UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Purdue University, *et al.*, Plaintiffs, v. Eugene Scalia, Secretary of Labor, *et al.*, Defendants.	Civil Action No. 20-cv-30006

PLAINTIFFS MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION OR APA SECTION 705 STAY

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INTRODUCTION

Seventeen Plaintiffs represent a cross-section of academic institutions, businesses, organizations, and trade associations situated across the United States. They are comprised of nine nationally recognized colleges and universities and eight non-college or university affiliated employers operating in the healthcare, immigration, or technology-related fields of endeavor. Plaintiffs respectfully move this Court to enter a Preliminary Injunction 1) enjoining Defendants from enforcing Department of Labor Interim Final Regulation: *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States*, 85 Fed. Reg. 63872 (October 8, 2020) ("IFR") and; 2) requiring Defendants, within 10 business days of the date of the order, to reissue any prevailing wage determinations that have been issued pursuant to the IFR. Plaintiffs request a hearing on this motion as expeditiously as possible and no later than November 13, 2020, which is twenty-one days from the date of this filing. D.C. Local Rules 65.1(d). Plaintiffs have conferred with Defendants and are continuing to dsicuss a briefing schedule and production of the administrative record and will file a motion if we reach an agreement.

As shown below and through the attached exhibits, Plaintiffs have a substantial likelihood of showing that Defendants violated the Administrative Procedure Act, 5 U.S.C. § 501 *et. seq*., in promulgating the IFR. Specifically, Defendants failed to give interested parties notice of the proposed rule's content and "an opportunity to participate in the rule making through the submission of written data, views, or arguments." 5 U.S.C. §§ 553(b) (c) Defendants lacked "good cause" for refusing to engage in notice-and-comment rulemaking procedures required under the APA, refusing to consider the impact to Plaintiffs, and arbitrarily and irrationally changing the wages required for the employment of certain categories of foreign national

workers. In so doing, Defendants relied on a distorted and factually inaccurate view of the labor market both historically and now. Beginning with the false premise that highly-skilled foreign national workers cause lower wages to U.S. workers and reduce the number of jobs available for U.S. workers, Defendants used the COVID-19 pandemic to require employers to pay dramatically higher wages for foreign national employees as compared to similarly situated Americans; in some case the required wages have increased 50% overnight. Since the publication of the rule, numerous economic studies have been prepared that debunk the myths the Defendants have used to justify this rule.[1] Plaintiffs and the rest of the U.S. public were left out of the rulemaking process and have been struggling to cope with the immediate ramifications of this rule, the impact that trying to implement this bill will have on the Plaintiffs' missions and ability to carry out Plaintiffs' essential functions, while at the same time budgeting for the dramatic changes that this rule leaves in its wake. The IFR will leave Plaintiffs no choice but to reshape core programs and the reevaluate the employment of key workers.

Plaintiffs have suffered and will continue to suffer irreparable harm due to the unlawful process and substantive changes under the IFR. Accordingly, Plaintiffs respectfully request a preliminary injunction that sets aside the IFR in its entirety pursuant to Federal Rules of Civil Procedure 65(a), Local Rule 65.1, and 5 U.S.C. § 705.

STATUTORY AND REGULATORY BACKGROUND

I. THE IMMIGRATION AND NATIONALITY ACT PROVIDES FOR THE ADMISSION OF NONIMMIGRANT AND IMMIGRANT WORKERS

[1] See *et al*, Trump's H-1B Reforms Will Make America Poorer, BLOOMBERG.COM, October 20, 2020, https://www.bloomberg.com/opinion/articles/2020-10-20/trump-s-h-1b-visa-reforms-will-hurt-u-s-economic-recovery (last visited Oct 22, 2020). Stuart Anderson, Economic Research Exposes Significant Flaws In DOL H-1B Visa Rule, FORBES (OCT. 22, 2020). https://www.forbes.com/sites/stuartanderson/2020/10/22/economic-research-exposes-significant-flaws-in-dol-h-1b-visa-rule/#5975dd0c6146 (last visited Oct 22, 2020).

Congress has carefully crafted a complex scheme for the admission of nonimmigrants and immigrants to the United States.[2] *See*, Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 ("INA"); 8 U.S.C. §§ 1101, *et seq*. One of Congress' goals in constructing this system was to admit immigrants with skills that are useful to the economy. *See, e.g.*, *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1094 (9th Cir. 2005); *Kaliski v. Dist. Dir. of INS*, 620 F.2d 214, 217 (9th Cir. 1980). In accomplishing those goals, Congress has also placed into the statute measures to protect American workers. We discuss some of those measures below.

a. The Labor Certification Process for Second and Third Preference Employment Based Immigrants

The INA prohibits the admission of certain employment-based immigrants unless the Secretary of Labor:

> has determined and certified to the Secretary of State and the Attorney General 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.

8 U.S.C. § 1182(a)(5)(A).

The "labor certification" is essentially a test of the labor market, although the market test requirement does not apply to all employment-based immigrants. The INA provides five "preference" categories or immigrant visa classes, only two of which—the second and third

[2] Nonimmigrant visas are for foreign nationals who enter the U.S. on a temporary basis—for tourism, medical treatment, business, temporary work, study, or other reasons. 8 U.S.C. § 1101(a)(15); 8 U.S.C. §1184. Immigrant visas are issued to foreign nationals who intend to live permanently in the U.S. and, with limited exceptions, require a sponsor from a qualifying a United States citizen or permanent resident family member or a qualifying employer. 8 U.S.C. § 1151, 8 U.S.C. §1153.

preference employment categories (commonly called the EB-2 and EB-3 immigrant visa classifications)—require a labor certification. However, these two categories represent the majority of both high skilled and lower skilled workers who seek to immigrate. *See* 8 U.S.C. §§ 1153(b)(2), 1153 (b)(3), 1182(a)(5)(D).

For example, 8 U.S.C. §1153(b)(2) governs the EB-2 classification of immigrant work visas granted 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. To gain entry in this category, the foreign worker must have prearranged employment with a U.S. employer that meets the requirements of labor certification, unless the work he or she is seeking admission to perform is in the "national interest," such as to qualify for a waiver of the job offer (and hence, the labor certification) requirement under 8 U.S.C. § 1153(b)(2)(B). The EB-3 classification applies to foreign workers who are either "skilled workers," "professionals," or "other" (unskilled) workers, as defined by the statute. 8 U.S.C. §1153(b)(3). To gain entry in this category, the foreign worker must have prearranged employment with a U.S. employer that meets the requirements of labor certification, without exception.

Only after the Secretary determines both that there are not sufficient able, willing, qualified, and available U.S. workers, and that employment of the foreign worker will not adversely affect the wages and working conditions of similarly employed U.S. workers, will the Secretary certify a permanent labor certification for purposes of approving an immigrant visa. 20 CFR §656.24(b). With this labor certification, an employer seeking to sponsor a foreign worker for an immigrant visa under the EB-2 or EB-3 immigrant visa classifications generally

must file a visa petition with the Department of Homeland Security (DHS) on the worker's behalf. 8 U.S.C. §1154(a)(1)(F), 8 U.S.C. §1182(a)(5)(A) and 8 U.S.C.§1182(a)(5)(D).

b. The H-1B Specialty Occupation Visa

The H-1B nonimmigrant visa program allows U.S. employers to temporarily employ foreign workers in specialty occupations. "Specialty occupation" is defined by statute as an occupation that requires the theoretical and practical application of a body of "highly specialized knowledge," and a bachelor's or higher degree in the specific specialty, or its equivalent, as a minimum for entry into the occupation in the U.S. *See*, 8 U.S.C §1101(a)(15)(H)(i)(b), 8 U.S.C. §1184(i). Thus, the H-1B is not for everyone. It is only for highly-skilled, degreed professional workers.

