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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

RAMON TORRES HERNANDEZ, and FAMILIAS UNIDAS POR LA JUSTICIA, AFL-CIO, a labor organization;

Plaintiffs,

vs.

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

Defendants.

No. 1:20-CV-03241-SMJ

PLAINTIFFS' REVISED MOTION FOR PRELIMINARY INJUNCTION

2/18/2021
With Oral Argument: 2:00 p.m.
Richland, WA

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I. INTRODUCTION

On January 4, 2021, in the midst of a deadly pandemic where farmworkers risk their lives to harvest our nation's crops, the U.S. Department of Labor (USDOL), the agency whose primary statutory duty is to protect the wages of domestic farmworkers, arbitrarily slashed the harvest wages of Washington farmworkers. To reach this cruel and unprecedented decision, which eliminates higher piece-rate wages in the cherry, pear, and apple harvests (where farmworkers can earn in excess of $20 an hour) in favor of lower minimum wages, *USDOL tossed aside all farmworker survey data* – data that overwhelmingly indicated higher piece-rate wages are the prevailing practice in Washington's tree-fruit industry. The financial and policy impacts are stunning. USDOL's wholesale abandonment of its statutory mandate sends the dual message to farmworkers that their back-breaking labor is not valued and their voices in the wage survey process do not count.

Ramon Torres Hernandez and Familias Unidas por la Justicia, AFL-CIO (FUJ) (jointly "the Workers") seek to enjoin USDOL, which administers the H-2A program affecting approximately 41,000 jobs in Washington, to remedy at least three arbitrary and capricious actions that violate the Administrative Procedure Act. The Workers are likely to succeed because USDOL's actions are contrary to the agency's primary statutory duty to protect the wages of domestic farmworkers

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and the Workers are likely to suffer irreparable harm because impoverished farmworker families are unable to bear the burden of such draconian wage cuts.

II. FACTUAL BACKGROUND

For decades, the prevailing practice in Washington State's tree fruit industry has been to pay piece-rate wages to farmworkers who harvest our state's cherry, pear, and apple crops. ECF No. 14 ¶¶ 32-48. The average farmworker earns $18 an hour on piece-rate harvest wages while highly skilled farmworkers can earn wages well in excess of $20 per hour. *Id.* ¶¶ 42-48. Impoverished farmworker families rely on peak piece-rate harvest wages to pay rent and buy food when seasonal work disappears during the winter and early spring. ECF No. 4 ¶ 13; ECF No. 5 ¶ 17. The 2019 Wage Survey Results, now published by USDOL, eliminate those prevailing wages. ECF No. 14 ¶¶ 68 & 72-87.[1]

[1] The USDOL published wage rates are available at https://www.foreignlaborcert.doleta.gov/reader.cfm. USDOL adopted the ESD Wage Survey Results, ECF No. 6-13 at 9-10, with one additional reduction in Bartlett pear thinning from $13.40 per hour to $12 per hour. *Compare id.*; *see* Supplemental Declaration of Rachael Pashkowski ¶ 12, Ex. 11. Page numbers used here for previous filings are the individual document page numbers generated by the CM-ECF system.

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Since at least 2015, the industry has endeavored to use the prevailing wage survey process to eliminate harvest piece-rate wages and replace them with hourly minimum wages. *See* ECF No. 14 ¶¶ 49-67. That campaign continues today. Supplemental Declaration of Arasele Bueno ¶ 3, Ex. 35 (industry representative in response to this lawsuit states piece rates should not be used to set H-2A wages).

There are at least three ways that the 2019 Wage Survey results undermine the higher paying piece-rate wages of Washington farmworkers. First, USDOL failed to verify the grower survey data using the mandated farmworker survey it funded and ESD conducted and which overwhelmingly indicates piece-rate wages are the prevailing wage in harvest. ECF No. 14 ¶¶ 86-87 & 117-123; ECF No. 6-32 at 3-4. Second, USDOL interjected the "hourly wage guarantee" into the prevailing wage methodology which impugns all wage data collected and eliminates higher paying prevailing piece-rate wages for harvesting Skeena cherries, yellow cherries, and berries. ECF No. 14 ¶¶ 74, 76, 88-116; Supp. Decl. Pashkowski ¶¶ 2-6. Finally, USDOL failed to follow its own policy of rounding up to determine sample size, and disregarded other statistically valid data, well within its discretion to consider, resulting in no prevailing wage findings for apple and pear harvesting

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generally and four specific crops, Red Delicious, Fuji and Honeycrisps apples and Bartlett pears. ECF No. 14 ¶¶ 84-85.

III. LEGAL STANDARD

A plaintiff seeking a preliminary injunction "must meet one of two variants of the same standard." *Alliance for the Wild Rockies v. Pena*, 865 F.3d 1211, 1217 (9th Cir. 2017). Under the original *Winter* standard, a plaintiff must establish that they are (1) "likely to succeed on the merits"; (2) "likely to suffer irreparable harm in the absence of preliminary relief"; (3) that "the balance of equities tips in [its] favor"; and (4) that "an injunction is in the public interest." *Disney Enterprises, Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017) (alteration in original) (*quoting Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008)). When the government is a party, the last two factors—the balance of equities and the public interest—merge. *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1271 (9th Cir. 2020).

