UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Purdue University, *et al.*, *Plaintiffs*, v. Eugene Scalia, *et al.*, *Defendants*.	Civil Action No. 1:20-cv-3006 (EGS) Hon. Emmet G. Sullivan

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL ASSOCIATION OF MANUFACTURERS, AND TECHNET AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS

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GLOSSARY

APA.....Administrative Procedure Act

DHS.....Department of Homeland Security

DOL .....Department of Labor

NAM .....National Association of Manufacturers

INTRODUCTION AND INTEREST OF *AMICI CURIAE*

The Department of Labor (DOL) interim final rule challenged in this case aims to make it prohibitively expensive for companies to hire the high-skilled, specialized foreign workers they need to run and grow their businesses. Despite the fact that it is hugely consequential—DOL itself estimates that it will cost American businesses nearly *$200 billion* over the next decade—that rule, *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States*, 85 Fed. Reg. 63,872 (Oct. 8, 2020) (DOL Rule), was issued without even the minimal procedural safeguards provided by public notice and comment.

Amici are business associations that collectively represent key sectors of the American economy, including thousands of firms that hire H-1B, EB-2, and EB-3 employees for their unique skills, productivity, and innovation. *Amici* thus have deep institutional interests in ensuring that the government is not permitted to rush this massively harmful, permanent regulation into effect without subjecting it to the public scrutiny mandated by the APA. *Amici*'s interests are so deep, in fact, that two of them are leading a separate lawsuit to set aside the DOL Rule (and a companion rule promulgated by the Department of Homeland Security (DHS)). *See Chamber of Commerce of U.S. v. DHS*, No. 20-cv-7331 (N.D. Cal.). *Amici* submit this brief to supplement the plaintiffs' arguments regarding the inapplicability of the APA's good-cause exception.

* * *

Amicus Chamber of Commerce of the United States of America (U.S. Chamber) is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. Part of the U.S. Chamber's mission is advocating for its members' abilities to bring the world's best and brightest to America to foster innovation and economic growth. Because many of the U.S. Chambers' members face acute labor shortages as to certain specialty occupation workers, they employ individuals via the H-1B, EB-2, and EB-3 visa categories. The DOL Rule thus directly injures the interests of the members of the U.S. Chamber.

Amicus National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes roughly $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for nearly three-quarters of private-sector research and development in the Nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. Part of the NAM's mission is advocating for its members' abilities to access global talent and retain workers who drive innovation in manufacturing. The NAM recognizes that immigrants help build America's manufacturing industry and that temporary workers from abroad are essential to the Nation's manufacturing competitiveness. Because many of the NAM's members have hired—and intend to hire—employees via the H-1B, EB-2, and EB-3 visa categories, the DOL Rule will directly injure its members' interests.

Amicus Technology Network (TechNet) is the national, bipartisan network of technology CEOs and senior executives that promotes the growth of the innovation economy by advocating a targeted policy agenda at the federal and 50-state level. TechNet's diverse membership includes dynamic American companies ranging from startups to the most iconic companies on the planet, and represents over three million employees and countless customers in the fields of information technology, e-commerce, the sharing and gig economies, advanced energy, cybersecurity, venture capital, and finance. Because many of TechNet's members have hired—and intend to hire—employees via the H-1B, EB-2, and EB-3 visa categories, the DOL Rule will directly injure its members' interests.

ARGUMENT

I. THERE IS NO GOOD CAUSE TO BYPASS NOTICE AND COMMENT.

In general, binding agency rules must follow the notice and comment rulemaking process mandated by the APA, and rules that evade that process will be set aside. 5 U.S.C. §§ 553, 706(2)(D). "These procedures are not a mere formality." *Capital Area Immigrants' Rights Coal.*

v. Trump, __ F. Supp. 3d __, 2020 WL 3542481, at *11 (D.D.C. June 30, 2020) (*CAIR Coal.*). Rather, "[t]hey 'are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.'" *Id.* (quoting *Int'l Union, United Mine Workers v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005)); *see also, e.g.*, *MCI Telecommc'ns Corp. v. FCC*, 57 F.3d 1136, 1141 (D.C. Cir. 1995) (notice and comment "serves both (1) to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies; and (2) to assure that the agency will have before it the facts and information relevant to a particular administrative problem") (quotation marks omitted).

