

1 Mark D. Selwyn (SBN 244180)
2 mark.selwyn@wilmerhale.com
3 WILMER CUTLER PICKERING
4 HALE AND DORR LLP
5 2600 El Camino Real, Suite 400
6 Palo Alto, CA 94306
7 Telephone: (650) 858-6031
8 Facsimile: (650) 858-6100

9 *Attorney for Plaintiffs*

10
11
12 **UNITED STATES DISTRICT COURT**
13 **EASTERN DISTRICT OF CALIFORNIA**
14 **FRESNO DIVISION**

15 UNITED FARM WORKERS and UFW
16 FOUNDATION,

17 Plaintiffs,

18 v.

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

22 Defendants.

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

**NOTICE OF MOTION FOR
PRELIMINARY INJUNCTION**

ORAL ARGUMENT REQUESTED

**SCHEDULING STIPULATION
TO FOLLOW**

23 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

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

1 2020.¹

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

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

10
11 DATED: November 30, 2020

Respectfully submitted,

12 /s/ Mark D. Selwyn

13 Mark D. Selwyn (SBN 244180)
WILMER CUTLER PICKERING

14 HALE AND DORR LLP
2600 El Camino Real, Suite 400
15 Palo Alto, CA 94306
Telephone: (650) 858-6031
16 Facsimile: (650) 858-6100
mark.selwyn@wilmerhale.com

17 *Attorney for Plaintiffs*
18
19
20
21
22
23
24
25

26 _____
27 ¹ This Court cited the December 21 effective date of the Final DOL Rule as a basis for denying the United States'
28 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.

1 Mark D. Selwyn (SBN 244180)
2 mark.selwyn@wilmerhale.com
3 WILMER CUTLER PICKERING
4 HALE AND DORR LLP
5 2600 El Camino Real, Suite 400
6 Palo Alto, CA 94306
7 Telephone: (650) 858-6031
8 Facsimile: (650) 858-6100

9 *Attorney for Plaintiffs*

10 **UNITED STATES DISTRICT COURT**
11 **EASTERN DISTRICT OF CALIFORNIA**
12 **FRESNO DIVISION**

13 UNITED FARM WORKERS and UFW
14 FOUNDATION,

15 Plaintiffs,

16 v.

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

20 Defendants.

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

**PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INTRODUCTION 1

BACKGROUND 3

 A. The H-2A Foreign Guestworker Visa Program 3

 B. DOL’s Final Rule For The First Time Untethers AEWRs From Market Wages 5

LEGAL STANDARD 6

ARGUMENT 7

I. Plaintiffs Are Likely To Succeed On The Merits 7

 A. The Final Rule Contravenes Federal Law By Failing To Protect Against
Adverse Effects 8

 B. The Final Rule Is Arbitrary and Capricious Because DOL Failed To Offer A
Reasoned Explanation For Intentionally Deflating Farmworker Wages 10

 C. DOL Failed To Comply With The APA’s Notice-And-Comment
Requirements 18

II. Plaintiffs’ Members And Farmworkers Across The Country Will Be Irreparably
Injured Absent Immediate Injunctive Relief 21

III. The Remaining Equitable Factors Favor Granting Immediate Injunctive Relief 24

CONCLUSION 25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Page(s)

Cases

AFL-CIO v. Brock,
835 F.2d 912 (D.C. Cir. 1987).....13, 16

Akhtar v. Burzynski,
384 F.3d 1193 (9th Cir. 2004)8

Alameda Health System v. Centers for Medicare & Medicaid Services,
287 F. Supp. 3d 896 (N.D. Cal. 2017)20

Alliance for the Wild Rockies v. Pena,
865 F.3d 1211 (9th Cir. 2017)7

Amerijet Int’l, Inc. v. Pistole,
753 F.3d 1343 (D.C. Cir. 2014)..... 11

Arizona Dream Act Coalition v. Brewer,
757 F.3d 1053 (9th Cir. 2014)23

Banner Health v. Price,
867 F.3d 1323 (D.C. Cir. 2017).....11

Carson v. American Brands, Inc.,
450 U.S. 79 (1981).....23

City of Waukesha v. EPA,
320 F.3d 228 (D.C. Cir. 2003).....20

CSX Transportation, Inc. v. Surface Transportation Board,
584 F.3d 1076 (D.C. Cir. 2009).....20, 21

