UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

FAMILIAS UNIDAS POR LA JUSTICIA, AFL-CIO, a labor organization; Plaintiff, vs. UNITED STATES DEPARTMENT OF LABOR, and JULIE SU in her official capacity Acting United States Secretary of Labor, Defendants.	No. 2:24-cv-00637 PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION NOTE ON MOTION CALENDAR: June 7, 2024 ORAL ARGUMENT REQUESTED

I. INTRODUCTION

The U.S. Department of Labor (DOL) has recognized that protecting the wages that prevail in a crop activity is critical to carrying out Congress's command that the importation of foreign H-2A workers not adversely affect the wages and working conditions of U.S. workers. In 2022, DOL promulgated a new methodology that it claimed would make it easier to find prevailing wages and thus improve the protections for U.S. workers. In practice, those regulations have had the opposite effect, making it virtually impossible to determine a prevailing wage

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for any crop activity, and leaving U.S. workers with none of the protections that DOL admits are critical.

Washington-State harvest workers currently have no prevailing wage protections. Meanwhile, DOL has continued to admit thousands of foreign workers at hourly wages far below the prevailing piece-rate wages that Washington workers depend upon. The admission of those workers at substandard wages is having a devastating effect on the wages and job opportunities of Washington farmworkers in direct contravention of Congress's mandate. 8 U.S.C. §1188. Accordingly, Plaintiff, Familias Unidas por la Justicia (Familias), an independent union representing its Washington farmworker members, filed this action to challenge the lawfulness of the new prevailing wage rules and DOL's application of these rules to Washington. Here, Familias seeks a preliminary injunction requiring DOL to enforce the 2020-Survey prevailing wages (the last prevailing wage findings in effect before the new methodology eliminated all prevailing wages), until such time as DOL publishes new, lawful prevailing wages for Washington. Although the 2020 prevailing wages do not reflect the wage increases that have occurred in the past four years, enforcement of those wages will at least protect the prevailing piece-rate wage structure that has, for decades, been the mainstay of Washington farmworkers and ensure that employers cannot use foreign workers willing to work for lower hourly rates to undermine that wage structure.

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II. STATUTORY AND FACTUAL BACKGROUND

A. The H-2A Program

The H-2A program allows U.S. employers to bring foreign nationals to the United States to fill temporary agricultural jobs where the supply of U.S. workers is insufficient if, and only if, the importation of such workers will not depress the wages and working conditions of domestic farmworkers. Before an employer files a petition for visas, federal law requires DOL to certify that there are not sufficient domestic workers who are willing "to perform the labor or services involved in the petition," at the terms offered and that "**the employment of [foreign] labor . . . will not adversely affect the wages and working conditions of workers in the United States similarly employed."** 8 U.S.C. § 1188(a)(1) (emphasis added).

To fulfill this statutory mandate to prevent adverse effect on the wages of domestic farmworkers, DOL regulations have for decades provided that employers who seek to import foreign H-2A workers must offer and pay the highest of (i) the Adverse Effect Wage Rate (AEWR), a special minimum hourly wage set by DOL, (ii) the prevailing wage rate for the crop activity, (iii) the agreed-upon collective bargaining wage, or (iv) the Federal or State minimum wage. 20 C.F.R. § 655.120(a); *see also* 20 C.F.R. § 655.122(l). Because the Washington AEWR is always higher than the minimum wage and there are very few collectively bargained

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wages in agriculture, the rule in effect requires the higher of the prevailing wage or the AEWR.

DOL requires employers to pay the highest of these wages to "ensure[] that domestic [farm]workers receive the greatest potential protection from the adverse effects on their wages and working conditions" caused by the importation of foreign H-2A workers. 75 Fed. Reg. 6884, 6893 (Feb. 12, 2010); *see generally id.* at 6891-93.

While the AEWR is a minimum hourly wage floor for all H-2A farms in a state, prevailing wages are intended to reflect the most common method of payment (piece rate or hourly) paid to workers in specific crop activities (e.g. harvest of gala apples). DOL has long recognized that when the prevailing wage for a crop activity is higher than the AEWR, "domestic workers would be disadvantaged by the use of the AEWR instead of the higher alternative." *Id.* at 6893; *see also* 6895, n.9. And as recently as 2023, DOL reiterated that *the prevailing wage serves "as an important protection for workers in crop and agricultural activities that offer piece rate pay or higher hourly rates than the AEWR."* 88 Fed. Reg. 12760, 12775 (Feb. 28, 2023) (emphasis added).

For over 40 years, DOL has funded State Workforce Agencies (SWAs) to conduct prevailing wage surveys according to a methodology determined by DOL. *See* 87 Fed. Reg. at 61679, 61689 (Oct. 12, 2022); 84 Fed. Reg. at 36171, 36179

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(July 26, 2019); Fuentes Decl. Ex. 30. Pursuant to DOL's rules, SWAs send survey questionnaires to all employers and use the responses to make prevailing wage rate (PWR) findings for different crop activities. *Id.* Once PWR findings have been made, they are submitted to DOL, which reviews the findings and, if approved, publishes them on DOL's Agricultural Online Wage Library (AOWL). *Id.* H-2A employers must offer and pay the published prevailing rate as a condition of receiving certification for H-2A visas. 655 C.F.R. § 655.122(c)&(l).

B. Prevailing Wage Determinations in Washington State Prior to the Challenged Regulations

The Washington State Employment Security Department (ESD) is the SWA for Washington. ESD began conducting prevailing wage surveys shortly after Washington employers first began importing H-2A workers in the mid-2000s. From 2006-2018, ESD's prevailing wage surveys determined, consistent with the industry's decades-old practice, that piece-rate wages were the prevailing wages for the harvest of apples, cherries and pears. *See* DOL, AOWL, https://www.dol.gov/agencies/eta/foreign-labor/wages/agriculture (Linville Decl. Ex. A).