The limited exception at issue here permits an agency to forgo notice and comment only if it "for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). "Because notice and comment is the default, 'the onus is on the agency to establish that notice and comment' should not be given," and "[a]ny agency faces an uphill battle to meet that burden." *Nat'l Venture Capital Ass'n v. Duke*, 291 F. Supp. 3d 5, 15-16 (D.D.C. 2017) (quoting *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 801 n.6 (D.C. Cir. 1983)); *see also, e.g.*, *CAIR Coal.*, 2020 WL 3542481, at *12 ("[T]he D.C. Circuit has set a high bar for satisfying good cause."). Indeed, "the good-cause inquiry is 'meticulous and demanding.'" *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014) (quoting *N.J. Dep't of Envt'l Protection v. EPA*, 626 F.2d 1038, 1046 (D.C. Cir. 1980)). Courts "are to 'narrowly construe' and 'reluctantly countenance' the exception." *Id.* (quoting *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012) (alterations incorporated).

This Court "reviews an agency's finding of good cause *de novo*," rather than affording the agency's good-cause determination any deference. *Nat'l Venture Capital Ass'n*, 291 F. Supp. 3d at 15; *see Sorenson*, 755 F.3d at 706. In conducting this "inevitably fact-or-context dependent inquiry" (*Sorenson*, 755 F.3d at 706 (quotation marks omitted)), the court "must 'examine closely'

the agency's explanation as outlined in the rule" (*Nat'l Venture Capital Ass'n*, 291 F. Supp. 3d at 15-16 (quoting *Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 580 (D.C. Cir. 1981)).

A. COVID-related unemployment cannot justify "emergency" rules issued seven months after its height.

The DOL Rule principally asserts that the agency may discard pre-promulgation notice and comment because of the effects of COVID-19 on the domestic labor market, particularly on unemployment. *See generally* DOL Rule, 85 Fed. Reg. at 63,898-63,902. As discussed below, the unemployment-based analysis DOL uses is wrong on its face. But the agency's good-cause assertion also fails for a simpler reason: The government may not rely upon an emergency that was apparent in March to justify evading the APA's requirements in October.

"It is well established that good cause cannot arise as a result of the agency's own delay," and "[t]he D.C. Circuit (and district courts within this circuit) have repeatedly rejected good cause when the agency delays implementing its decision." *Nat'l Venture Capital Ass'n*, 291 F. Supp. 3d at 16 (quotation marks omitted); *accord, e.g.*, *Wash. Alliance of Tech. Workers v. DHS*, 202 F. Supp. 3d 20, 26 (D.D.C. 2016) ("[G]iven its own delay in initiating rulemaking, DHS did not come close to establishing a bona-fide emergency, such that the Court could have 'reluctantly countenanced' the avoidance of notice and comment.").

In other words, even if there *is* an emergency that might otherwise constitute good cause (*but see* pages 7-13, *infra*.), the exception is not available where the agency knew about the emergency with enough time to provide notice and comment, but chose to wait and invoke the good-cause exception instead. *See, e.g.*, *Air Transp. Ass'n of Am. v. Dep't of Transp.*, 900 F.2d 369, 379 (D.C. Cir. 1990) (holding that "the FAA is foreclosed from relying on the good cause exception by its own delay in promulgating the [challenged] Rules," where "[t]he agency waited almost nine months before taking action" and therefore "could have realized [its] objective short of disregarding its obligations under the APA" by "using expedited notice and comment procedures if necessary"), *vacated on other grounds*, 498 U.S. 1077 (1991); *Nat'l Ass'n of Farmworkers Orgs. v. Marshall*, 628 F.2d 604, 622 (D.C. Cir. 1980) ("[W]e cannot sustain the suspension of notice and

comment to the general public" where "[t]he Department waited nearly seven months" and therefore "found it quite possible to consult with the interested parties it selected."); *Env'tl Def. Fund v. EPA*, 716 F.2d 915, 921 (D.C. Cir. 1983) (rejecting as "baseless" the argument that "outside time pressures forced the agency to dispense with APA notice and comment procedures" where agency waited eight months before invoking good cause).[1]

In *National Venture Capital Association*, for example, the Department of Homeland Security issued a final rule on July 11, 2017, purportedly in response to an Executive Order issued on January 25, 2017. This delay of 167 days precluded the agency's invocation of the good-cause exception: The court agreed that, "[b]ecause Defendants could have initiated the notice-and-comment process during that six-month span," the position that "they may not now rely on 'good cause'" "finds significant traction." 291 F. Supp. 3d at 16.

The DOL Rule attempts exactly the maneuver that was rightly rejected in these cases. Its principal justification for skipping notice and comment is that "the shock to the labor market caused by the widespread unemployment resulting from the coronavirus public health emergency has created exigent circumstances that threaten immediate harm to the wages and job prospects of U.S. workers." DOL Rule, 85 Fed. Reg. at 63,898; *see also id.* at 63,899, 63,900 (suggesting good cause exists in "the unique confluence of a public health emergency of a kind not experienced in living memory [and] its impact on the labor market," particularly the "high unemployment rates . . . which reached 14.7 percent in April, a rate not seen since the Great Depression"). Because of this unemployment emergency, the agency claims, "immediate action by the Department" is needed, leaving no time for notice and comment. *Id.* at 63,898.