District of Columbia v. U.S. Department of Agriculture,
444 F. Supp. 3d 1 (D.D.C. 2020).....21

Doe #1 v. Trump,
957 F.3d 1050 (9th Cir. 2020)25

Earth Island Institute v. Hogarth,
494 F.3d 757 (9th Cir. 2007)7

East Bay Sanctuary Covenant v. Trump,
950 F.3d 1242 (9th Cir. 2020)24, 25

Environmental Defense Center, Inc. v. EPA,
344 F.3d 832 (9th Cir. 2003)19

1 *FCC v. Fox Television Stations Inc.*,
 2 556 U.S. 502 (2009).....13, 17

3 *Genuine Parts Co. v. EPA*,
 4 890 F.3d 304 (D.C. Cir. 2018).....13

5 *Gerstein v. CIA*,
 6 No. C-06-4643, 2006 WL 3462659 (N.D. Cal. Nov. 29, 2006)25

7 *Haskins v. Stanton*,
 8 794 F.2d 1273 (7th Cir. 1986)22

9 *Hernandez Flecha v. Quiros*,
 10 567 F.2d 1154 (1st Cir. 1977).....24

11 *Jensen v. IRS*,
 12 835 F.2d 196 (9th Cir. 1987)21

13 *Kildare v. Saenz*,
 14 325 F.3d 1078 (9th Cir. 2003)21

15 *League of Women Voters v. Newby*,
 16 838 F.3d 1 (D.C. Cir. 2016).....24

17 *Lee v. Christian Coalition of America, Inc.*,
 18 160 F. Supp. 2d 14 (D.D.C. 2001).....21, 23

19 *Long Island Care at Home, Ltd. v. Coke*,
 20 551 U.S. 158 (2007).....19

21 *Michigan v. EPA*,
 22 576 U.S. 743 (2015).....18

23 *Motor Vehicle Manufacturers Ass’n of U.S., Inc. v. State Farm Mutual Automobile*
 24 *Insurance Co.*,
 25 463 U.S. 29 (1983).....7, 11, 18

26 *NRDC v. EPA*,
 27 279 F.3d 1180 (9th Cir. 2002)19

28 *NRDC v. Rauch*,
 244 F. Supp. 3d 66 (D.D.C. 2017).....18

Paxton v. Secretary of Health & Human Services,
 856 F.2d 1352 (9th Cir. 1988)21

Planned Parenthood of Greater Washington & N. Idaho v. U.S. Dep’t of Health &
Human Services,
 946 F.3d 1100 (9th Cir. 2020)8

1 *United Farm Workers v. Perdue*,
 2 No. 12-cv-1452-DAD-JLT, 2020 WL 6318432 (E.D. Cal. Oct. 28, 2020).....5, 12

3 *WildEarth Guardians v. EPA*,
 4 759 F.3d 1064 (9th Cir. 2014) 14

5 *Winter v. NRDC.*,
 6 555 U.S. 7 (2008).....6

7 **Docketed Cases**

8 *United Farm Workers v. Perdue*, No. 20-cv-1452 (E.D. Cal.).....4, 5

9 **Statutes & Codes**

10 5 U.S.C.
 11 § 553(b)(3)18
 12 § 706(2)(A)7
 13 § 706(2)(D)7, 18

14 8 U.S.C.
 15 § 1182(a)(5)3
 16 § 1184(c)(1)3
 17 § 1188(a)(1)3
 18 § 1188(a)(1)(B)9, 10

