UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PURDUE UNIVERSITY, *et al.*,

Plaintiffs,

v.

EUGENE SCALIA, Secretary of Labor, *et al.*,

Defendants.

Case No. 1:20-cv-03006-EGS

PLAINTIFFS' REPLY IN SUPPORT OF CONVERTED MOTION FOR PARTIAL SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO DEFENDANTS' CROSS-MOTION

Assigned to Emmet G. Sullivan

Hearing Date: November 13, 2020
Time: 11:00 a.m.

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SUMMARY OF THE ARGUMENT

Defendants' attempt to justify the "emergency" need to dispense with notice and comment procedures and institute a rule that dramatically increases the wages employers pay to highly-skilled foreign nationals remains short on facts and long on invention. On November 6, 2020, the Bureau of Labor Statistics ("BLS"), a component of the Department of Labor ("DOL"), reported that private payrolls increased by 906,000 for the month of October and the unemployment rate for those with a bachelor's degree or higher declined to 4.2%. *See* The Employment Situation – October 2020, https://www.bls.gov/news.release/empsit.nr0.htm at Tables A-4, B-1. These latest data points add to the mountain of uncontested evidence supporting Plaintiffs' claim that Defendants lacked good cause to dispense with notice and comment in promulgating Interim Final Rule, *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States*, 85 Fed. Reg. 63872 (October 8, 2020) ("IFR" or "DOL Rule"). ECF. No.4, Plaintiff's Complaint at ¶¶ 55-76,121-24; ECF No.6, Plaintiffs Memorandum of Points and Authorities in support of Motion for Preliminary Injunction or APA 705 Stay, ("Pls Mot.") at 21-28.

In their opposition to Plaintiffs' motion for summary judgment and their cross-motion for summary judgment, Defendants repeat the unconvincing reasons offered within the DOL Rule. *See* ECF No.18, Memorandum in Support of Defendants' Cross-Motion for Partial Summary Judgment and in Opposition to Plaintiffs' Motion for Preliminary Injunction or APA Section 705 Stay (as Converted to a Motion for Partial Summary Judgment) ("Def. Mot.") at 12-23. Defendants' first claim, that the COVID-19 pandemic created an emergency requiring the agency to act immediately in October lacks merit. Def. Mot. at 13-21. The DOL delayed promulgating the IFR by more than six months after the designated emergency to the economy

and employment due to the COVID-19 pandemic began in late March; the economy has continued to recover ever since. The agency offers no evidence to demonstrate that, as of October 8, 2020, an emergency existed that justified the DOL to take "[i]mmediate corrective action [to correct the wage rates] to ensure that the Department's regulations are, consistent with their purpose, safeguarding the well-being of U.S. workers." Def. Mot. at 13, *quoting* 85 Fed. Reg. at 63,900 (as altered). Indeed, Defendants admit that the "emergency" problem the DOL attempts to correct, the alleged deleterious effect to American workers' wages and jobs due to highly skilled foreign labor, existed for a long time prior to the COVID-19 pandemic; they also fail to explain why the circumstances were so dire that they had to bypass consideration of the reliance interests to the employers affected, including the Plaintiffs where they concede the changes may cost close to $200 billion and result in a 7.74% *reduction* in labor demand. 85 Fed. Reg. at 63908. Pls. Mot. at 24; Def. Mot. at 14-20.

Second, Defendants claim that affording the public the statutorily required opportunity for notice and comment would have led to "a rush" to avoid the new wages required to be paid under the IFR. Def. Mot. at 23. The bare assertion for this "regulatory evasion" claim does not meet the D.C. Circuit's standard for "good cause." *Id.* The irreparable harms to Plaintiffs due to the unlawful promulgation of the IFR remain uncontested, on-going and will only be redressed through the grant of summary judgment in their favor. *Id.* The Court should grant plaintiffs' motion and set aside the DOL rule. *See* 5 U.S.C. § 706(2)(A).

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

The reasoning for bypassing notice and comment offered in the DOL rule represents an echo-chamber filled with unsupported, conclusory, and internally-inconsistent claims. Before this Court, Defendants do not meaningfully counter Plaintiffs' claim that the DOL Rule violated

the APA by bypassing the notice-and-comment requirement without good cause. *See* 5 U.S.C. §§ 553(b)-(d). Defendants fail to meet the demanding and exceedingly narrow exception to the APA's requirement for pre-promulgation notice and comment. The DOL: 1) delayed promulgation of the rule for months after the alleged "emergency;" 2) admit the changes remained years overdue; and 3) offer no evidence that employers, including the Plaintiffs here, would rush to evade the rule. Def. Mot. at 14-23. Plaintiffs' uncontested, irreparable harm due to Defendants' failure to afford them with the opportunity to comment on the dramatic changes to wages paid to highly skilled workers therefore warrants summary judgment in their favor. *Id.* at 14-23.

ARGUMENT

DEFENDANTS UNLAWFULLY DISPENSED WITH NOTICE AND COMMENT PROCEDURES

A. Procedural Background and Standard of Review

The Court has agreed to "advance[d] [to] the trial on the merits and consolidate[d]" the preliminary injunction hearing into a motion for a summary judgment. *See* ECF No.12; Fed. R. Civ. P. 65(a)(2). The Court will therefore "grant[] summary judgment on the basis of the factual record available at the preliminary injunction stage." *See Air Line Pilots Ass'n, Int'l v. Alaska Airlines, Inc.*, 898 F.2d 1393, 1397 n.4 (9th Cir. 1990); *Marquez v. Cable One, Inc.*, 463 F.3d 1118, 1120 (10th Cir. 2006). In addition to the parties' pleadings, the Court may refer to the evidence of record which, in this case includes the **uncontested** declarations and exhibits in support of Plaintiffs' Motion that describe the prejudice and on-going irreparable harms that resulted from Defendants' decision to bypass notice and comment procedures. *Id.*; s*ee* Pls. Mot. at 34-41, ECF. Nos. 6-1-6-18.