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[1] *See also Make the Rd. N.Y. v. McAleenan*, 405 F. Supp. 3d 1, 51 (D.D.C. 2019) ("[T]he agency's own conduct in waiting two and a half years to issue the New Designation after the President first brought this matter to the agency's attention . . . will likely impede [its] progress with respect to any good-cause showing."), *rev'd on other grounds*, 962 F.3d 612 (D.C. Cir. 2020); *Wash. Alliance of Tech. Workers*, 202 F. Supp. 3d at 27 (D.D.C. 2016) ("It was . . . unreasonable for DHS to argue, after four years of inaction, that an ongoing labor shortage entitled it to proceed with an emergency rulemaking.").

But contrary to this assertion of exigency, DOL has known about "the widespread unemployment resulting from the coronavirus public health emergency" (85 Fed. Reg. at 63,898) since late March, or April at the very latest. In a vivid illustration of the point, another interim final rule aimed at the H-1B program, issued by DHS the same day as the DOL Rule, makes essentially the same good-cause arguments, relying on "front page" headlines *from March 27, 2020* that decry the "unprecedented 'economic cataclysm'" presented by COVID-related unemployment. *Strengthening the H-1B Nonimmigrant Visa Classification Program*, 85 Fed. Reg. 63,918, 63,938 & nn.138, 139 (Oct. 8, 2020) (capitalization altered). Indeed, no reasonably observant consumer of news in late March 2020 could have failed to comprehend that unemployment was spiking to "unprecedented" levels.[2]

DOL obviously was well aware of this information: It is the federal agency charged with overseeing the labor markets, and it produces and reports the unemployment statistics on which the DOL Rule relied. *See* DOL Rule, 85 Fed. Reg. at 63,898.

That is, far from engaging in "immediate action" upon learning of COVID-related unemployment (DOL Rule, 85 Fed. Reg. at 63,898), DOL waited *over six months*—certainly enough time to have conducted a notice and comment process—before issuing the Rule challenged here. The APA does not countenance such behavior.

Because DOL "could have realized [its] objective short of disregarding its obligations under the APA" by providing notice and the opportunity for comment in the intervening six-plus months, it now "is foreclosed from relying on the good cause exception by its own delay." *Air*

[2] In addition to the New York Times articles cited by the DHS Rule, see, for example, Heather Long & Alyssa Fowers, *A Record 3.3 Million Americans Filed for Unemployment Benefits as the Coronavirus Slams Economy*, Wash. Post (Mar. 26, 2020), perma.cc/U3NU-Y4EQ; Eric Morath et al., *Record Rise in Unemployment Claims Halts Historic Run of Job Growth*, Wall Street J. (Mar. 26, 2020), perma.cc/S3T7-FBBB; Paul Davidson et al., *A Record 3.3. Million Americans File for Unemployment Benefits as the Coronavirus Takes a Big Toll on the Economy*, USA Today (Mar. 26, 2020), perma.cc/9428-SJTH.

Transp. Ass'n, 900 F.2d at 379; *accord Nat'l Venture Capital Ass'n*, 291 F.3d at 16-17; *Env'tl Def. Fund*, 716 F.2d at 921.

B. In any event, the COVID-19 pandemic does not establish good cause.

Quite apart from the fact that its claims of exigency come after six months of inaction, DOL has failed to demonstrate through record evidence that there is presently—now, in October 2020—an unemployment emergency *related to* H-1B, EB-2, and EB-3 visas that is "so dire as to warrant dispensing with notice and comment procedures." *CAIR Coal.*, 2020 WL 3542481, at *13; *see also Sorenson*, 755 F.3d at 707 (good cause requires "record support proving the emergency").

a. Before turning to DOL's arguments, three points bear substantial emphasis.

First, good cause is reserved for truly emergent circumstances. As the D.C. Circuit has repeatedly explained, "the good-cause exception should be invoked only in '*emergency* situations . . . or where delay could result in serious harm.'" *Sorenson*, 755 F.3d at 706 (quoting *Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004)). The court went on to make clear that the paradigm case is one "where delay would imminently threaten *life or physical property*." *Id.* (emphasis added). Thus, qualifying emergencies include post-9/11 airline security measures needed "to prevent a possible imminent hazard to aircraft, persons, and property within the United States" (*Jifry*, 370 F.3d at 1179), and mine-safety measures of "life-saving importance" (*Council of S. Mountains*, 653 F.2d at 581). *Accord NRDC v. Nat'l Highway Traffic Safety Admin*, 894 F.3d 95, 115 (2d Cir. 2018) (rejecting good cause where "[t]his is not a situation of acute health or safety risk requiring immediate administrative action").

