UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Purdue University
610 Purdue Mall,
West Lafayette, IN 47907

University of Michigan
500 S State St,
Ann Arbor, MI 48109

University of Denver
2199 S. University Blvd.
Denver, CO 80208

Dentists for America, LLC
8 The Green #11433
Dover, DE 19901

Physicians for American Healthcare Access
P.O. Box 1895
Dover, DE 19903;

United Methodist Homes and Services
1415 West Foster Avenue
Chicago, Illinois 60640;

Hodges Bonded Warehouse, Inc.
1065 N. Eastern Blvd.
Montgomery, AL 36117

Chapman University
1 University Dr, Orange,
CA 92866

Civil Action No. 1:20-cv-03006-ESG

FIRST AMENDED COMPLAINT[1]

[1] Plaintiffs may amend as a matter of right still under Federal Rules of Civil Procedure, Rule 15. Rule15(a)(1) provides that a plaintiff may amend his complaint once as of right "within: (A) 21 days after serving [the complaint], or (B) if the pleading is one to which a responsive pleading is required, [within] 21 days after service of a responsive pleading or 21 days after service of a motion" to dismiss, a motion for a more definite statement or a motion to strike, "whichever is earlier." Here, Defendants did not file an answer to the original Complaint, nor did they file a motion to dismiss, a motion for a more definite statement or a motion to strike. Instead, they filed a motion for summary judgment, which is not a "pleading" under Rule 15(a)(1)(B). *See* Rule 7(a), Fed. R. Civ. P. (defining pleadings as: "a complaint ... an answer to a complaint ... [and] if the court orders one, a reply to an answer").

Bard College
30 Campus Rd, Annandale-On-Hudson,
NY 12504
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Information Technology Industry Council
700 K St NW, Suite 600
Washington, D.C. 20001, USA

Arizona State University
PO Box 871004
Tempe AZ 85287-1004

Scripps College
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Claremont, CA 91711

Marana Health Center
13395 N. Marana Main St.
Marana, AZ 85653

Northern Arizona University
1899 S. San Francisco St.
Flagstaff, AZ 86011

Study Mississippi
14000 Hwy 82 West
MVSU 5209
Itta Bena, MS 38941

Plaintiffs,

v.

AL Stewart, Acting Secretary of Labor
U.S. Department of Labor
Office of the Solicitor
200 Constitution Avenue, N.W.
Room N-2700
Washington, D.C. 20210

United States Department of Labor
200 Constitution Ave NW
Washington, DC 20210

Defendants.

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INTRODUCTION

1. The litigation and this Court's resulting partial summary order granted against the Interim Final Rule ("IFR") did not prevent the previous administration's midnight haste to convert the IFR to a Final Rule. *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States*, 86 Fed. Reg. 3608-01 (Jan. 14. 2021) ("final rule" or "rule").

2. While modified, Defendants re-imposed similarly drastic unlawful increases in prevailing wage levels that this Court and two other separate district courts previously set aside. The final rule, which is set to take effect May 14, 2021, suffers from the same substantive defects and new procedural defects as the previously vacated IFR. The substantive changes continue to be based on faulty, undocumented, and irrational economic assumptions that ignore the thousands of comments to the IFR, misapprehend the data behind its calculations, and do not account for the harms to plaintiffs. Neither iteration of the rules contains a reasoned explanation for instituting such an arbitrary change and both rules were promulgated in violation of the Administrative Procedure Act's ("APA") notice-and-comment requirements.

3. The final rule will force plaintiffs and similarly situated employers to pay dramatically higher wages for foreign national employees as compared to similarly situated Americans; in some cases, the required wages will increase approximately 25% while specific occupations, such as computer science teachers, will increase as much as 41%--well above the actual wages.

4. Defendants failed to adequately provide more than a 30-day comment period for such a rule of this magnitude, nor explained why the customary 60-day comment period was not feasible.

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5. Defendants brazen rulemaking is reflected in its failure to consider the significant reliance interests and harms at stake for plaintiffs and small entities who expressed the inability to pay the proposed wages. The final rule is procedurally defective, contrary to law, and arbitrary and capricious under APA.

6. For these and other reasons, the final rule is unlawful and should be set aside.

JURISDICTION AND VENUE

7. This case arises under the APA, 5 U.S.C. § 701, *et. seq.* The Court has subject matter jurisdiction over plaintiffs' claims pursuant to 28 U.S.C. § 1331 (Federal Question Jurisdiction). This Court has authority to grant relief under the Declaratory Judgment Act (28 U.S.C. § 2201) and the APA, 5 U.S.C. § 702.

8. Venue in this judicial district is proper under 28 U.S.C. § 1391(e) because this is a civil action in which defendants are agencies of the United States and federal officers acting in their official capacity, and a substantial part of the events or omissions giving rise to the claims occurred in this district.

THE PARTIES

PLAINTIFFS:

9. Purdue University is a public research university with its principal place of business in West Lafayette, Indiana. Purdue is classified by the Carnegie Classification of Institutions of Higher Education as a "Research 1 (R1) Doctoral University" for "very high research activity" and offers more than 200 majors for undergraduates, over 69 masters and doctoral programs, and professional degrees in pharmacy, nursing, and veterinary medicine. Purdue employs both domestic and international faculty. All the faculty, regardless of home country, are highly skilled, highly educated and much sought-after leaders within their fields; and the wages Purdue

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pays are already as high as is feasible. Purdue's research programs are also staffed by more than 500 postdoctoral research scholars across 80 departments.

10. The University of Michigan is a public university with its principal place of business in Ann Arbor, Michigan. The university was founded in 1817 and consists of three campuses in Ann Arbor, Dearborn, and Flint as well as Michigan Medicine, a premier medical center, consisting of the Michigan Medical School, the UM Health System, Michigan Health Corporation, and one of the nation's largest biomedical research communities. The University of Michigan's main campus in Ann Arbor has grown to include 19 schools and colleges, covering the liberal arts and sciences as well as most professions. The fall 2019 enrollment of undergraduate, graduate, and professional students in Ann Arbor was 48,090. (Total enrollment at all campuses exceeds 64,000 students.) According to the National Science Foundation, the University of Michigan is number one in research volume among U.S. public research universities, with more than $1.62 billion in research expenditures.

11. University of Denver ("DU") is a not-for-profit Colorado private research university with its principal place of business in Denver, Colorado. Each year, DU's faculty members bring in millions of dollars to conduct research for federal, state, and local governments, as well as a variety of corporations and non-governmental organizations.

12. Arizona State University ("ASU") is an Arizona public research university with its principal place business in Tempe, AZ. ASU is classified by Carnegie as an R1 Doctoral University for its extensive research activity and offers more than 350 undergraduate degree programs and majors and more than 450 highly ranked graduate degree and certificate programs to nearly 120,000 undergraduate and graduate students. ASU is ranked number 1 in the United States for innovation by U.S. News & World Report (2021) and fifth in the world for global

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impact in research, outreach, and stewardship, for advancing the United Nations' Sustainable Development Goals, including global impact on poverty and hunger, developing solutions for clean water and energy, and promoting gender equality.