Although there is not a test of the labor market like in the immigrant visa context, the H-1B visa category still has labor protections built into the process. First, there is a statutory limit on the number 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), 8 U.S.C.§1184(g)(5)(C). The spouses and minor children of H-1B sponsored employees may accompany those employees to the United States as derivatives on H-4 visas. 8 C.F.R. § 214.2(h)(9)(iv); Pub. L. No. 91-225, 84 Stat. 116 (1970). The status of H-4 derivatives depends on the continued employment of the H-1B employee. 8 C.F.R. § 214.2(h)(9)(iv). Most H-4 derivative visa holders are not legally authorized to work in the United States. Only H-4 spouses (not H-4 children) may obtain such authorization, and they may do so only by applying for an Employment Authorization Document (EAD), which is generally available only if the H-1B visa holder has an approved I-140 petition to obtain a permanent immigrant visa. 8 C.F.R. § 214.2(h)(9)(iv).

c. The H-1B1 Specialty Occupation Visa for Chile and the E-3 Specialty Occupation Visa for Australia

Similar to the H-1B visa classification, the H-1B1 and E-3 nonimmigrant visa classifications also allow U.S. employers to temporarily employ foreign workers in specialty occupations, except that these classifications specifically apply to the nationals of certain countries. These visas are based on bilateral investment and trade treaties with particular countries. The H-1B1 visa classification applies only to foreign workers in specialty occupations from Chile and Singapore, 8 U.S.C. § 1101(a)(15)(H)(i)(b)(1), and the E-3 visa classification applies to foreign workers in specialty occupations from Australia. 8 U.S.C. § 1101(a)(15)(E)(iii).

d. The Labor Condition Application for H-1B, H-1B(1) and E-3 Visas

In addition to the labor protections described above, there are additional protections in the process. The Secretary must certify a Labor Condition Application (LCA) filed by the foreign worker's prospective U.S. employer before the prospective employer may file a petition with DHS on behalf of a foreign worker for H-1B, H-1B1, or E-3 nonimmigrant classification. 8 U.S.C. § 1101(a)(15)(E)(iii), (a)(15)(H)(i)(b), §(a)(15)(H)(i)(b)(1); 8 C.F.R §214.2(h)(2)(i)(E). The LCA requires various attestations from the employer about the wages and working conditions that it will provide the foreign worker. *See generally* 8 U.S.C. §1182(n), 8 U.S.C. §1182(t); 20 C.F.R. part 655, subpart H Similar to Permanent Labor Certifications, employers must agree to pay temporary workers 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). Under the INA, the DOL must make this determination based on the "best

information available." 8 U.S.C. §1182(n)(1)(A)(II). Since January 1998, DOL has used the Bureau of Labor Statistics Occupational Employment Statistics Survey (OES) to determine the prevailing wage rates for H-1B occupations. 65 Fed. Reg. 80110, 80198 (Dec. 20, 2000).

II. THE HISTORICAL WAGE METHODOLOGY

DOL knows how to adopt rules properly. The DOL first adopted the LCA requirements, including the prevailing wage levels in 1991. Unlike the rule-making procedures implemented with this IFR, prior to implementing the 1991 rule, DOL followed the normal "notice and comment" process and opened the window for comments, multiple times, before finalizing the rule: First, it welcomed comments in an Advanced Notice of Proposed Rule Making, *see* 56 Fed. Reg. 11705 (March 20, 1991), and then provided a second opportunity for comments in a Notice of Proposed Rulemaking. 56 Fed. Reg. 37175 (August 5, 1991). DOL followed with an Interim Final Rule where it explained the DOL's consideration of the comments previously provided in both to both the ANPRM and NPRM and allowed further comment. *See* 56 Fed. Reg. 54720 (October 22, 1991).

DOL received public comments from the regulated community as reflected in this summary of the Department's obligations from 1991: "The Department believes that Congress, in enacting the Act [the Immigration Act of 1990, that created the LCA obligation and the requirement for employers to pay the greater of actual or prevailing wages], intended to provide greater protection than under prior law for U.S. and foreign workers without interfering with an employer's ability to obtain the H-1B workers it needs on a timely basis." 56 Fed. Reg. 54720 at 54271 (October 22, 1991). *See* 20 C.F.R § 656.40.

In 1991, when the wage levels were first codified, DOL had provided only two levels, the entry level (average of the bottom one-third of surveyed wages) and the experienced

level (average of the top two-thirds of surveyed wages).[3] In 2004, Congress mandated that DOL, when using or making a governmental survey available to employers to determine the prevailing wage, include at least four wages "commensurate with experience, education, and the level of supervision." with levels 2 and 3 equidistant between the level 1 and 4 points. 8 U.S.C. § 1182(p)(4); L-1B and H-1B Visa Reform Act, Pub. L. No. 108-447, Title IV, Subtitle B, § 423 (Dec. 8, 2004).

DOL provided four wage levels with the following descriptions of their skill set as compared to the Department's "standard" job requirements found on the "O*Net":

> **Level I** (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.
>
> **Level II** (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones.
>
> **Level III** (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or

[3] See, American Immigration Council, "*Wages and High-Skilled Immigration: How the Government Calculates Prevailing Wages and Why It Matters*" (December 2017) at p. 6, available at file:///Users/marmernice/Documents/AIC%20wages_and_high-skilled_immigration%2012-2017.pdf

> educational degrees that are at the higher ranges indicated in the O*NET Job Zones would be indicators that a Level III wage should be considered.
>
> **Level IV** (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.

In order to be "commensurate" with the education, experience, and supervisory duties these wage levels hold, DOL assigned a percentile of the total wage rates for a given "Metropolitan Statistical Area," and employers were not permitted to pay a wage below that assigned "prevailing wage." These prevailing wages were determined to fit the following percentiles:

> Wage Level I (entry), 17th percentile – or higher than 17% of all wages for that particular position in that particular Metropolitan Statistical Area;
>
> Wage Level II (qualified), 34th percentile – or higher than 34% of all wages for that particular position in that particular Metropolitan Statistical Area;
>
> Wage Level III (experienced), 50th percentile – or higher than 50% of all wages for that particular position in that particular Metropolitan Statistical Area;
>
> Wage Level IV (fully competent), 67th percentile, or higher than 67% of all wages for that particular position in that particular Metropolitan Statistical Area.

See 85 Fed. Reg. at 63876, 63889.

III. THE OCTOBER 8, 2020 INTERIM FINAL RULE

a. DOL Premised the IFR on a Narrative that Foreign National Workers Have Long Reduced Wages and Employment of U.S. Workers

On October 8, 2020, the DOL dispensed with notice and comment and published an IFR that changed its method for calculating prevailing wage rates. *See* 85 Fed. Reg. 63872. The

DOL premised the urgent need for dramatic changes to the longstanding existing wage level calculations through an IFR because: (1) the wages that employers offer when recruiting for U.S. workers and pay when employing foreign workers, "have long been set below rates at which similarly employed workers are paid" and the changes should have been "undertaken years ago"; and (2) "it is … imperative that the Department take immediate action to ensure that U.S. workers' current and future wages and job prospects are protected." 85 Fed. Reg. at 63899-900. The DOL also claimed that IFR remained "consistent with the aims of" the June 22, 2020 Presidential Proclamation, *Suspending Entry of Aliens Who Present a Risk to the U.S. Labor Market Following the Coronavirus Outbreak*, 85 Fed. Reg. 38263 (June 25, 2020), which: 1) extended the President's prior Proclamation 10014, *Suspending Entry of Immigrants who Present Risk to the U.S. Labor Market During Economic Recovery Following the Covid-19 Outbreak*, 85 Fed. Reg. 23441 (Apr. 22, 2020), that had suspended the entry of certain immigrants, including EB-2 and EB-3 immigrants; and 2) included the suspension of entry to include nonimmigrant workers, including H-1B nonimmigrant workers, through December 31, 2020.[4] 85 Fed. Reg. at 63899. In the IFR, the DOL claimed that the changes to the wage levels "mitigates aspects of the danger to the U.S. workforce caused by recent shocks to the labor market and employment of foreign workers not fully addressed by the Proclamation," to wit workers who had previously entered the U.S. and thus were not subject to the Proclamations. 85 Fed. Reg. at 63899. Notwithstanding the justifications for the IFR, DOL also recognized within the rule that the

[4] The District Court of the Northern District of California declared the June 22, 2020 proclamation void as it applied to the plaintiffs in that matter because the underlying economic basis of the proclamations as it applied to jobs and immigrants was without merit. *See, Nat'l Ass'n of Mfrs. v. DHS*, 2020 U.S. Dist. LEXIS 182267 at *35 (N.D. Cal. Oct. 1, 2020) (hereinafter, "NAM").

changes to wage levels could result in a 7.74% reduction in labor demand. 85 Fed. Reg. at 63908.