Alternatively, under the "sliding scale" variant of the *Winter* standard, preliminary relief is appropriate when a plaintiff raises "serious questions going to the merits—a lesser showing than likelihood of success on the merits," the "balance of hardships tips *sharply* in the plaintiff's favor," and where the other two *Winter* factors (likelihood of irreparable harm and the public interest) "are satisfied." *Alliance for the Wild Rockies*, 865 F.3d at 1217 (internal quotation

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marks omitted, emphasis in the original). Under the "sliding scale" approach, the elements are "balanced[] so that a stronger showing of one element may offset a weaker showing of another." *Hernandez v. Sessions*, 872 F.3d 976, 990 (9th Cir. 2017) (quotations omitted). Thus, while the Workers present strong claims on the merits and satisfy both standards, preliminary relief would be appropriate even if Plaintiffs made a weaker showing as to the merits given how sharply the balance of hardships tips in Workers' favor. *Id.*

IV. ARGUMENT

A. Plaintiffs Are Likely to Succeed on the Merits.

The APA directs courts to "hold unlawful and set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or that is taken "without observance of procedure required by law." 5 U.S.C. § 706(2)(A) & (D). "Constructions that are contrary to clear Congressional intent or frustrate the policy that Congress sought to implement must be rejected." *Earth Island Inst. v. Hogarth*, 494 F.3d 757, 765 (9th Cir. 2007). Moreover, agency action that is not the product of reasoned decision making is arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). To satisfy that requirement, an agency must "cogently explain why it has exercised its discretion in a given manner." *Id.* at 48.

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Plaintiffs are likely to succeed in establishing USDOL unlawfully eliminated higher paying piece-rate wages for four reasons. First, USDOL ignored all farmworker survey data contrary to the agency's long-standing written policy. Second, USDOL fundamentally altering the prevailing wage methodology by interjecting an "hourly wage guarantee." Third, USDOL failed to follow its own policy in determining sample size and failed to analyze other statistically valid data. And fourth, the agency's actions unlawfully depress local working conditions in addition to wages.

Each of these actions are fundamentally arbitrary and capricious because they contravene USDOL's statutory obligation to protect the wages and working conditions of U.S. farmworkers. *See* 8 U.S.C. § 1188(a)(1)(B); *Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 596 (1982) ("[t]he obvious point of this somewhat complicated statutory and regulatory framework" is to ensure the working conditions of domestic farmworkers are not adversely affected).

1. USDOL's Decision to Ignore All Worker Survey Data and Certify Unverified Employer Wage Data is Arbitrary and Capricious.

USDOL, without explanation, ignored all farmworker survey data, which the agency was required to collect in order to verify the accuracy of data submitted by agricultural employers to ensure the wages of domestic farmworkers would not be adversely affected. *See* ECF No. 14 ¶¶ 53-55 & 117-122. Instead, UDSOL

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published wage rates based solely on employer responses. *See* ECF No. 6-32 at 3. The farmworker survey data overwhelmingly indicates piece-rate wages are the prevailing wage in harvest. *Id.* at 3-4. This confirms decades of practice in Washington State, acknowledged by growers and workers alike, in which harvest wages are predominately paid by the piece-rate, which substantially exceed statutory minimums. ECF No. 14 at ¶¶ 32-37, 42-48 & 121.

Handbook 385 commences with the statement that "[a]ccurate farm wage data are essential to the effective operation" of the job service system through which all H-2A job orders are placed. ECF. No 6-2 at 2. USDOL asserts the Handbook was developed to protect the wages of domestic farmworkers. Supp. Bueno Decl., Ex. 37 ¶ 6 (declaration of Brian D. Pasternak in *Evans Fruit Co., v. USDOL*). The Handbook specifically provides that wage data supplied by agricultural employers "**must** be verified through worker interviews." ECF. No 6-2 at 6 [I-116] (emphasis added).

This check and balance is particularly necessary here, where the agricultural industry has engaged in a campaign to eliminate piece-rate wages which continues to this day. *See* ECF No. 14 ¶¶ 49-67; Supp. Bueno Decl. ¶ 3, Ex. 35. In fact, worker surveys were first conducted in Washington State, in 2016, following the documented grower manipulation of the 2015 wage survey. ECF No. 14 ¶¶ 53-54.