19 **Regulations**

20 20 C.F.R.
 21 § 655.103(b).....4
 22 § 655.120(a)4
 23 § 655.156.....17

24 54 Fed. Reg. 28,037 (July 5, 1989).....4

25 73 Fed. Reg. 77,110 (Dec. 18, 2008).....17

26 74 Fed. Reg. 45,906 (Sept. 4, 2009)3

27 75 Fed. Reg. 6884 (Feb. 12, 2010)3, 8, 11

28 84 Fed. Reg. 36,168 (July 26, 2019)..... *passim*

85 Fed. Reg. 61,719 (Sept. 30, 2020)4

85 Fed. Reg. 70,445 (Nov. 5, 2020)..... *passim*

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

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

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

15 The statute and DOL’s regulations contain several mechanisms to protect against adverse
16 effects. DOL primarily fulfills its statutory mandate with respect to wage rates by establishing for
17 each state an Adverse Effect Wage Rate (AEWR)—a minimum wage that employers must pay to both
18 U.S. farmworkers and foreign guestworkers. Since the H-2A program’s inception in 1986 (except for
19 a brief two-year period beginning in 2008), DOL has relied exclusively on data from the U.S.
20 Department of Agriculture (USDA) Farm Labor Survey (FLS) to establish AEWRs. DOL has
21 repeatedly acknowledged that the FLS is its preferred data source because it is “the *only*
22 *comprehensive survey* of wages paid by farmers and ranchers.” 85 Fed. Reg. 70,445, 70,467 (Nov. 5,
23 2020) (emphasis added). That data allows DOL to establish AEWRs that reflect what farmworkers
24 are actually paid, which protects wages paid to U.S. farmworkers from being depressed or stagnating
25 due to the availability of foreign guestworkers willing to work for less.

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

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

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

17
18 Preliminary relief is necessary because the Final Rule will cause many hundreds of
19 thousands of farmworkers already living on subsistence incomes to be paid significantly less than
20 they otherwise would. The two-year wage freeze will cause workers to be paid more than 4% less
21 on average than they would under DOL’s current regulations. In certain states, like California,
22 Oregon, and Washington, those losses would be substantially greater. Indeed, DOL itself quantified
23 that H-2A workers stand to lose over \$1.6 billion in wages over the next ten years, with average
24

25
26 ¹ Conversely, the Final Rule creates more refined, market-based annual AEWRS for a small set of
27 “higher-skilled” agricultural jobs using the Occupational Employment Statistics (OES) survey.
28 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.

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

3 **BACKGROUND**

4 **A. The H-2A Foreign Guestworker Visa Program**

5 1. Statutory Framework

6 The H-2A agricultural guestworker program permits agricultural employers to hire foreign
7 workers to perform agricultural work on a temporary basis under certain circumstances. The H-2A
8 program does not limit the number of H-2A visas that may be granted each year. As DOL itself has
9 recognized, the program can create downward pressure on the wages paid to both U.S. and foreign
10 guestworkers because the introduction of a potentially unlimited supply of low-cost, foreign labor
11 prevents higher wages that would ordinarily result from competition for labor. *See* 75 Fed. Reg.
12 6884, 6892 (Feb. 12, 2010). With the labor market no longer exerting upward pressure, wage
13 stagnation or depression is likely to occur. *See* 74 Fed. Reg. 45,906, 45,911 (Sept. 4, 2009)
14 (employing large numbers of H-2A workers in a labor market at the prevailing wage “would
15 inevitably keep the prevailing wage improperly low”).
16

17
18 Congress, recognizing the risks of an uncapped visa program, mandated that employers
19 apply and obtain approval from DOL to hire H-2A foreign guestworkers. Federal law charges DOL
20 with certifying petitions requesting foreign guestworkers only where the employer has shown that
21 (a) the domestic agricultural labor market cannot supply enough workers who are “able, willing,
22 and qualified, and who will be available at the time and place needed, to perform the labor” required,
23 *and* (b) the employment of temporary foreign labor “will not adversely affect the wages and working
24 conditions” of domestic farmworkers “similarly employed.” 8 U.S.C. § 1188(a)(1); *see also id.*
25 § 1182(a)(5) (mandating that DOL similarly certify most foreign laborers seeking to work in the
26 United States); *id.* § 1184(c)(1) (discussing the non-immigrant labor certification process).
27
28

1 2. H-2A Minimum Wages And The “Adverse Effect Wage Rate”

2 DOL satisfies its obligation to prevent adverse economic effects on U.S. farmworkers by
3 setting minimum wage rates for H-2A employers. The AEW is the primary wage rate under the
4 H-2A program, determining the wages of approximately 92% of farmworkers employed by H-2A
5 program employers, because it is higher than the other minimum wages in most circumstances. *See*
6 84 Fed. Reg. 36,168, 36,179 (July 26, 2019).² DOL’s current AEW regulations, promulgated in
7 2010, require it to set an AEW for each state using “[t]he annual weighted average hourly wage
8 for field and livestock workers (combined) ... as published annually by the U.S. Department of
9 Agriculture ... based on its quarterly wage survey,” the FLS. 20 C.F.R. § 655.103(b).

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

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

25
26 _____
27 ² DOL regulations also permit H-2A employers to pay the local prevailing wage rate for particular
28 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.