The DOL relied on the need to stop the deleterious effects on wages and employment to act immediately and to overall the prevailing wage calculations. 85 Fed. Reg. at 63872, 63889, 63898-02. DOL claimed that "good cause" existed to dispense with the notice and comment process because the "shock to the labor market caused by the widespread unemployment resulting from the coronavirus has created exigent circumstances that threaten the immediate harm to the wages and job prospects of U.S. workers." 85 Fed. Reg. at 63898. DOL asserted that it would be "impracticable" for it to comply with notice and comment procedures and fulfill its mandate to protect U.S. workers from the "harm to the wages and job prospects of U.S. workers" caused by "the flaws in the existing wage levels." *Id.* Second, the DOL claimed that "good cause" existed to bypass with notice and comment because employers would otherwise seek to evade the new wage levels by making a "massive rush" to evade the rule. 85 Fed. Reg. at 63900-01. Although DOL acknowledged that the changes "should have been taken years ago," they had become "urgently needed" to protect the wages and jobs of American workers. *Id.* at 63900.

b. The Higher Wage Calculations

Under the pre October 8, 2020 wage methodology, a level 1 wage was calculated by taking the average of bottom one-third of the surveyed wages in the OES survey, or about the 17th percentile, and the level 4 was calculated by taking the average of the top two-thirds of the surveyed wages in the OES survey, or about the 67th percentile. 85 Fed. Reg. at 63875, 63893. The IFR creates new level 1 and level 4 points in the OES data. The new level 1 is the arithmetic mean of the fifth decile (or the 45th percentile of surveyed OES wages). The new

level 4 wage is the arithmetic mean of the tenth decile (the 95th percentile of surveyed OES wages). 85 Fed. Reg. at. 63915.

IV. IMMEDIATE AND IMMINENT HARMS TO THE PLAINTIFFS

The Plaintiffs, collectively and individually, are irreparably harmed by implementation of the IFR, because each would have commented on the regulation as to its deleterious effects on their business, services, and programs, and because of the ongoing immigration needs of each of them are immediately impacted by the new wage requirements. *See*, *e.g.*, Exhibit 1, Declaration of Jason Oxman ("Oxman Decl."), ¶¶ 7-11; Exhibit 2, Declaration of Lance Hunter ("Hunter Dec."), ¶¶15-18; Exhibit 3, Declaration of Mark Searle ("Searle Decl."), ¶¶ 13, 14, 23; Exhibit 4, Declaration of Martino Harmon ("Harmon Decl.") ¶¶11, 15, 17, 18; Exhibit 5, Declaration of Malia Du Mont ("Du Mont Decl.") ¶¶11, 12, 15, 18; Exhibit 6, Declaration of Glenn Pfeiffer, ("Pfeiffer Decl.") ¶¶ 11-15, 18, Exhibit 7, Declaration of Clinton Kuntz ("Kuntz Decl.") ¶¶10, 12, 17; Exhibit 8 Declaration of Michael A. McRobbie ("McRobbie Decl.")¶¶23, 24, 25, 32, 33, 34; Exhibit 9, Declaration of Jay Akridge ("Akridge Decl.")¶¶8, 26, 27, 28, 47, 50, 51; Exhibit 10, Declaration of Lokesh Shivakumaraiah ("Shivakumaraiah Decl")¶¶5, 7; Exhibit 11, Declaration of Dr. Jaspreet Kaur Gill, ("Gill Decl.")¶¶10, 11, 12, 13; Exhibit 12, Declaration of Dr. Rita Hartung Cheng ("Hartung Cheng Decl.")¶¶8, 19; Exhibit 13, Declaration of Dr. Ram Sanjeev Alur ("Alur Decl.")¶¶5, 6, 13, 14, 17, 18, 19, 20; Exhibit 14, Declaration of Amy Marcus-Newhall ("Marcus-Newhall Decl.")¶¶6-9; Exhibit 15, Declaration of Jeffrey Thielman ("Thielman Decl.")¶¶ 10,11, 12.; Exhibit 16, Declaration of William Lowe, ("Lowe Decl")¶¶ 5,6,9,10.

The college and universities must budget months in advance to fulfill its academic and research missions, which rely on the hiring and employment of highly skilled foreign nationals.

The IFR has immediately caused them to budget for the reduction of foreign national professors and researchers because they cannot afford to pay the new wages. For example, Plaintiff University of Michigan has calculated that the IFR would cause an increase in cost of $1 million dollars for which appropriate budgeting and planning of curricula must begin immediately. Harmon Decl. at ¶15. Each of the colleges and universities would have participated in the notice and comment process to explain how such a dramatic change would affect them. Hunter Dec., ¶¶15-18; Harmon Decl. ¶¶11, 15, 17, 18; Pfeiffer Decl. ¶¶11, 12, 15, 18; Shivakumaraiah Decl. ¶¶5, 7; McRobbie Decl.")¶¶23, 24, 25, 32, 33, 34.

Similarly, Plaintiff ITI has been forced to divert resources to deal with the inability to fulfill its mission and participate in the rule-making process with the DOL. Oxman Decl., ¶¶ 7-11, attached as Exhibit 1.

Plaintiff Hodges Bonded Warehouse is faced with the dilemma of losing one of its key employees who has helped to develop a critical technology to help the company's logistics operation. Hunter Decl., ¶¶15-18., attached as Exhibit 2. This U.S. employer had planned to sponsor the employee for an H-1B visa and permanent residence but cannot afford the new wages. Id. If the IFR remains in effect in November, Hodges will not sponsor the employee for a visa and she will have to leave the United States. *Id.* This will cause it to reduce its U.S. employee workforce and suffer significant economic harm. *Id*.

Plaintiffs in the health-care and dentistry fields serve in rural areas where there remain acute shortages of workers. They have admirably filled a void and provided health-care to those in need. This IFR will result in the reduction of workers and care in these underserved communities. Exhibit 11, Gill Decl. at ¶¶10-13; Exhibit 13, Alur Decl. at ¶¶5, 6, 13-14, 17-20; Exhibit 16, Lowe Decl. at¶¶5,6,9,10. These health care Plaintiffs represent a diverse set of

institutions and organizations from across the United States who have already suffered, and will continue to suffer unrecoverable costs and irreparable harms due the manner of issuance and change to the wage levels from the IFR. For example, Plaintiff Marana Healthcare has prevailing wage determination pending with DOL and has an immediate need to hire five physicians, and seven of the candidates are on J-1 visas and would need an H-1B visa to remain in the United States and served in the rural areas of Southern Arizona. Exhibit 7, Kuntz Decl at ¶¶10, 12, 17.

LEGAL STANDARD

When considering a motion for a preliminary injunction, the Court considers four factors: (1) the movant's likelihood of success on the merits; (2) irreparable harm to the movant; (3) the balance of equities; and (4) the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014); *Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004). Where, as here, plaintiffs sue to vindicate procedural rights, such as the right to have notice and an opportunity to comment on proposed regulatory action, they must still "establish the agency action threatens their concrete interest," but "[o]nce that threshold is satisfied, the normal standards for immediacy and redressability are relaxed." *Mendoza v. Perez*, 754 F.3d 1002, 1010 (D.C. Cir. 2014) (quotation marks omitted). "[I]f the plaintiffs can demonstrate a causal relationship between the final agency action and the alleged injuries, the court will assume the causal relationship between the procedural defect and the final agency action." Id. (quotation marks omitted; alteration incorporated); *accord Pye v. United States*, 269 F.3d 459, 471 (4th Cir. 2001).

SUMMARY OF THE ARGUMENT

Each of the four factors pertaining to granting a Preliminary Injunction weigh in favor of setting aside the IFR in its entirety. Plaintiffs' challenge to the IFR is likely to succeed under

the APA, because Defendants have unlawfully dispensed with the notice and comment. In doing so, the Defendants have relied on faulty economic theories, inaccurate or non-existent data, and have failed to consider important aspects of the problem including inconsistency and violation of other federal and state laws. Beyond the procedural injuries from being left out of the process, the IFR will continue to cause imminent and irreparable harm if not enjoined: Employers will be unable to proceed with planned hiring, will be unable to extend the status of current employers, will be unable to seek permanent residence for their employees, and their future operations are immediately at risk. Finally, the balance of equities and public interest factors tilt decisively in favor of immediate relief as there is no public interest in allowing an agency to subvert the process for rulemaking where, as here, it lacked good cause and relied on a myopic and distorted reasoning to reach its far-reaching changes that affect millions of employers.

ARGUMENT

I. PLAINTIFFS HAVE STANDING TO CHALLENGE THE UNLAWFUL MANNER OF RULEMAKING

A plaintiff must prevail on the question of standing to prevail on the merits of an injunction. *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015); see *also U.S. House of Representatives v. Mnuchin*, No. 19-5176, 2020 WL 5739026, at *3 (D.C. Cir. Sept. 25, 2020). Article III of the Constitution limits "[t]he judicial power of the United States" to "Cases" and "Controversies." U.S. Const. art. III, §§ 1–2. "To state a case or controversy under Article III, a plaintiff must establish standing," *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 133 (2011), "the 'irreducible constitutional minimum' of" which requires "'the plaintiff [to] have suffered an injury in fact'" that has a "'causal connection'" to "the challenged conduct," and that can be "be 'redressed by a favorable decision,'" *Env't Integrity Project v. McCarthy*, 139 F. Supp. 3d 25, 36 (D.D.C. 2015) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S.