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USDOL has at its disposal worker survey data, garnered through surveys administered by the University of Washington for the very purpose of complying with the Handbook 385 requirement. *See* ECF No. 6-32 & ECF No. 14 ¶¶ 118-120. The agency has not changed its policy that wage data must be verified through worker surveys, nor has it articulated in a reasoned manner why it "does not 'use' worker survey results" and bases its prevailing wage decisions "solely on employer responses." *See* ECF 6-32 at 3. Where an agency has announced a policy, "departure from that policy (as opposed to an avowed alteration of it)" can constitute arbitrary and capricious action within the meaning of the APA. *I.N.S. v. Yueh-Shaio Yang*, 519 U.S. 26, 32 (1996). It is irrational and arbitrary for USDOL to disregard its own mandate, and even more so for it to pay ESD to gather data it refuses to use. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

In addition to the history of industry manipulation and the glaring irregularity of close to 90 percent of farmworkers reporting piece-rate harvest wages while the USDOL-published rates eliminate almost all harvest piece rates, the blueberry harvest wage data also provides an example of the importance of verifying employer wage surveys as mandated by the Handbook. In 2020, this Court upheld the prevailing wage of $0.75 per pound as the prevailing wage for harvesting blueberries. *Zirkle Fruit Co. v. USDOL*, 442 F. Supp. 3d 1366, 1373 (E.D. Wash. 2020). The 2019 wage survey reduces this rate to $0.50 pound. ECF

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No. 6-13 at 9. ESD provided no explanation for this decrease. ECF No. 14 at ¶ 80.[2] The data used to decrease the piece rate appear to reflect that four H-2A employers participated in the survey, demonstrated by the reporting of an hourly guarantee of $15.03, the AEWR[3] applicable at the time. *See* ECF No. 7-9 at 2 (bottom figure). One H-2A employer reported the required piece rate of $0.75 per pound. *Id.* (bottom figure, second row). However, one H-2A employer reported a lower piece rate of $0.60/pound, and the two others reported $0.50/pound. *Id.* (bottom figure, circled in red). These two employers appear to be fairly large in that their combined estimated employment is nearly 500 workers. *Id.* (bottom figure, line shaded green). If the assumption is correct that the three employers were H-2A employers, the employers either paid their workers below the legally required wage or did not accurately report the wages paid, both of which impugn the data and demonstrate the importance of using farmworker information as a check on

[2] USDOL's publishing of this wage data without an explanation from ESD of the reason for the decrease, particularly given the recent litigation over the issue, may also be arbitrary and capricious. *See Zirkle,* 442 F. Supp. 3d. at 1378-79.

[33] The Adverse Effect Wage Rate – commonly known as the minimum hourly wage for the H-2A program.

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employer surveys.[4]

Finally, USDOL's refusal to use the worker survey is arbitrary and capricious because it "entirely failed to consider an important aspect of the problem." *See League of Wilderness Defs. Blue Mountains Biodiversity Project v. Allen*, 615 F.3d 1122, 1130 (9th Cir. 2010). As this Court has recognized:

> Congress delegated to DOL—and, by extension, ESD—the important task of calculating the PWR to ward off serious damage to the domestic labor market that could result from an influx of foreign labor paid below-market wages.

Zirkle, 442 F. Supp. 3d at 1383. Here, USDOL has entirely failed to consider that prevailing wage surveys are intended to protect domestic farmworkers' wages when it failed to use worker surveys to verify their higher paying piece-rate wages.

2. USDOL's Interjection of the Hourly Guarantee into the Prevailing Wage Methodology Violates the APA.

A review of the ETA 232 data that the Workers recently obtained shows that interjection of the hourly wage guarantee eliminated prevailing piece rates for Skeena and Yellow cherry harvest and for berry harvest.[5] Supp. Paskowski Decl.

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[4] The 2019 farmworker survey focused on apple and cherry harvest and did not include blueberry workers. *See* ECF No. 6-32 at 2.

[5] This updates Plaintiffs' First Amended complaint alleging impact on prevailing wage rates for the harvesting of Dark Red and Lapin cherries, Braeburn

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¶¶ 2-6. USDOL's interjection of the hourly wage guarantee concept changes the wage finding process so dramatically that it should have been subject to rulemaking. In addition, USDOL's publishing of wage rates based on the concept is also arbitrary and capricious because it has failed: to define the hourly guarantee, to provide any rationale for the change, and to consider the resulting elimination of higher piece-rate wages which contravenes the statutory mandate to protect domestic farmworkers from wage depression. Agency action that contravenes federal law or that is "'contrary to clear congressional intent'" must be declared invalid and set aside. *Planned Parenthood of Greater Wash. & N. Idaho v. U.S. Dep't of Health & Human Servs.*, 946 F.3d 1100, 1112 (9th Cir. 2020).

a. USDOL failed to comply with the APA's notice-and-comment requirements.