"This is no such case." *Sorenson*, 755 F.3d at 706. Here, the harms asserted by defendants do not have the same imminence as terrorist threats or the prevention of mine explosions. Rather, DOL contends that the alleged wage "gap" between H-1B employees and domestic workers has "persisted for more than two decades." 85 Fed. Reg. at 63,882. Indeed, DOL asserts that the action it took "should have been undertaken years ago." *Id.* at 63,900.[3]

[3] DOL rests (85 Fed. Reg. at 63,898 n.216) on a passing comment made by the D.C. Circuit in *Sorenson*, which observed that a "fiscal calamity could *conceivably* justify bypassing the notice-

Second, if DOL's delay in promulgating these rules does not categorically bar its reliance on the good-cause exception (*see* pages 4-7, *supra*), its sluggish conduct indicates that its invocation of COVID-19 is mere pretext. If the DOL Rule were a bona fide response to an emergency, one would anticipate that DOL would *act* on an emergency schedule.

By way of analogy, when courts consider whether to grant a preliminary injunction, it is broadly understood that "[a]n unexcused delay in seeking extraordinary injunctive relief may be grounds for denial because such delay implies a lack of urgency and irreparable harm." *Dallas Safari Club v. Bernhardt*, 453 F. Supp. 3d 391, 403 (D.D.C. 2020) (quoting *Newdow v. Bush*, 355 F. Supp. 2d 265, 292 (D.D.C. 2005)); *see also, e.g.*, *AARP v. EEOC*, 226 F. Supp. 3d 7, 22 (D.D.C. 2016) ("Several circuits have observed that delay in pursuing a preliminary injunction undercuts a claim of irreparable injury.") (collecting cases). Simply put, a plaintiff's "delay in seeking a preliminary injunction . . . undercuts its asserted harms." *Fla. EB5 Invs., LLC v. Wolf*, 443 F. Supp. 3d 7, 13 (D.D.C. 2020). So too here. DOL's conduct speaks far louder than its words.[4]

Moreover, the regulatory changes implemented by the DOL Rule are not novel; to the contrary, they have been contemplated for years prior to the advent of COVID-19, undercutting the government's suggestion that the Rule is in fact an emergency response to that pandemic. *See, e.g.*, *Wash. Alliance of Tech. Workers*, 202 F. Supp. 3d at 27 ("long planned" agency action is ineligible for good-cause exception). As early as April of 2017, a "senior administration official" briefed the

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and-comment requirement" (755 F.3d at 707 (emphasis added)). But, as we show below, there is no "fiscal calamity" in the categories of employment actually relevant to the DOL Rule.

[4] The Federal Register website, www.federalregister.gov/documents/search#advanced, reveals that DOL issued many rules and proposed rules having nothing to do with COVID-19 between March and October 2020. *See, e.g.*, 85 Fed. Reg. 60,600 (interpretation of independent-contractor status under FLSA); 85 Fed. Reg. 53,163 ("Good Guidance" procedures); 85 Fed. Reg. 51,896 (training for workers affected by foreign trade); 85 Fed. Reg. 39,782 (regulations for administering United States-Mexico-Canada Agreement); 85 Fed. Reg. 34,970 (computation of overtime for certain employees under FLSA); 85 Fed. Reg. 30,608 ("establish[ing] a system of discretionary secretarial review over cases pending before or decided by the Board of Alien Labor Certification Appeals"). Good cause is not met when an agency delays responding to a professed emergency "largely [as] a product of the agency's decision to attend to other obligations." *Air Transp. Ass'n*, 900 F.2d at 379.

press on this administration's plans to "adjust the wage scale" for H-1B workers, putatively because "about 80 percent of H1B workers are paid less than the median wage in their fields."[5] And the DOL Rule itself "acknowledges" that "[t]he reforms to the prevailing wage levels that the Department is undertaking in this rulemaking . . . should have been undertaken years ago." DOL Rule, 85 Fed. Reg. at 63,900.

That the changes wrought by the DOL Rule have been under consideration for so long strongly suggests the government is using the pandemic as pretext to ram permanent rules into effect without facing the gauntlet of public comment—further discrediting the agency's assertions that "immediate action by the Department" (DOL Rule, 85 Fed. Reg. at 63,898) is required to respond to a crisis that began more than half a year ago.