555 (1992)). When the plaintiff is an organization, as particular plaintiffs are in this matter, the organization may assert standing on its own behalf ("organizational standing") "or on behalf of [its] members ('associational standing')." *McCarthy*, 139 F. Supp. 3d at 36; see also *O.A. v. Trump*, 404 F. Supp. 3d 109, 142 (D.D.C. 2019). As long as one plaintiff establishes standing, the Court '"need not consider the standing of the other plaintiffs to raise that claim.'" *Bauer v. DeVos*, 325 F. Supp. 3d 74, 88 (D.D.C. 2018) (quoting *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996)); see also *Town of Chester, N.Y. v. Laroe Estates, Inc*., 137 S. Ct. 1645, 1651 (2017) ("At least one plaintiff must have standing to seek each form of relief requested in the complaint.").

The attached declarations from Plaintiffs establish standing. The promulgation of the IFR has caused injury to Plaintiffs by bypassing them from the notice and comment process, failing to take into account the specific interests and harms that the substantive changes would caused to them and relief ordered by the court enjoining the IFR would redress the harms presented. *Env't Integrity Project*, 139 F. Supp. 3d at 36; *see, e.g.*, Exhibit 1, Oxman Decl., ¶¶ 7-11; Exhibit 2, Hunter Dec., ¶¶15-18; Exhibit 4, Harmon Decl. ¶¶11, 15, 17, 18; Exhibit 6, Pfeiffer Decl. ¶¶11, 12, 15, 18; Exhibit 10, Shivakumaraiah Decl. ¶¶5, 7; Exhibit 11, Gill Decl. ¶¶10, 11, 12, 13; Exhibit 13, Alur Decl." ¶¶5, 6, 13, 14, 17, 18, 19, 20; Exhibit 7, Kuntz Decl." ¶¶10, 12, 17; Exhibit 8, McRobbie Decl.")¶¶23, 24, 25, 32, 33, 34.

As noted in the cited declarations, had the Defendants followed notice and comment procedures, these Plaintiffs would have offered comments, economic studies, and written materials that would have shown Defendants that the rule is mathematically flawed and is based on faulty undocumented and irrational economic assumptions, while also doing enormous immediate damage to the Plaintiffs, other employers who utilize the H-1B, H-1B(1), E-3 and PERM labor certification system and the entire economy. *Id*.

For Plaintiffs, the lack of opportunity to participate in the rulemaking process as provided in the APA establishes the requisite substantial likelihood of standing here. *Env't Integrity Project*, 139 F. Supp. 3d at 36. Furthermore, the substantive changes, if left unchecked, will continue to harm Plaintiffs whose interests were either ignored or disregarded along with the empirical evidence showing that the targeted foreign national workers have neither displaced wages, nor taken jobs from U.S. workers. As employers of these affected individuals, Plaintiffs have standing, as a jurisdictional and prudential matter, to bring this action against Defendants. *Id; see also Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012) ("in keeping with Congress's evident intent when enacting the APA "to make agency action presumptively reviewable," the zone-of-interests test "is not meant to be especially demanding.") (quotation marks omitted).

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR APA CLAIMS

a. Defendants Failed to Engage in Notice-and-Comment Rulemaking

Plaintiffs are likely to succeed in showing that Defendants' waiver of OIRA review and immediate implementation of the IFR is in violation of the APA's notice and comment procedures. *See* 5 U.S.C. §§ 553(b)-(d). Before promulgating a new rule, the APA requires federal agencies to provide interested parties notice of the proposed rule's content and "an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. §§ 553(b)-(c). Here, DOL first provided public notice of the IFR when it posted the rule for public inspection on October 6, 2020. Since it was already in its final form and the rule published as an IFR on October 8, 2020, it is undisputed that DOL failed to provide the notice and opportunity for comment typically required under the APA. 85 Fed. Reg. at 63872, 63890.

b. Defendants Lacked Good Cause to Dispense with Notice and Comment

Defendants assertions that good cause allowed them to dispense with notice-and-comment rulemaking procedures lack merit. 85 Fed. Reg. at 63898-901. The engagement of the public through "notice and comment" is a critical component of rulemaking such that Congress only allows an agency to forego this procedure in the narrowest circumstances when the agency, for good cause, finds that it is impracticable, unnecessary, or contrary to the public interest, and the agency incorporates this finding and reasons therefore in the rules issued. 5 U.S.C. § 553(b)(3)(B). First, notice and comment is only "impracticable" when an agency finds that timely execution of its functions would be impeded by such procedure, as when a safety investigation reveals an immediate need for a new safety rule. *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001). Second, notice and comment is "unnecessary" only in "situations in which the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public." *Id.* at 755. Third, notice and comment is "contrary to the public interest" when the interest of the public is defeated by providing notice and comment. *Id.* The public interest prong is invoked "only in the rare circumstance" where ordinary procedures meant to serve public interest would in fact harm that interest. *See Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 95 (D.C. Cir. 2012) ("The question is not whether *dispensing* with notice and comment would be contrary to the public interest, but whether *providing* notice and comment would be contrary to the public interest.")

Plaintiffs are likely to prevail in showing that Defendants did not have "good cause" to dispense with notice-and-comment procedures and thus violated the APA. The D.C. Circuit has "repeatedly made clear that the good cause exception 'is to be narrowly construed and only reluctantly countenanced.'" *Id.* at 93; (quoting *Util. Solid Waste Activities Grp*. v. *EPA*, 236

F.3d at 754). The exception is only appropriate in "exceptional circumstances. Otherwise, an agency unwilling to provide notice or an opportunity to comment could simply wait until the eve of a statutory, judicial, or administrative deadline, then raise up the 'good cause' banner and promulgate rules without following APA procedures." *Council of Southern Mountains, Inc. v. Donovan*, 653 F.2d 573, 581 (D.C. Cir. 1981).[5]

Within the IFR, Defendants relied on the "impracticability" and "public interest" exceptions to dispense with the customary rulemaking process. 85 Fed. Reg. at 63898-901. Yet, each ground lacked the requisite supporting evidence and relied on inaccurate economic premises that could meet the stringent requirements to bypass notice and comment and issue an "emergency" IFR.[1] *See Perry v. Block*, 737 F.3d 1193, 1200 (D.C. Cir. 1984) (good cause exceptions "should be limited to emergency situations."); *see also Sorenson Commc'ns Inc. v. F.C.C.*, 755 F.3d 702, 707 (D.C. Cir. 2014) (finding that no good cause existed when the agency failed to establish facts supporting a "threat of impending fiscal peril"); *Tennessee Gas Pipeline Co. v. F.E.R.C.*, 969 F.2d 1141, 1146 (D.C. Cir. 1992) (finding no good cause when the Federal Energy Regulatory Commission (FERC) invoked emergency circumstances in the issuance of an interim rule that required pipeline companies to make disclosures and give advance notice prior to constructing new facilities or replacing existing ones).

The DOL's claim that notice and comment would have been impracticable to stop the depression of wages paid or jobs made available to U.S. workers as the economy recovers from

[5] Generally, the D.C. Circuit has applied an arbitrary and capricious standard to review of whether good cause exists. *See, e.g., Sorenson Commc'ns Inc. v. F.C.C.*, 755 F.3d 702, 706 (D.C. Cir. 2014); *Util. Solid Waste Activities Grp., v. EPA, 236 F.3d 749, 754* (D.C. Cir. 2001). However, in other cases, the D.C. Circuit has placed primary emphasis on the narrow construction of the good cause provision. *NRDC v. SEC*, 606 F.2d 1031, 1048 (D.C. Cir. 1979). The plaintiffs are likely to prevail under either standard of review.

the "COVID-19" pandemic lacks merit. *See* 85 Fed. Reg. at 63898-99. As an initial matter, there was no deadline imposed on the agency that made it dispense with the normal rulemaking procedures, especially given their claims that the changes should have been undertaken "years ago." 85 Fed. Reg. at 63900. Moreover, the DOL recognized the significant and dramatic changes to the complex scheme caused by the IFR. *See* 85 Fed. Reg. at 63898-99. DOL specifically recognized that that the changes to wage levels could result in a 7.74% reduction in labor demand. 85 Fed. Reg. at 63908. Yet, DOL asserted that "the shock to the labor market caused by the widespread unemployment resulting from the coronavirus public health emergency has created exigent circumstances that threaten immediate harm to the wages and job prospects of U.S. workers." *Id.* As such, DOL alleged, that the delay a notice and comment period would create in issuing the rule would make it "impracticable for the Department to fulfill its statutory mandate and carry out the 'due and required execution of [its] agency functions' to protect U.S. workers." *Id*.