Plaintiffs are likely to succeed on their claim that USDOL violated the APA's notice-and-comment requirement because it changed the prevailing wage methodology "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

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and Gala apples, and Bosc pears. *See* ECF No. 14 ¶¶ 74 & 76. Plaintiffs had not previously identified the impact on berry harvest wages. *See id.*

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USDOL's ETA Handbook No. 385 provides the standards required to conduct prevailing wage surveys. 84 Fed. Reg. 36168, 36184 (Jul. 26, 2019). Substantial changes in the agency's prevailing wage methodology, including changes in Handbook 385, are the subject of pending rulemaking. *See id.* at 36184-88. Plaintiffs acknowledge this Court previously determined USDOL was not required to engage in notice and comment process to alter the provisions of Handbook 385. *See Zirkle*, 442 F. Supp. 3d at 1376. However, the interjection of the hourly wage guarantee at issue here, which is not described in the Handbook or elsewhere in USDOL policies, substantially changes the wage finding methodology and has an adverse effect on prevailing wages in direct conflict with the statutory protection for domestic farmworkers. *See* ECF No. 14 ¶¶ 69, 88-94 & 104-108.

Legislative rules, which are subject to APA notice and comment, "create rights, impose obligations, or effect a change in existing law pursuant to authority delegated by Congress." *Wilson v. Lynch*, 835 F.3d 1083, 1099 (9th Cir. 2016). USDOL's change in prevailing wage calculation methodology is a legislative rule, not an exempt interpretive rule, because it changes the law regarding prevailing wages, and in fact results in the elimination of higher prevailing piece-rate wages, one of the rates which *must* be offered pursuant to 20 C.F.R. § 655.120(a) to ensure domestic farmworkers are protected from adverse effects on their wages. *See* 75

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Fed. Reg. 6884, 6893 (Feb. 12, 2010); *see also* 85 Fed. Reg. 70445, 70450 (Nov. 5, 2020) (prevailing wages are intended to provide an additional safeguard against wage depression).

The analysis in *Mendoza v. Perez*, 754 F.3d 1002 (D.C. Cir. 2014) is instructive. In *Mendoza*, the court found that USDOL's attempt to remove the option of establishing a special monthly AEWR for sheepherders, thus allowing employers to pay lower wages, was a substantive change and violated the APA because it was promulgated without notice-and-comment rulemaking. *Id.* at 1024. The change here is similarly substantive because it allows Washington agricultural employers to offer H-2A jobs without higher prevailing piece-rate wages and will deprive Washington farmworkers of those higher wages. *See id.* at 1024-25. This agency action, taken "without observance of procedure required by law," is unlawful and should be vacated.

b. The Change in the prevailing wage methodology is arbitrary and capricious.

USDOL's interjection of the hourly wage guarantee into the prevailing wage methodology is arbitrary and capricious because USDOL failed to: 1) explain the reason for the change or even announce it was making such a change; 2) define the "hourly wage guarantee," making rational application impossible; and 3) consider the resulting elimination of higher piece-rate wages.

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Agency action that is not the product of reasoned decision making is arbitrary and capricious. *See Motor Vehicle Mfrs.*, 463 U.S. at 43. To avoid committing arbitrary and capricious action, an agency must "cogently explain why it has exercised its discretion in a given manner." *Id.* at 48. "An agency may not … depart from a prior policy *sub silentio* …. And of course the agency must show that there are good reasons for the new policy." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). USDOL has offered no explanation as to why the interjection of the hourly wage guarantee into the prevailing wage rate determination is justified. As this Court has recognized "an 'unannounced departure in practice' from a settled and consistent approach to PWR surveys" could be arbitrary and capricious. *Zirkle*, 442 F. Supp. 3d at 1376.

An irrational departure from a policy is also arbitrary and capricious. *See id.* at 1374 (citing *I.N.S. v. Yueh-Shaio Yang*, 519 U.S. 26, 32 (1996)). Here USDOL's implementation of a wage survey methodology that eliminates higher piece-rate wages that have been in existence for decades and replaces them with markedly lower minimum wages is the definition of "irrational." Moreover, USDOL has failed to define hourly wage guarantee or explain how that concept should be applied by states conducting wage surveys. As a result, the vast majority of employers indicating they used an "hourly wage guarantee" reported a rate that

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was *less than or equal to statutorily required minimums*.[6] *See* Supp. Pashkowski Decl. ¶¶ 7 & 10. Even though these wage rates were exactly the same as employers who did not report an "hourly wage guarantee" but were bound by the same minimums, the two groups were treated differently, resulting in the elimination of piece-rate harvest wages for Skeena cherries, Yellow cherries and berries, and the reduction of the prevailing wage rate to Washington State's minimum wage. *Id.* at ¶ 6 & 12, Ex. 11 (berries were reduced to $12.64, not $12.00). While Plaintiffs' are not able to demonstrate, at this juncture, that the hourly wage guarantee eliminated additional piece rates, other irregularities in the data demonstrate the impact of the failure to define the concept. *See id.* ¶ 11 (over thirty percent of estimated employment in Bosc pears included an hourly wage guarantee *below* the state minimum wage).

Because there is no definition of an hourly wage guarantee in the survey instrument, all data collected are suspect. *See* ECF No. 14 ¶¶ 114-15. For example,

[6] Plaintiffs have also alleged that hourly wage guarantees are not in common usage in Washington State. ECF No. 14 at 22 n.8; *see also* ECF No. 6-3 at 4 n.2 (hourly guarantees *above* the legal minimum would run counter to incentives for high productivity offered by piece rates).

