage, or (iv) the federal or state minimum wage. *See 20 C.F.R.*
19 *§ 655.120(a); see also 20 C.F.R. § 655.122(a)* ("The employer's job offer must offer to U.S. workers
20 no less than the same benefits, wages, and working conditions that the employer is offering, intends
21 to offer, or will provide to H-2A workers"). DOL issues an AEWR for each state based on the
22 regional "annual weighted average hourly wage" paid to field and livestock workers combined, as
23 determined by the prior year's FLS data as published in the FLR. 20 C.F.R. § 655.103(b). In other
24 words, DOL is *required* by regulation to rely on FLS data to publish annual AEWRs for the H-2A
25 program. *See id.* DOL ordinarily issues the following year's AEWRs in December based on the

27 ² Under the H-2A program, the "prevailing wage" is based on the wages paid in a local
28 geographic area for a particular job. *See Gooch Decl., Ex. 9 (ETA Handbook No. 385 (Aug. 1981))* (providing process for identifying local prevailing wages).

1 data published in the November FLR. *See, e.g., Labor Certification Process for the Temporary*
2 *Employment of Aliens in Agriculture in the United States: 2020 Adverse Effect Wage Rates for Non-*
3 *Range Occupations*, 84 Fed. Reg. 69774 (Dec. 19, 2019) (publishing AEWs for 2020 based on
4 annualized FLS data).

5 In practice, the AEW is the primary wage rate under the H-2A program because it is higher
6 than the alternative minimum wages in most circumstances. *See* 75 Fed. Reg. at 6893 n.7, 6897;
7 *see also* Compl. ¶¶ 38-41, 58. Moreover, because employers can reject any job applicant—
8 including highly qualified U.S. farmworkers—who demand a wage higher than the minimum rate
9 required under the H-2A program, the program’s “minimum” pay requirement often becomes the
10 employer’s maximum offer. *See* UFW Decl. ¶ 9. Accordingly, the AEW determines the wages
11 of approximately 90% of the farmworkers working for H-2A program employers. *See* 75 Fed. Reg.
12 at 6893 n.7, 6897. DOL’s reliance on the FLS to compute the AEW is a longstanding agency
13 practice; DOL has used FLS data to compute the AEW since the H-2A program’s inception in
14 1986, and it used FLS data for the H-2A’s predecessor program dating back to 1953. *See Labor*
15 *Certification Process for the Temporary Employment of Aliens in Agriculture in the United States:*
16 *Adverse Effect Wage Rate Methodology*, 54 Fed. Reg. 28037, 28039-28040 (July 5, 1989); 75 Fed.
17 Reg. at 6891.

18 To memorialize DOL’s substantial reliance on the FLS, USDA has entered formal
19 agreements with DOL regarding the FLS, most recently in December 2019. The December 2019
20 Memorandum of Understanding (MOU) acknowledged that DOL “relies *exclusively* upon the
21 agricultural wage information provided by the [FLS] in performing its responsibilities under the
22 Immigration and Nationality Act, which includes setting an [AEW] for the H-2A temporary
23 agricultural program.” Gooch Decl., Ex. 10, at 1 (December 2019 Memorandum of Understanding
24 between USDA and DOL) (emphasis added). The MOU also expressly recognized DOL’s
25 “continued and recurring *bona fide* need for the information provided by the [FLS], which will allow
26 [DOL] to produce the official AEWs,” and that “*it is not possible for [DOL] to obtain the needed*
27
28

1 *information by any other means.” Id.* at 2 (emphasis added).³ In the agreement, DOL also agreed
2 to continue to fund the FLS through December 31, 2022, as it has done since 2011. *Id.*

3 **C. USDA’s Decision To Discontinue The FLS and Cease Publication Of The FLR**

4 On September 30, 2020, USDA announced without warning that it was discontinuing the
5 FLS and ceasing publication of the FLR. *See Notice of Revision to the Agricultural Labor Survey*
6 *and Farm Labor Reports by Suspending Data Collection for October 2020*, 85 Fed. Reg. 61719
7 (Sept. 30, 2020).⁴ USDA did not solicit any public comment or employ formal rulemaking
8 procedures. *See id.* The Notice offers no explanation for USDA’s decision. Instead, the Notice
9 acknowledges some of the many uses of FLS data, including that “wage rates have been used in the
10 administration of the H–2A Program and for setting Adverse Effect Wage Rates.” *Id.* It then asserts,
11 without elucidation, that “USDA has determined the public can access other data sources for the
12 data collected” by the FLS. *Id.*

13 **LEGAL STANDARD**

14 A temporary restraining order and preliminary injunction are warranted where plaintiffs
15 have shown that they are “likely to succeed on the merits,” that they are “likely to suffer irreparable
16 harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that
17 an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008);
18 *see also Immigrant Legal Res. Ctr. v. City of McFarland*, No. 1:20-CV-00966-TLN-AC, 2020 WL
19 4012786, at *2 (E.D. Cal. July 14, 2020) (“[T]emporary restraining orders are governed by the
20 same standard applicable to preliminary injunctions.”). Alternatively, preliminary relief is
21 appropriate when “there are serious questions going to the merits—a lesser showing than likelihood
22 of success on the merits,” “the balance of hardships tips sharply in the plaintiff’s favor, and the other
23

24 _____
25 ³ *See also id.* (explaining that the MOU “and accompanying transfer of fund are necessary to
26 ensure that [DOL] has the necessary information regarding the wages of U.S. agricultural workers
27 to comply with its statutory and regulatory obligations, as well as DOL’s stated commitment to
28 providing fair wages and strong labor protections for all agricultural workers, as expressed in its H-2A program regulations”). DOL has separately recognized that FLS data are critical to the H-2A program and protecting the wages of U.S. farmworkers. *See, e.g.*, 75 Fed. Reg. at 6898.

⁴ Available at <https://www.govinfo.gov/content/pkg/FR-2020-09-30/pdf/2020-21592.pdf>.

1 two *Winter* factors” (irreparable harm and the public interest) “are satisfied.” *All. for the Wild*
2 *Rockies v. Pena*, 865 F.3d 1211, 1217 (9th Cir. 2017) (internal quotation marks omitted). Plaintiffs
3 satisfy both standards.