Third, rules that are extraordinarily consequential are uniquely inappropriate candidates for the good-cause exception. As many courts have explained, "the broader a rule's reach, 'the greater the necessity for public comment,'" and the less permissible it is to allow promulgation through the good-cause exception. *CAIR Coal.*, 2020 WL 3542481, at *12 (quoting *AFL-CIO v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981)); *accord, e.g.*, *Tenn. Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1144 (D.C. Cir. 1992).

The Rule at issue here fundamentally upsets the H-1B visa program, which, according to DHS statistics, employs over 580,000 individuals in the United States.[6] In keeping with the scale of the program, DOL itself calculates that the changes contained in the DOL Rule will cost American employers *$198 billion* over the next ten years. DOL Rule, 85 Fed. Reg. at 63,908. By DOL's own calculations, this is one of the most expensive regulations in history. That is an astounding amount of money for a government agency to transfer between private parties without even engaging in the "surrogate political process" of notice and comment, which is intended to "take[]

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[5] The White House, *Background Briefing on Buy American, Hire American Executive Order* (Apr. 17, 2017), perma.cc/JCJ7-9P9V.

[6] U.S. Citizenship & Immigration Services, *H-1B Authorized-to-Work Population Estimate* 1 (Sept. 30, 2019), perma.cc/N2KZ-BZ6R.

some of the sting out of the inherently undemocratic and unaccountable rulemaking process." *CAIR Coal.*, 2020 WL 3542481, at *11 (quoting *DHS v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1929 n.13 (2020) (Thomas, J., dissenting)).

b. With these principles in hand, DOL's effort to invoke the good-cause exception by reference to COVID-19-related unemployment must fail.

The DOL Rule relies for its good-cause analysis on the existence of high topline unemployment numbers, citing the 14.7% overall unemployment figure in April 2020 as "a rate not seen since the Great Depression." DOL Rule, 85 Fed. Reg. at 63,899. But those are the numbers from April; when the Rule was published on October 8, the latest figures (for September) showed instead 7.9% overall unemployment, with the rate having fallen steadily every month since its April peak.[7]. Indeed, Secretary of Labor Eugene Scalia publicly reported on October 2—six days before issuing the DOL Rule—that "[m]ore than half the jobs lost from the pandemic have now been restored."[8] Economic conditions six months ago cannot constitute good cause for dispensing with notice and comment when those conditions have materially changed in the meantime.

Moreover, while the current 7.9% overall unemployment rate is higher than the historically low rates seen just before the pandemic, it is far from unprecedented. Indeed, the overall unemployment rate was higher than (or comparable to) 7.9% during the entire four-year period from January 2009 through January 2013, during the last recession and subsequent recovery.[9] Such a rate does not satisfy the "meticulous and demanding" good-cause exception. *Sorenson*, 755 F.3d at 706. Were it otherwise, whenever unemployment reaches this level—again, a level at which unemployment has remained for extended periods in the recent past—the government would have virtually unlimited authority to promulgate regulations impacting the labor markets without notice-

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[7] U.S. Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey*, perma.cc/GJ6R-EYL2.

[8] U.S. Dep't of Labor, *Statement by U.S. Secretary of Labor Scalia on the September Jobs Report* (Oct. 2, 2020), perma.cc/36VA-EGYR.

[9] U.S. Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey*, perma.cc/GJ6R-EYL2.

and-comment rulemaking. That would gut the notice-and-comment requirement of the APA, and is antithetical to the "narrowly construed and only reluctantly countenanced" good-cause exception. *Mack Trucks*, 682 F.3d at 93.

In any event, overall unemployment is not the relevant metric for H-1B workers. By statute, the H-1B visa is available only to high-skilled workers possessing "a bachelor's or higher degree in the specific specialty (or its equivalent)." 8 U.S.C. § 1184(i)(1), (3). And DOL's unemployment statistics for workers with bachelor's degrees show a much less dramatic picture than the overall rate: Unemployment for those workers stood at 4.8% in September 2020.[10] Again, this rate is comparable to that seen throughout the last recession and recovery, which did not fall below 4% between February 2009 and April 2012.[11] Even if a fiscal calamity could be grounds for invoking the good-cause exception, the current unemployment rates—which are now in line with those seen for sustained periods not long ago—do not justify invoking the APA's provision for emergency powers.