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had employers been instructed that only an hourly wage that *exceeded* statutorily required minimums should be reported as an "hourly wage guarantee" it is likely that very few would have reported such a rate. *See id.*; Supp. Pashkowski Decl. ¶¶ 7 & 10. Unfortunately, the current wage survey continues to incorporate this concept, without definition or instructions, and exacerbates the problem, by assuming an hourly wage guarantee could be *less than* the state minimum wage. *See* ECF No. 14 ¶ 116; ECF No. 6-33 at 6 (2020 wage survey instrument). An hourly wage guarantee that is the statutorily required minimum, or anything lower, is not a meaningful "guarantee." *See* ECF No. 14 ¶¶ 57, 94 & 116; ECF No. 6-5 at 3.

Finally, USDOL's use of the hourly wage guarantee is arbitrary and capricious because it "entirely failed to consider an important aspect of the problem." *See League of Wilderness*, 615 F.3d at 1130. This Court's decision in *Wild Fish Conservancy v. Irving*, 221 F. Supp. 3d 1224, 1231 (E.D. Wash. 2016), is instructive because agency action was deemed arbitrary and capricious where the agency relied on previous years' stream flow data to predict future stream flows but failed to factor in future climate change. USDOL's action here is similarly arbitrary and capricious; USDOL failed to factor in how the interjection of the hourly wage guarantee into the wage finding determination would eliminate higher

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prevailing piece-rate wages, thereby negatively impacting farmworkers wages contrary to statutory and regulatory mandates.

3. USDOL's Failure to Follow Its Own Policy on Rounding Up to Determine "15 Percent Sample Size" and Its Disregard of Statistically Valid Data are Arbitrary and Capricious.

In the most recent wage survey and in other recent years, USDOL has required that all survey data either represent a sample size of 15 percent of the population doing a given task or be entirely disregarded, resulting in "no finding" of any prevailing wage. This position is contrary to its own stated policy, is inconsistent with the discretion afforded in Handbook 385, and causes the agency to disregard statistically valid data, all of which arbitrary and capricious.

In the *Evans Fruit* prevailing wage litigation before this Court, USDOL plainly stated that it "rounds up" to the nearest integer when determining if a data set meets the 15 percent threshold. Here, the thresholds for apple harvesting and Red Delicious were 14.64 and 14.52 respectively, but no wage findings were made, contrary to USDOL's stated rounding-up policy. *See* ECF No. 14 ¶ 85; ECF No. 6-13 at 18-20 (Appendix 3); Supp. Bueno Decl., Ex. 37 ¶¶ 19-20 (declaration of Brian D. Pasternak).

Moreover, USDOL has discretion to make wage findings even where sample sizes are below 15 percent because the thresholds in the Handbook provide a "general guide." In *Evans Fruit*, this Court found:

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> Handbook 385 dictates that when more than 3000 domestic workers are engaged in a given crop activity, as a "general guide," a prevailing wage survey should include data representing at least 15% of that population. The Court reads this provision to mean that the 15% threshold prescribed by Handbook 385 is not an absolute floor, anything less than which results in an invalid PWR, but rather an approximate guideline.

Evans Fruit Co., Inc. v. USDOL, 1:19-CV-03202-SMJ, 2019 WL 7820432, at *6 (E.D. Wash. Oct. 11, 2019) (citations omitted); *see also* Supp. Bueno Decl. ¶ 5, Ex. 37 ¶ 9 (USDOL declares the handbook provides "broad guidelines" within which wage surveys are conducted); 84 Fed. Reg. 36168, 36184 (Jul. 26, 2019). As this Court observed:

> if the agency consistently followed a "general policy by which its exercise of discretion will be governed, an irrational departure from that policy," rather than "an avowed alteration of it" may be arbitrary and capricious independent of the result the agency reached. *I.N.S. v. Yueh-Shaio Yang*, 519 U.S. 26, 32 (1996).

Evans Fruit, 2019 WL 7820432, at *4. USDOL has not offered any basis for not following its own policy or insisting that the Handbook prescribes a 15-percent absolute minimum.

Additionally, ESD has recently advocated that sample sizes similar to those used in the 2019 wage survey for harvest wages of Fuji apples, Honeycrisp apples, pear harvesting generally, and Bartlett pears were all statistically sufficient to determine prevailing wages, especially when considered in conjunction with the farmworker survey. In 2017, ESD advocated that wage finding determinations be

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made where thresholds ranged from 10.74 to 13.39 percent. ECF No. 14 at 66; ECF No. 6-11 at 3-4. ESD further advocated that the arbitrary imposition of strict thresholds would disregard valid statistical findings and "lead to a large decrease in the required wage for workers in the Washington apple harvest . . . . in direct conflict with the fundamental goal . . . to ensure domestic workers are not adversely effected by the use of foreign labor." ECF No. 6-11 at 2.