4 ARGUMENT

5 I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

6 The APA directs courts to “hold unlawful and set aside” agency action that is “arbitrary,
7 capricious, an abuse of discretion, or otherwise not in accordance with law” or that is taken “without
8 observance of procedure required by law.” 5 U.S.C. § 706(2)(A), (D). Agency action is arbitrary
9 and capricious if the agency “entirely failed to consider an important aspect of the [issue]” before
10 the agency. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29,
11 43 (1983); *see also Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1912-
12 1913 (2020). An agency must also “cogently explain why it has exercised its discretion in a given
13 manner.” *State Farm*, 463 U.S. at 48; *see also id.* at 43 (agencies must “examine the relevant data
14 and articulate a satisfactory explanation for its action including a ‘rational connection between the
15 facts found and the choice made’”).

16 USDA’s decision to discontinue the FLS and cease publication of the FLR fails these basic
17 statutory requirements for at least three reasons. *First*, USDA failed to consider important aspects
18 of its decision, including the impact its decision would have on the wages of U.S. and H-2A
19 farmworkers. *Second*, USDA failed to provide any reasoned explanation that supports its decision.
20 *Third*, USDA’s decision violates APA’s notice-and-comment rulemaking requirement.

21 A. USDA’s Decision Is Arbitrary and Capricious Because USDA Failed To 22 Consider The Decision’s Impact On The H-2A Program And Farmworker Wages Or The Reliance Interests Of Public Agencies And Private Parties

23 Plaintiffs are likely to succeed on their claim that USDA’s decision to discontinue the FLS
24 is arbitrary and capricious because USDA “entirely failed to consider ... important aspect[s] of the
25 [issue]” before it. *State Farm*, 463 U.S. at 43; *see also Regents*, 140 S. Ct. at 1912-1913. USDA’s
26 decision to eliminate the FLS, after consistently conducting the survey for over 100 years and
27 repeatedly acknowledging that it is the *only* source of reliable information about farm labor, will
28 have a dramatic effect on the H-2A program and the wages paid to U.S. and H-2A farmworkers.

1 USDA’s decision also introduces substantial uncertainty concerning the ability of numerous federal
2 and state agencies to administer several programs assisting farmworkers who have long relied on
3 FLS data. The Notice contains no indication at all that USDA considered the effect on H-2A
4 workers or agencies’ reliance interests when making its decision. USDA may not announce such
5 a dramatic shift in its practices “without any consideration whatsoever” of these effects. *Regents*,
6 140 S. Ct. at 1912. “That ... alone” renders the Notice arbitrary and capricious, requiring vacatur.
7 *Id.* at 1913.

8 **1. Effects On H-2A Wages and Farmworkers**

9 The decision to discontinue the FLS will upend the H-2A program and harm U.S.
10 farmworkers and H-2A foreign guestworkers across the United States. It is a basic rule of
11 administrative law that an agency must “pay[] attention to the advantages and the disadvantages of
12 [its] decisions.” *Michigan v. EPA*, 576 U.S. 743, 753 (2015). That includes considering a decision’s
13 impact on “how [federal agencies] would fulfill their statutory ... duties.” *Nat’l Urban League v.*
14 *Ross*, No. 20-CV-05799-LHK, 2020 WL 5739144, at *29 (N.D. Cal. Sept. 24, 2020). But the Notice
15 reflects no consideration whatsoever of the considerable harms that USDA’s decision would impose
16 on U.S. and H-2A farmworkers, harm that DOL is statutorily obligated to prevent. *See id.* (finding
17 that U.S. Census Bureau’s “constitutional and statutory obligations are ‘important aspects’ of the
18 problem before” the defendants).

19 Discontinuing the FLS effectively eliminates AEWRs under the H-2A program, which
20 creates uncertainty and will likely result in lower wages for U.S. and H-2A farmworkers. DOL
21 regulations define AEWR as “[t]he annual weighted average hourly wage for field and livestock
22 workers (combined) in the States or regions as published annually by the [USDA] based on its
23 quarterly wage survey,” *i.e.*, FLS data published in the FLR. 20 C.F.R. § 655.103(b). Because of
24 USDA’s decision, employers will only be required to pay H-2A foreign guestworkers and their U.S.
25 counterparts the highest of the prevailing wage rate, an agreed-upon collective bargaining wage,⁵ or
26

27 ⁵ In most states, there is no survey of local prevailing wages and there is no collective
28 bargaining agreement since most farmworkers are not represented by a union. *See Gooch Decl.*,
Ex. 11 (U.S. Bureau of Labor Statistics, *Table 3. Union Affiliation of Employed Wage and Salary*

1 the federal or state minimum wage. *See* 20 C.F.R. § 655.120(a). In most circumstances, data from
 2 previous years demonstrates that those alternative wage rates either do not exist or are less than the
 3 AEW. *See* 75 Fed. Reg. at 6893 n.7, 6897 (recognizing that the AEW is the highest minimum
 4 wage for approximately 90% of H-2A farmworkers). Accordingly, eliminating the AEW will
 5 result in lower wages for U.S. and H-2A workers.

6 For example, DOL certified over 21,000 H-2A positions in California through the third
 7 quarter of fiscal year 2020. *See* Gooch Decl., Ex. 12 (DOL Office of Labor Certification, *H-2A*
 8 *FY2020 Q3 Disclosure File: California*). Those employers were required to pay their U.S. and H-
 9 2A workers a minimum wage of \$14.77 under the AEW published by DOL. *See* Gooch Decl.,
 10 Ex. 13 (DOL, *Adverse Effect Wage Rates for 2020*). For most crops, California did not publish local
 11 prevailing wages in 2020. *See* Gooch Decl., Ex. 14 (DOL Office of Labor Certification,
 12 *Agricultural Online Wage Library: California*).⁶ As a result, without the AEW, the minimum H-
 13 2A wage paid at most H-2A employers in 2021 would be California’s minimum wage of \$14.00.
 14 *See* Gooch Decl., Ex. 15 (Cal. Dep’t of Industrial Relations, *Minimum Wage* (Dec. 2019)).
 15 Eliminating the AEW in 2021 therefore would result in wages that are at least \$0.77 lower per
 16 hour than they otherwise would have been, causing U.S. and H-2A workers to be paid \$30.80 less
 17 per 40-hour workweek, totaling \$1,601.60 in lost income over the course of a year.⁷ This over 5%
 18 pay cut creates severe hardship for farmworkers. *See* UFW Decl. ¶¶ 17-20; *infra* Part II. And those
 19 losses do not account for the likely increase in AEWs in 2021, which means that the decrease to
 20
 21

22
 23 *Workers by Occupation and Industry* (Jan. 22, 2020)) (data indicating that between 2018 and
 24 2019, only 2.8% of “[a]gricultural or related industries” were represented by unions).
 Consequently, if there is no AEW, the applicable required H-2A wage would be the state or
 federal minimum wage.