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

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

13 **B. DOL’s Final Rule For The First Time Untethers AEWs From Market Wages**

14 On November 5, 2020, DOL published a Final Rule in the Federal Register announcing
15 changes to its methodology for establishing AEWs under the H-2A program. *See* 85 Fed. Reg. at
16 70,445.³ The Final Rule fundamentally alters the methodology for calculating AEWs by
17 untethering wages for most H-2A jobs from farmworkers’ real-world wages—a substantial
18 departure from the AEW regulation proposed in DOL’s July 2019 NPRM.⁴ The Final Rule freezes
19 the current 2020 AEWs—based on 2019 FLS wage data—for two years. *Id.* at 70,452. Then,
20 beginning in 2023, DOL will adjust those 2020 AEWs annually by the previous year’s change in
21 the Employment Cost Index (ECI)—an index that measures the change in the cost of labor by
22 surveying various private industries, but notably *excluding* farms and agricultural workers. *Id.*

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

25 _____
26 ³ Available at <https://www.govinfo.gov/content/pkg/FR-2020-11-05/pdf/2020-24544.pdf>.

27 ⁴ DOL will also establish AEWs each year—including in 2021 and 2022—for a smaller set of
28 “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.

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

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

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

23 **LEGAL STANDARD**

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

1 “the balance of hardships tips *sharply* in the plaintiff’s favor, and the other two *Winter* factors”
2 (irreparable harm and the public interest) “are satisfied.” *All. for the Wild Rockies v. Pena*, 865 F.3d
3 1211, 1217 (9th Cir. 2017) (internal quotation marks omitted). Plaintiffs 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). Regulations “that are
9 contrary to clear Congressional intent or frustrate the policy that Congress sought to implement
10 must be rejected.” *Earth Island Inst. v. Hogarth*, 494 F.3d 757, 765 (9th Cir. 2007). Moreover,
11 agency action that is not the product of reasoned decisionmaking is arbitrary and capricious. *See*
12 *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).
13 To satisfy that requirement, an agency must “cogently explain why it has exercised its discretion in
14 a given manner.” *Id.* at 48; *see also id.* at 43 (agencies must provide “a ‘rational connection between
15 the facts found and the choice made’”).

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

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

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

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

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

1 workers in the United States similarly employed,” *id.*, and a single nationwide AEW R would
2 inevitably lead to “below market rates in some areas and above market rates in other areas, resulting
3 in all of the associated adverse effects.” *Id.* DOL similarly criticized another proposed alternative
4 by stating that it would lead to AEW Rs “untethered to actual wages paid to similarly employed
5 workers in the area.” *Id.* at 70,464.

6 Similarly, the Final Rule explains that it must establish AEW Rs each year—including in
7 2021 and 2022—for a smaller set of “higher-skilled” agricultural jobs using the OES survey because
8 using alternative methodologies (even, apparently, FLS data) “may have the effect of depressing
9 wages in higher-paid occupations,” which would “cause an adverse effect on the wages of workers
10 in the United States similarly employed, contrary to [DOL’s] statutory mandate.” *Id.* at 70,458-
11 70,459. DOL explains that even if AEW Rs increase because of the change in methodology, relying
12 on OES survey data is still appropriate because “these changes are the result of [DOL’s] use of more
13 accurate occupational data that better reflect the actual wage paid, and thus the wage needed to
14 protect against adverse effect.” *Id.* at 70,453.⁵ In short, DOL has understood federal law to require
15 AEW Rs reflecting market wages to prevent adverse effects on U.S. farmworkers.⁶

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

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

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

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

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

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

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

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

26 _____
27 ⁷ The ECI is reported nationally and regionally. ECI’s data are divided into four regions—
28 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.

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

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

11 The Final Rule arbitrarily decides to freeze H-2A wages for two years, stagnating wages in
 12 a manner wholly at odds with the AEWR’s purpose and DOL’s statutory mandate. Agency
 13 regulations are regularly found to be arbitrary and capricious when an agency’s explanation is
 14 “internally inconsistent and inadequately explained.” *Banner Health v. Price*, 867 F.3d 1323,
 15 1349 (D.C. Cir. 2017). DOL’s justification for the two-year wage freeze is inadequate because it
 16 contradicts the reasoning offered elsewhere in the Final Rule (and in prior rulemakings), ignores
 17 recent trends in agricultural labor markets, and fails to address critical aspects of the rule.