Here USDOL disregarded survey data and failed to set prevailing wages, even when the sample sizes met or exceeded the thresholds ESD previously advocated were statistically valid, adopting the "no determination" findings for Fuji and Honeycrisp apples, pear harvesting generally and Bartlett pears. *See* ECF No. 14 ¶ 85; ECF No. 6-13 at 18-20 (Appendix 3). As ESD previously asserted, USDOL instead could have made prevailing wage determinations. The agency's adherence to a strict 15-percent threshold in violation of its own policy, leaving workers without a prevailing wage and disregarding the Congressional mandate to protect local wages, is arbitrary and capricious.

4. USDOL's Elimination of Prevailing Piece Rates Affects Not Only Local Wages, But Also Local Working Conditions, Contrary to Federal Law.

USDOL's elimination of prevailing piece rates, as a result of the agency's failures described above, is also contrary to federal law because it worsens not only the wages, but also the *working conditions* of farmworkers by causing a shift in the

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incentive structure of the work, in contravention of the mandate of the INA. *See* 8 U.S.C. § 1188(a)(1)(B). As noted by respected agricultural labor economist Philip Martin, "[p]iece rates are often paid when it is hard to monitor workers' effort but easy to monitor their output, as with picking fruit in trees." Supp. Bueno Decl. ¶ 4, Ex. 36. In this system, workers are incentivized to "work fast without close supervision." *Id.* H-2A growers, when freed from the requirement to pay piece rates that allow workers to earn more than the AEWR, still want to get the same amount of fruit picked in the same amount of time, and they need mechanisms other than financial incentives to control the pace of work. In tree fruit, where conveyor belts and rolling harvest machines cannot be used to set the pace, employers overwhelmingly turn to pressure through discipline and threats to fire those who don't work at a certain pace to force workers to pick like they are earning a piece rate, but for a stagnant hourly rate. *See* ECF No. 4 ¶¶ 10, 11. These tactics are often tolerated by H-2A workers, who are thousands of miles from home, vulnerable to retaliation, impoverished, subject to blacklisting if they complain or leave their jobs, and will work at essentially any wage. *See* U.S. Gov't Accountability Office, GAO-15-154, H-2A and H-2B Visa Programs: Increased Protections Needed for Foreign Workers 37-38 (March 2015), https://www.gao.gov/assets/690/684985.pdf. However, to local workers, this shift away from financial incentive and toward pressure through threats and discipline is a

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meaningful depression of working conditions—one that often pushes them to walk away, leaving room for growers to hire more vulnerable H-2A workers. *See* ECF No. 4 ¶¶ 10, 11. USDOL's elimination of piece rates fundamentally damages the working conditions of the local labor market, contrary to Congressional mandate, and thus in violation of the APA.

B. The Workers Will Suffer Irreparable Injury without Emergency Relief.

USDOL's unlawful actions resulting in lower prevailing wages will irreparably harm Washington farmworkers without preliminary injunctive relief from this Court. Hand-harvest jobs that have always offered an opportunity for farmworkers to earn well in excess of minimum wages will suddenly be paid by the hour, resulting in sharp decreases in wages— *between 20 percent to 47 percent in cherry harvest*. ECF No. 7 ¶¶ 13-16. Industry-wide, the magnitude of wage loss to workers is staggering. In 2018, when the industry succeeded in influencing ESD to disregard valid survey results because of the 15% sample-size threshold, Dan Fazio, the CEO of WAFLA asserted that the elimination of piece rates for apples would save the industry millions. ECF No. 14 ¶¶ 61-62; ECF No. 6-12 at 3.

Nearly 60 H-2A contracts (known as "Clearance Orders") have already been submitted for jobs beginning in early 2021, and these orders are rapidly being accepted and published by USDOL. *E.g.*, ECF No. 6-13, 6-17, 6-19, & 6-20; Supp. Bueno Decl. ¶ 6. H-2A Clearance Orders will dictate terms for approximately

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41,000 farmworker jobs this year in Washington. *See* ECF No. 6-22 at 2; Supp. Bueno Decl. ¶ 6 (figure includes both H-2A workers and domestic workers on farms using H-2A). Many of the jobs offered in these orders have a contract term of many months—from January to November—and cover a wide variety of tasks, including cherry, apple, and/or pear harvest. *E.g.*, ECF Nos. 6-15, 6-17, 6-19, & 6-20 (6-17 at 2 is Empey Orchard's Clearance Order with period of employment commencing January 1, 2021). Nearly all of the Clearance Orders published to date relied on the previous year's prevailing wages but reserved the right to decrease workers' pay if USDOL published new prevailing wages. *E.g.*, ECF Nos. 6-15, 6-17, 6-19, & 6-20. Growers will now cut wages, as promised.