25 ⁶ The prevailing wages rates published for each state are available through DOL’s website at
 26 <https://www.foreignlaborcert.doleta.gov/reader.cfm>. Prevailing wage rates are published for
 27 specific regions and agricultural jobs, which are often defined by crop. For example, the only
 prevailing wage published for California in 2020 was for farmworkers in the “North Coast” region
 working “Wine Grape Harvest” jobs. *See* Gooch Decl., Ex. 14.

28 ⁷ This pay cut is substantial relative to an annual pre-tax income of only \$27,040. However,
 since these jobs are seasonal, actual annual incomes for these workers are often less than this figure.

1 farmworkers' wages would be even greater. *See* Gooch Decl., Ex. 16 (DOL, *AEWR Trends*)
 2 (documenting a 5.44% average yearly increase to California AEWR between 2015 and 2020).⁸

3 The impacts would be even greater in other states. In Oregon, for instance, DOL certified
 4 over 2,500 H-2A positions through the first three quarters of fiscal year 2020. *See* Gooch Decl., Ex.
 5 17 (DOL Office of Labor Certification, *H-2A FY2020 Q3 Disclosure File: Oregon*). Oregon's H-
 6 2A employers were obligated to pay at least \$15.83 based on the 2020 AEWR. *See* Gooch Decl.,
 7 Ex. 13. Because DOL has not published prevailing wages for any regions in Oregon since 2013,
 8 *see* Gooch Decl., Ex. 18 (DOL, *Archive Agricultural Online Wage Library: Oregon* (updated Oct.
 9 9, 2019)), eliminating the AEWR means that many H-2A workers in Oregon will be paid the state
 10 minimum wage (for non-urban areas) of \$11.50 or \$12.00 after the minimum wage increases on
 11 July 1, 2021, *see* Gooch Decl., Ex. 19 (Oregon Bureau of Labor and Industries, *Oregon Minimum*
 12 *Wage Schedule*). As a result, in 2021 Oregon's H-2A employers would be permitted to pay \$3.83
 13 to \$4.33 per hour less without a statewide AEWR, a \$153.20 to 173.20 decrease in pay per 40-hour
 14 workweek, resulting in \$7,966.40 to \$9,006.40 in lost wages on an annualized basis.⁹ This amounts
 15 to more than a 24% to 27% pay cut.¹⁰ And in Idaho, farmworkers would suffer even more severely.
 16 Through the first three quarters of fiscal year 2020, DOL certified 3,656 H-2A positions in Idaho.
 17 *See* Gooch Decl., Ex. 20 (DOL Office of Labor Certification, *H-2A FY2020 Q3 Disclosure File:*
 18 *Idaho*). Idaho did not publish a local prevailing wage in 2020 (it has not published prevailing wages
 19 since 2014). *See* Gooch Decl., Ex. 21 (DOL, *Archive Agricultural Online Wage Library: Idaho*
 20 (updated Oct. 9, 2019)). Accordingly, workers that would have been paid the \$13.62 AEWR
 21 published by DOL in 2020, *see* Gooch Decl., Ex. 13, would instead be paid the \$7.25 state minimum
 22 wage (which is not scheduled to increase in 2021 or beyond), *see* Gooch Decl., Ex. 22 (Idaho Dep't

24 ⁸ Assuming that California's AEWR would increase by the five-year-average percent
 25 increase, California's 2021 AEWR would be \$15.57, meaning that farmworkers would suffer
 wage losses of \$1.57 per hour, or 10% of their income.

26 ⁹ A farmworker paid the Oregon minimum wage of \$12.00 for an entire year would earn an
 annual pre-tax income of only \$24,960.

27 ¹⁰ Again, these calculations do not account for the likely increase to AEWRs in 2021.
 28 Between 2015 and 2020, Oregon's AEWR increased by an average of 4.96% every year. *See*
 Gooch Decl., Ex. 16. Assuming a similar increase in 2021, Oregon's AEWR would be \$16.62.

1 of Labor, *Wage & Hour FAQs*).¹¹ Eliminating the AEW would therefore result in U.S. and H-2A
2 workers at H-2A employers in Idaho being paid \$6.37 less per hour, \$254.80 less per 40-hour
3 workweek.¹² This would reduce farmworkers' income by more than 46%.¹³ Allowing farm
4 employers to pay those lower wages will cause substantial harm to both U.S. and H-2A
5 farmworkers. *See infra* Part II.

6 The Notice provides no indication that USDA considered the substantial negative impact on
7 farmworker wages caused by its decision to eliminate the FLS, which effectively eliminates AEWs
8 under the H-2A program. Because it "should have considered those matters but did not," its "failure
9 was arbitrary and capricious in light of the APA." *Regents*, 140 S. Ct. at 1915.

10 2. Reliance Interests of Public Agencies and Private Parties

11 The Notice also fails to reflect any consideration of the "serious reliance interests" caused
12 by USDA's century-old practice of conducting the FLS. *Regents*, 140 S. Ct. at 1913; *Encino*
13 *Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (holding that an agency must "be
14 cognizant that longstanding policies may have 'engendered serious reliance interests that must be
15 taken into account.'"). Until USDA abruptly ended the FLS and its publication of the FLR, it had
16 consistently conducted that survey for over 100 years. *See* Gooch Decl., Ex. 1, at 6. Unsurprisingly,
17 many federal and state agencies, as well as private entities and individuals, have come to rely on
18 FLS data during that time.