In the 2019 Survey, the number of prevailing piece-rate findings made by ESD for fruit harvest work fell from 21 crops to 6. When DOL published those findings

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as the rates applicable to the 2021 season,[1] farmworkers sued alleging that the precipitous drop in prevailing piece rate findings was the result of manipulation of survey responses by the agricultural industry, and methodological missteps by ESD and DOL. *Torres Hernandez v. USDOL, et al.*, No. 1:20-cv-03241-SMJ (E.D. Wash., filed December 17, 2020). The farmworker plaintiffs obtained a preliminary injunction requiring DOL to continue to enforce the prevailing wages derived from the 2018 employer wage survey during the 2021 season and until such time as DOL published a new, non-arbitrary prevailing wage survey. *Torres Hernandez v. Stewart*, No. 1:20-CV-03241-SMJ, 2021 WL 6274440, at *12 (E.D. Wash. Mar. 1, 2021).

The 2020 employer wage survey conducted by ESD reported prevailing piece-rate findings applicable to 10 harvest crops, but importantly included three "general" harvest wages (for apple, cherry, and berry) covering every variety without a specific prevailing wage, and the findings reflected increases in the prevailing piece rates since 2018. Woerner Decl. at 2-3. As a result, the parties jointly asked the court to modify the injunction to allow DOL to proceed with publication of the 2020

[1] Because ESD conducts surveys late in the year, preliminary findings are generally released in the spring or summer of the following year. DOL often does not publish the prevailing wages until the fall of that year or even the winter of the next year. Thus, the survey conducted in late 2019 was not published until December 2020, and it applied to the 2021 season.

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prevailing wage findings. Fuentes Decl. Ex. 34 (Order Granting Sealed [now unsealed] Joint Motion for Entry of Modified Order, *Torres Hernandez v. Walsh*, No. 1:20-cv-3241-SMJ (Dec. 7, 2021)). DOL published the prevailing wages derived from the 2020 employer wage survey on January 24, 2022, Linville Decl. Ex. A, and, pursuant to the agreed modified injunction, those prevailing wages were applicable to harvest work performed after that date.

C. The Challenged 2022 Prevailing Wage Methodology

In 2019, DOL issued a notice of proposed rulemaking to amend its H-2A regulations, including its rules applicable to the prevailing-wage-finding process. 84 Fed. Reg. 36168, 36184-36189 (July 26, 2019). The NPRM noted that:

> [C]oncerns about wage depression from the importation of foreign workers [under the H-2A visa program] are particularly acute because access to an unlimited number of foreign workers in a particular labor market and crop activity or agricultural activity could cause the prevailing wage of workers in the United States similarly employed to stagnate.

Id. at 36180. DOL was also concerned that the existing methodology "incentivized employers not to respond to a survey" because employers could prevent a prevailing wage finding from being made by not responding. *Id.* at 36187. H-2A employers prefer no prevailing wage finding because without one, they are free to import and pay foreign workers at the hourly AEWR rather than at the significantly higher piece rates that are typically found to be prevailing. DOL made clear that the proposed changes were designed "to encourage a greater number of reliable prevailing wage

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results," *id.* at 36185, noting that the existing methodology "often result in 'no finding' from a prevailing wage survey [which is] both **a waste of government resources and fail[s] to meet the goal of producing reliable and accurate prevailing wage rates,**" *id*. at 36187 (emphasis added). DOL stated that it intended the proposed rule changes to allow it to:

> [W]ork with the States through their annual grant plans to focus prevailing wage surveys on those crop[s] . . . where prevailing wage surveys **are most useful to protect the wages of U.S. workers, including for activities for which employers commonly pay based on a piece rate[.]**

Id. at 36180 (emphasis added).

DOL published the final H-2A Rule on October 12, 2022, with an effective date of November 14, 2022. 87 Fed. Reg. 61660 (Oct. 12, 2022). Contrary to DOL's mandate and the agency's stated goal of encouraging a greater number of prevailing wage findings, the newly adopted rule changes have had the opposite effect: **DOL has published no prevailing wage findings for Washington State since these regulations went into effect**. ESD applied the new methodology to its 2021 survey results but never submitted the findings to DOL. Schmitt Decl. ¶¶3-4. Based on its 2022 survey, ESD reported only 4 harvest prevailing-wage findings (all piece-rates, one "general" harvest wage for pear) down from 9 found in 2020 (including three "general" harvest wages: apple, cherry, berry) using the old methodology:

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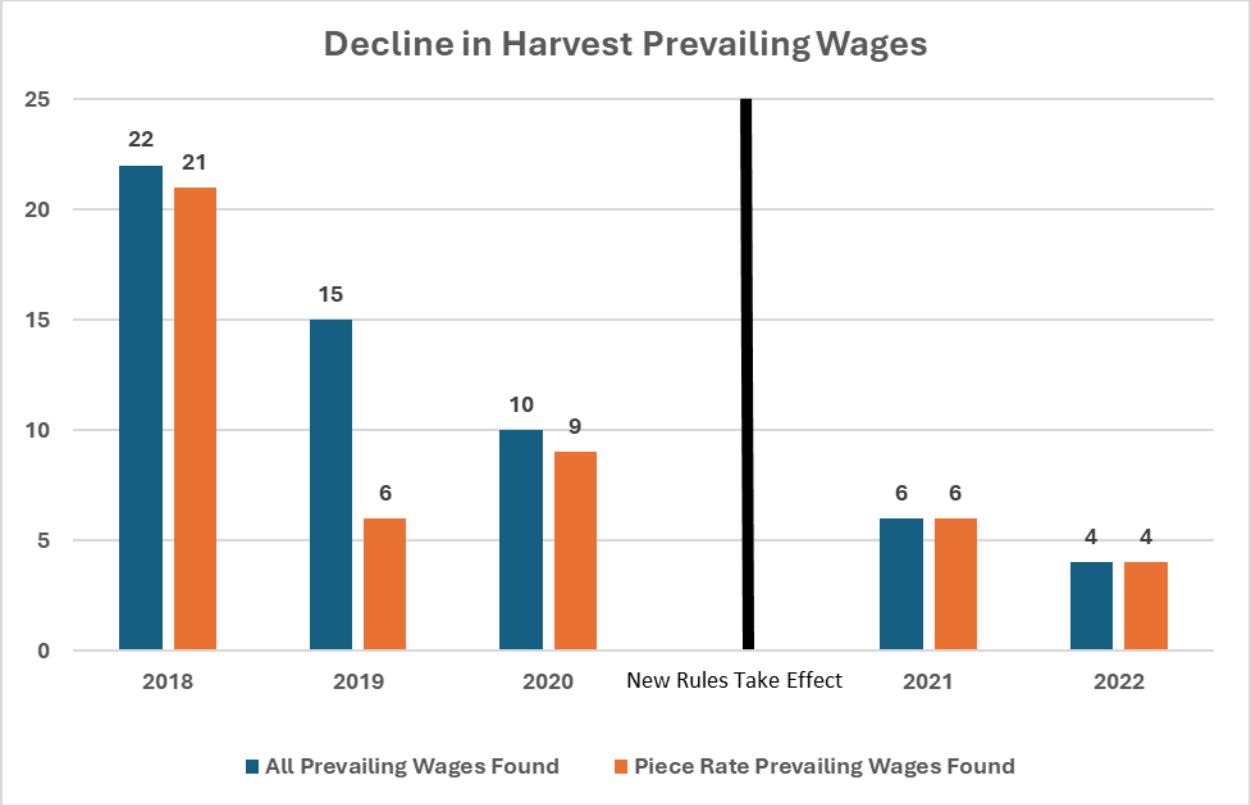