13. Northern Arizona University ("NAU") is a public research university with its principal place of business in Flagstaff, Arizona. NAU is classified by Carnegie as an R2 "high research activity" institution and offers more than 150 combined undergraduate and graduate degree programs to nearly 30,000 undergraduate and graduate students, distinguished by an ongoing commitment to close student-faculty relationships.

14. Chapman University ("Chapman") is a California mid-size private university with its principal place of business in Orange, California 92866. Chapman is classified by Carnegie as a "Research 2 – high research activity" institution and offers personalized education to more than 9,000 undergraduate and graduate students. Chapman's institutional mission of global citizenry requires their students have access to global scholars and scholars who work in diversity.

15. Bard College is a New York private liberal arts college with its principal place of business in Annandale-On-Hudson, New York. Bard enrolls approximately 1,900 undergraduate students at its Annandale campus, and more than 600 graduate students' study in Bard programs, plus nearly 1,200 students in Bard's early colleges and 2,500 students at Bard's global affiliates.

16. Arizona State University ("ASU") is an Arizona public research university with its principal place business in Tempe, AZ. ASU is classified by Carnegie as an R1 Doctoral University for its extensive research activity and offers more than 350 undergraduate degree programs and majors and more than 450 highly ranked graduate degree and certificate programs to nearly 120,000 undergraduate and graduate students. ASU is ranked number 1 in the United States for innovation by U.S. News & World Report (2021) and fifth in the world for global

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impact in research, outreach, and stewardship, for advancing the United Nations' Sustainable Development Goals, including global impact on poverty and hunger, developing solutions for clean water and energy, and promoting gender equality.

17. Scripps College ("Scripps") is a private liberal arts women's college with its principal place of business in Claremont, California. Scripps offers more than 65-degree programs to more than 1,000 undergraduate and 20 post-baccalaureate students. Scripps confers a higher percentage of Science, Technology, Engineering, and Mathematics ("STEM") degrees than any other women's college in the nation and is ranked third among top liberal arts colleges in the percentage of women graduates who are STEM majors. Scripps is also ranked in the top 25 among U.S. baccalaureate institutions credited with producing the greatest number of Fulbright Scholars.

18. Dentists for America, LLC is a Delaware-based, non-profit membership organization. Dentists for America is comprised of international dentists primarily from India who have received their education and training in the United States and who advocate for better, fairer immigration laws and policies affecting their members and the broader international dental community in the United States. International dentists are foreign-trained dentists who have been educated abroad and then enter the US for a rigorous additional two to three years of education in a DMD/DDS program.

19. Physicians for American Healthcare Access is ("PAHA") is a non-stock, non-profit corporation organized under the corporate law of the State of Missouri. PAHA's membership is comprised of licensed U.S. physicians, fellows, residents, and students. PAHA's mission is to improve access to healthcare for all Americans and to organize all like-minded physicians in the United States to develop and execute the plans in collaboration with lawmakers, community, and

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healthcare organizations to promote better health care access to all. The goals of the organization are to increase awareness among policymakers about health care in underserved communities and thereby achieve better health care access for all Americans.

20. United Methodist Homes and Service ("UMH&S") is an Illinois 501(c)(3) senior care not-for-profit corporation with its principal place of business at in Chicago, Illinois 60640. UMH&S operates several rehabilitation and senior care facilities, as well as memory care and assisted living facilities, and participates in joint ventures with other non-profit senior care organizations within Illinois and beyond. UMH&S' nursing staff comprises approximately 25% of their workforce of approximately 300 employees and is vital in providing quality care to UMH&S' patients. The cost of the nursing care provided to UMH&S' patients is generally reimbursed to them by Medicare, Medicaid, and private insurance systems, and UMH&S depends on donations, events, and development work to meet their expenses. For approximately fifteen years, United Methodist Homes and Service has regularly filed immigrant petitions for registered nurses, most of whom have emigrated from the Philippines.

21. Hodges Bonded Warehouse, Inc. ("Hodges Bonded Warehouse" or "Hodges") is an Alabama warehousing, logistics, and transportation services corporation with its principal place of business in Montgomery, Alabama. Hodges Bonded Warehouse has 108 permanent employees, most of whom are drivers, forklift and heavy equipment operators, dispatchers, and logistics specialists. At times they may employ over 15 temporary employees from local agencies. Presently, many of Hodges' clients are parts suppliers to Original Equipment Manufacturers ("OEMs") in the Southeast or to other suppliers who supply OEMs. Hodges Bonded Warehouse partners with Auburn University at Montgomery ("AUM") to cultivate talent in data analysis, information systems management, and supply chain management and to create

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data and logistics management techniques using commonly accessible software programs. Hodges has invested nearly $300,000 in this effort to modernize their systems, which includes training and software for the use of Xiaobei Cao ("Ms. Cao"), who is a citizen of China working to complete her Master of Science Degree in Information Management Systems at AUM and interning with Hodges on an H-1B visa.

22. International Institute of New England ("IINE") is a non-profit organization with its principal place of business in Boston, Massachusetts. IINE's community-based sites feature a core of common services essential to their mission, which is to create opportunities for refugees and immigrants to succeed through resettlement, education, career advancement and pathways to citizenship. IINE employs 50 full-time and 20 part-time employees to support its refugee resettlement, case management, health services navigation, employment, education and literacy, and citizenship programming; and IINE's leadership team carries wide-ranging expertise in education, social work, workforce development, program design, and community advocacy.

23. Information Technology Industry Council ("ITI") is a Washington, D.C.-based trade association that represents an array of vanguard companies, including cybersecurity, digital services, hardware, internet, semiconductor, software, and network equipment companies that are located across the United States and have offices around the globe. Members of ITI are at the forefront of research and development investment in the United States and, subsequently, drive domestic economic growth and job creation. To achieve these objectives, ITI members rely on U.S. citizen, lawful permanent resident, and temporary non-immigrant employees educated and trained in specialized fields, such as science, technology, engineering, and mathematics, as well as the ability to recruit these high-skilled professionals in the United States and globally. As an advocacy and policy organization for the world's leading innovation companies, ITI navigates

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the relationship between policymakers, companies, and non-governmental organizations, providing creative solutions that advance the development and use of technology in the United States and around the world.

24. Marana Health Care ("Marana") MHC Healthcare is the oldest community health center within its principal place of business in Tucson, Arizona. The center began in 1957 providing medical care to migratory farm workers and other locals in Marana. MHC Healthcare has grown to a network of 16 Health Centers, employs over 500 staff, and serves over 50,000 patients. Marana has remained committed to removing barriers towards healthcare services.

25. Study Mississippi ("SM") is a consortium of accredited educational institutions based in Mississippi, whose purpose is to connect international students and professionals with quality Mississippi education and training and to provide opportunities for U.S. students to have international experiences. SM's member schools include K-12, community colleges, English language training institutes, and public and private colleges and universities, including schools in the top Carnegie Classifications for research activities.