But this data is still too general, because the COVID-related spike in unemployment was not distributed evenly across sectors and occupations. Although certain jobs in tourism, hospitality, and related service industries were hit hardest, an analysis of Bureau of Labor Statistics data shows that the unemployment rate in computer occupations rose only slightly, and is now essentially back to the pre-pandemic baseline: The unemployment rate in computer occupations was 3.0% in January 2020 (before the economic impacts of the virus were felt) and now stands at 3.5% in September 2020.[12] And H-1B employees overwhelmingly work in exactly those occupations: DHS data

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[10] U.S. Bureau of Labor Statistics, *The Employment Situation—September 2020* at 18 & tbl. A-4, perma.cc/G752-FCV9.

[11] U.S. Bureau of Labor Statistics, *Unemployment rates for persons 25 years and older by educational attainment*, perma.cc/QPE2-P2GT.

[12] Nat'l Foundation for American Policy, *Employment Data for Computer Occupations for January to September 2020* at 2-3 (Oct. 2020), perma.cc/5F78-AJ2N. *See also* Stuart Anderson, *Tech Employment Data Contradict Need for Quick H-1B Visa Rules,* Forbes (Oct. 13, 2020), perma.cc/3GAN-86SS.

show that nearly two-thirds of approved H-1B visa petitions are for jobs in "computer-related occupations,"[13] a point underscored by the Rule itself. *See, e.g.*, DOL Rule, 85 Fed. Reg. at 63,883.

Similarly, during the 30 days ending October 2, 2020, there were over 655,000 active job vacancy postings advertised online for jobs in common computer occupations—including over 280,000 postings for "software developers, applications" alone—indicating that overall demand for high-skilled workers in these occupations still exceeds the domestic supply.[14] In short, as of October 8, 2020, unemployment in the high-skilled labor markets that H-1B workers occupy is simply not "so dire as to warrant dispensing with notice and comment procedures." *CAIR Coal.*, 2020 WL 3542481, at *13.

Indeed, another district court recently enjoined the Department of Homeland Security from implementing Presidential Proclamation 10052—which had sought to ban the entry of H-1B workers to prevent them from "taking jobs from American citizens" during the coronavirus emergency—on the basis of exactly this "mismatch" between COVID-related unemployment and the types of positions typically filled by high-skilled H-1B workers. *Nat'l Ass'n of Mfrs. v. DHS*, __ F. Supp. 3d __, 2020 WL 5847503, at *1, 13 (N.D. Cal. Oct. 1, 2020). As that court explained, "[t]he statistics regarding pandemic-related unemployment actually indicate that unemployment is concentrated in service occupations and that large number of job vacancies remain in the area most affected by the ban, computer operations which require high-skilled workers. . . . These jobs are simply not fungible." *Id.* at *13.

The court therefore concluded that the plaintiffs in that case—which include several *amici* here—were likely to succeed on their claim that the President's action barring H-1B workers on the basis of domestic unemployment "does not comport with actual facts." *Nat'l Ass'n of Mfrs.*,

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[13] U.S. Dep't of Homeland Security, U.S. Citizenship & Immigration Services, *Characteristics of H-1B Specialty Occupation Workers: Fiscal Year 2019 Annual Report to Congress* ii, 12 & tbl 8A (Mar. 5, 2020), perma.cc/VL4G-FVNN.

[14] Nat'l Foundation for American Policy, *Employment Data for Computer Occupations for January to September 2020* at 4 (Oct. 2020), perma.cc/5F78-AJ2N.

2020 WL 5847503, at *13. The same facts require the same conclusion here, and DOL has therefore failed in its "uphill battle to meet th[e] burden" of proving good cause. *Nat'l Venture Capital Ass'n*, 291 F. Supp. 3d at 16; *see also see also Sorenson*, 755 F.3d at 707 (good cause requires "record support proving the emergency," rather than "an unsupported assertion" by the agency).[15]

C. DOL's alternative good-cause theory is also meritless.

The DOL Rule also offers a second good-cause theory, separate from COVID-related unemployment. Good cause to dispense with notice and comment is satisfied, DOL asserts, because "[a]dvance notice of the intended changes would create an opportunity, and the incentives to use it, for employers to attempt to evade the adjusted wage requirements." DOL Rule, 85 Fed. Reg. at 63,898. In other words, DOL's theory is that it had to keep its regulatory changes secret, otherwise companies would "rush" to submit labor condition applications (LCAs) under the old rules, thereby "lock[ing] in" the prior wage rates. *Id.* at 63,901.

a. This argument must immediately fail as a factual matter, because the government *did not* keep this proposed regulation secret. Quite to the contrary, on June 22, a "senior administration official" told reporters that DOL would raise the H-1B wage floor to the "50th percentile":