Pashkowski Decl. ¶20. Effective January 2023, DOL relied on its new regulations to deem all of the 2020 prevailing wage rates no longer valid, Fuentes Decl. Ex. 27 ¶7, and, although ESD submitted the findings from its 2022 survey to DOL in 2023, DOL has never published those prevailing wages, Linville Decl. Ex. A. As a result, **Washington agricultural workers have no prevailing wage protections. Nevertheless, DOL has continued to approve H-2A applications throughout that period, including applications with requests for 23,405 H-2A workers for the 2024 season**. Pashkowski Decl. ¶4.

This suit challenges DOL's failure to protect Washington prevailing wages, which has allowed H-2A workers to adversely affect the wages and working

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conditions of Washington farmworkers. Three actions in particular are challenged in this motion and referred to by Familias as "One-Year Rule," the "25% Rule," and the "Population Estimate Methodology."

1. One-Year Rule -- 20 C.F.R. §655.120(c)(2)

The "One-Year Rule" requires that prevailing wage findings automatically expire one year after initial publication in order to ensure that prevailing wages are based on "the most recent data." 20 C.F.R. §655.120(c)(2); 87 Fed. Reg. at 61701. Implicit in the adoption of this Rule was the notion that DOL would publish new prevailing wages each year. However, since the regulation was adopted, DOL has made clear through its inaction on Washington-State wage findings that it has no such intention. As applied, DOL interprets the "One-Year Rule" to mean that, unless DOL chooses to make a new finding, DOL will enforce no prevailing wage for a crop activity and instead allow employers to import H-2A workers to perform that work at the far lower hourly AEWR. *See* 20 C.F.R. 655.120(a)(2) (PWR required only if one has been approved).

Because of this interpretation, DOL has enforced no prevailing wage rates in Washington since January 2023. *See* Linville Decl. Ex. A; Fuentes Decl. Ex. 29 at 881. Even though ESD reported 2022 prevailing wages for four crop activities in August 2023, Fuentes Decl. Ex. 26 at 667, DOL has not taken action on those

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findings, neither approving them for publication nor sending them back to ESD for reconsideration, *id.*; Linville Decl. Ex. A.

2. 25% Rule -- 20 C.F.R. § 655.120(c)(1)(ix)

The 25% Rule requires that no employer responding to the survey may account for more than 25% of the workers paid at the prevailing method of payment. 20 C.F.R. § 655.120(c)(1)(ix). This provision was added "to ensure prevailing wages are as reliable as possible." 87 Fed. Reg. at 61699. Rather than simply removing the large employer's data from the survey and calculate the prevailing wage based on the remaining survey responses, ESD has interpreted the 25% Rule as *prohibiting a prevailing wage finding from being made* if one of the respondents accounts for more than 25% of the workers paid at the prevailing method of payment. Fuentes Decl. Ex. 1 at 24. DOL has not corrected that statistically suspect and unlawful view despite ample opportunity to do so. *See* Fuentes Decl. Ex. 2 at 37; Ex. 29 at 878-79; Ex. 1 at 24. Applying its interpretation to its 2022 survey results, ESD threw out all prevailing wage data for harvest work in at least 15 major Washington fruit varieties or variety groups:

- General apple
- Red Delicious apple
- Honeycrisp apple
- Granny Smith apple

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- Golden Delicious apple
- Gala apple
- Fuji apple
- Cripps Pink ("Pink Lady") apple
- Cosmic Crisp apple
- Ambrosia apple
- General cherry
- Red cherry
- Sweetheart cherry
- Yellow cherry
- Dark-sweet cherry

Fuentes Decl. Ex. 1 at 30.

3. Population Estimate Methodology

The new rules require a SWA to estimate whether there are at least 30 workers and 5 employers in a crop activity. 20 C.F.R. §655.120(c)(1)(vii) and (viii). The preamble to the Rule states that the population estimates may be made using readily available data such as "UI databases, open and closed job orders, State labor market information, and information provided by State agricultural extension offices. . ." 87 Fed. Reg. at 61694. Nevertheless, ESD has chosen to rely exclusively on a complex computation, including a methodology known as "capture-recapture," to estimate

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the population of employers and workers in a crop activity.[2] *Zirkle v. USDOL*, 442 F. Supp. 3d at 1373. This capture-recapture methodology is commonly used to estimate wildlife populations, such as the number of fish in a lake.[3] It relies upon an analysis of previous years' surveys as compared to the current year and on "raking algorithms" to produce estimates of the percentage of the total population represented by each employer responding to the survey. *Id.* The capture-recapture methodology requires a minimum number of responses both in prior years and the present year in order to be implemented, and further requires that those responses come from a certain ratio of "small, medium, and large" employers, as defined by ESD. *See* Schmitt Decl. Ex. E.

The complex data requirements necessary to implement ESD's methodology are often missing for a particular crop activity, with the result that ESD claims it cannot even undertake the prevailing-wage-finding process because it cannot estimate how many employers and/or workers there are in that crop activity. As a result of its reliance on the capture-recapture methodology, ESD *refused to even attempt to make prevailing wage findings* for dozens of crop activities covered by

[2] ESD developed this methodology to estimate the *total* worker population in a crop activity as was required by the *pre-2022 regulatory scheme*. *See* Fuentes Decl. Ex. 21; Ex. 30 at 886; Ex. 11.