19 DOL relies heavily on FLS data to fulfill its statutory duty under the H-2A program to
20 prevent the importation of foreign guestworkers from adversely affecting employment opportunities
21 and wage rates for U.S. farmworkers. Since Congress left uncapped the number of H-2A visas that
22 can be issued, the AEW plays a crucial role in metering the importation of foreign labor by

23
24 ¹¹ In total, twenty-one states have minimum wages of \$7.25 under state or federal law. *See*
25 Gooch Decl., Ex. 23 (DOL, *State Minimum Wage Laws*). That includes Georgia, North Carolina,
Louisiana, Kentucky, and Texas, five of the top ten states in terms of H-2A hiring. *See* Gooch Decl.,
Ex. 8.

26 ¹² This corresponds to a pay cut of \$13,249.60 over 52, 40-hour weeks, for an annual pre-tax
income of only \$15,080.

27 ¹³ Between 2015 and 2020, Idaho's AEW increased by an average of 4.26% per year. *See*
28 Gooch Decl., Ex. 16. Assuming a similar increase in 2021, Idaho's AEW would be \$14.20,
resulting in even greater losses to farmworkers' incomes if DOL is unable to publish AEWs.

1 ensuring that guestworkers' wages do not undercut domestic farmworkers' wages. As USDA has
2 repeatedly acknowledged, DOL needs FLS data to compute the AEW under the H-2A program.
3 *See, e.g., Submission for OMB Review; Comment Request*, 83 Fed. Reg. 50631, 50632 (Oct. 2, 2018)
4 (recognizing that the "[c]omprehensive and reliable agricultural labor data" provided by the FLS
5 "are ... needed by [DOL] in the administration of the 'H-2A' program"). In recognition of DOL's
6 reliance on the FLS, USDA most recently entered into an MOU with DOL in late 2019. That MOU
7 acknowledged that DOL "relies exclusively upon the agricultural wage information provided by the
8 [FLS] in performing its responsibilities under the Immigration and Nationality Act, which includes
9 setting an [AEWR] for the H-2A temporary agricultural program." Gooch Decl., Ex. 10, at 1. The
10 MOU also expressly recognizes DOL's "continued and recurring *bona fide* need for the information
11 provided by the [FLS], which will allow [DOL] to produce the official AEWs," and that "it is not
12 possible for [DOL] to obtain the needed information by any other means." *Id.* at 2.¹⁴ For that
13 reason, DOL has funded the FLS since 2011, and under the MOU, commits such funding through
14 December 31, 2022. *Id.* And both USDA and DOL have separately recognized that the FLS is the
15 *only* source of information on the number of workers hired and the wages paid by farms in the
16 United States. *See* 83 Fed. Reg. at 50632 (USDA explaining that the FLS "is the only timely and
17 reliable source of information on the size of the farm worker population"); 75 Fed. Reg. at 6898
18 (DOL explaining that "[t]he FLS is the only annually available data source that actually uses
19 information sourced directly from farmers").

20 USDA has also recognized that FLS data are used "to help ensure federal assistance for farm
21 worker assistance programs supported with government funding" and "by farm worker
22 organizations to help set wage rates and negotiate labor contracts as well as determine the need for
23 additional workers." 83 Fed. Reg. at 50632. For example, FLS data are used by the National
24

25 _____
26 ¹⁴ *See also id.* (explaining that the MOU "and accompanying transfer of fund are necessary to
27 ensure that [DOL] has the necessary information regarding the wages of U.S. agricultural workers
28 to comply with its statutory and regulatory obligations, as well as DOL's stated commitment to
providing fair wages and strong labor protections for all agricultural workers, as expressed in its H-2A program regulations"). DOL has separately recognized that FLS data are critical to the H-2A program and protecting the wages of U.S. farmworkers. *See, e.g.,* 75 Fed. Reg. at 6898.

1 Farmworker Jobs Program (NFJP) administered by DOL, the Migrant and Seasonal Head Start
2 Program administered by the U.S. Department of Health and Human Services, and the Legal
3 Services Corporation's programs for migrant farmworkers.¹⁵ These federal programs use
4 information about farmworker populations collected by the FLS to allocate federal funding and
5 other resources to provide economic, housing, professional, educational, and legal assistance to
6 farmworkers. USDA also uses FLS data to calculate parity prices and the parity index under the
7 Agricultural Adjustment Act, which protects farms and farmworkers from economic losses caused
8 by volatility in agricultural markets. *See* Gooch Decl., Ex. 3, at 8. Private parties also rely on parity
9 prices and the parity index, and by extension FLS data, when negotiating agricultural production
10 contracts. *See* Gooch Decl., Ex. 26 (USDA NASS, *Prices Paid Surveys and Indexes*).

11 Finally, FLS data are used by federal and state policymakers more broadly to assess farm
12 labor supply and demand. By directly surveying farms, the FLS provides granular and timely details
13 about the number of workers hired, the type of work performed, and the wages paid. *See, e.g.,*
14 Gooch Decl., Ex. 5. Moreover, FLS data are used by DOL to conduct the National Agricultural
15 Workers Survey (NAWS). Various federal agencies "use [NAWS] data to estimate the number and
16 characteristics of crop workers and their dependents who qualify to participate in or receive services
17 from various migrant and seasonal farmworker programs." *Agency Information Collection*
18 *Activities; Comment Request; National Agricultural Workers Survey*, 84 Fed. Reg. 35886, 35886
19 (July 25, 2019).

20 The Notice does not acknowledge these "serious reliance interests," much less explain why
21 they were not considered in USDA's decision-making process. "Making that difficult decision was
22 the agency's job, but the agency failed to do it." *Regents*, 140 S. Ct. at 1914; *see also Nat'l Urban*
23
24

25 ¹⁵ *See Program Year (PY) 2019 Workforce Innovation and Opportunity Act (WIOA) Section*
26 *167, National Farmworker Jobs Program (NFJP) Grantee Allotments*, 84 Fed. Reg. 33087, 33088
27 (July 11, 2019) (noting FJMP reliance on FLS data); Gooch Decl., Ex. 24 (HHS Office of Planning,
28 Research, and Evaluation, *Migrant and Seasonal Head Start Supplement to the National*
Agricultural Workers Survey 2015 Report (Mar. 2015)) (noting HHS reliance on FLS data); Gooch
Decl., Ex. 25 (LSC, *Basic Field – Agricultural Worker Grants*) (noting LSC reliance on FLS data).