> The Department of Labor has also been instructed by the President to change the prevailing wage calculation and clean it up, with respect to H-1B wages. It has really -- it's an old, crazy system from the Clinton era, with four tiers, and the prevailing wage calculation is done in a variety of bases. And *the Department of Labor is going to fix all that, with the idea of setting the prevailing wage floor at the 50th percentile* so these people will be in the upper end of earnings.[16]

[15] Finally, it is telling that, while arguing that COVID-19-related unemployment is a basis to fundamentally remake American immigration—leading to hundreds of billions of dollars of expense—officials are simultaneously touting that "Our Economy is doing very well" and pointing to a "New Jobs Record." President Donald J. Trump (@realDonaldTrump), Twitter (Oct. 6, 2020, 2:48pm), perma.cc/G7TQ-PM2E; President Donald J. Trump (@realDonaldTrump), Twitter (Oct. 12, 2020, 12:47pm), perma.cc/JK6V-2RK4.

[16] Office of the Press Secretary, Transcript of White House Background Press Call Concerning the June 22 Presidential Proclamation (June 22, 2020) (emphasis added), perma.cc/Z9YU-MUZK.

Then, on August 3, President Trump further confirmed that the government was "finalizing H1-B regulations" to ensure that such employees are "highly paid."[17] That is, the White House *did* announce the "scale of the wage change achieved by this rule." DOL Rule, 85 Fed. Reg. at 63,901. (It announced a slightly *greater* increase). DOL cannot invoke the good-cause exception to notice-and-comment rulemaking out of a stated desire to protect secrecy when the government itself failed to keep the secret. The White House's conduct thus precludes DOL's good-cause argument.

b. In any event, this sort of good-cause argument is disfavored and requires proof in the record—and DOL has provided none.

The *CAIR Coalition* case—in which Judge Kelly recently rejected an identical argument to the one DOL attempts here—is instructive in this regard. There, the government issued an interim final rule making it more difficult for noncitizens to obtain asylum; the agencies invoked the good-cause exception, asserting that "dispensing with the notice-and-comment period was 'essential to avoid a surge of aliens who would have strong incentives to seek to cross the border during pre-promulgation notice and comment.'" *CAIR Coal.*, 2020 WL 3542481, at *4 (quoting 84 Fed. Reg. 33,829, 33,841). The court accepted the incentives-based logic of the argument, but explained that incentives are not enough:

> Common sense dictates that the announcement of a proposed rule may, at least to some extent and in some circumstances, encourage those affected by it to act before it is finalized. *But this rationale cannot satisfy the D.C. Circuit's standard in this case unless it is adequately supported by evidence in the administrative record* suggesting that this dynamic might have led to the consequences predicted by the Departments—consequences so dire as to warrant dispensing with notice and comment procedures. *See Sorenson*, 755 F.3d at 707.

Id. at *13. The court went on to carefully inspect the evidence cited in the challenged rule, and found it wanting: "[T]his Court in no way 'exclude[s] the possibility' that the circumstances here 'could conceivably justify bypassing the notice-and-comment requirement.' But 'this case does not provide evidence of such an exigency.'" *Id.* at *15 (quoting *Sorenson*, 755 F.3d at 707).

[17] Remarks by President Trump in a Meeting with U.S. Tech Workers and Signing of an Executive Order on Hiring American (Aug. 3, 2020), perma.cc/47NF-SZ6W.

Other cases have reached the same result: Good cause requires record evidence that regulated parties would *in fact* attempt to evade new restrictions during the notice and comment period, and incentives alone are insufficient. *Tenn. Gas Pipeline Co.*, 969 F.2d at 1145 (rejecting similar argument because "the Commission has provided little factual basis for its belief that pipelines will seek to avoid its future rule by rushing new construction and replacements."); *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 777-778 (9th Cir. 2018) (*E. Bay I*) (recognizing that, "theoretically, an announcement of a proposed rule creates an incentive for those affected to act prior to a final administrative determination," but finding that "inference . . . too difficult to credit" without evidence demonstrating that affected parties would *actually* act on those incentives) (quotation marks omitted); *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1278 (9th Cir. 2020) (*E. Bay II*) (rejecting the same argument again on subsequent appeal because "[t]he government's reasoning continues to be largely speculative; no evidence has been offered to suggest that any of its predictions are rationally likely to be true") (citation omitted).[18]

Here, DOL provides *zero* "record support proving the emergency" (*Sorenson*, 755 F.3d at 707)—that visa sponsors allegedly would swarm to file LCAs under the old wage levels if notice and comment were provided. Rather, it simply asserts that notice and comment "would create an opportunity, and the incentives" to do so, observing that following APA procedures thus "*could* result in [a] 'massive rush.'" DOL Rule, 85 Fed. Reg. at 63,898, 63,901 (emphasis added). As *CAIR Coalition* and the other cases cited above explain, that is plainly not enough to satisfy