The harm to farmworkers will not be limited to wages lost in harvest, but will also harm the local labor market. Local workers who would have worked alongside H-2A workers will be pushed out of their jobs entirely, as those whose families cannot bear the wage cuts are forced seek piece-rate wages at exclusively non-H-2A orchards. As noted by an industry attorney, when workers even perceive that you have eliminated piece rates, "they're going to turn around and go work for your neighbor." Supp. Bueno Decl. ¶ 2, Ex. 34; *see* ECF No. 4 ¶ 14; ECF No. 5 ¶ 16. This flight of local workers from H-2A jobs will have far-reaching downward pressure on local wages and working conditions, as growers this year will be approved to bring in more H-2A workers than they would need if they paid true

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prevailing wages, and growers in future years will rush to use the H-2A program, as it allows them to opt out of the labor market and pay government-protected depressed wages.

When wages fall even a few percentage points, farmworker families suffer significant hardship because many already live in or at the edge of poverty. Washington farmworkers depend on their income from better-paying harvest jobs to sustain them and their families through the winter and early spring, when opportunities for work are scarce in agricultural communities. ECF No. 4 ¶ 12; ECF No. 5 ¶ 17; *see* ECF Nos. 6-30 at 27-28 and 6-26 at 4-5 (average farmworker family incomes below poverty); ECF Nos. 6-28 at 3, 9-11 and 6-27 (staggering rates of food insecurity); ECF Nos. 6-29 and 6-23 at 13 (limited access to healthcare). For farmworker families already experiencing poverty, a reduction in wages, even of 5%, can mean the difference between keeping housing or becoming homeless, feeding a family or going hungry, and risking illness or getting care. *See* ECF No. 5 ¶¶ 7 & 16-17; ECF No. 4 ¶¶ 2 & 14-15; ECF No. 6-30 at 11.

While purely monetary damages typically are not irreparable, courts have recognized an exception where the plaintiffs are "so poor that [they] would be harmed in the interim by the loss of the monetary benefits." *Lee v. Christian Coal. of Am., Inc.*, 160 F. Supp. 2d 14, 31 (D.D.C. 2001) (internal quotations and citations omitted); *see also Kildare v. Saenz*, 325 F.3d 1078, 1083 (9th Cir. 2003)

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("[E]conomic hardship constitutes irreparable harm."). Courts have widely recognized that the inability to afford necessities such as food or medical care constitutes irreparable harm because those losses, even if temporary, cannot be remedied by back payments. *See District of Columbia v. U.S. Dep't of Agric.*, 444 F. Supp. 3d 1, 43 (D.D.C. 2020) ("Going without food is an irreparable harm."); *Haskins v. Stanton*, 794 F.2d 1273, 1276-77 (7th Cir. 1986) ("[T]he deprivation of food is extremely serious and is quite likely to impose lingering, if not irreversible, hardships.") (internal quotations and citations omitted).

Moreover, even if the Workers could be compensated for their injuries, they have no practical path to recovering their lost wages. Where the injured party "cannot typically recover monetary damages flowing from their injury. . . economic harm can be considered irreparable." *E. Bay Sanctuary*, 950 F.3d at 1280. The Plaintiffs in this case seek only injunctive relief against USDOL and know of no cause of action under which the government could be liable for lost wages. Workers would also face huge barriers attempting to collect wages from their employers as there are not sufficient legal resources to pursue these claims on behalf of low-income workers, ECF No. 5 ¶ 21, and courts have recognized that reliance on an agency decision may be a defense to restitution, *see Lake Mohave Boat Owners Ass'n v. Nat'l Park Serv.*, 78 F.3d 1360, 1369-70 (9th Cir. 1995); *see also Donaldson v. U.S. Dep't of Labor*, 930 F.2d 339, 345 (4th Cir. 1991) (finding

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growers had not reasonably relied on USDOL's certification of job orders, where the agency originally disapproved the wage provisions and only certified them after the growers sued the agency and obtained a court order). Moreover, as noted by USDOL in recent prevailing-wage litigation, even if USDOL were ordered to instruct employers to set aside wages in anticipation of this Court's final ruling on the issue, "it will be exceedingly difficult to ensure that. . .workers are paid the additional wages they are owed," since H-2A and domestic workers alike disperse after the season ends. Defs' Resp. to Plfs' Mot. for Prelim. Injunction, *Evans Fruit Co. v. USDOL*, No. 1:19-cv-03202-SMJ, ECF No. 31 at 27 (E.D. Wash. Oct. 2, 2019).