18 *First*, to the extent DOL justifies its Final Rule by relying on USDA’s decision to end the
 19 FLS, that reasoning renders the wage freeze arbitrary and capricious. As an initial matter, the July
 20 2019 NPRM expressed DOL’s clear intent to continue relying on FLS data to establish AEWRs,
 21 explaining that “[t]he FLS [remained] the Department’s preferred wage source for establishing the
 22 AEWR because it is the only comprehensive wage survey that collects data from farm and ranch
 23 employers.” 84 Fed. Reg. at 36,180.⁸ And the Final Rule continues to defend the FLS’s accuracy,
 24 responding to commenters’ complaints about the volatility of AEWRs by rejecting “suggestions that

25
 26 ⁸ See also 85 Fed. Reg. at 70,468 (“[T]he FLS has been the only comprehensive survey of wages
 27 paid by farmers and ranchers that has enabled the Department to establish hourly rates of pay for
 28 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”).

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

5 Nonetheless, DOL chose to abandon the use of FLS data for even 2021, explaining that it
6 reached its conclusion because “USDA publicly announced its intent to cancel the planned October
7 data collection” and that, as a result, it “may not release its November 2020 report.” 85 Fed. Reg.
8 at 70,446. DOL similarly asserts that “USDA’s recent announcement regarding the FLS” means
9 that relying on old FLS data instead of current FLS data is “appropriate in order to promote greater
10 certainty in the setting of AEWWRs in future years.” *Id.*⁹ That justification ignores that this Court
11 ordered USDA to conduct the FLS and issue the November 2020 FLR *before* DOL issued the Final
12 Rule, *see United Farm Workers v. Perdue*, No. 12-cv-1452-DAD-JLT, 2020 WL 6318432 (E.D.
13 Cal. Oct. 28, 2020), meaning that FLS data will be available to DOL to publish 2021 AEWWRs under
14 its current methodology. Thus, DOL’s statements in the Final Rule that the FLS “has been
15 suspended for October 2020,” 85 Fed. Reg. at 70,468, and that the availability of 2020 FLS data
16 remains “uncertain,” *id.* at 70,449, are simply wrong.¹⁰ “[A]n agency cannot ignore evidence that
17

18 ⁹ *See also id.* at 70,446 (“The Department has determined that this uncertainty regarding the near-
19 term and long-term future of the FLS also weighs in favor of the Department establishing now a
20 revised methodology for determining the AEWWR[.]”); *id.* at 70,452 (suggesting that the new rule is
21 justified “in light of uncertainty about the immediate availability of FLS wage data”); *id.* at 70,455
22 (suggesting the new rule is reasonable “given uncertainty about the future of the FLS”); *id.*
23 (stating that freezing AEWWRs for two years and then adjusting those wage rates using the ECI was
24 “particularly [appropriate] given uncertainty about the future of the FLS”); *id.* at 70,457
25 (expressing “concern[s] about using a data source beyond its control and which is subject to an
26 uncertain future, demonstrated by the recent suspension of data collection”); *id.* at 70,458
27 (concluding that relying on OES survey data is appropriate because of “the continued uncertainty
28 about ongoing availability of FLS data, including to set the 2021 AEWWRs”); *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.”).

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

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

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

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

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

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

1 unsustainable wage *increases*,” and that DOL crafted the Final Rule to “best address[] [those]
 2 concerns.” *Id.* at 70,452 (emphasis added). Elsewhere, DOL recognizes that the Final Rule
 3 effectively accomplishes that goal by facilitating a “transfer payment from H-2A employees to H-
 4 2A employers” that totals more than \$1 billion dollars over ten years. *Id.* at 70,472. DOL fails to
 5 explain how allowing employers to pay farmworkers over \$100 million less per year protects against
 6 the adverse effects of hiring agricultural guestworkers.

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

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

18 The Final Rule adopts a new methodology for adjusting AEWs starting in 2023, after the
 19 two-year wage freeze. The new methodology would replace reliance on the FLS—which DOL
 20 acknowledges is still accurate and remains the best source of data about agricultural labor markets—
 21

22 ¹¹ Nor does the Final Rule rationally explain why it could not have immediately started adjusting
 23 wage rates to account for market wage increases or inflation. DOL states that adjusting AEWs
 24 immediately might “cause additional disruption of the kind this [rule] seeks to avoid,” and argues
 25 that the freeze addresses “commenters’ concerns that recent accelerations in the wage rates are, in
 26 their view, attributable to flawed survey results and have caused artificially surging wage
 27 increases.” 85 Fed. Reg. at 70,456. But the rule never explains how “additional disruption”
 28 would result from immediate implementation of wage adjustments, which (depending on the
 metric used) likely would have resulted in smaller AEW 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.