1 *League*, 2020 WL 5739144, at *44 (“Where an agency fails to consider reliance interests, its action
2 is arbitrary and capricious.”). Plaintiffs are therefore likely to succeed on this claim.

3 **B. USDA’s Decision Is Arbitrary And Capricious Because USDA Failed To**
4 **Articulate A Plausible Rationale That Could Justify It**

5 Plaintiffs are also likely to succeed on their claim that USDA’s decision to discontinue the
6 FLS and cease publication of the FLR is arbitrary and capricious because USDA does not articulate
7 *any* rationale that could justify its decision. It is “a fundamental requirement of administrative law
8 ... that an agency set forth its reasons for decision; an agency’s failure to do so constitutes arbitrary
9 and capricious agency action.” *Amerijet Int’l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014).
10 “[C]onclusory statements will not do; an agency’s statement must be one of reasoning.” *Id.* (internal
11 quotation marks omitted); *see also Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019)
12 (an agency must “articulate[] a satisfactory explanation for [its] decision”). Here, the Notice does
13 not provide any reasoning to justify USDA’s decision to end a survey that has been a mainstay in
14 agricultural labor policy for over 100 years. The only commentary in the Notice is the claim that
15 “the public can access other data sources for the data collected in the Agricultural Labor Survey.”
16 85 Fed. Reg. at 61719. That bald assertion—coupled with a total lack of transparency in the
17 decision-making process—is insufficient to justify the substantial change brought about by USDA’s
18 decision.

19 First, USDA’s suggestion that FLS data is redundant is contradicted by USDA’s and DOL’s
20 prior statements. USDA has recognized that the FLS and the labor statistics it provides “are an
21 integral part of [NASS’s] primary function of collecting, processing, and disseminating current
22 state, regional, and national agricultural statistics.” 83 Fed. Reg. at 50632. USDA also has
23 explained that the FLS “is the *only* timely and reliable source of information on the size of the farm
24 worker population,” and that DOL and other agencies rely on that information to administer federal
25 programs. *Id.* (emphasis added). DOL has similarly recognized that FLS data are unique,
26 explaining that “[t]he FLS is the only annually available data source that actually uses information
27 sourced directly from farmers,” which “is a strong advantage of the FLS as the AEWL data source
28

1 compared to all other alternatives.” 75 Fed. Reg. at 6898.¹⁶ Given those findings, it is unsurprising
2 that last year’s MOU between USDA and DOL unequivocally states that “it is not possible for
3 [DOL] to obtain the needed information by any other means.” Gooch Decl., Ex. 10, at 2. Those
4 findings, which directly contradict the cursory statement in the Notice, demonstrate that USDA’s
5 decision is not supported by the facts before the agency. *See Nat’l Urban League*, 2020 WL
6 5739144, at *39 (finding that defendants’ contradictory prior statements showed that the agency
7 decision “runs counter to the facts”). Moreover, when changing positions, an agency must “display
8 awareness that it *is* changing position” and “show that there are good reasons for the new policy.”
9 *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).¹⁷ The Notice, however, fails to
10 even recognize that USDA’s decision contradicts the agency’s prior statements, let alone provide a
11 justification for that about face. *See Nat’l Urban League*, 2020 WL 5739144, at *43 (finding “one-
12 and-a-half page[.]” press release did not adequately explain the agency’s decision or inconsistent
13 approach).

14 Second, even if alternative data sources were available as USDA suggests, that fact alone
15 does not articulate a reasoned explanation for the agency’s decision. To start, DOL is *required* by
16 regulation to rely on FLS data to publish AEWs for the H-2A program, which renders alternatives
17 meaningless under the circumstances. *See* 20 C.F.R. § 655.103(b). Moreover, one of the data
18 sources that the Notice identified as a potential substitute—NAWS—cannot possibly replace FLS
19 data because NAWS’s sampling and statistical methodologies rely on FLS data for accuracy, thus
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21

22 ¹⁶ DOL similarly explained in a 2019 notice of proposed rulemaking that “[t]he FLS
23 [remained] the Department’s preferred wage source for establishing the AEW because it is the
24 *only* comprehensive wage survey that collects data from farm and ranch employers.” *Temporary*
25 *Agricultural Employment of H-2A Nonimmigrants in the United States*, 84 Fed. Reg. 36168, 36180
26 (July 26, 2019) (emphasis added). The U.S. Bureau of Labor Statistics (BLS), by contrast, generally
27 collects data from “nonfarm establishments.” *See* Gooch Decl., Ex. 27 (BLS, *Occupational*
28 *Employment Statistics Overview*) (Occupation Employment Statistics program); Gooch Decl., Ex.
29 28 (BLS, *Current Employment Statistics*) (Current Employment Statistics program).

¹⁷ *See also Modesto Irr. Dist. v. Gutierrez*, 619 F.3d 1024, 1034 (9th Cir. 2010) (recognizing
that “[c]ourts will not ‘assume [an agency] has engaged in reasoned decision making’ when it
‘implicitly’ departs from its prior precedent and provides no explanation for doing so”).

1 making the reliance on NAWS data inadequate.¹⁸ Even if DOL could rely on alternative data, the
2 Notice does not address the reliability of that data or whether using that data would cause
3 farmworkers' wages to decrease. The failure to evaluate those circumstances is particularly stark
4 given that DOL has recognized that past attempts to rely on data sources other than the FLS to
5 calculate the AEWB "resulted in the average certified wage for H-2A workers decreasing
6 nationwide" by over 11%. 75 Fed. Reg. at 6896-6897. Basic principles of administrative law
7 required USDA to "examine[] 'the relevant data'"—including the effect of forcing DOL and other
8 agencies to rely on alternative data sources—and to "articulate[] 'a satisfactory explanation' for [its]
9 decision, 'including a rational connection between the facts found and the choice made.'" *Dep't of*
10 *Commerce*, 139 S. Ct. at 2569 (quoting *State Farm*, 463 U.S. at 43). The Notice's conclusory
11 assertion that alternative data sources are available—which contradicts USDA's and DOL's earlier
12 statements and lacks any assessment of the adequacy of those alternatives—does not provide an
13 adequate explanation for USDA's action.