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[18] The Ninth Circuit also explained *why* courts should not accept good-cause invocations based on common-sense incentives, but lacking factual support:

> [T]hat 'the very announcement of [the] proposed rule itself can be expected to precipitate activity by affected parties that would harm the public welfare' is likely often, or even always true. The lag period before *any* regulation, statute, or proposed piece of legislation allows parties to change their behavior in response. *If we were to agree with the government's assertion that notice-and-comment procedures increase the potential harm the Rule is intended to regulate, these procedures would often cede to the good-cause exception.*

E. Bay II, 950 F.3d at 1278 (citation omitted; emphases added).

Sorenson's requirement that "something more than an unsupported assertion is required" to "establish good cause." *Sorenson*, 755 F.3d at 707; *see CAIR Coal.*, 2020 WL 3542481, at *13-15; *Tenn. Gas Pipeline Co.*, 969 F.2d at 1145; *E. Bay II*, 950 F.3d at 1278.[19]

c. Even apart from this complete evidentiary failing, the LCA process itself limits the extent to which employers could rush to take advantage of the expiring wage levels. As the Rule admits, companies are "not permitted to file an LCA earlier than six months before the beginning date of the period of intended employment" (DOL Rule, 85 Fed. Reg. at 63,901)—significantly limiting the amount of "locking in" that could be accomplished during the notice and comment period. *See* 20 C.F.R. § 655.730(b). Even if it had attempted to provide record evidence of this sort of strategic behavior, therefore, DOL would be hard pressed to demonstrate that the results of such limited continuing use of the old wage levels—levels that had been in effect for decades, and for the past seven months of the COVID-19 pandemic—would somehow turn out to be "so dire as to warrant dispensing with notice and comment procedures." *CAIR Coal.*, 2020 WL 3542481, at *13. Just like its COVID-related justification, DOL's incentives-based good-cause theory fails under scrutiny.

II. THE FAILURE TO PROVIDE NOTICE AND COMMENT IS PREJUDICIAL.

Finally, DOL's decision to unlawfully forgo notice and comment is prejudicial, rather than harmless. *See* 5 U.S.C. § 706 ("[D]ue account shall be taken of the rule of prejudicial error."). This

[19] For its part, DOL relies on cases from the now-defunct Temporary Emergency Court of Appeals approving the use of the good-cause exception to prevent commodity market participants from evading impending price controls. *See* DOL Rule, 85 Fed. Reg. at 63,901 & nn.238-240 (citing *Mobil Oil Corp. v. Dep't of Energy*, 728 F.2d 1477, 1492 (Temp. Emer. Ct. App. 1983)). Those cases, however, arose in the unique context of emergency government price controls on commodities, and have readily been distinguished on that basis. *See Tenn. Gas Pipeline Co.*, 969 F.2d at 1146 (distinguishing *Mobil Oil* because "the success of its price control regulation depended on its being given immediate effect," distinct from economic arrangements that "are planned well in advance and take time to accomplish"); *CAIR Coal.*, 2020 WL 3542481, at *14 n.17 (distinguishing *Mobil Oil* because "Defendants here offered no evidence from which the Court can reasonably conclude that migratory patterns change with anything approaching the speed of commodity prices").

is not a high bar for plaintiffs to overcome where an agency disregards notice and comment entirely. As the D.C. Circuit has repeatedly explained, "an utter failure to comply with notice and comment cannot be considered harmless if there is any uncertainty at all as to the effect of that failure." *Safari Club Int'l v. Zinke*, 878 F.3d 316, 335 (D.C. Cir. 2017) (quoting *Sugar Cane Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002)). Indeed, "this rule substantially lessens if not altogether eliminates a challenging party's burden" with respect to harmless error where notice and comment is wholly neglected, "for there will rarely if ever be no 'uncertainty' as to the error's effect, and the party is not even required to identify 'additional considerations [it] would have raised in a comment procedure.'" *AFL-CIO v. Chao*, 496 F. Supp. 2d 76, 89 (D.D.C. 2007) (quoting *Sugar Cane Growers*, 289 F.3d at 97). Thus, while "[m]erely 'technical' failures with respect to notice and comment may be harmless" (*Shands Jackson Med. Ctr. v. Burwell*, 139 F. Supp. 3d 240, 265 (D.D.C. 2015)), complete failures to follow notice and comment at all—as here—generally cannot.

Because the agency's avoidance of notice and comment is not harmless, the Rule must be set aside.

CONCLUSION

For the foregoing reasons, the Court should grant the motion for preliminary injunction.

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Respectfully submitted,

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