[3] *See* Fishbio, One Fish, Two Fish – Using Mark-Recapture to Estimate Population Size (Aug. 19, 2020), https://fishbio.com/using-mark-recapture-estimate-population-size/.

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the 2022 survey including Braeburn, Jonagold, and Jazz apples; Rainier, Lapin, and Skeena cherries; Bosc, D'Anjou, and Asian pears; and all berries (blueberries, strawberries, raspberries, and blackberries). Fuentes Decl. Ex. 1 at 31-33.

DOL has endorsed both ESD's decision to rely on the capture-recapture methodology to estimate whether there are 5 employers and 30 workers in a crop activity and its refusal to make findings where the methodology cannot be applied.[4]

D. The Challenged Regulations Are Causing Irreparable Injury to Washington Workers

DOL's failure to protect the wages prevailing in Washington harvest work is having and will continue to have devastating effects on Washington State farmworkers in the form of wage depression and loss of employment.

Piece rates have been and continue to be far and away the most common method of payment in the harvest of Washington's fruit crops, and those prevailing piece rates allow Washington's farmworkers to earn far more than the hourly

[4] DOL understands the intricacies of ESD's methodology from litigation under the old rules, *see Zirkle v. U.S.DOL*, 442 F. Supp. 3d at 1380-81, and ESD had a conference call with DOL regarding how to implement the new regulations in March 2023, in which ESD informed DOL it was using its population estimate methodology and asked questions about where in the process to use it, Fuentes Decl. Ex. 29 at 878-79. DOL later wrote an email approving of the use of population estimates in certain parts of the analysis under the new rules and did not repudiate ESD's methodology. *Id.* at 875-76.

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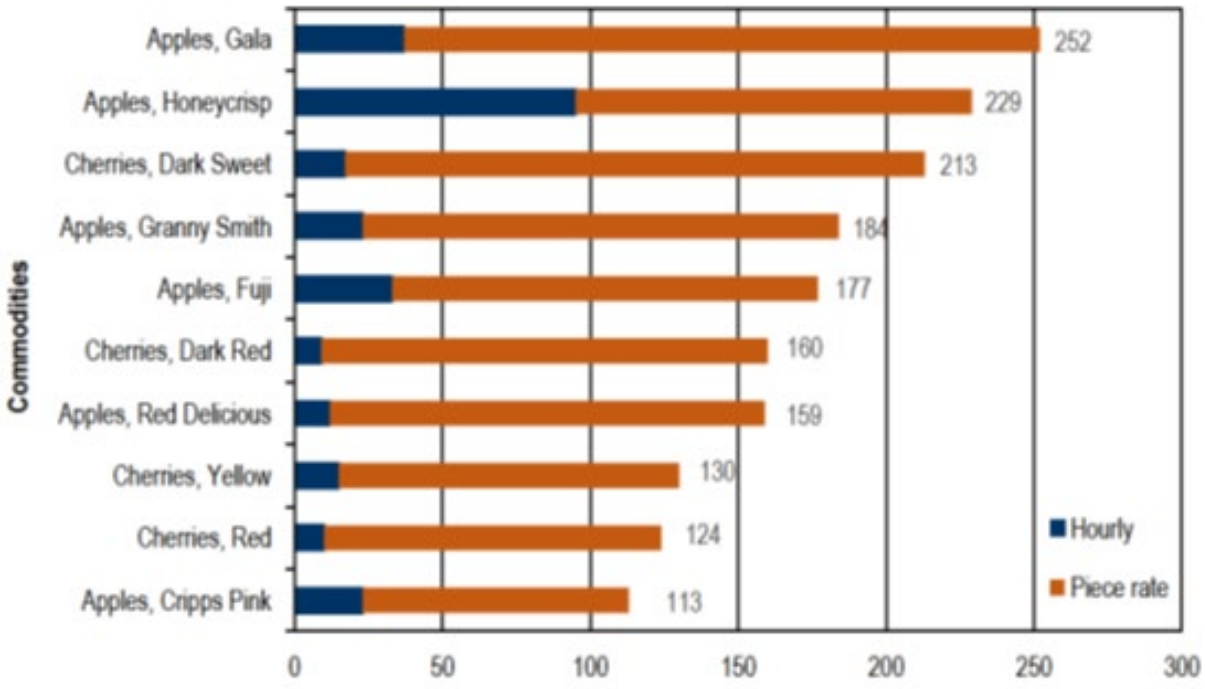
AEWR. In 2022, an average 73% of employers reported to ESD that they paid by the piece across fruit harvests. Pashkowski Decl. ¶8. Annual surveys of fruit-harvest *workers* conducted by ESD since 2016 have reported consistently that 80% or more of the workers in each harvest activity (with an exception for one particularly delicate variety of apples) were paid by the piece. Woerner Decl.¶¶8-9; Fuentes Decl. Ex. 33 at 924-25; Ex. 33 at 912. A chart of the 2022 worker survey findings—prepared by ESD—displays in orange the piece-rate wage responses from domestic farmworkers:



Fuentes Decl. Ex. 1 at 20.

Worker declarants in this case from around the state, including the President of Familias Unidas, report that they almost always earn money by the piece in

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harvest work, consistent with industry practice. Ramirez Decl. ¶12; Dominguez Decl. ¶21. Alex Galarza, the Northwest Justice Project's Outreach Coordinator for more than 16 years confirms that through his contact with hundreds, if not thousands, of workers a year, he knows that the vast majority of workers harvest Washington's fruit crops by the piece. Galarza Decl. ¶25. Piece rates prevail in berry harvesting work, as well. Ramirez Decl. ¶12.

Piece-rate pay systems allow Washington farmworkers to earn far more than the hourly AEWR. Piece rates allow workers to increase their earnings based on their speed and ability; the more skilled a worker is, the more money the worker can make; hourly wages deprive workers of that opportunity. Martin Decl. Ex. A at 6; Salas Decl. ¶¶8-19; Ruiz Decl. ¶¶8-13; 16-19, 21-24; Linares Decl. ¶¶13-14. Familias members report earning between $20-40 per hour harvesting different varieties of cherries, apples, and blueberries at piece-rate wages. Dominguez Decl. ¶¶9-10; Salas Decl. ¶¶20, 22; Ruiz Decl. ¶¶21, 23; Linares Decl. ¶¶7-11; Juarez Decl. ¶8; Ramirez Decl. ¶13 (Familias members earn upwards of $200 or $300 per day, or $25-37 per hour, harvesting blueberries in very good conditions). In 2023, even delicate varieties were paid at piece rates that allowed workers to earn wages far in excess of the AEWR. Salas Decl. ¶18; Ruiz Decl. ¶19 (earning $28-33/hour picking delicate Sugarbee apples at a piece rate). Those high earnings are consistent with the theory behind piece rates which holds that, to be effective as ensuring high productivity,

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they must be set to yield earnings 10-40% higher than the applicable minimum hourly wage. Martin Decl. Ex A at 6; *see* Ramirez Decl. ¶¶13-16.