14 "The reasoned explanation requirement ... is meant to ensure that agencies offer genuine
15 justifications for important decisions, reasons that can be scrutinized by courts and the interested
16 public." *Id.* at 2575-2576. USDA has failed to satisfy that requirement, and Plaintiffs are therefore
17 likely to succeed on this claim, too.

18 C. USDA's Decision Violates The APA's Notice-And-Comment Requirement

19 Finally, Plaintiffs are also likely to succeed on their claim that USDA's decision violates the
20 APA's notice-and-comment requirement. The APA requires this Court to hold unlawful and set
21 aside agency action taken "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).
22 The Notice was issued in contravention of the APA's procedural requirements and should be set
23 aside on that basis.

25 ¹⁸ Specifically, FLS data are used to allocate NAWS data collection resources and to assign
26 appropriate weights to sampled data so as to construct unbiased NAWS estimates for entire
27 populations. See Gooch Decl., Ex. 29, at 1-2, 6-7 (DOL, 1205-0453: *The National Agricultural*
28 *Workers Survey, Part B*). Moreover, NAWS is based on a small sample of farmworkers nationwide
to provide an economic and demographic portrait; it does not seek or provide the extensive information
that is gathered by the FLS.

1 The Notice is a “rule” within the meaning of the APA, as it is “an agency statement of
2 general or particular applicability and future effect designed to implement, interpret, or prescribe
3 law or policy.” *Id.* § 551(4). In general, the “agency process for formulating, amending, or
4 repealing [such] a rule,” *id.* § 551(5), must comply with the APA’s requirements of notice-and-
5 comment rulemaking, *id.* § 553. While the APA exempts certain rules from notice and comment
6 procedures, *see id.* § 553(b), the Notice does not fall within any of those exemptions. Rather, it is
7 a “substantive” rule that USDA was required to—and did not—issue pursuant to § 553’s notice-
8 and-comment provisions.

9 First, the Notice is a substantive rule subject to notice-and-comment requirements. “[T]he
10 distinction between substantive and procedural rules is ‘one of degree’ depending upon ‘whether
11 the substantive effect is sufficiently grave so that notice and comment are needed to safeguard the
12 policies underlying the APA.’” *EPIC v. U.S. Dep’t of Homeland Sec.*, 653 F.3d 1, 5-6 (D.C. Cir.
13 2011). Those policies are “to ‘serve the need for public participation in agency decisionmaking’
14 and to ensure the agency has all pertinent information before it when making a decision.” *Id.* at 6.
15 Courts have thus held that agency pronouncements that have a substantial impact on the rights or
16 responsibilities of individuals must go through notice-and-comment rulemaking. In *Mendoza v.*
17 *Perez*, 754 F.3d 1002 (D.C. Cir. 2014), for example, the D.C. Circuit held that DOL had to follow
18 notice-and-comment requirements when issuing agency guidance that purported merely to alter the
19 procedures for DOL’s certification process but in fact “set[] the minimum wage an employer must
20 offer American workers before it can obtain H–2A certification.” *Id.* at 1008-1009, 1024. The court
21 explained that the agency guidance documents effectively “set the bar for what employers must do
22 to obtain approval” by eliminating the AEW for H-2A herders, and “[i]n doing so, they
23 substantially affect the rights and interests of both herders and employers.” *Id.* at 1024-1025.¹⁹

24 _____
25 ¹⁹ *See also, e.g., EPIC*, 653 F.3d at 6 (holding changes to Transportation Security
26 Administrations screening procedures “substantively affects the public to a degree sufficient to
27 implicate the policy interests animating notice-and-comment rulemaking”); *Batterton v. Marshall*,
28 648 F.2d 694, 708 (D.C. Cir. 1980) (holding that changes to a calculation used to determine
emergency job program allocations “jeopardize[d] the rights and interest of parties”); *Mayor & City
Council of Baltimore v. Trump*, 416 F. Supp. 3d 452, 506 (D. Md. 2019) (finding U.S. State
Department’s Foreign Affairs Manual was required to comply with notice-and-comment procedures

1 Here, USDA’s decision to discontinue the FLS and cease publication of the FLR is a
 2 departure from established agency practice that will have the effect of negating farmworkers’ rights
 3 to wage protections that have long been available and required by DOL to satisfy its statutory
 4 obligations. USDA’s decision effectively eliminates the AEW, allowing employers to pay
 5 farmworkers lower wages, resulting in drastic impacts on farmworkers’ wages across the country.
 6 *See supra* pp.10-13; *infra* Part II. These substantial effects on farmworkers’ rights and financial
 7 condition mean that the Notice is substantive and subject to notice-and-comment requirements.

8 Second, no exceptions to the notice-and-comment requirement apply. The Notice is not, for
 9 example, an interpretive rule not subject to notice-and-comment requirements. *See* 5 U.S.C. § 553;
 10 *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 96 (2015). Interpretive (*i.e.*, non-substantive) rules
 11 “do not themselves alter the rights or interests of parties.” *Batterton v. Marshall*, 648 F.2d 694, 707
 12 (D.C. Cir. 1980). Such rules instead include those created per “housekeeping statutes” that enable
 13 agencies to create internal standards governing “organization, procedure, and practice.” *Chrysler*
 14 *Corp. v. Brown*, 441 U.S. 281, 285 (1979). The exception for procedural rules is narrowly
 15 construed, *EPIC*, 653 F.3d at 6, and cannot be applied “where the agency action trenches on
 16 substantial private rights and interests,” *Batterton*, 648 F.2d at 708. As discussed, the Notice—
 17 which prevents DOL from issuing AEW as required under the H-2A program regulations—
 18 substantially impacts farmworkers’ interests.

19 Third, USDA cannot demonstrate that “good cause” would support issuing the Notice
 20 without going through notice-and-comment procedures. There is no plausible argument that public
 21 comment would be “impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C.
 22 § 553(b)(3)(B). This standard imposes a “high bar,” pursuant to which the exception applies “only
 23 in those narrow circumstances in which ‘delay would do real harm.’” *United States v. Valverde*,
 24 628 F.3d 1159, 1164-1165 (9th Cir. 2010); *see also Levesque v. Block*, 723 F.2d 175, 184 (1st Cir.
 25 1983) (the good cause exception “is narrowly construed”). Here, by contrast, the elimination of the
 26

27 _____
 28 because even though it did not have “the force of law,” the revisions “effects substantive changes”
 to the application of the Immigration and Nationality Act).