DEFENDANTS:

26. Defendant Al Steward is the Acting Secretary of the U.S. Department of Labor. He is sued in his official capacity.

27. Defendant United States Department of Labor is a federal agency of the United States responsible for fostering, promoting, and developing the welfare of the wage earners, job seekers, and retirees of the United States, including the improvement to working conditions, the advancement of opportunities for profitable employment, and assurance of work-related benefits and rights.

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STATUTORY AND REGULATORY BACKGROUND

28. The Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq*., authorizes U.S. employers to sponsor foreign workers for employment in United States in a variety of visa categories, including either as nonimmigrants for temporary employment under the H-1B visa classification, or as immigrants who are permanent residents of the United States who may subsequently naturalize as United States citizens.

H-1B VISAS: LABOR CONDITION APPLICATIONS

29. The H-1B visa program permits employers to temporarily employ foreign, nonimmigrant workers in specialty occupations. *See* 8 U.S.C. § 1101(a)(15)(H). A specialty occupation is defined as an occupation that requires "theoretical and practical application of a body of highly specialized knowledge" and "attainment of a bachelor's or higher degree in a specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." *Id*. § 1184(i)(1).

30. To participate in the H-1B program, employers complete a two-step process with respect to each eligible foreign worker. First, employers must submit a Labor Condition Application ("LCA") to DOL identifying the specialty occupation position at issue and confirming that they will comply with the requirements of the program. *See* 8 U.S.C. § 1182(n)(1); 8 C.F.R. § 214.2(h)(4). In the LCA, the prospective employer must attest, among other things, that it will pay the nonimmigrant worker the greater of "the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question," or "the prevailing wage level for the occupational classification in the area of employment." 8 U.S.C. § 1182(n)(1)(A)(i).

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31. The same process applies to nonimmigrant workers under the H-1B1 and E-3 visa categories: the H-1B1 visa classification applies to foreign workers in specialty occupations from Chile and Singapore, 8 U.S.C. § 1101(a)(15)(H)(i)(b1), and the E-3 visa classification applies to foreign workers in specialty occupations from Australia. 8 U.S.C. § 1101(a)(15)(E)(iii)

32. The DOL defines the prevailing wage "as the average wage paid to similarly employed workers in a specific occupation in the area of intended employment."[2] *See* 8 U.S.C. § 1182(p). "Where the Secretary of Labor uses, or makes available to employers, a governmental survey to determine the prevailing wage, such survey shall provide at least 4 levels of wages commensurate with experience, education, and the level of supervision. Where an existing government survey has only 2 levels, 2 intermediate levels may be created by dividing by 3, the difference between the 2 levels offered, adding the quotient thus obtained to the first level and subtracting that quotient from the second level." 8 U.S.C. § 1182(p)(4).

33. The DOL determines the prevailing wage as of the time of the filing of the LCA. 20 C.F.R. § 655.731(a)(2). However, an employer may not file an LCA more than six months prior to the beginning date of the period of intended employment. 20 C.F.R. § 655.730(b). If there is no applicable collective bargaining agreement "contain[ing] a wage rate applicable to the occupation," an employer may base the prevailing wage on one of the following sources: a current wage as determined under the Davis-Bacon Act or the McNamara-O'Hara Service Contract Act; an independent authoritative source that satisfies the requirements in 20 C.F.R. § 655.731(b)(3)(iii)(B); or another legitimate source of wage data that satisfies the requirements in 20 C.F.R. § 655.731(b)(3)(iii)(C). 20 C.F.R. § 655.730(b).

[2] https://www.dol.gov/agencies/eta/foreign-labor/wages/prevailing-wage

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34. In the absence of any of these sources, the Department's National Prevailing Wage Center ("NPWC"), a component of the Office of Foreign Labor Certification ("OFLC"), derives the appropriate prevailing wage from the Bureau of Labor Statistics Occupational Employment Statistics ("OES") Survey.

35. An LCA is valid for the period of employment stated in the LCA, but in no event longer than three years. 20 C.F.R. § 655.750(a).

36. After the DOL certifies the LCA, the employer moves to the second step whereby the employer must file an H-1B visa petition with the U.S. Department of Homeland Security ("DHS") on behalf of the prospective employee, which shows that the proffered position satisfies the statutory and regulatory requirements. 8 U.S.C. § 1184(c); 20 C.F.R. § 655.705(b).

37. An approved H-1B petition allows the foreign national beneficiary to reside in United States and work in the position identified in the petition. There is a statutory limit on the number of H-1B visas (cap and cap-exempt) of 65,000 per year, plus an additional 20,000 per year for Masters, PhD, and post-graduate-level graduates of U.S. universities. 8 U.S.C. § 1184(g)(1)(A), (5)(C).

PERMANENT LABOR CERTIFICATIONS FOR EB-2 AND EB-3 VISA WORKERS

38. The INA also creates a multi-step process for noncitizens to become lawful permanent residents based on their employment in the United States in certain professional or skilled occupations.

39. There are five "preference" categories, or immigrant visa classes, provided in the INA. Two of the "preference" categories—the second and third categories (referred to as the EB-2 and EB-3 immigrant visa classifications)—requires a permanent labor certification from the DOL

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before the employer can file a visa on behalf of the employee with DHS. *See* 8 U.S.C. §§ 1153(b)(2)-(3), 1182(a)(5)(A).

40. An EB-2 immigrant visa applies to foreign workers who are either professionals holding advanced degrees (master's degree or above) or foreign equivalents of such degrees, or persons of "exceptional ability" in the sciences, arts, or business. *Id.* § 1153(b)(2).

41. An EB-3 immigrant visa applies to foreign workers who are either "skilled workers," "professionals," or "other" unskilled workers, as defined by the statute. *Id*. § 1153(b)(3).

42. Prior to filing for a labor certification, the employer must obtain a prevailing wage determination for the prospective foreign national employee. *Id.* §§ 656.15(b)(1), 656.40(a). If there is no prevailing wage rate derived from an applicable CBA, the employer may elect to use an applicable wage determination under the Davis-Bacon Act or McNamara-O'Hara Service Contract Act or provide a wage survey that complies with the DOL's standards governing employer-provided wage data. *Id.* § 656.40(b)(2)-(4). In the absence of any of the above sources, the NPWC will use the OES Survey to determine the prevailing wage. *Id*. § 656.40(b)(2).

43. Once the employer receives a PWD, the employer may file a labor certification application. The employer must attest, among other things, that the employer will offer a wage that equals or exceeds the prevailing wage, and that the employer will pay the foreign worker a wage equal to or exceeding the prevailing wage. 20 C.F.R. § 656.10(c)(1).

44. A labor certification reflects the DOL's determination that:

> (I) there are not sufficient workers who are able, willing, qualified ... and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

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8 U.S.C. § 1182(a)(5)(A)(i); *see also* 20 C.F.R. § 656.1(a)(1)-(2).