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

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

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

23 Here, by contrast, DOL celebrates its switch to ECI data because it yields a “reduction in
24 wage growth relative to the previous methodology,” 85 Fed. Reg. at 70,456, a goal at odds with the
25 very purpose of preventing adverse effects on U.S. farmworkers’ wages. Confronted with this
26 presumptively harmful effect on U.S. farmworkers, DOL had to justify its choice to use ECI data
27 rather than a source reflecting farmworker wages. The Final Rule, however, does not explain why
28

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

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

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

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

26
27
28 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).

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

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

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

17 Plaintiffs are also likely to succeed on their claim that DOL violated the APA’s notice-and-
18 comment requirement because the Final Rule is not a logical outgrowth of its proposal in the July
19 2019 NPRM. Such agency actions, taken “without observance of procedure required by law,” are
20 unlawful and should be vacated. 5 U.S.C. § 706(2)(D).

21 For the notice and opportunity to comment provided by the APA to be meaningful, an
22 agency must publish an NPRM that alerts affected parties to the agency’s plans. *See* 5 U.S.C.
23 § 553(b)(3). Agencies should be responsive to comments received and changed circumstances after
24

25 ¹³ Even if DOL “considered” harm to U.S. farmworkers, its thinly reasoned conclusion about
26 adverse effects is irrational given the absence of any economic analysis of the harm. As in *Rauch*,
27 the information DOL has provided “if anything, works *against* the [Department].” 244 F. Supp.
28 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.

1 publication of the NPRM, but “the final rule the agency adopts must be ‘a logical outgrowth of the
2 rule proposed,’” *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007), and “‘in
3 character with the original proposal,’” *Env’tl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 851 (9th Cir.
4 2003). A final rule is therefore invalid where “part[ies] should [not] have anticipated that a
5 particular requirement might be imposed.” *Id.* That determination hinges on “whether a new round
6 of notice and comment would provide the first opportunity for interested parties to offer comments
7 that could persuade the agency to modify its rule.” *Id.* If a final rule is not a logical outgrowth of
8 an initial proposal, and an agency fails to provide additional notice and comment, the final rule “is
9 arbitrary or an abuse of discretion.” *NRDC v. EPA*, 279 F.3d 1180, 1186 (9th Cir. 2002).

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

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

25 _____
26 ¹⁴ Interested parties were similarly unaware that DOL may need to end its reliance on the FLS to
27 establish AEWRs. As discussed, DOL explained that it anticipated using FLS data to establish
28 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.

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

10 Nor is the Final Rule’s turn away from agricultural labor market data a logical outgrowth of
 11 DOL’s July 2019 proposal. The NPRM stressed the importance of establishing AEWs based on
 12 market wages, explaining that the AEW protects U.S. farmworkers from adverse effects “because
 13 it is the wage rate that is determined from a survey of actual wages paid by employers.” 84 Fed.
 14 Reg. at 36,179.¹⁶ Farmworkers therefore could not have known that a fundamental break with
 15 decades of DOL policy was “on the table,” and a new round of notice and comment would have
 16 provided farmworkers their first opportunity to persuade DOL not to scuttle that decades-old policy.

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

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

¹⁶ *See also id.* at 36,180 (“[B]ecause the AEW 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 AEW protects against localized wage depression that might occur in prevailing
 wage rates.”).

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

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

13 **II. PLAINTIFFS’ MEMBERS AND FARMWORKERS ACROSS THE COUNTRY WILL BE**
14 **IRREPARABLY INJURED ABSENT IMMEDIATE INJUNCTIVE RELIEF**