1 FLS would cause harm to farmworkers and disrupt the administration of agricultural programs
2 across the United States. Plaintiffs are thus likely to succeed on this claim.

3 **II. PLAINTIFF’S MEMBERS AND FARMWORKERS ACROSS THE COUNTRY WILL BE**
4 **IRREPARABLY INJURED ABSENT EMERGENCY RELIEF**

5 Farmworkers across the United States will suffer material—and indeed, in many states,
6 severe—wage reductions if the FLS and FLR are discontinued and the AEW is effectively
7 eliminated. *See supra* pp.10-13. While purely monetary damages typically are not irreparable,
8 courts have recognized an exception where “the plaintiff is so poor that he would be harmed in the
9 interim by the loss of the monetary benefits.” *Lee v. Christian Coal. of Am., Inc.*, 160 F. Supp. 2d
10 14, 31 (D.D.C. 2001); *see also Kildare v. Saenz*, 325 F.3d 1078, 1083 (9th Cir. 2003) (“[E]conomic
11 hardship constitutes irreparable harm.”). Economic hardship is distinguished from ordinary
12 monetary loss; a company’s lost revenue does not impose the same harm as cutting the income of
13 an individual already earning subsistence wages. *Compare Los Angeles Memorial Coliseum*
14 *Commission v. NFL*, 634 F.2d 1197, 1202 (9th Cir. 1980) (threat of loss revenue for a stadium did
15 not constitute irreparable harm), *with Jensen v. IRS*, 835 F.2d 196, 198 (9th Cir. 1987) (substantial
16 income garnishment of a low-income individual constituted irreparable harm). For low-income
17 individuals, economic loss can mean inadequate access to “food, shelter [and] other necessities.”
18 *Kildare*, 325 F.3d at 1083; *cf. Paxton v. Sec’y of Health & Human Servs.*, 856 F.2d 1352, 1354 (9th
19 Cir. 1988) (“When a family is living at subsistence level, the subtraction of any benefit can make a
20 significant difference to its budget and to its ability to survive”). Courts have widely recognized
21 that the inability to afford necessities such as food or medical care constitutes irreparable harm
22 because those losses, even if temporary, cannot be remedied by back payments. *See District of*
23 *Columbia v. U.S. Dep’t of Agric.*, 444 F. Supp. 3d 1, 43 (D.D.C. 2020) (“Going without food is an
24 irreparable harm.”); *Haskins v. Stanton*, 794 F.2d 1273, 1276-1277 (7th Cir. 1986) (“[T]he
25 deprivation of food ‘is extremely serious and is quite likely to impose lingering, if not irreversible,
26 hardships.’”).²⁰

27
28 ²⁰ *See also Beno v. Shalala*, 30 F.3d 1057, 1064 n.10 (9th Cir. 1994) (“We have no doubt that
irreparable harm is occurring to the plaintiff class as each month passes ... [even if the Eleventh

1 Plaintiffs' members, including both U.S. and H-2A farmworkers, will be irreparably harmed
 2 absent a temporary restraining order and preliminary injunction. USDA's decision to eliminate the
 3 FLS and cease publication of the FLR effectively eliminates the AEW under DOL's H-2A
 4 regulations. Without the data collected during the October FLS and the annual average hourly
 5 wages published in the November FLR, DOL will be unable to issue AEWs in December for 2021.
 6 *See* 20 C.F.R. § 655.103(b); 84 Fed. Reg. at 69774. Because most of Plaintiffs' members are paid
 7 the AEW, it is highly likely those members will be paid less per hour as a result of USDA's
 8 decision. For instance, a substantial number of UFW members work in California, which has an
 9 AEW of \$14.77. *See* UFW Decl. ¶ 13. As explained above, eliminating that AEW will cause
 10 many Plaintiffs' members to be paid the state minimum wage of \$14.00, resulting in a roughly 5%
 11 wage cut. *See supra* p.11; UFW Decl. ¶ 13. Plaintiffs' members in Idaho will see even great pay
 12 cuts. The Idaho minimum wage of \$7.25 is 46% less than the 2020 AEW of \$13.62. *See supra*
 13 pp.12-13; UFW Decl. ¶ 15. Many of Plaintiffs' members in Oregon and other states will likewise
 14 be paid materially lower wages as a result of USDA's decision. UFW Decl. ¶¶ 14, 16.

15 Those reduced wages will cause substantial economic hardship for many Plaintiffs'
 16 members. Farmworkers are already among the lowest-paid workers in the United States, which
 17 means that in many circumstances they are earning a subsistence income. UFW Decl. ¶ 17;
 18 Declaration of Diana Tellefson Torres, Executive Director, UFW Foundation ("UFW Foundation
 19 Decl.") ¶ 6. A wage decrease of 5-46%, *see supra* pp.10-13; UFW Decl. ¶¶ 13-16, would cause
 20 substantial harm to Plaintiffs' members and their families. For example, eliminating the AEW in
 21
 22

23 Amendment would permit a court order requiring retroactive benefits payments, because] [f]or
 24 people at the economic margin of existence, the loss of \$172 a month and perhaps some medical
 25 care cannot be made up by the later entry of a money judgment."); *Moore v. Miller*, 579 F. Supp.
 26 1188, 1191-1192 (N.D. Ill. 1983) ("For those in the 'grip of poverty', living on the financial edge,
 27 even a small decrease in payments can cause irreparable harm"); *Nelson v. Likins*, 389 F. Supp.
 28 1234, 1237, 1242 (D. Minn. 1974) (loss of \$80 to \$100 a month in AFDC benefits is sufficient
 irreparable injury to justify a preliminary injunction and a denial of a stay of preliminary injunction
 pending appeal because "[w]hile the loss of money is normally not considered irreparable, ... in this
 case those affected are not the average citizens but those in the grip of poverty"), *aff'd per curiam*,
 510 F.2d 414 (8th Cir. 1975).