45. Once the Secretary certifies the permanent labor certification, the employer may proceed to file a visa petition with DHS. *Id*. § 656.17(a). The labor certification must be filed in support of a visa petition within 180 calendar days of the date on which DOL granted the certification. *Id*. § 656.30(b)(1).

THE PREVAILING WAGE DETERMINATION

46. Since 1998, the DOL has used the OES survey data to calculate prevailing wage rates. *See Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas in Specialty Occupations and as Fashion Models; Labor Certification Process for Permanent Employment of Aliens in the United States*, 65 Fed. Reg. 80110, 80198 (Dec. 20, 2000). In 2004, Congress revised the prevailing wage rate system to require that DOL, when using or making a governmental survey available to employers to determine the prevailing wage, include at least four levels of wages "commensurate with experience, education, and the level of supervision." L-1B and H-1B Visa Reform Act, Public Law No. 108-447, Title IV, Subtitle B, § 423 (Dec. 8, 2004) (8 U.S.C. § 1182(p)(4)).

47. Prior to the issuance of the IFR in this case, DOL determined the four wage rates based on the 17th percentile, the 34th percentile, the 50th percentile, and the 67th percentile, respectively, of the OES reported wage distribution for each occupation. 85 Fed. Reg. at 63,875.

THE INTERIM FINAL RULE AND ITS VACATUR

48. On October 8, 2020, the DOL published the IFR titled "*Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States*," 85 Fed. Reg. 63,872 (Oct. 8, 2020). The DOL made the IFR effective the same date without first providing notice and comment. It provided for the submission of public comments during a

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prescribed 30-day post-effective public comment period that closed on November 9, 2020. During this time, the Department received **2,340 comments**. 86 Fed. Reg. at 3612.

49. The IFR updated the computation of prevailing wage levels set for certain foreign labor certification programs "to better reflect the actual wages earned by U.S. workers similarly employed to foreign workers," 85 Fed. Reg. at 63,872, thereby increasing the prevailing wage rates for certain occupations "by as much as forty or fifty percent." *Id*.

50. The DOL asserted that the prevailing wage levels "are not advancing the purposes of the INA's wage provisions" because, "under the existing wage levels, artificially low prevailing wages provide an opportunity for employers to hire and retain foreign workers at wages well below what their U.S. counterparts ... make," which "creat[es] an incentive—entirely at odds with the statutory scheme—to prefer foreign workers to U.S. workers, and caus[es] downward pressure on the wages of the domestic workforce." 85 Fed. Reg. at 63,877. Based on this view, the IFR incorporated changes to the computation of wage levels under the DOL's four-tiered wage structure based on the OES wage survey. 85 Fed. Reg. at 63,872. The IFR upwardly adjusted the first-tier prevailing wage rate from the 17th percentile of the OES wage distribution to the 45th percentile; the second-tier prevailing wage rate from the 34th to the 62nd percentile; the third-tier prevailing wage rate from the 50th to the 78th percentile; and the fourth-tier prevailing wage rate from the 67th to the 95th percentile. *Id.* at 63,892-93, 63,905. The DOL asserted that "[t]his update will allow DOL to more effectively ensure that the employment of immigrant and nonimmigrant workers admitted or otherwise provided status through the above-referenced programs does not adversely affect the wages and job opportunities of U.S. workers." *Id.* at 63,872.

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51. On October 19, 2020, plaintiffs filed their original complaint. The Court subsequently consolidated this case with *Stellar IT, Inc. v. Scalia*, No. 20-cv-3175 (EGS) (Nov. 9, 2020).

52. Plaintiffs collectively alleged that Defendants violated the APA in setting the higher wage rates because the DOL did not provide advance notice and comment prior to promulgating the IFR without good cause and, in the alternative, set the new wage levels arbitrarily, capriciously, and not in accordance with law.

53. The parties filed cross motions for partial summary judgment for resolution of the notice-and-comment claim.

54. On December 14, 2020, this Court granted plaintiffs' motions for partial summary judgment finding that the DOL lacked "good cause" to forego advance notice-and-comment procedures in promulgating the IFR joining two other district courts who previously set aside the IFR for the same reasons. *Purdue Univ. v. Scalia*, Slip Copy, 2020 WL 7340156 (D.D.C. Dec. 14, 2020); *Chamber of Commerce v. DHS*, Slip Copy, 2020 WL 7043877 (N.D. Cal. Dec. 1, 2020); *Itserve v. Scalia*, Slip Copy, Slip Copy, 2020 WL 7074391 (D. N.J. Dec. 3, 2020).

THE FINAL RULE

ARBITRARY AND CAPRICIOUS SUBSTANTIVE CHANGES

55. On January 14, 2021, DOL published a final rule that "adopts with changes an Interim Final Rule (IFR) that amended Employment and Training Administration (ETA) regulations governing the prevailing wages for employment opportunities that United States (U.S.) employers seek to fill with foreign workers on a permanent or temporary basis through certain employment-based immigrant visas or through H-1B, H-1B1, or E-3 nonimmigrant visas." 86 FR 3608-01.

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56. "Notwithstanding the district courts' orders to set aside the IFR on procedural grounds," DOL suggests that "the U.S. Supreme Court has acknowledged and affirmed the proposition that a procedurally flawed IFR does not taint a final rule relying upon an IFR as a proposed rule." 86 Fed. Reg. at 3612, *citing Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2385-86 (2020).

57. The DOL asserts that the "IFR provided sufficient notice to the public by allowing for a 30-day comment period; gave interested persons an opportunity to participate in the rule making through submission of written data, views or arguments; the rule contained a concise general statement of their basis and purpose; and the rule will be published more than 30 days before it becomes effective." 86 Fed. Reg. at 3612 (internal quotations and additional citations omitted)

58. The DOL thus declares the vacated IFR comports with the APA's procedural requirements at 6 U.S.C. §§ 553(b)-(d) such that the final rule, as amended, could become effective. 86 Fed. Reg. at 3612

59. In the preamble, the DOL avers that "the overwhelming majority of [the 2340] commenters opposed the new wage level computation methodology. Notably, however, commenters generally did not offer justifications or data to support the continued use of the old wage methodology." 86 Fed. Reg. at 3612.

60. Nevertheless, adhering to the belief that "the reasoning put forward in the IFR" for upwardly revising wages "is sound," "the Department has adjusted the Level I wage and the Level IV wage downward to the 35th percentile and 90th percentile, respectively," which represents a 10 percentile and 5 percentile adjustment from the IFR. 86 Fed. Reg. at 3613.

61. The final rule, in effect, upwardly adjusts the first-tier prevailing wage rate from the **17th percentile of the OES wage distribution to the 35th percentile and the fourth-tier prevailing**

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wage rate from the 67th to the 90th percentile. *Id*. at 3613. Level II wages will reset at "approximately the 53rd percentile" and "a Level III wage at approximately the 72nd percentile of the OES distribution." *Id.* at 3654.