The agricultural industry agrees the piece-rate system gives workers a chance to make more money, estimating that workers earn $250 to $300 per day (about $31.00 - $37.50 an hour) during the cherry harvest.[5] Tellingly, the CEO of the Washington Farm Labor Association (WAFLA), boasted in an email, after pressuring ESD to remove piece-rate findings, "[I]n case you didn't hear . . . [ESD] removed all piece rates for apples for growers that utilize the H-2A program. . . This is a huge win and *saved the apple industry millions*. Really glad we could help." Fuentes Decl. Ex. 12 at 387 (emphasis added).

Finally, DOL's own National Agricultural Worker Survey data shows that between 2011 and 2020, "at least 70% of the piece rate harvest workers in the Northwestern Region [which includes Washington] had hourly earnings that were higher than the [AEWR]," and those workers earned an average of 41% more than workers who were paid by the hour over that same period. Rutledge Decl. Ex. A at 7-8.

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[5]Testimony in Washinton State Senate Agriculture, Water, Trade & Economic Development Committee, Feb. 14, 2017, available at: https://www.tvw.org/watch/?clientID=9375922947&eventID=2017021224&eventID=2017021224&startStreamAt=2068&stopStreamAt=2293&autoStartStream=true (starting approximately 34:00; $250-$300 referenced at 37:40).

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Washington farmworkers rely on the high earnings generated by piece rate pay to tide their families over the winter months when agricultural work is scarce. Salas Decl. ¶23; Dominguez Decl. ¶¶16-23; Linares Decl. ¶ 13; Ramirez Decl. ¶¶15-16; *see* Fuentes Decl. Ex. 14 at 474 (farmworker wages among lowest in country); Ex. 25 at 660 (farmworker pay far lower than usually reported because of seasonal nature of work).

DOL's failure to protect the high earnings produced by the piece rate pay systems prevailing in Washington harvest work and, instead, allow H-2A employers to import foreign workers at lower hourly rates will inevitably lead to wage depression. DOL has acknowledged this:

> Economic theory holds that, other things being constant, any increase in the supply of labor available in a labor market segment would result in a decrease in the equilibrium wage. This theory-based observation of the effect of increased labor supply is the basis for the concern that currently employed, or incumbent farm workers would be adversely affected by lowered wages as a result of the influx of temporary foreign farm workers. . . .
>
> In cases in which the AEWR is not higher than the prevailing wage . . . incumbent domestic workers would be disadvantaged by the use of the AEWR instead of the higher [prevailing wage].

75 Fed Reg at 6892-6893.

Not only does an influx of foreign workers at wages below those prevailing in the area have a depressive effect on the wages of U.S. workers, it also deprives U.S. workers of needed job opportunities. U.S. workers relying on the earnings they

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receive while working by the piece cannot afford to take harvest jobs that pay by the hour; to do so would be to risk their families' survival. *See* Juarez Decl. ¶9; Ramirez Decl. ¶¶15-16. DOL has recognized that fact as well. *See* 20 C.F.R. §655.0(a)(2) ("U.S. workers cannot be expected to accept employment under conditions below the established minimum levels."). Thus, each time DOL allows an employer to hire foreign workers to perform harvest work at hourly rates, it is effectively taking jobs away from Washington workers.

What is more, the below-market hourly wages will affect the results of prevailing wage surveys in future years, causing further harm by creating a downward wage cycle.

III. ARGUMENT

A. Legal Standard for Preliminary Injunctions

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, plaintiffs 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

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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, the first two 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). Under that 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." *Alliance for the Wild Rockies*, 865 F.3d at 1217 (internal quotation marks omitted).

B. Familias is likely to prevail in demonstrating that the "Prevailing Wage Expiration" Rule, the "25% Rule," and the "Population Estimate Methodology" are Arbitrary, Capricious, and Contrary to Law under the APA

1. APA Standard

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." 5 U.S.C. § 706(2)(A). "[A]n agency rule [is] arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Alaska Dep't of Health & Soc. Servs. v. Centers for Medicare*

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& Medicaid Servs., 424 F.3d 931, 938 (9th Cir. 2005) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). The crux of this test is whether the agency has "engaged in reasoned decisionmaking." *Judulang v. Holder*, 565 U.S. 42, 53 (2011). To satisfy the test, an agency must "cogently explain why it has exercised its discretion in a given manner." *Motor Vehicle Mfrs*., 463 U.S. at 48.

Agency action is "not in accordance with law" if it violates a statutory or regulatory requirement. In evaluating this type of challenge:

> [A] reviewing court must first determine if the regulation is consistent with the language of the statute. . . . In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.

K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988) (internal quotations omitted). Agencies may not adopt rules that "defeat the purpose" of the underlying statute. *Batterton v. Francis*, 432 U.S. 416, 428 (1977). "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) (citation omitted). Familias is likely to succeed on its challenges under both APA standards.

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2. The "One-Year Rule" is Arbitrary and Capricious and Contrary to Law If New Prevailing Wages Are Not Published Each Year

DOL's decision to enforce the new "one-year expiration" rule, 20 C.F.R. § 655.120(c)(2), without adopting new prevailing wages to replace the expired wages, is both arbitrary and contrary to law. DOL's stated reason for adopting the Rule was that it would help the department base prevailing wages on "the most recent data," 87 Fed. Reg. 61660, 61701 (Oct. 12, 2022), clearly implying that it would publish prevailing wages each year. But that is not what DOL is doing.[6] Instead, it is applying the Rule to eliminate prevailing wage protections altogether. The Farmworkers agree that enforcing prevailing wages based on "the most recent data" is an appropriate goal, but if the most recent data happens to be more than a year old, it still offers significant protections for U.S. workers. While it may not reflect *increases* in the prevailing wage level,[7] even year-old data ensures that the prevailing method of payment (overwhelmingly piece rates in harvest work) is protected and that foreign workers do not undercut that method of payment by being imported at the hourly AEWR. DOL offers no explanation as to why it considers *no* prevailing

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[6] ESD has implored DOL to publish its 2022 wage findings for nine months to no avail. Fuentes Decl. Ex. 26.