1 Oregon for a single-income family of four would place that family below the federal poverty line,²¹
2 *see supra* p.12, placing financial strain on their ability to obtain food, shelter, and other necessities.
3 Many Plaintiffs' members, and other farmworkers across the United States, would likewise struggle
4 to pay for necessities like food, shelter, and medical care if their wages decreased by even \$1 to \$2.
5 *See* UFW Decl. ¶¶ 18-20; UFW Foundation Decl. ¶ 7. Indeed, many farmworkers already struggle
6 with food insecurity and rely on emergency food programs. *See* Gooch Decl., Ex. 31, at 46 (Ip et
7 al., *Profiles of Food Security for US Farmworker Households and Factors Related to Dynamic of*
8 *Change*, 105 Am. J. of Pub. Health 42 (Oct. 2015)) (finding that almost half (49%) of farmworkers
9 fell into a state of food insecurity over a 2-year period); *see also* UFW Foundation Decl. ¶ 6. A
10 decrease in wages will necessarily lead to greater food insecurity among this already vulnerable
11 population. *See* UFW Foundation Decl. ¶ 9. Those harms are exacerbated by reduced hours caused
12 by the pandemic, leaving an already impoverished population even more vulnerable. *See id.* ¶ 8.
13 Thus, in the absence of immediate injunctive relief, farmworkers will suffer immediate harms in the
14 form of economic hardship that cannot be undone through the payment of back wages.

15 Moreover, even if Plaintiffs' members could be compensated for their injuries (and as
16 explained, they cannot), it is unlikely they would obtain that relief. First, in the absence of FLS
17 data, it is all but certain that DOL will authorize employers to hire U.S. farmworkers and H-2A
18 guestworkers at lower wage rates, hindering farmworkers' claims to back wages even if Plaintiffs
19 ultimately prevail in this action. UFW Decl. ¶ 21. Second, even if Plaintiffs' members could
20 attempt to recoup their lost wages if USDA's decision is later vacated, U.S. and H-2A workers are
21 unlikely to receive back pay because they lack meaningful access to attorneys and the court system.
22 *See* UFW Decl. ¶ 22. Plaintiffs similarly lack the resources to pursue claims against thousands of
23 H-2A employers across the country. *Id.* ¶ 23; UFW Foundation Decl. ¶ 10. USDA's elimination
24 of the FLS and Farm Labor Survey thus causes irreparable harm for Plaintiffs' members.

25
26
27 ²¹ The U.S. Department of Health and Human Services has set the 2020 federal poverty
28 guideline for a family of four at \$26,200. *See* Gooch Decl., Ex. 30 (U.S. Department of Health &
Human Services, *HHS Poverty Guidelines for 2020*).

1 **III. THE REMAINING EQUITABLE FACTORS FAVOR GRANTING A TEMPORARY RESTRAINING**
2 **ORDER AND PRELIMINARY INJUNCTION**

3 The remaining equitable factors also favor granting preliminary relief. In assessing whether
4 preliminary relief should be granted, courts must weigh the irreparable harm to Plaintiffs' members
5 against the benefits to the public and harm to the government. *See E. Bay Sanctuary Covenant v.*
6 *Trump*, 950 F.3d 1242, 1280 (9th Cir. 2020); *see also id.* at 1271 (“When the government is a party,
7 the last two factors (equities and public interest) merge.”). “Relevant equitable factors” for
8 assessing whether the public interest is served by an injunction “include the value of complying
9 with the APA, the public interest in [avoiding the harm caused by the agency action], preserving
10 congressional intent, and promoting the efficient administration of our immigration laws.” *Id.* at
11 1280.

12 While Plaintiffs' members and farmworkers across the country will suffer irreparable injury
13 as demonstrated above, “[t]here is generally no public interest in the perpetuation of unlawful
14 agency action,” whereas there “is a substantial public interest in having governmental agencies
15 abide by the federal laws that govern their existence and operations.” *League of Women Voters v.*
16 *Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) (quotation cleaned). Here, USDA’s “failure to comply with
17 the APA”—including the failure to consider important aspects of its decision, provide a reasoned
18 explanation, and adhere to notice-and-comment requirements—“weighs in favor of granting
19 injunctive relief.” *E. Bay*, 950 F.3d at 1281.

20 The public interest is also served by preventing U.S. farmworkers’ wages from falling and
21 facilitating the effective administration of the H-2A foreign guestworker visa program. *See Gerstein*
22 *v. CIA*, No. C-06-4643, 2006 WL 3462659, at *5 (N.D. Cal. Nov. 29, 2006) (recognizing public
23 interest is served by promoting Congress’s “core purpose” in enacting regulatory program). When
24 Congress created the H-2A program, it sought to protect U.S. farmworkers from the adverse effects
25 of importing abundant, low-cost labor into the United States. *See supra* pp.5-7. Allowing USDA
26 to end the FLS and stop issuing the FLR would prevent DOL from issuing AEWRs, frustrating its
27 ability to adhere to that statutory mandate and protect U.S. farmworkers’ wages and employment
28

1 prospects. As the Ninth Circuit explained, the public interest “in the ‘efficient administration of the
2 immigration laws,’” which includes the H-2A program, “is ‘weighty.’” *E. Bay*, 950 F.3d at 1281.

3 Moreover, injunctive relief would serve the public interest by preserving the status quo.
4 USDA routinely has conducted the FLS for over 100 years. *See supra* pp.3-5. Plaintiffs are not
5 asking USDA to change their practices or take novel action. Instead, Plaintiffs ask only that USDA
6 continue its established practice of conducting the FLS in October and publishing the FLR in
7 November, as it has done for decades. The public interest is served by maintaining that long-
8 established status quo during the pendency of this litigation, rather than permitting the Notice to
9 fundamentally alter USDA’s and DOL’s historical practices. *See Doe #1 v. Trump*, 957 F.3d 1050,
10 1069 (9th Cir. 2020) (holding “the public interest favors preserving the *status quo*”). Those interests
11 are particularly strong where an agency’s practice has “for countless decades” allowed the
12 government to administer “a stable immigration system.” *Id.*

13 CONCLUSION

14 The Court should enter a temporary restraining order and preliminary injunction preventing
15 USDA from implementing its decision to discontinue the Farm Labor Survey and cease publication
16 of the Farm Labor Report. USDA should be ordered to conduct the October survey and publish the
17 November Farm Labor as previously planned.

18 DATED: October 13, 2020

Respectfully submitted,

19 /s/ Joseph Taylor Gooch

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