62. The DOL states that the largest users of the H-1B program are already offering wages higher than the existing prevailing wage, in many cases wages well over 20 percent in excess of the prevailing wage rate and offering similar amounts to the "actual wages" that their other U.S. workers are making, thereby supporting its decision to raise the prevailing wage. 85 Fed. Reg. at 63886.

63. The DOL reasons that the increases "should have only a relatively small effect for those other companies "abusing" the process. *Id.*

64. The DOL "found that the annual wage data for specific jobs in specific metropolitan areas offered by commenters were clustered around percentiles in the 30s." *Id*. at 3637.

65. "The Department is also implementing in this rule a number of changes to how it uses data from BLS in the H-1B and PERM programs that will further reduce the incidence of inappropriately inflated wages identified by commenters." *Id*. at 3613. Specifically, the DOL "will largely eliminate" incidence of default rates set at $208,000 per year, and "thereby inflated well above both the previous entry-level wage" by only utilizing the default rate "in cases where the 90th percentile wage value exceeds the highest wage interval value used by BLS." *Id.* at 3649. The change is intended to "ensure that leveled wages and an entry-level wage appropriately set at the 35th percentile will be provided wherever possible." *Id*. The DOL did not disclose how many jobs are implicated by this change nor how many jobs will default to the higher wage.

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66. Finally, "the Department is adopting a phase-in approach to how the new wage levels will be applied to give employers and workers time to adapt to the change." *Id*. The first adjustment to employers' prevailing wage obligation will not occur until July 1, 2021." *Id*. at 3644.

67. "On July 1st, the entry-level wage will increase from roughly the 17th percentile to 90 percent of the 35th percentile wage, as provided by BLS—a point approximately halfway between the current Level I wage and the 35th percentile, which, as explained above, is the point in the OES distribution that the Department has determined is appropriate for setting entry-level wage rates." *Id.* "Similarly, at the same time the Level IV wage will increase from roughly the 67th percentile to 90 percent of the 90th percentile wage."

68. "The following year, on July 1, 2022, the wage levels will again increase, and be placed at the 35th percentile for the entry-level wage and the 90th percentile for the uppermost level, at which point the transition to the new wage structure will be complete." *Id*.

69. In sum, "For the two-step transition the current wage levels will be in effect from January 1, 2021 through June 30, 2021. From July 1, 2021 through June 30, 2022, the prevailing wage will be 90 percent of the final wage level. From July 1, 2022 and onward the prevailing wage will be the final wage levels. For the three and a half year transition the current wage levels will be in effect from January 1, 2021 through June 30, 2021. From July 1, 2021 through June 30, 2022 the prevailing wage will be 85 percent of the final wage levels; from July 1, 2022 through June 30, 2023 the prevailing wage will be 90 percent of the final wage levels; from July 1, 2023 through June 30[,] 2024 the prevailing wage will be 95 percent of the final wage levels; and from July 1, 2024 onwards the prevailing wage will be the final wage levels." 86 Fed. Reg. at 3661.

THE INADEQUATE POST-EFFECTIVE 30-DAY COMMENT PERIOD

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70. The APA requires agencies provide the public with a meaningful opportunity to participate in the rulemaking process. 5 U.S.C. § 553.

71. The government regards 60-days as the appropriate comment period. *See* Executive Order 13,653, 76 Fed. Reg. 3,821, 3821-22 (Jan. 18, 2011) ("To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment … on any proposed regulation, with a comment period that should generally be at least 60 days."); Executive Order 12,866, 58 Fed. Reg. 51,735, 51,740 (Sept. 30, 1993) ("each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days.").

72. Defendants arbitrarily, capriciously, and without adequate explanation provided a 30-day post-promulgation comment period in lieu of the customary 60-day comment period.

73. Defendants do not explain why a 60-day comment period was not feasible.

74. The "final rule is a major rule as defined by 5 U.S.C. 804, also known as the 'Congressional Review Act,' as enacted in section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104-121, 110 Stat. 847, 868, et seq." 86 Fed. Reg. at 3671.

75. As a result of the transfer of wages from employers to employees, "[t]he Department estimates the total transfer over the 10-year period is $130.83 billion and $105.16 billion at discount rates of 3 and 7 percent, respectively." 86 Fed. Reg. at 3665. DOL confesses "that this final rule will have a significant economic impact on a substantial number of small entities" *Id*. at 3666. Admittedly, "[o]f the 22,430 unique small employers with revenue data, up to 13 percent of employers would have more than 3 percent of their total revenue affected in 2019, up to 22 percent in 2020 and 2021, and up to 16 percent in 2022." *Id*. at 3669.

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76. The final rule is of such magnitude and complexity that commenters must engage in extensive research and analysis of the proposed calculations.

77. In this instance, based on the way the DOL implemented the rule, commenters had to comment while the IFR was already in effect thereby heightening the need for at least a 60-day comment period for meaningful participation.

78. Defendants adjustments to the IFR and hasty publication of the final wage levels without affording the public with a meaningful opportunity to comment on the adjusted wage levels prevented plaintiffs and the public from fully exploring and participating in the rulemaking process.

THE LACK OF NECESSARY REVIEW FROM THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS

79. Pursuant to E.O. 12866, the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA), determines whether a regulatory action is significant and, therefore, subject to the requirements of the E.O. and review by OMB. 58 Fed Reg. 51735 (1993).

80. Under Executive Order 12866, any rulemaking that "is likely to result in a rule that may . . . have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities" requires further review by OIRA. 58 Fed. Reg. 51735 (1993) (directing agencies to follow certain principles in rulemaking, such as consideration of alternatives and analysis of benefits and costs and describing OIRA's role in the rulemaking process.

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81. OIRA has determined that the final rule is an economically significant regulatory action. 86 Fed. Reg. at 3657. Pursuant to the Congressional Review Act (5 U.S.C. 801 et seq.), OIRA has designated that this rule is a "major rule," as defined by 5 U.S.C. § 804(2).

82. "However, OIRA has waived review of this regulation under E.O. 12866, section 6(a)(3)(A)."

83. In guidance entitled "Promoting the Rule of Law Through Improved Agency Guidance Documents" OIRA recognized limits on granting such a waiver of review for significant and major rules: **Q33**: Is it possible to waive the need for a significance determination or EO 12866 review in the event of an emergency? **A:** Agencies may request that a significance determination or review be waived due to exigency, safety, or other compelling cause. A senior policy official must explain the nature of the emergency and why following the normal clearance procedures would result in specific harm. The OIRA Administrator will review and decide as to whether granting such a request is appropriate. *See, Document M-20-2, dated October 31, 2019, issued by the Office of Management and Budget*, https://www.whitehouse.gov/wp-content/uploads/2019/10/M-20-02-Guidance-Memo.pdf (emphasis added).

84. Defendants' arbitrary departure from its guidance without explanation is not in accordance with law. This Court previously granted partial summary judgement against the IFR because the Court disagreed that a sufficient emergency or other "good cause" existed that would justify skipping notice and comment. Here again, with the publication of the final rule, there is similarly no excuse to skip important aspects of the rulemaking processing including OIRA review and a full 60-day comment period.