The government's public statements belie the dire economic assertions as they continue to shout that the economy is "roaring back to life." https://www.whitehouse.gov/issues/economy-jobs/. According to the Bureau of Labor Statistics, the general unemployment rate for September 2020 is 7.9 percent, nearly half the rate that DOL cites as a basis for its action. *See* Statement by Secretary of Labor Scalia on the September Jobs Report, Release Number: 20-1870-NAT (Oct. 2, 2020), available at: https://www.dol.gov/newsroom/releases/osec/osec20201002. "More than half the jobs lost from the pandemic have now been restored, and the third quarter ended with a 7.9 percent unemployment rate, half the 15.8 percent third quarter unemployment rate projected by the Congressional Budget Office in May." *Id.*

Regardless of the contradictory and confusing claims of the Defendants regarding the state of the economy, the claim that notice and comment would be "impracticable" or not "in the public interest" does not pass even a cursory review. While the COVID-19 pandemic has impaired the economy, the virus and its affect to the worldwide economy does not present an excuse to dispense with notice and comment rule-making where, as here, the rule is directed at *increasing* wages that employers are forced to pay to maintain workers. 85 Fed. at 63875, 63893.

The economic rational Defendants use to support its claims to "good cause" have recently been completely discredited by the courts. The IFR relies upon the Presidential Proclamations barring entry due to the economic downturn PP10014 (e.g., EB-2, EB-3) & 10052 (e.g., H-1B, H-1B), which share the premise of the IFR that these highly skilled workers decrease employment and would hamper the economic recovery. 85 Fed. Reg. 63899. In *NAM* , 2020 U.S. Dist. LEXIS 182267 at *35, the Court rejected the economic claims to enjoin the administration's suspension of entry for nonimmigrant workers including H-1B workers. The Court specifically found that "[t]he statistics regarding pandemic-related unemployment actually indicate that unemployment is concentrated in service occupations and that large numbers of job vacancies remain in the area most affected by the [Proclamation], computer occupations which require high-skilled workers." Furthermore, the court concluded these jobs "are simply not fungible" and, "in reality, there remains a significant mismatch of facts regarding the unemployment caused by the proliferation of the pandemic and the classes of noncitizens who are barred by the Proclamation." *Id.* "[A]lthough the stated purpose is to aid the domestic economy by providing job opportunities for United States citizens, the Proclamation completely disregards both economic reality and the preexisting statutory framework" that safeguards domestic workers. *Id.* Here, as in the *NAM* , Defendants have failed to provide the requisite

justification for their economic theories that, at the very least, fail to account for evidence to the contrary.

In addition, the justifications underpinning the IFR suffer from a more fundamentally flawed economic basis. As noted earlier, the IFR fails to account for empirical evidence that shows the hiring of highly skilled workers has led to increase in wages. David J. Bier, *100% of H-1B Employers Offer Average Market Wages—78% Offer More*, CATO Institute (May 18, 2020) available at: https://www.cato.org/blog/100-h-1b-employers-offer-average-market-wages-78-offer-more.

The fact that immigration is net good for the economy is not a novel idea. Nearly 1500 economist joined in a letter to the Trump Administration advocating for legal immigration as good for the economy.[6] Economic studies disprove the statistics and evidence relied on by the Defendants. With regard to unemployment, the unemployment rate for foreign-born workers with a bachelor's degree or higher rose by 5.1 percent, while at the same time the overall U.S .unemployment rose by 1.5 percent *less* than foreign workers or by 3.6%. [7] This demonstrates no evidence of job opportunity depression that would have "shocked" the labor market as claimed in the IFR. 85 Fed. Reg. at 63899.

Looking at the larger economic picture, Douglas Holtz-Eakin, President of the American Action Forum cites to a longitudinal 30 year study by economist Giovanni Peri found that a 1 percentage point increase in the share of foreign-born STEM workers in a city's total employed population increased wage growth of native college-educated workers by 7-8 percentage points and 3-4 percentage points for non-college educated native workers.[8] The flow of H-1B workers demonstrates that highly skilled workers actually have a net positive benefit on the economy by

[6] Exhibit 17, Declaration of Douglas Holtz-Eakin, American Action Forum, at paragraph 21.
[7] Id. at ¶ 11, 12
[8] *Id.* at ¶ 19-20.

spurring economic growth and through innovation and entrepeneurship create more net jobs than they take and increase economic growth.[9]

DOL's alternative assertion that dispensing with notice and comment would serve the public interest because employers would make a "massive rush" to evade the new rule lacks an evidentiary basis, is based on pure speculation, and is irrational. 85 Fed. Reg. at 63900-01. An employer may only file an LCA if it intends to employ an H-1B worker in an identified occupation, *see* 20 C.F.R. § 655.730(c)(4), and may not file an LCA more than six months before the beginning date of intended employment. See 20 C.F.R. § 655.730(b). Employers are also required to sign filed LCAs under penalty of perjury. See 20 C.F.R. § 655.730(c)(1); *see also* Form ETA-9035 at Section 5.11 DOL's assertion that employers would engage in what is akin to a "price fixing" scheme as a reason to dispense with notice and comment rulemaking is evidence-free speculation, while also claiming that there remain massive numbers of jobs available to H-1B workers, which runs counter to Defendants' claims of economic peril. *See* 85 Fed. Reg. at 93901, *citing Nader v. Sawhill*, 514 F.2d 1064, 1068 (Temp. Emer. Ct. App. 1975) (good cause exists where advance notice of a price freeze may lead to a massive rush to raise prices); *DeRieux v. Five Smiths*, 499 F.2d 1321, 1332 (Temp. Emer. Ct. App. 1974) (finding good cause where an announcement of an emergency rule may generate selective pricing and grandfathering of unequal prices in favor of one class of producers at the disadvantage of another; *Mobile Oil Corp. v. Dep't of Energy*, 728 F.2d 1477, 1493 (Temp. Em. App. 1983). Defendants' speculative and unsupported claims fail to meet the narrow exception to the notice and comment rulemaking procedures. Accordingly, Plaintiffs have a substantial likelihood in showing that Defendants' promulgation of the IFR without following notice and comment is a

[9] *Id.* at ¶21.

violation of the APA.

c. Plaintiffs are likely to succeed in showing that the IFR was not issued in accordance with Law

Alternatively, Plaintiffs are likely to succeed in showing that the IFR violates the APA because it is arbitrary, capricious and not in accordance with law. "'A full and rational explanation' becomes 'especially important' when, as here, an agency elects to 'shift [its] policy' or 'depart[ ] from its typical manner of' administering a program." *Sw. Airlines Co. v. Fed. Energy Regulatory Comm'n*, 926 F. 3d 851 855-56 (D.C. Cir. 2019) (quoting *Great Lakes Gas Transmission Ltd. Partnership v. FERC*, 984 F.2d 426, 433 (D.C. Cir. 1993)). The agency "must examine the relevant data and articulate a satisfactory explanation for its action." *Casa de Maryland v. U.S. Dep't of Homeland Security*, 924 F.3d 684, 703 (4th Cir. 2019); *accord Baystate Franklin Med. Ctr. v. Azar*, 950 F.3d 84, 89 (D.C. Cir. 2020) (same principle); *Cigar Ass'n of Am. v. FDA*, 2020 WL 532392, at *9 (D.C. Cir. Feb. 3, 2020) (noting the "basic procedural requirement[] … that an agency must give adequate reasons for its decisions") (quoting *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2018)). "***At a minimum***, an agency must 'display awareness that it is changing position and show that there are good reasons for the new policy.'" *Casa de Maryland*, 924 F.3d at 703-04 (quoting *Encino Motorcars*, 136 S. Ct. at 2126) (emphasis added); *accord Sw. Airlines*, 926 F.3d at 855-56 (agency changing position "must at least 'acknowledge' its seemingly inconsistent precedents and either offer a reason 'to distinguish them' or 'explain its apparent rejection of their approach'") (quoting *Tenn. Gas Pipeline Co. v. FERC*, 867 F.2d 688, 692 (D.C. Cir. 1989)).