[7] That Washington farmworker wage rates tend to go up over time is well established. *See* Pashkowski Decl. ¶¶15-19; Woerner Decl. at 2-3 (prevailing wages increase over time); Fuentes Decl. Ex. 32.

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wage preferable to allowing a prevailing wage to remain on the books until such time as a new prevailing wage finding has been published. Its refusal to do so cannot be squared with its stated rulemaking goal of "mak[ing] prevailing wage findings available where, *the prevailing wage rate would be higher than the AEWR*." [8] 87 Fed. Reg. 61660, 61701 (Oct. 12, 2022) (emphasis added).

DOL's application of the One-Year Rule is also contrary to law because it represents a wholesale abandonment of DOL's duty to protect U.S. workers. As noted above, DOL has long recognized that the failure to protect prevailing wages allows the very wage depression that Congress prohibited when it adopted 8 U.S.C. §1188. As a result of the One-Year Rule, DOL has now approved at least 214 H-2A visa applications for Washington State requesting more than 23,000 foreign workers in 2024, Pashkowski Decl. ¶4, all without any prevailing wage protections for Washington farmworkers.

In order to ensure that Congress's statutory mandate that the importation of foreign workers not adversely affect the wages and working conditions of U.S. workers is carried out, this Court should preliminarily enjoin the "One-Year Rule"

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[8] DOL stated in the rule preamble that the One-Year Rule was "generally consistent with DOL's current practice" at the time of rulemaking. 87 Fed. Reg. 61660, 61701 (Oct. 12, 2022). As to Washington, however, DOL has consistently left prevailing wages in effect for more than a year. Besso Decl. ¶¶6-8; Linville Decl. ¶¶16-19.

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and reinstate the 2020 prevailing wages published on January 24, 2022 (which are the prevailing wages based on the "most recent data") until judgment is entered in this case.

3. DOL's Approval of ESD's Application of the 25% Rule is Arbitrary and Capricious and Contrary to Law

Plaintiffs are also likely to succeed on their claim that DOL's approval of ESD's interpretation of the 25% Rule is arbitrary and capricious and contrary to law. The Department proposed the 25% rule in 2019 with the stated goal of ensuring that a prevailing wage finding "is not unduly impacted by the wages of a single dominant employer." 84 Fed. Reg. 36168, 36187 (July 26, 2019). DOL emphasized that the 25% rule was "consistent with the Department's aim of requiring that the wages reported from a prevailing wage survey are sufficiently representative, and the wages of a single employer do not drive the wage result." *Id*. at 36188. Even assuming that the presence of data from a large employer somehow makes survey responses unrepresentative, it is irrational to then allow ESD to throw out the rest of the survey responses and refuse to make any prevailing wage finding for that crop activity. It would be far more consistent with DOL's goal of increasing the number of prevailing wage findings and its duty to protect prevailing wages to simply remove the large employer's data from the sample. If there are sufficient other responses to meet the minimum requirements (5 employers/30 workers), a prevailing wage could then be

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calculated without being "unduly impacted by the wages of a single dominant employer."

That could have been done with at least 12 of the major crop activities in which the presence of one large employer resulted in no prevailing wage finding. For example, the 2022 survey data for "general cherry harvest"—one of the 15 harvest surveys that failed the 25% Rule—included responses from 103 agricultural employers with 81% (83 out of 103) responding they paid a piece-rate wage for general cherry harvest. Pashkowski Decl. ¶9. ESD determined that a piece-rate of 27 cents a pound was the prevailing wage rate based on wage data from the 32[9] cherry

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[9] The 32 growers who paid piece rates without hourly guarantees establish the majority method of payment. The other 51 growers paid piece rates with hourly guarantees, which DOL treats as a different method of payment. The complaint also challenges ESD's fracturing of piece-rate wages that results in a watering down of 83 to 32 growers, Dkt. No. 1 ¶¶113-133, but that claim is not addressed in this motion. Suffice it to say that the 25% Rule is even more likely to eliminate prevailing wage findings where piece-rates are fractured into tiny categories. Steinbaum Decl. Ex. A at 7-8. For example, for the 2022 survey, the 25% Rule caused a no-finding for three of Washington's top 5 apple varieties (Fuji, Granny Smith, and Red Delicious) despite the vast majority of growers reporting piece-rate wages. Pashkowski Decl. ¶¶11-13. There, ESD found that a piece rate (by the bin) was the most common method of pay, but that piece rate was reported by a *single grower who said that they were "not sure" of the size of their own apple bins*. Every other grower answering any apple harvest survey in 2022 knew the size of its bins and answered that they were a standard size. *Id.* at ¶11 n.1. Because this grower was the only one to report a bin size

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growers who paid by the piece (the majority method of payment). However, ESD threw out all of the wage data and refused to certify 27 cents a pound as the prevailing wage rate because one employer, who paid 25 cents a pound, employed **25.5%**—283 of the 1,108—of the reported workers. *Id.* Had ESD simply removed that one grower from the data set and used the wage data of the 31 remaining cherry growers who paid by the piece, the 25% Rule would not have been violated (the largest grower would have employed only 18% of the reported workers) and a prevailing piece rate wage could have been reported. *Id.*

The same result occurred in the "general apple harvest" survey where 133 growers responded to the survey, 92 of whom responded they paid a piece rate wage. *Id.* ¶10. ESD determined the majority method of pay was a piece rate of $29.82 a bin but threw out all the data because the grower who employed the most workers in this pay category—who paid $30/bin—employed more than 25% of the reported workers. *Id.* If ESD simply eliminated that one grower, the 25% rule would not have applied, and the data from the remaining 42 employers paying by the majority pay

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of "not sure," the calculation was guaranteed to fail the 25% Rule, as the lone employer respondent always employs 100% of the reported workers. *Id.*[10] The Complaint also outlines that ESD's use of estimated populations later in the prevailing-wage-finding process is contrary to law. Dkt. No. 1 ¶¶ 83-87. This claim is not addressed in this motion.