THE MISREPRESENTATION, MISAPPREHENSION AND FAILURE TO CONSIDER CONTRARY EVIDENCE

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85. The DOL received 2340 comments in the abbreviated 30-day comment period and largely dismissed the commenters concluding in cursory fashion that "[m]ost of the comments were not relevant and/or not substantive." 86 Fed. Reg. at 3612.

86. The DOL further misapprehended the specific comments and data that has been presented by commenters when the DOL readjusted its wage levels.

87. According to leading economic organizations, the DOL's determination that raising the prevailing wage should have only a relatively small effect for those companies "abusing" the process is objectively false. "The prevailing wage will affect 100 percent of the top 50 H-1B employers and impact 73 percent of their H-1B job offers. The average prevailing wage increase will be about $20,000 higher than their actual wage offers, which DOL says are based on what other U.S. workers are making."[3]

88. The DOL further claims "that private wage data from the commenters support" its observations that wage data is "clustered" in percentiles in the 30s, "but that is false."[4]

89. The DOL also misapprehended private wage data from commenters, 86 Fed. Reg. at 3637, which show actual wages falling much closer to the existing prevailing wage structure than the DOL's rule, which therefore contravenes its assumption that "the old wage levels are the source, in many cases, of serious, adverse effects on U.S. workers' wages and job opportunities." *Id*. at 3642.

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[3] Bier, David J., *DOL Wage Rule Affects All Major Employers, 70% of H-1B Requests, After DOL Said Few Should Be Affected* (Jan. 29, 2021). https://www.cato.org/blog/dol-wage-rule-affects-all-major-employers-70-h-1b-requests-after-dol-said-few-should-be?queryID=d272ed1094eaf28dcac4b324d54f256f

[4] Bier, David J, DOL *Misrepresents Wage Data to Justify H-1B Prevailing Wage Increase* (Jan. 25, 2021). https://www.cato.org/blog/dol-misrepresents-wage-data-justify-h-1b-prevailing-wage-increase

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90. The agency stated its rulemaking is meant to "further the goals of E.O. 13788, Buy American and Hire American," *See* 82 Fed. Reg. 18837, but President Biden's January 25, 2021 Executive Order, E.O. 14005, rescinded this policy and announced a pro-immigration policy that contradicts the practical affect under the final rule to restrict foreign immigrant labor to the United States.[5] Thus, even the government's own justifications for the rule have now been withdrawn by the very same government.

91. Similarly, the DOL relied on a now-rescinded policy memorandum[6] for H-1B computer programmers to compute the wage levels in the final rule and base salaries at the Level I wage on employees with master's degrees. 86 Fed. Reg. at 3627.

92. Against the weight of the evidence and new policy directives of the Executive, the DOL arbitrarily and capriciously concludes that "the existing wage levels" are "artificially low" and "provide an opportunity for employers to hire and retain foreign workers at wages well below what their U.S. counterparts—meaning U.S. workers in the same labor market, performing similar jobs, and possessing similar levels of education, experience, and responsibility—make, creating an incentive—entirely at odds with the statutory scheme—to prefer foreign workers to U.S. workers, and causing downward pressure on the wages of the domestic workforce." *Id*. at 3614.

93. The DOL ignored commenters' data that refuted the agency's conclusion that "commenters have also not provided data or analysis demonstrating that the wage rates under the

[5] 1. https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/25/executive-order-on-ensuring-the-future-is-made-in-all-of-america-by-all-of-americas-workers/; 86 Fed. Reg. 7475 (Jan. 28, 2021).

[6] http://www.uscis.gov/sites/default/files/document/memos/PM-602-0142.1_RescissionOfPM-602-0142.pdf.

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old wage methodology produces wage rates commensurate with the wages paid to U.S. workers similarly employed and with comparable education, experience, and responsibility to H-1B and PERM workers, as required by statute." *Id.* at 3617.

94. The DOL stated that it relied on data from the National Science Foundation ("NSF") for increasing the wage levels and setting the threshold at employees with a master's degree but did not reveal the data it relied on and how it used to the data to reach its conclusion. *Id.* at 3615.

95. The NSF data refutes the DOL's conclusion and its data shows that a master's degree level is not the most common starting wage for specialty occupations; "66% of individuals in computer occupations had a bachelor's degree as their highest degree."[7]

96. A post-publication analysis conducted by the National Foundation for American Policy refuted the DOL's assumptions regarding the limited impact to employers and found, to the contrary, that employers will suffer an average increase between 24% and 27% at each wage level.[8]

97. The increases for specific occupations are far higher and do not reflect the actual wages in the market. For example, employers of computer science teachers will need to pay a 41% higher Level I wage that will harm academic institutions by greatly reducing the ability to employ an H-1B of employment-based immigrant to educate their student-body in computer science and STEM-related fields.[9]

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[7] https://nfap.com/wp-content/uploads/2021/02/An-Analysis-of-the-DOL-Final-Rules-Impact-on-H-1B-Visa-Holders-and-Employment-Based-Immigrants.NFAP-Policy-Brief.February-2021-1.pdf; National Foundation for American Policy tabulation of the National Science Foundation 2017 National Survey of College Graduates.

[8] https://nfap.com/wp-content/uploads/2021/02/An-Analysis-of-the-DOL-Final-Rules-Impact-on-H-1B-Visa-Holders-and-Employment-Based-Immigrants.NFAP-Policy-Brief.February-2021-1.pdf

[9] *Id.*

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98. The DOL misapprehended the "prevailing wage rate," defined as the average wage paid to similarly employed workers in a specific occupation in the area of intended employment," in setting new wage levels because the final rule creates wage levels that far exceed the prevailing wage rates. The agency provides no rational explanation or analysis showing that the new wage levels comport with the prevailing wage rate under the INA and regulations.[10]

HARMS TO PLAINTIFFS

COLLECTIVE HARMS TO PLAINTIFFS

99. The procedural defects that have culminated in the final rule have deprived plaintiffs of a meaningful opportunity to participate in the rulemaking process. Prior to being enjoined the IFR, forced plaintiffs into a crisis response to participate in the 30-day comment period. The truncated comment period did not cure the unlawful process; it compounded the agency's procedural and substantive errors.

100. Plaintiffs will experience a dramatic increase in operational costs due to the final rule. Plaintiffs have already diverted resources away from providing core services to understand and comply with the IFR while trying to comment on the dramatic changes to wage levels.

101. Like the IFR, the final rule will make it impossible for Plaintiffs to maintain the same cost-structure and employment levels. If they have not already done so, Plaintiffs will be forced to forego or reduce hiring, or terminate employees due to the new rule, including US workers.

102. Like the IFR, the final rule is causing a decline in morale among Plaintiffs' staffs. The final rule's arbitrary and irrational wage mechanisms will make it difficult, if not impossible, for employers to hire new H1-B workers and continue to employ existing foreign national and

[10] *Id.*

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U.S. workers. The final rule will stunt growth. Contrary to DOL's intent in issuing the rule, the harm to U.S. employers will ultimately harm the employment and wage levels of U.S. workers.