To justify a change in position, the agency must address the "facts and circumstances that underlay or were engendered by the prior policy," ***including any "serious reliance interests."*** *Encino Motorcars*, 136 S. Ct. at 2126 (emphasis added). An "unexplained inconsistency" is reason

enough to hold a change in policy to be arbitrary and capricious, and thus unlawful. *Id.* So is a "fail[ure] to consider an important aspect of the problem." *HIAS, Inc. v. Trump*, 415 F. Supp. 3d 669, 683 (D. Md. 2020) (quoting *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). "Where the agency has failed to provide a reasoned explanation, or where the record belies the agency's conclusion, the court must undo its action." *Cigar Ass'n*, 2020 WL 532392, at *9.

For the same reasons set forth above, the flawed and distorted proposition that foreign workers who must be paid a prevailing wage actually depress wages for American workers or take jobs from American workers, is likely irrational and will likely to be set aside on this basis alone. But there is more. Because there was no notice and comment, there was no consideration of the "serious reliance interests" of employers and organizations like Plaintiffs. In the IFR, Defendants do not address the impact of the changes to academic institutions, non-profits, and health-care workers who will be priced out the market for essential highly skilled workers. Defendants' failure to give any consideration to these "serious reliance interests" is more than enough to void their decisions as they have wholly failed to "give adequate reasons for [their] decision[]" to implement the IFR in record speed against Plaintiffs. *Cigar Ass'n*, 2020 WL 532392, at *9.

Based in part on a similar litany of agency "fail[ures] to adequately consider a number of critical factors," the District of Maryland recently granted preliminary injunctive relief under the APA against several agencies' implementation of an immigration-related executive order. *HIAS*, 415 F. Supp. 3d at 683-64. The same result should occur here. Defendants also have not "articulated a satisfactory explanation for [their] action" inasmuch as there is no evident "rational connection between the facts found and the choices made." *Baystate*, 950 F.3d at 89 (citations

omitted); *Casa de Maryland*, 924 F.3d at 703-04. Establishing such a connection appears impossible for the fundamental reason that there is no evidence that Defendants have "found" any "facts" relevant to the question whether implementing the IFR immediately rather than after public input will serve to solve the problems the Defendants claim prompt the exigent publication of the rule. Nor is it likely that any *rational* connection could ever be made between the IFR's stated goals and Defendants' insistence on applying the IFR immediately, nationwide, and without notice.

First, The IFR creates new level 1 and level 4 points in the OES data. The new level 1 is the arithmetic mean of the fifth decile (or the 45th percentile of surveyed OES wages). The new level 4 is the arithmetic mean of the tenth decile (the 95th percentile of surveyed OES wages). 85 Fed. Reg. at. 63915. Although the new level four is supposed to be arithmetic mean of the tenth decile (or the 95th percentile of surveyed OES wage), the new formula does not work out mathematically such that the law complies with the requirements of the IFR because very high-paying, outlier level 4 wages skew the average of the top decile (90-100) higher which artificially skews the level 2 and 3 wages higher based on the formula set forth in 8 U.S.C. § 1182(p)(4). Bier, available at: https://www.cato.org/blog/dols-h-1b-wage-rule-massively-understates-wage-increases-26. The result is that Level 2 is not at the 62nd percentile of wages, but rather at the 78th percentile, and level 3 is not at the 78th percentile, but rather at the 90th percentile — both are actually mathematically higher because level 4 is higher.[10] DOL used these erroneous assumptions to calculate the costs of the rule. This error in calculating costs is significant. If the IFR had been in effect for the first three quarters of fiscal year 2020, employers would have had to offer approximately $95 billion in wages to H-1B workers. An

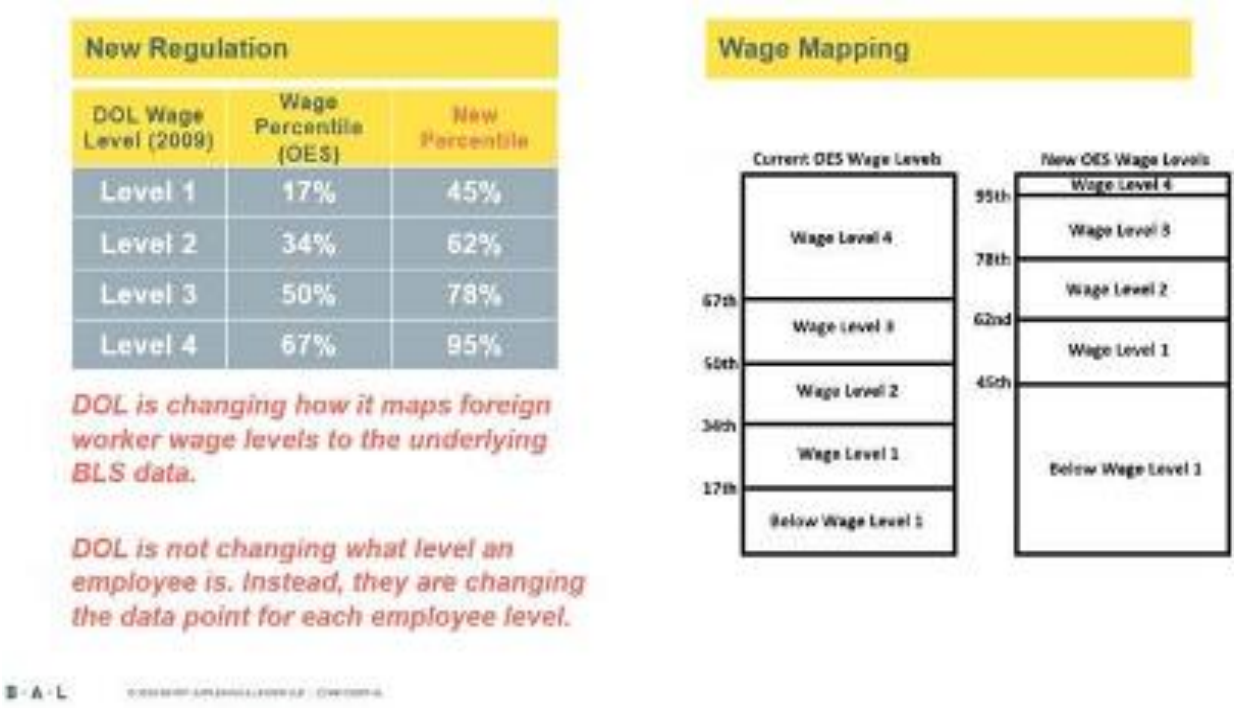
[10] Exhibit 18, Declaration of David Bier, CATO Institute, at ¶¶6-8.

error of 15% in the wage levels, which is what is estimated here would impose costs of $14 billion on employers that DOL failed to methodologically account for.[11]

A second problem with implementation takes place at the other end of the prevailing wage levels. Entry-level Level 1 wages for H-1B positions must now be calculated with reference to wage data for entry-level positions for individuals with Masters degrees. 85 Fed. Reg. at 63889. DOL reasoned that "that **an individual with a master's degree and little-to-no work experience is the appropriate comparator for entry-level workers** in the Department's PERM and specialty occupation programs for purposes of estimating the percentile at which such workers' wages fall within the OES wage distribution." 85 Fed. Reg. at 63893, 63889 63905. The DOL further concluded that (i) such individuals fall within the 32nd and 49th percentiles of the wage distribution, (ii) noting that the average of these wages would actually come out at the 40th percentile, and, instead (iii) "calculating the average of a subset of the data located at the higher end of the identified wage range" to arrive at "the entry-level wage being placed at approximately the 45th percentile." 85 Fed. Reg. at 63889

Third--across the board--wages have increased. As shown in the diagram below, Wage Level 1 is now at the 45th percentile, up from the 17th percentile prior to the rule; Wage Level 2, is now at the 62nd percentile, up from the 34th; Wage Level 3 is now at the 78th percentile, up from the 50th and Level 4 is at the 95th percentile up from the 67th prior to the rule:

[11] *Id.* at 10.



Under the new methodology, *any wage*, for *any* position that is greater than $63.00 per hour, automatically upgrades to $100.00 per hour which equates to $208,000 per hour for *entry* level. https://www.flcdatacenter.com/OesQuickResults.aspx?code=29- Thus, for these positions the wage levels have been eliminated altogether. In many cases, there is only one wage identified for a job, regardless of the level of experience. For example, in the Washington D.C. Metropolitan Statistical Area (MSA), the mandated minimum wage for a newly graduated attorney with no experience, seeking work under an H-1B visa is now $208,000, with the DOL now saying there is only 1 wage level, in contravention to statutory requirements. *See, Foreign Labor Certification Data Center Online Wage Library*, https://www.flcdatacenter.com/OesQuickResults.aspx?area=47900&code=23-1011&year=21&source=3. All positions, nationwide, with a mean wage of more than approximately $63.00-hour are now considered "highly compensated positions" that default to $100-hour for all wage levels. Examples include a Software Developer in San

Francisco, a General Manager in Phoenix, and, most troubling, even doctors in rural areas. It is estimated that the number of jobs that have the default $100 per hour wage exceeds 18,300 positions. See, National Foundation for American Policy, Policy Brief, "An analysis of the DOL H-1B Wage Rule," (October 2020) p. 12. https://nfap.com/wp-content/uploads/2020/10/01-8-Exhibit-H.pdf.