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unit could have been calculated and a prevailing piece-rate wage reported to DOL. *Id.*

Had DOL required ESD to use a common-sense interpretation of the rule for these two surveys, rather than accepting ESD's interpretation, **all cherry and apple crops would be covered by a piece-rate prevailing wage**—a result that reflects the reality of Washington's pay structure for fruit harvests and protects the wages of domestic workers.

DOL's acceptance of ESD's decision to "throw the baby out with the bath water," rather than insist on the far more commonsense reading of the 25% Rule, is the essence of arbitrary agency action, particularly so because eliminating the dominant employer's data and calculating the prevailing wage from the remaining data is consistent with DOL's stated goal of obtaining "a greater number of reliable prevailing wage results," 84 Fed Reg. at 36185, while throwing out all of the data and failing to make any finding at all because of the presence of one dominant employer is directly contrary to DOL's stated goal in adopting the new methodology. *See* Steinbaum at 9 ("throwing away the data . . . when one employer predominates in the collected data sample, **defeats the purpose of the regulation**"). As noted by Familias's expert, there are also other, more sophisticated statistical methods of compensating for the removal of certain survey respondents in a data set. *Id.*

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Even apart from the irrationality of throwing out all the data because of the presence of one large employer, the underlying assumption that the presence of a large employer renders the survey data unrepresentative is arbitrary. The new methodology requires ESD to send surveys to the entire population of employers in a given crop activity or to a random sample of such employers. 20 C.F.R. § 655.120(c)(1)(iv). The methodology then makes the fundamental assumption that if the survey is distributed by one of those means and the required minimum number of voluntary responses are received (at least 5 employers employing at least 30 workers), the responses will necessarily constitute a representative sample of the population. Given that assumption, there is no reason to believe that, just because one employer represents 25% or more of the workers reported to have been paid by the majority unit of pay, the sample is no longer representative. Indeed, it may well be that large employers are typical in that crop activity and that responses showing 25% or more of workers being employed by a large employer is a statistically accurate reflection of the population. DOL fails to provide any explanation for its assumption that the presence of a large employer among the survey responses makes the responses unrepresentative.

DOL's statement that it doesn't want a prevailing wage finding that is "unduly impacted by the wages of a single dominant employer" is similarly unexplained. *See Bldg. & Const. Trades Dep't, AFL-CIO v. Martin*, 961 F.2d 269, 277 (D.C. Cir.

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1992) (holding construction prevailing wage rule arbitrary and capricious for lack of sufficient explanation). Apparently, DOL thinks that large employers pay differently from small- and medium-sized employers. But it offers no evidence to support that assumption, and the assumption is clearly belied by the 2022 survey data gathered by ESD. The 25% rule caused no-findings for harvests of dark Sweet cherries, red cherries, Sweetheart cherries, and Cripps Pink apples, Fuentes Decl. Ex. 1 at 30, even though in every situation, the top employer was paying a piece-rate within the range of piece rates paid by other employers in that wage category, Fuentes Decl. Ex. 6 at 218; 226; 234; 130. Because large employers do not tend to pay differently from small employers, there is no reason to throw out a prevailing wage finding simply because one responding employer represents 25% of the reported workers.

Finally, DOL irrationally states that it came up with the 25% rule by borrowing it from the anti-trust "safety zone" standard used by the Department of Justice to define when communications between employers regarding wages will be viewed as evidence of price-fixing. *See* 84 Fed. Reg. at 36187-88 & n.52. DOL fails to explain how such a rule is relevant to a government wage survey designed to find out how the majority of workers are paid (not how often employers talk to each other about wages, much less what the anti-competitive effects of such discussions may be). *See* Steinbaum Decl. Ex. A at 6 (use of rule in context of government surveys "non-sensical"). It is also worth noting that DOJ and the FTC abandoned the 25%

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safe harbor in 2023, calling it outdated. *See id.* at 2-3. Thus, the only theoretical support DOL offers for the 25% rule turns out to be obsolete as well as inapplicable to wage surveys.

DOL's decision to adopt the 25% Rule and to accept ESD's view that the Rule requires throwing out all survey results where a large employer is among the respondents is not only arbitrary and capricious, it is also contrary to law. Like the "One Year Rule," DOL's actions with respect to the 25% Rule necessarily result in fewer, rather than more prevailing wage findings, thereby leaving farmworkers' prevailing wages (including the prevailing piece-rate method of pay) unprotected from the adverse effects of foreign workers, in direct violation of the congressional mandate. Familias requests that this Court preliminarily enjoin DOL from accepting ESD's interpretation of the 25% Rule.

4. DOL's Implementation of Its Rules by Allowing ESD to Use a Complex Population Estimate Methodology Designed for the Superseded Regulations, is Arbitrary, Capricious, and Contrary to Law

The Farmworkers are likely to succeed on their claim that DOL's decision to permit ESD to use an unnecessary population estimate methodology to make the estimates required by 20 C.F.R. § 655.120(c)(1)(vii) and (viii), is arbitrary, capricious, and contrary to law.

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Rather than requiring precise population estimates, the current rules simply require ESD to estimate whether a crop activity has more than 30 workers and 5 employers. *Id.* ESD's population estimate methodology, involving layers of statistical analysis, is not remotely necessary to make such a simple estimate. It is self-evident that harvest of major crops involves more than 5 employers and 30 workers and, even with less common crop varieties, ESD can rely on the number of workers reported by employers in their survey responses, the number of employers filing H-2A applications for the crop and the number of workers those applications seek, the number of workers responding to ESD's own worker wage survey, or calls to agricultural extension offices to determine that there are more than 5 employers and more than 30 workers harvesting a crop. It defies logic to say that ESD needs complex algorithms to tell whether there are 5 employers in a particular cherry crop, when more than 5 employers have told ESD on its own wage survey that their workers pick that crop.