103. Startup companies will particularly impacted and so will nonprofit organizations who lack the ability to shift employees or operations abroad.

104. Studies have shown that H-1B workers in fact benefit US worker.[11] The existence of the H-1B program causes some employers to expand – or at least not decrease – the number of jobs open to American workers, even workers who hold jobs like those held by H-1B workers. If not enough U.S. workers are available and an employer cannot use the H-1B program, the employer may move jobs in each position overseas, ultimately reducing job opportunities for American workers.

ACADEMIC INSTITUTIONS

105. Nine Plaintiffs are academic institutions that face an enormous, but vital, challenge to create global citizens in a world that is increasingly digitized. Studies regularly report the under-representation of African American/Black and Hispanic/Latinx recipients of doctoral degrees in the United States. The final rule will limit access to international scholars and materially affect the recruitment of foreign national faculty members who remain necessary to educate our students on the mission to create global citizens.

[11] For overview of value of H-1B professionals to the United States economy see, Alex Nowsareth, *Don't Ban H-1B Workers: They are Worth their Weight in Innovation,* CATO Institute (May 14, 2020) available at: https://www.cato.org/blog/dont-ban-h-1b-workers-they-are-worth-their-weight-patents and Madeline Zavodny, *The Impact of H-1B Visa Holders on the U.S. Workforce*, National Foundation for American Policy Brief (May 2020), available at https://nfap.com/wp-content/uploads/2020/05/The-Impact-of-H-1B-Visa-Holders-on-the-U.S.-Workforce.NFAP-Policy-Brief.May-2020.pdf.

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106. These Plaintiffs rely on foreign professors, researchers, post-doctorate fellows and other highly educated foreign scholars. The final rule arbitrarily and capriciously changes the wage structure that will reduce the ability of plaintiffs to fulfill their staffing needs. The increase to salaries will either price them out-of-the market for international scholars and post-doctoral fellows or necessitate an increase in tuition and other sources of revenue at the public's expense. Critical research projects and grant funding led by foreign national scientists and scholars will be put at great risk if Plaintiffs cannot meet the increased salary demands imposed by the final rule.

107. Plaintiffs will be negatively impacted if they are unable to retain foreign national scholars who possess a high level of knowledge and expertise in teaching and research. This not only negatively impacts specific sponsoring departments at academic institutions, but also negatively students, broader university business and the national economy as a whole. Defendants failed to account for these foreseeable impacts that, if not set aside, will render the United States a less competitive option for recruiting international scholars and arbitrarily impose an insurmountable barrier to the employment of talent needed to prepare the next generation of students to solve the most complex issues facing the country and the world.

HEALTHCARE ORGANIZATIONS, TECHNOLOGY TRADE ASSOCIATIONS, AND NON-PROFIT EMPLOYERS

108. Plaintiffs rely on highly skilled and highly educated professionals in the healthcare industry, including nurses, physical therapists, occupational therapists, dentists, and similarly situated health care workers. These medical professionals provide critical care to our rapidly aging population in nursing homes, assisted living facilities and hospitals. They also provide therapy services to injured workers and the foreign national nurses are on the front lines in the fight against Covid-19. Nurses and Physical Therapists are recognized shortage occupations, and,

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unlike non-shortage occupations, their U.S. employers are not required to test the labor market in permanent residence filings as the Federal government acknowledges there are not enough U.S. workers in these occupations. Many (if not most) of the facilities that employ these professionals do not directly hire them and – instead – turn to expert staffing services. These services operate on very tight margins to provide staff to the affected facilities at rates that are presently affordable for elderly residents, and patients and at rates which insurance companies are willing to reimburse.

109. Plaintiffs, including United Methodist Homes and Services will now lack the capacity to pay the salaries mandated under the final rule. Given the recognized shortages in these occupations, America's aging parents and grandparents, injured workers and people needing nursing care more generally will have greatly reduced or, in some locations, no access to these healthcare services.

110. Approximately 1/4 of the U.S. Physician workforce is comprised of international medical graduates. These physicians are not only working on the frontlines of the COVID-19 response, but also dedicate their lives to the provision of healthcare in our most vulnerable and underserved medical populations in the U.S. The upward departure from industry norms under the final rule will dramatically restrict plaintiffs from employing the necessary international talent resulting in a direct and immediate impact on the provision of medical care. Furthermore, there are many factors beyond the control of an employer that factor into determining physician salaries including the fact that graduate medical residents are subsidized by Medicare dollars and insurance companies tightly control what physicians are paid for services provided. Additionally, despite the changes in the final rule, the problem noted in the IFR – namely, that the rule will force some physician employers pay physicians above the fair market value for services.

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111. Companies that are members of the technology industry and members of ITI provide vital technology to our military, businesses, infrastructure, transportation, healthcare, and other industries. Our demand for the latest technology to keep us safe, secure, efficient, and ahead of our competitors means that we must rely on highly skilled foreign workers in the high-tech industry. These foreign nationals are dependent on the H-1B visa for entry into the United States and service to the economy. The arbitrarily new wage levels will materially alter the cost structure for technology companies, start-ups, research and development firms and other users of H-1B, E-3 and PERM who will no longer sponsor highly skilled foreign nationals for employment in the United States.

CAUSES OF ACTION

FIRST CAUSE OF ACTION: VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT AND THE IMMIGRATION AND NATIONALITY ACT.

112. Plaintiffs incorporate and reallege the allegations above.

113. The APA § 706 provides, in relevant part, that the reviewing court shall--

> (2) hold unlawful and set aside agency action, findings, and conclusions found to be--
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> ...
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> (D) without observance of procedure required by law; ....

5 U.S.C. § 706(2).

114. The final rule constitutes final agency action as it has the force of law and constitutes a legislative rule. 5 U.S.C. § 553(b).

115. Courts will invalidate agency action that fails to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found

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and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 43 (1983) (citation omitted).

116. Furthermore, when an agency substantially alters a position, it must "supply a reasoned analysis for the change," *State Farm*, 463 U.S. at 42, and may not "depart from a prior policy sub silentio or simply disregard rules that are still on the books." *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009) (*citing United States v. Nixon*, 418 U.S. 683, 696 (1974))

117. The final rule violated the statutory framework that is intended to have "prevailing wages" within a geographic area of employment approximate the actual wages and permits a survey to determine the prevailing wage that "shall provide at least 4 levels of wages commensurate with experience, education, and the level of supervision." 8 U.S.C. § 1182(p)(4)

118. One of the most basic canons of statutory construction is that words should be given their ordinary, everyday meanings absent a specific definition provided by Congress. U.*S. Congressional Research Service, Statutory Interpretation: Theories, Tools, and Trends* (R45153, Apr. 5, 2018)

119. "Commensurate" is commonly defined as "corresponding in size, extend, amount, or degree."[12]

120. Under the INA, employers must agree to pay foreign nationals seeking H-1B, H-1B1, and E-3 nonimmigrant visas the greater of "the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question," or "the prevailing wage level for the occupational classification in the area of employment." 8 U.S.C. § 1182(n)(1).