Fourth, the IFR will have a massive impact on rural healthcare. The implementation of the IFR will eviscerate the statutorily created Conrad 30 Foreign Medical Graduate Program which demonstrates the IFRs arbitrary attempt to distort and impair the labor market. Foreign Medical Graduates may work on J-1 visas for extended periods of time where they are employed in an underserved, and often rural, area. *See* 8 U.S.C. § 1184(l). Under what is known as the "CONRAD 30" program, these J-1 Foreign Medical Graduates could change their status to that of an H-1B worker and remain in the U.S. while working in an underserved area for a minimum of three years. 8 U.S.C. §1182(l)(1)(C). However, under the IFR, Foreign Medical Graduates, must be paid a minimum of $208,000 per year despite only having just graduated medical school, which is dramatically higher than the market rate for these employees and clearly more than rural hospital and medical centers are able to pay. By devising a regulation where the underlying data does not allow calculation of wage levels for purposes of high-skilled immigration and imposing a default $208,000 annual salary, underserved populations in rural areas will remain underserved. Employers will no longer be able to hire high level and high skilled workers.

It is clear that Defendants failed to consider material empirical evidence that undercut their economic theory which they also used as their justification for a sudden change in their "longstanding earlier position," *Encino Motorcars,*136 S. Ct. at 2127. Where, as here, a new

agency action conflicts with a preexisting statutory mandate, the new action is invalid under the APA. "[A]dministrative agencies are bound to follow their rules and guidelines[,] … however they might be denominated," and therefore "an agency can be sued [under the APA] for failing to abide by the rules and procedures it formulates to perform its duties." *Emami v. Nielsen*, 365 F. Supp. 3d 1009, 1020 (N.D. Cal. 2019). Indeed, "'in the immigration context,'" the requirement that an agency adhere to its rules "'is not limited to rules attaining the status of formal regulation,'" but is properly "applied to internal agency guidance." *Damus v. Nielsen*, 313 F. Supp. 3d 317, 336 (D.D.C. 2018) (quoting *Montilla v. INS*, 926 F.2d 162, 167 (2d Cir. 1991)); *accord Moghaddam v. Pompeo*, 424 F. Supp. 3d 104, 120-21 (D.D.C. 2020) (permitting APA claim based on State Department's failure to adhere to its own guidance and pronouncements); *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books."); *Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA*, 752 F.3d 999, 1009 (D.C. Cir. 2014) ("an agency action may be set aside as arbitrary and capricious if the agency fails to comply with its own regulations"); Because the IFR runs contrary to existing laws and regulations, the IFR must give way under the APA.

For each and all of the reasons set forth above, Plaintiffs respectfully submit that the Court is likely to conclude that Defendants' implementation of the IFR immediately without notice and comment was not done without good cause, is arbitrary, capricious, and not in accordance with law.

III. PLAINTIFFS HAVE ESTABLISHED A SUBSTANTIAL LIKELIHOOD OF IRREPARABLE HARM

Plaintiffs' demonstration that Defendants lacked good cause to forego notice and comment

rulemaking suffices to establish a likelihood of irreparable harm absent immediate relief. "A failure to comply with APA procedural requirements [] itself causes irreparable harm because the damage done by [the Agency's] violation of the APA cannot be fully cured by later remedial action." *N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 18 (D.D.C. 2009). Plaintiffs continue to suffer from the failure of Defendants to comply with notice and comment rulemaking. Accordingly, the issue of irreparable harm is indisputable. *Id.* The immediate aftershocks of the IFR continue to irreparably harm Plaintiffs. As noted, Plaintiffs include employers that 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, 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. Almost overnight, Plaintiffs, including United Methodist Homes and Services and Dentists for America, can no longer afford to pay the salaries mandated under the IFR. 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.

Further, 24% of the U.S. Physician workforce is comprised of international medical graduates.[12] These physicians are not only working on the frontlines of COVID-response, but also dedicate their lives to the provision of healthcare in our most vulnerable and underserved medical populations in the U.S. These wages now dictated by the IFR force U.S. Employers to default to a $208,000 per year default for not only U.S. Residents and Fellows in training, but also to practicing physicians. The upward departure from industry norms dramatically hinders or U.S. Healthcare system from employing the best and brightest international talent that has a direct and immediate impact on the provision of medical care to all aspects of our healthcare system, and particularly when we are fighting the global COVID pandemic. Plaintiffs like Marana Health Care, Physicians for American Healthcare, Dentists for America, and United Methodist Home Services will now simply be unable to find and place foreign doctors and health care workers in rural areas to serve the most vulnerable populations in the United States during the greatest health crisis in a century. See Declaration of Marana Health Care and Physicians for American Healthcare, attached as Exhibit 7.

The IFR and its immediate implementation will harm Plaintiff's' missions and operations, including Plaintiff ITI, whose members depend on the organization to meaningfully participate in the rulemaking process and foster reasonable regulations that promote innovation and economic growth. The unlawful process that led to the IFR and irrational policy has made it impossible for ITI to fulfill its mission and it has now diverted precious, unrecoverable

[12] "International Medical Graduates in the US Physician Workforce," The Journal of American Osteopathic Association, April 2015, https://jaoa.org/article.aspx?articleid=2213422#:~:text=The%20total%20number%20of%20IMGs,physician%20population%20in%20the%20country.&text=They%20are%20originally%20from%20127,%2C%20Pakistan%2C%20and%20Dominican%20Republic.

resources to ameliorate the harm to members. Exhibit 1. 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. Demand for the latest technology to keep us safe, secure, efficient and ahead of our competitors means that we must rely, at least partially, 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. If wages are increased arbitrarily, as they are in the IFR, and technology companies are required to increase wages by as minimum of 50% and, in most cases increase wages to the default rate of $208,000 a year, technology companies, start-ups, research and development firms and other users of H-1B, E-3 and PERM will simply have to outsource those jobs overseas.[13]

Plaintiff universities face an enormous challenge these days in creating 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. As reported by PBS News Hour, the biggest problem for colleges looking to diversify is finding non-white faculty.[14] It further stated that only 6.4% of U.S. Citizens or permanent residents research doctoral recipients in 2014 were Black, and only 6.5 were Hispanic. Id. The competition for diverse faculty is immense. Limiting access to international scholars has a considerable impact on recruiting diverse faculty and faculty who can educate our students on the mission to create global citizens. The changes to the wage structure imposed

[13] See, "H-1B Restrictions Driving Companies' Outsourcing, Offshoring," Dice, Nick Kolakowski, October 7, 2019, https://insights.dice.com/2019/10/07/h-1b-restrictions-outsourcing-offshoring/ .

[14] See, PBS News, Report dated September 12, 2016, https://www.pbs.org/newshour/education/shortage-non-white-professors-self-perpetuating-problem, and The Hechinger Report, Matt Krupnick, September 12, 2016, "College's promises to diversity face one challenge: finding Black faculty," https://hechingerreport.org/colleges-promises-to-diversify-face-one-challenge-finding-black-faculty/

by the IFR will create a substantial financial hardship by raising wages at time when higher education has already faced great economic challenges due to the impact of the COVID-19. See, Exhibits 3, 4, 5, 6, 8, 9, 10 ,12 and 14.

Not only are enrollment and other revenue sources down, the costs of setting on up online instruction in addition to implementing testing and other safety protocols are high.[15]. Increasing the salaries of international scholars will not just impact the international scholars and post-doctoral fellows but will drive up the overall wages for faculty at a time when campuses can ill afford the added expense. See Exhibits 3, 4, 5, 6, 8, 9, 10 ,12 and 14. International scholars already faced delays in starting due to COVID-19 related travel restrictions.[16] Adding these additional unrealistic wage barriers will make the United States a less competitive option for recruiting international scholars, exactly when universities require their presence for the unique and important contributions in preparing U.S. born students to contribute on a global level. Overall, the wage rate imposed by the new DOL rules creates significant barriers to engaging talent Universities need to prepare the next generation of students to solve the most complex issues facing the country and the world.