The U.S. District Court for the Eastern District of California recently granted preliminary injunctive relief in a farmworker case germane to this action. There, the USDA abruptly announced it would not conduct the survey that USDOL relies on to set the AEWR. *United Farm Workers v. Perdue*, No. 1:20-cv-01452-DAD-JLT, 2020 WL 6318432, at *1-2 (E.D. Cal. Oct. 28, 2020). The lack of a 2020 AEWR would allow H-2A employers to reduce wages offered in Clearance Orders – from 5 percent in California to 46 percent in Idaho. *Id.* at *14. The court held that the plaintiffs had shown "irreparable harm," and ordered the USDA to reverse the cancellation of the survey. *Id.* at *15-17. Even more recently, in *United Farm Workers v. USDOL*, No. 1:20-cv-01690-DAD-JLT, 2020 WL 7646406, at *16, *21

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(E.D. Cal. Dec. 23, 2020), the same court granted a preliminary injunction against USDOL's decision to freeze the AEWR, finding that a $0.81 reduction in hourly wages irreparably harmed workers. Likewise, in this case, USDOL's faulty prevailing wage determinations cause irreparable harm to farmworkers. This harm is already being perpetuated for 2022, as ESD is now conducting the 2020-21 wage survey in a manner that only exacerbates the "hourly guarantee" problem. *See supra*, sec. IV.A.2.b; ECF No. 14 ¶ 116; ECF No. 6-33 at 6 (2020 wage survey instrument).

In order to stop this harm, this Court should order USDOL to require all H-2A employers in harvest tasks for which no piece rate was found to pay a piece rate of the 2018 prevailing piece rate, plus five percent. *See* Supp. Pashkowski Decl. ¶ 12, Ex. 11. This relief would ensure that workers are not deprived of the approximately five-percent annual wage increases that are documented in national data sources. *See* ECF No. 7 ¶¶ 3-11. The Court should also order USDOL to remove the "hourly guarantee" from the 2020 survey instrument and re-survey the affected questions before it is too late to remedy the error.

C. The Remaining Equitable Factors Favor Granting a Temporary Restraining Order and Preliminary Injunction.

The remaining equitable factors also favor granting preliminary relief. In assessing whether preliminary relief should be granted, courts weigh the

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irreparable harm to Plaintiffs against the benefits to the public and harm to the government. *See E. Bay Sanctuary*, 950 F.3d at 1280. "Relevant equitable factors" for assessing whether the public interest is served by an injunction include the public interest in avoiding the harm caused by the agency action and preserving congressional intent. *Id.* at 1280.

It is self-evident that "[t]here is generally no public interest in the perpetuation of unlawful agency action," whereas there "is a substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations." *League of Women Voters v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) (internal citations and quotations omitted). By ignoring worker data and insisting on flawed methods of calculating prevailing wages, USDOL is causing the very harm to the public that Congress explicitly sought to prevent in the H-2A program—depression of local farmworker wages.

Moreover, injunctive relief would serve the public interest by preserving the status quo. USDOL has found consistently over more than a decade that in Washington, fruit harvest activities are paid at piece rates (with no hourly guarantees except statutory minimum wages), and this conclusion is consistent with farmworkers' lived experience. The public interest is served by the resulting stability in farmworker wages. *See Doe #1 v. Trump*, 957 F.3d 1050, 1069 (9th Cir. 2020) (holding "the public interest favors preserving the status quo").

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Ordering USDOL to require 5% wage increases over the 2018 survey results is the equitable solution and the only way to preserve the status quo. Despite years of struggle to resist the H-2A system's downward pressure on their wages and working conditions, local farmworkers have seen their wages decreased and their job opportunities evaporate. *See* ECF No. 5 ¶ 6. USDOL must not be allowed to run the H-2A program in contravention of Congress's fundamental aim to protect local wages and working conditions. The public will benefit significantly from preliminary relief, and the government will suffer no harm from an order to cease its unlawful conduct.

D. This Court Should Not Require Plaintiffs to Post Bond.

Plaintiffs do not have the financial means to post bond, ECF No. 4 ¶ 2; ECF No. 5 ¶ 9. The district court has discretion "as to the amount of security required, *if any*" and "may dispense with the filing of a bond when it concludes there is no realistic likelihood of harm to the defendant from enjoining his or her conduct." *Johnson v. Couturier*, 572 F.3d 1067, 1086 (9th Cir. 2009) (internal quotation marks and citation omitted). There is no harm to USDOL from enjoining its unlawful action. Moreover, given the public interest underlying the litigation and that requiring bond would effectively deny access to judicial review, waiver of any bond is appropriate. *See Van De Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1325 (9th Cir. 1985); *UFW v. USDOL*, No. 1:20-CV-01690-DAD-JLT, 2020

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WL 7646406, at *21 (E.D. Cal. Dec. 23, 2020) (finding bond not warranted in granting nationwide injunction preventing the freezing of the AEWR); *Washington v. Trump*, 2020 WL 5568557, at *5-7 (E.D. Wash. Sept. 17, 2020) (no security required for nationwide injunction where public interest at stake).

V. CONCLUSION

For the foregoing reasons the Workers respectfully request that this Court: 1) declare that the Workers are likely to succeed on the merits of their APA claims; 2) order USDOL to require all H-2A employers in harvest tasks for which no piece rate was found to pay a piece rate of the 2018 prevailing piece rate, plus five percent; 3) order USDOL to require ESD to eliminate the "guaranteed wage" concept from the 2020 survey and re-survey the responses gathered to date; and 4) find that no bond is necessary in this case.

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DATED this 13th day of January, 2021.

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