Because the complex data needed to perform the capture/recapture calculations are missing for many crop activities, ESD's use of the methodology causes it to declare from the beginning that it cannot even attempt the steps in DOL's prevailing-wage-finding process, much less make a finding, for a host of crops, including common varieties of apples, cherries, pears, and berries. Fuentes Decl. Ex. 1 at 31-33; Schmitt Decl. Ex. E. Thus, the methodology is not only unnecessary, but

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its stringent requirements actively frustrate DOL's goal of increasing the number of prevailing wage findings so that it can better protect U.S. workers. [10]

For all of these reasons, Familias is likely to succeed on its claim that DOL's acceptance of ESD's use of the complex capture-recapture analysis is arbitrary and capricious and, because it precludes DOL from protecting prevailing wages, it frustrates the statutory mandate that U.S. wages and working conditions not be adversely affected by the importation of foreign workers and is, therefore, contrary to law.

This Court should enjoin DOL to instruct ESD that its population estimate methodology is contrary to DOL's regulations and that ESD must estimate whether there are 5 employer and 30 workers in a crop activity using "sources such as UI databases, open and closed job orders, State labor market information, and information provided by State agricultural extension offices. . ." or other readily available means to make such estimates. 87 Fed. Reg. at 61694.

[10] The Complaint also outlines that ESD's use of estimated populations later in the prevailing-wage-finding process is contrary to law. Dkt. No. 1 ¶¶ 83-87. This claim is not addressed in this motion.

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C. Plaintiff Familias's members and Farmworkers Statewide Are Suffering and Will Continue to Suffer Irreparable Injury without Emergency Relief.

As explained in the fact section, absent injunctive relief, DOL's unlawful actions will continue to irreparably harm Washington farmworkers, as the workers are deprived of market wages at which workers regularly earn 10% to 40% or more above what they would at the default hourly AEWR. *See* Martin Decl. Ex A at 6; *see generally* Section II.D, *supra.* Farmworkers have already been injured by DOL's failure to protect prevailing piece rates during the 2023 harvest season, and 2024 harvest season is imminent.[11] *See* Pashkowski Decl. ¶¶ 4-5 (214 job orders approved requesting 23,405 H-2A workers for 2024); Ramirez Decl. ¶¶ 19-21. The cherry and strawberry harvests begin in mid-June, with blueberry and blackberry harvests following in July and August, and apple harvest normally beginning in August and continuing into the middle of November. Ramirez Decl. ¶¶19-21.

When wages fall even a few percentage points, farmworker families suffer significant hardship because many already live in or at the edge of poverty. *See Torres Hernandez v. Stewart*, No. 1:20-CV-03241-SMJ, 2021 WL 6274440, at *10

[11] There is still time for the Court to protect workers this year because, though all H-2A job orders for June have already been approved, the regulations require employers to adjust their wage payment if prevailing wages change during the pendency of the contract. 20 C.F.R. § 655.120(c)(3).

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(E.D. Wash. Mar. 1, 2021) (finding irreparable harm from loss of prevailing wages); Ramirez Decl. ¶¶16-18; Fuentes Decl. Ex. 18 at 514-15, 530-32; Ex. 16 at 487, 493-95; Ex. 15; Ex. 17; Ex. 13 at 442-47. DOL's failure to protect prevailing piece rates will harm Washington harvest workers in another way: the employers that DOL allows to hire foreign workers at the hourly AEWR will report those hourly rates on next year's survey. The more employers that are certified at hourly wages, the more likely it becomes that next year's survey will deem hourly wages to be the prevailing wage, not piece rates. Once that happens, other employers will be forced to adopt that method of pay in order to stay competitive with employers relying on foreign workers. Faced with these significant wage cuts, U.S. workers will be driven out of harvest work and replaced by foreign workers or forced to accept lower wages and driven further into poverty.

While purely monetary damages typically are generally not considered irreparable, wage depression affects the structure of agricultural occupations and goes far beyond mere monetary injury. Moreover, courts have recognized that even purely monetary injury is irreparable 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) (quotations and citations omitted); *see also Kildare v. Saenz*, 325 F.3d 1078, 1083 (9th Cir. 2003) ("[E]conomic hardship constitutes irreparable harm"); *United Farm Workers v.*

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Perdue, No. 1:20-cv-01452-DAD-JLT, 2020 WL 6318432, at *1-2, 14 (E.D. Cal. Oct. 28, 2020) (finding irreparable harm from 5% wage decrease related to freeze of AEWR).

D. The Remaining Equitable Factors Favor Granting a Preliminary Injunction.

The remaining equitable factors also favor granting preliminary relief. "There 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). "Depression of local farmworker wages causes the exact harm that Congress sought to prevent in the H-2A program. And the public interest is served by stability in farmworker wages." *Torres Hernandez*, 2021 WL 6274440, at *11 (finding equitable factors favored enjoining 2019 prevailing wage survey). The situation here is indistinguishable from *Torres Hernandez.*

E. This Court should not require Familias to post a bond.

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) (quotation and citation omitted). There is no harm to USDOL from enjoining its unlawful action. Moreover, given

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the finances of the Plaintiff and its farmworker members waiver of a bond is appropriate. *See* Ramirez Decl. ¶¶7-9; *Torres Hernandez*, 2021 WL 6274440, at *12 (no bond required in prevailing wage challenge); *Van De Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1325 (9th Cir. 1985); *UFW v. USDOL*, 509 F. Supp. 3d 1225, 1255 (E.D. Cal. 2020) (bond not warranted in granting nationwide injunction preventing freezing of AEWR).

IV. CONCLUSION

For all of the foregoing reasons, this Court should enter a preliminary injunction requiring DOL to:

1. Cease to enforce the "One-Year Rule" and to reinstate and enforce the 2020-Survey prevailing wage rates, published in January 2022 (the last prevailing wage rates published in Washington) until judgment is entered in this case;

2. Cease to enforce the 25% Rule and/or to rescind its approval of ESD's interpretation of the 25% Rule as requiring *all survey results* to be thrown out if one responding employer accounts for 25% or more of the reported workers paid by the prevailing method of payment;

3. Rescind its approval of ESD's use of its complex population estimate methodology and direct ESD to estimate whether there are at least 5 employers and 30 workers in a crop activity using readily available sources of information; and,

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4. Prohibit DOL from certifying the importation of foreign workers until its duty to protect U.S. worker wages, particularly prevailing wages, has been carried out.

In addition, the Court should enter a scheduling order setting a deadline for DOL to file the administrative record, for Familias to seek additions to that record if necessary, and for summary judgment briefing.

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RESPECTFULLY SUBMITTED this 10th day of May, 2024.

We certify that this memorandum contains 8392 words, in compliance with the Local Civil Rules.

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