All Plaintiffs have immediately experienced an increase in operational costs due to the IFR. Plaintiffs have had to divert resources away from providing core services to understand the IFR, update their internal and public-facing materials to conform with the IFR , develop materials and webinar presentations to inform and train members on the contours and effects of the IFR , develop materials to explain the IFR to the communities they serve, and conduct

[15] See, Higher Education Responses to Coronavirus (COVID-19), July 27, 2020, https://www.ncsl.org/research/education/higher-education-responses-to-coronavirus-covid-19.aspx

[16] See, The Harvard Gazette, "What New U.S. travel rules mean for foreign students, scholars, (Mar. 2020)" https://news.harvard.edu/gazette/story/2020/03/what-new-u-s-travel-rules-mean-for-foreign-students-scholars.

community outreach on the IFR . The sheer number of significant changes to wage levels in the rule made immediately effective amplifies these effects, as Plaintiffs scramble to understand the contours of the complex changes.

The IFR has also damaged the reputations that Plaintiffs have built over time. Plaintiffs enjoy strong reputations among their international peers, students, members, their employees, and customers. The IFR now makes it impossible for Plaintiffs to maintain the same level of service, education, and programming at the same cost, and Plaintiffs are already having to forego hiring and terminate employees subject to the new rule, or U.S. workers, which will inevitably put them at risk of failing to meet the expectations of customers and those they serve.

The IFR is causing and will continue to cause a decline in morale among Plaintiffs' staffs. Plaintiffs' staffs work with vulnerable, low-income individuals, which is challenging on its own. The IFR denigrates this work. The new rule will also jeopardize the status of an H-1B worker. When an employer needs to file a request for extension of status on behalf of an H-1B worker whose status is expiring, the new wage system may hinder the ability of the employer to do that. For example, the OES wage data for a Software Developer, Systems in San Francisco provided a wage at the following levels prior to the rule change: Level 1 - $96,616 per year, Level 2 - $120,931 per year, Level 3 - $145,246 per year and Level 4 - $169,562 per year.[14] If the employer cannot afford to pay this artificially high wage, or if it does, will be forced to violate other laws, the H-1B worker's status will be jeopardized if the request for an H-1B extension is not filed in a timely manner. H-1B workers who are unable to seek extensions will have to abruptly leave the US with their spouses and children in order to avoid falling out of status.

The increase in wage levels prices the hiring of recent graduates in H-1B status out of reach for employers. To hire a graduate requires the employer to pay that graduate, without experience, an additional 45% higher than the wages offered to similarly situated Americans. When fully implemented, the demand for engineers and computer science professionals on H-1B visas will dry up. And, while this may be the acutal purpose of the rule, in fact, the long term consequences of it are dire. [17] As noted, *supra*, The DOL did not consider the reliance interests of those impacted by the IFR, including academic institutions and foreign national students who will not seek to study in the United States. There are several reasons Universities find it advantageous to encourage foreign students to study at their schools. The financial return from foreign students is one significant factor, but not the only one.[18] In addition, the foreign students create a diverse student body, enhancing the education of their fellow students.[19] The students who will find the United States unwelcoming will find other world class universities to attend, enhancing universities in Europe, Australia, Russia and China to the detriment of US institutions.[20] Ultimately, the innovation that these students would bring to this country will migrate to other parts of the world. The long-term impact of this regulation

[17] It has long been argued that every H-1B workers actually creates and support at least five other full time jobs. See, National Foundation for American Policy, NFAP Policy Brief, March 2008, "H-1B visas and job creation," http://www.nfap.com/pdf/080311h1b.pdf

[18] "New Rules for interional students could cost U.S. colleges $41 billion," CNBC, July 7, 2020, https://www.cnbc.com/2020/07/07/new-rules-for-international-students-could-cost-us-colleges-billions.html.

[19] "Enhancing the Quality of the International Student Experience," Higher Education Today, July 2, 2018, https://www.higheredtoday.org/2018/07/02/enhancing-quality-international-student-experience/.

[20] "Coronavirus, Trump Chill International Enrollment at U.S. Colleges," Pew Trusts, September 14, 2020, https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/09/14/coronavirus-trump-chill-international-enrollment-at-us-colleges.

will harm American universities and the innovation and technology that makes the United States a global leader.[21]

This gravely harms Plaintiffs who will not hire much needed skilled workers in the United States. Startup companies will particularly impacted, as will nonprofit organizations who lack the ability to shift employees or operations abroad. The federal government's interference in the hiring processes of private sector employers that are engaging in the normal recruiting and selection of professionals in the U.S. labor market to fill jobs to be performed in the United States would harm rather than protect US workers.

The existence of the H-1B program also causes employers to expand – or at least not decrease – the number of jobs open to American workers, even workers who hold jobs similar to 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 a given position overseas, ultimately reducing job opportunities for American workers. This has happened in the recent past and threatens to happen again as a result of the IFR.[22]

Plaintiffs were both deprived of the ability to comment about these affects on them and the economy at large, and irreparably harmed by the illegal publication of the IFR in, foregoing a notice and comment period.

IV. THE BALANCE OF HARDSHIPS AND PUBLIC INTEREST WEIGH IN FAVOR OF INJUNCTIVE RELIEF

[21] "6 Ways having fewer international students on college campuses hurts the U.S., MarketWatch, May 27, 2020, https://www.marketwatch.com/story/6-ways-having-fewer-international-students-on-college-campuses-hurts-the-us-2020-05-27#:~:text=2.,billion%20to%20the%20U.S.%20economy.&text=While%20a%20decline%20in%20international,of%20state%20and%20local%20governments.

[22] See, https://insights.dice.com/2019/03/25/h-1b-hiring-moving-jobs-canada; https://economictimes.indiatimes.com/nri/visa-and-immigration/us-tech-firms-including-microsoft-amazon-and-facebook-join-lawsuit-against-h-1b-visa-ban/articleshow/77480374.cms?from=mdr;

Finally, Plaintiffs have established that "the balance of the equities tip in [their] favor and that an injunction is in the public interest." *See Winter,* 555 U.S. at 20. Because the government is the opposing party here, these factors merge. *Aracely R. v. Nielsen*, 319 F. Supp. 3d 110, 156 (D.D.C. 2018) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)). In determining whether to grant relief, the Court should weigh the "competing claims of injury" and "consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24. As the D.C. Circuit has opined, "[t]here is generally no public interest in the perpetuation of unlawful agency action." *League of Women Voters v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016). "To the contrary, there is a substantial public interest 'in having governmental agencies abide by the federal laws that govern their existence and operations.'" *Id; quoting Washington v. Reo*, 35 F.3d 1093, 1103 (6th Cir. 1994)). Here, as discussed above, the perpetuation of the unlawfully issued IFR that is substantively arbitrary, capricious and not in accordance with law, weighs in favor in its immediate enjoinment and restatements of flawed economic theory will not counterbalance the on-going harms and reasons for doing so. *Id.*

CONCLUSION

Based on the foregoing, the Court should enter a preliminarily injunction enjoining Defendants and the Department of Labor from implementing, applying, or enforcing the Interim Final Rule, 85 Fed. Reg. 63872, or any of the prevailing wage methodologies or prevailing wage rates under the Interim Final Rule, in its entirety.

CERFITICATE OF COMPLIANCE UNDER LOCAL RULES 7 & 65.1

Pursuant to local rule 65.1, undersigned counsel certifies that stating that actual notice of the time of making the application and copies of all pleadings and papers filed in the action to date or to be presented to the Court at the hearing, have been furnished to the adverse party at the time of filing. On October 21, 2020, Plaintiffs counsel conferred with attorneys for the Department of Justice who opposed the motion. Both parties continue to discuss the possibility of a joint a briefing schedule.

CERTIFICATE OF SERVICE

I, Jeff Joseph, hereby certify that on October 23, 2020, I filed the foregoing with the Clerk of Court using the CM/ECF system, and I hereby certify that I effected personal service of this document along with the complaint, summons and Judge Sullivan's standing orders to:

Civil Process Clerk
United States Attorney's Office
District of Columbia
555 Fourth Street, N.W.
Washington, D.C. 20530

I have also served this document along with the complaint, summons and Judge Sullivan's standing orders via first class mail return receipt requested to:

Eugene Scalia, 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
Office of the Solicitor
200 Constitution Ave NW
Washington, DC 20210

Finally, I sent a courtesy email of this document along with the original complaint and exhibits to

Federighi, Carol (CIV) Carol.Federighi@usdoj.gov
Rosenberg, Brad (CIV) Brad.Rosenberg@usdoj.gov

Respectfully submitted,

/s/ Jeff Joseph

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