15 Farmworkers across the United States will suffer material wage reductions under the new
16 AEW methodology provided in the Final Rule. While purely monetary damages typically are not
17 irreparable, courts have recognized an exception where ““the plaintiff is so poor that he would be
18 harmed in the interim by the loss of the monetary benefits.”” *Lee v. Christian Coal. of Am., Inc.*,
19 160 F. Supp. 2d 14, 31 (D.D.C. 2001); *see also Kildare v. Saenz*, 325 F.3d 1078, 1083 (9th Cir.
20 2003) (“[E]conomic hardship constitutes irreparable harm.”); *Jensen v. IRS*, 835 F.2d 196, 198 (9th
21 Cir. 1987) (substantial income garnishment of a low-income individual constituted irreparable
22 harm). For low-income individuals, economic loss can mean inadequate access to “food, shelter
23 [and] other necessities.” *Kildare*, 325 F.3d at 1083; *cf. Paxton v. Sec’y of Health & Human Servs.*,
24 856 F.2d 1352, 1354 (9th Cir. 1988) (“When a family is living at subsistence level, the subtraction
25 of any benefit can make a significant difference to its budget and to its ability to survive”). Courts
26 have widely recognized that the inability to afford necessities such as food or medical care
27 constitutes irreparable harm because those losses, even if temporary, cannot be remedied by back
28 payments. *See District of Columbia v. U.S. Dep’t of Agric.*, 444 F. Supp. 3d 1, 43 (D.D.C. 2020)

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

4 Plaintiffs’ members, including both U.S. and H-2A farmworkers, will be irreparably harmed
5 absent a preliminary injunction. DOL explicitly acknowledges that its decision to freeze AEWRs
6 in 2021 will cause farmworkers to be paid less. *See supra* p.6. Recent wage data confirms that
7 admission. For instance, recent FLS data suggests that the California AEWR would have increased
8 to approximately \$15.58 in 2021. *See Selwyn Decl.*, Ex. 2, at 5, 7 (reporting January and April
9 2020 California wages of \$15.40 and \$15.76). Under the Final Rule, however, those wages would
10 be frozen at \$14.77—the amount that farmworkers were paid in 2019. *See Selwyn Decl.*, Ex. 5, at
11 25 (USDA, *Farm Labor* (Nov. 21, 2019)). Because most of Plaintiffs’ members working at H-2A
12 employers are paid the AEWR, those members working in California will be paid approximately
13 \$0.81 less per hour—totaling \$139.32 per month and \$1,393.20 over a ten-month farming season—
14 as a result of DOL’s unlawful action. Farmworkers in Oregon and Washington will experience
15 similar losses. The latest FLS data suggests that the Oregon and Washington AEWR would have
16 increased by approximately \$0.45 per hour in 2021. *See id.* at 5, 7, 13, 15 (documenting that January
17 and April wages in Oregon and Washington increased by \$0.60 and \$0.30 between 2019 and 2020).
18 The Final Rule thus causes most farmworkers working for H-2A employers in those states to be
19 paid \$77.40 less per month, totaling \$774 in lost wages over a ten-month farming season.

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

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

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

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

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

1 the Final Rule “may further encourage U.S. employers to use more H-2A workers” instead of hiring
 2 U.S. farmworkers). Under the H-2A program, an employer seeking an H-2A labor certification
 3 need only offer the minimum H-2A wage rate. *See* UFW Decl. ¶ 9; *Hernandez Flecha v. Quiros*,
 4 567 F.2d 1154, 1156 (1st Cir. 1977). Any qualified U.S. worker who applies for the job but requests
 5 a higher wage rate may be rejected as unavailable and the slot may be filled with a guestworker.
 6 *See* 85 Fed. Reg. at 70,472. Those lost job opportunities will cause substantial, incurable hardship
 7 for Plaintiffs’ members. *See* UFW Decl. ¶ 26; UFW Foundation Decl. ¶ 9.

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

13 **III. THE REMAINING EQUITABLE FACTORS FAVOR GRANTING IMMEDIATE INJUNCTIVE** 14 **RELIEF**

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

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

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

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

14 Moreover, injunctive relief would serve the public interest by preserving the status quo.
15 Plaintiffs are not asking the Court to compel DOL to use a new methodology to compute AEWRS.
16 Instead, Plaintiffs ask only that DOL continue to establish AEWRS under its current methodology.
17 The public interest is served by maintaining that status quo during the pendency of this litigation,
18 rather than permitting DOL to fundamentally alter its historical practices. *See Doe #1 v. Trump*,
19 957 F.3d 1050, 1069 (9th Cir. 2020) (holding “the public interest favors preserving the *status quo*”).
20 Those interests are particularly strong where an agency’s practice has “for countless decades”
21 allowed the government to administer “a stable immigration system.” *Id.* at 1068.

22 CONCLUSION

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DATED: November 30, 2020

Respectfully submitted,

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

Attorney for Plaintiffs