[12] https://www.merriam-webster.com/dictionary/commensurate

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121. The final rule sets wages far beyond the prevailing wage and conflicts with the 4-level division as set forth in 8 U.S.C. §§ 1182(n)(1), (p)(4).

122. The wage levels no longer correspond in size, extent, amount, or degree with the individual's experience, education, and level of supervision in contravention of the INA and the APA.

123. Using a master's degree as the Level I proxy is inconsistent with the H-1B program that does not require a master's degree for employment and the wage levels do not reflect the prevailing wage in the geographic locales in contravention of the INA.

124. The wage rates further contravenes the definition of prevailing wage and violates 8 U.S.C. §1182(n)(1)(A)(II), because the new methodology exceeds the actual wages US employers pay US employees for the same position in the same occupational classification.

125. The final rule is not in accordance with the INA and should be set aside.

SECOND CAUSE OF ACTION: VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT AND THE IMMIGRATION AND NATIONALITY ACT.

126. Plaintiffs incorporate and reallege the allegations above.

127. The final rule unlawfully conflicts with 8 U.S.C. § 1184(i) and 8 C.F.R. § 214.2(h)(4)(ii), which specifically designate certain professions as "specialty occupations" eligible for H-1B visas that do not require a master's degree; indeed, the standard is for a bachelor's or its equivalent.

128. The final rule runs afoul of the statute and regulatory criteria by considering an individual with a master's degree as the proxy for entry-level, Level I workers for purposes of estimating the percentile at which such workers' wages fall within the OES wage distribution.

129. Because entry-level Level I wage for H-1B positions must now be determined with reference to wage data for entry-level positions for individuals with master's degrees the final

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rule is not in accordance with law as it is based on qualifications and educational standards inconsistent with the statutory and regulatory criteria for the H-1B program.

130. The final rule is not in accordance with the INA and should be set aside.

THIRD CAUSE OF ACTION: VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT. THE FINAL RULE IS ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION AND NOT IN ACCORDANCE WITH LAW.

131. Plaintiffs incorporate and reallege the allegations above.

132. The final rule is arbitrary, capricious, and not in accordance with law because Defendants failed to examine, ignored and misapprehended empirical evidence and data used to support its new wage levels.

133. In dramatically increasing wage levels, the agency based its decision to set Level I wages at a master's degree educational level using the former administration's "Buy American, Hire American" that President Biden has rescinded as well as a USCIS memorandum to guide the adjudication for H-1B computer programmers that the agency has since rescinded.

134. The final rule also fails to offer any substantial evidence or reasoned explanation to support how its new wage levels will serve its stated purposes of protecting American workers or reflects the actual wages in geographic locations.

135. The final rule entirely fails to consider numerous important aspects of the problem. The rule repeatedly stated that commenters failed to support its objections with data, but that is not true, and the agency provided the public with no notice and opportunity to comment on its re-calculated wage levels.

136. Moreover, the DOL misapprehended the data it relied on. Rather than support its new Level 1 wage, the data supported the commenters objection to increasing the wage level as it

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demonstrates that the new wages will have a broad-based impact untethered to the actual wages paid in geographic markets.

FOURTH CAUSE OF ACTION: VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT. DEFENDANTS FAILED TO PROVIDE ADEQUATE NOTICE AND A MEANINGFUL OPPORTUNITY TO COMMENT.

137. Plaintiffs incorporate and reallege the allegations above.

138. The APA states, in relevant part,

> (b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--
> (1) a statement of the time, place, and nature of public rule making proceedings;
> (2) reference to the legal authority under which the rule is proposed; and
> (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

5 U.S.C. § 553.

139. The APA further requires notice and a meaningful opportunity for comment prior to the promulgation of regulations. 5 U.S.C. §§ 553(b), (c).

140. Defendants failed to provide notice and a meaningful opportunity for the public to comment in a timely manner.

141. While not binding, the government's own internal orders state that "a comment period...should generally be at least 60 days." Exec. Order No. 13563, 76 Fed. Reg. 3821, 3821-22 (Jan. 18, 2011); *see also* Exec. Order 12866, 58 Fed. Reg. 51735 § 6(a)(1) (Oct. 4, 1993).

142. Even if the IFR provided notice, the agency abused its discretion in failing to provide, or explain its departure from, the customary 60-day comment period.

143. Defendants failed to explain why the customary 60-day period was not feasible or why a 30-day period was necessary where they issued an IFR and made it immediately effective.

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144. Defendants have not adequately explained, whether in the IFR or the final rule, the applicability of the good-cause exception to notice and comment rulemaking in this instance.

145. The 30-day notice-and-comment period provided after promulgation of the IFR, which was set aside for violating the notice and comment procedures, was inadequate, arbitrary, and an abuse of discretion when considered in conjunction with the immediate effective date of the IFR, the final rule's complexity, and the magnitude of its changes. The surreptitious procedure did not provide the public with a meaningful opportunity to participate in the process.

146. Further, the agency did not respond adequately to the comments and misapprehended the comments provided upon which it relied in setting the new wage levels. The rule is invalid.

147. The agency also failed to provide the public with advance notice of the technical studies and data underlying its decision, including the data from the National Science Foundation, and, the methodology and technical studies it did reveal, prevented the public with a meaningful opportunity to comment and adequately engage in the rulemaking process.

148. Plaintiffs lacked the meaningful opportunity to provide comments, data and information that rebutted its flawed methodology and assumptions.

RESERVATION OF RIGHTS

Plaintiffs reserve the right to add additional allegations of agency error and related causes of action upon receiving the certified administrative record.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that this Court grant the following relief:

A. Assume jurisdiction over the matter.

B. Hold the Department of Labor's final rule unlawful and prevent the Defendants from implementing the new calculations for wage levels or otherwise implementing the final rule;

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C. Order that the final rule violates the APA and therefore shall be set aside in its entirety pursuant to 5 U.S.C. § 706(2)(A);

D. To the extent necessary, issue all additional relief to postpone the effective date of the final rule action or to preserve status or rights pending conclusion of the review proceedings pursuant to 5 U.S.C. § 705;

E. Award Plaintiffs costs of suit and attorney's fees under the Equal Access to Justice Act, 42 U.S.C. § 1988 and any other applicable law;

F. Enter all necessary relief, injunctions, and orders as justice and equity as appropriate to remedy the harms to plaintiffs;

G. Grant such further relief as this Court deems just and proper.

Respectfully Submitted this 19th day of February 2021,

/s/ Jeff Joseph
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CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that the foregoing First Amended Complaint was submitted via the Court's EM/ECF system on February 19, 2021. Counsel for Defendants have submitted a notice of appearance using the EM/ECF system and hereby have been properly served.

Respectfully Submitted,

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