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 v. Duke*, 291 F. Supp. 3d 5, 15 (D.D.C. 2017); *see Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014). While Defendants assert that the Court reviews the agency's "factual findings and expert judgment's therefrom" under a deferential "arbitrary and capricious standard," Def. Mot. at 10-11, the inquiry into whether an agency properly supported its case to dispense with notice and comment rulemaking is "inevitably fact-or-context dependent inquiry" and 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)). As explained below, the DOL did not provide the necessary evidence that warrants deference to its decision to dispense with notice and comment. *See Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) ("Courts enforce [arbitrary and capricious review] with regularity when they set aside agency regulations which… are not supported by the reasons that the agencies adduce.").

There is no dispute that legislative rulemaking demands an opportunity for notice and comment and rules that evade the process will be set aside in the absence of an affirmative and supported showing of "good cause." 5 U.S.C. §§ 553(b)-(d), 706(2)(A), (D) (courts must "hold unlawful and set aside agency action[s]" taken "without observance of procedure required by law."); Def. Mot. at 10-11. The statutorily required notice and comment process serves carefully designed policy goals "'(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.'" *See Capital Area Immigrants' Rights Coal. v. Trump*, __

F. Supp. 3d __, 2020 WL 3542481, at *11 (D.D.C. June 30, 2020) (*CAIR Coal.*) (quoting *Int'l Union, United Mine Workers v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005)); *see also MCI Telecommc'ns Corp. v. FCC*, 57 F.3d 1136, 1141 (D.C. Cir. 1995). While Defendants concede the "onus" remains on the agency to justify its departure from the notice and comment process, *see* Def. Mot. at 11, the bare assertions within the IFR that Defendants repeat before this Court erroneously treat the process as "a mere formality," *see CAIR* Coal, 2020 WL 3542481 at *11, and do not meet the "demanding" required to demonstrate "good cause." Def. Mot. at 12; *see Nat'l Venture Capital Ass'n*, 291 F. Supp. 3d at 15-16; *Sorenson*, 755 F.3d at 706 ("the good-cause inquiry is 'meticulous and demanding,'" and the D.C. Circuit instructs that courts "are to 'narrowly construe' and 'reluctantly countenance' the exception.") (quoting *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012) (alterations incorporated).

B. Defendants' Unexplained Delay in Issuing the "Emergency" IFR Directed to Address a Long-Standing Problem for Industries that now have Declining Unemployment Rates Fails to Meet the APA's Demanding Standard for "Good Cause"

1. The DOL Waited Over Six Months After the Declared Emergency

Even assuming that the economic theories for the DOL Rule are accurate,[1] the DOL's unexplained decision to wait over six months before promulgating its massively disruptive IFR undercuts the lawfulness of its decision to dispense with notice and comment and proceed to "emergency rulemaking."[2] Def. Mot. 14-16. "It is well established that good cause cannot arise

[1] They are not. *See* Pls. Mot. at 24-26.

[2] DOL calculates that the changes contained in the DOL Rule may cost American employers **$198 billion** over the next ten years. DOL Rule, 85 Fed. Reg. at 63,908. DOL also hedges its bet that the substantive changes to the wage levels will produce a benefit to employment and admits that the changes to wage levels could result in **a 7.74% reduction** in labor demand. 85 Fed. Reg. at 63908. To say the least, these economic projections heavily weigh against proceeding with an IFR without first taking into account the reliance interests and harms of those affected; indeed, Congress designed the APA process to "take[] some of the sting out of the inherently

as a result of the agency's own delay," and courts have therefore "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.").

Contrary to Defendants' claim, *see* Def. Mot. at 13, the DOL lacked good cause to trigger the "emergency exception" because DOL indisputably knew about the emergency with enough time to provide notice and comment, but chose to wait and invoke the good-cause exception without justifying the delay. *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"

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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)).

the argument that "out-side time pressures forced the agency to dispense with APA notice and comment procedures" where agency waited eight months before invoking good cause).

"[T]he widespread unemployment resulting from the coronavirus public health emergency" began somewhere between late March and early April 2020. *See* 85 Fed. Reg. at 63,898; *Strengthening the H-1B Nonimmigrant Visa Classification Program*, 85 Fed. Reg. 63,918, 63,938 & nn.138, 139 (Oct. 8, 2020) (issued the same day as the DOL rule, this second IFR targets the H-1B program and cites to news headlines ***from March 27, 2020*** that decry the "unprecedented 'economic cataclysm'" presented by COVID-related unemployment). As the federal agency charged with overseeing the labor markets, DOL produces and reports the unemployment statistics on which the DOL Rule relied. *See* DOL Rule, 85 Fed. Reg. at 63,898. Far from engaging in "immediate action" upon learning of COVID-related unemployment, the DOL waited ***over six months***—enough time to have conducted a notice and comment process—before issuing the DOL Rule. DOL Rule, 85 Fed. Reg. at 63,898. Plaintiffs and the public should not be left out of the rulemaking process due to the agency's inaction and its decision to bypass notice and comment rulemaking in October can hardly be said to be the result of the "emergency" or "crisis." Def. Mot. 12. The agency's own data, standing alone, shows that 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 between March and October, and this Court should conclude that it "is foreclosed from relying on the good cause exception by its own delay." *Air Transp. Ass'n*, 900 F.2d at 379; *accord Nat'l Venture Capital Ass'n*, 291 F. Supp. 3d. at 16-17; *Env'tl Def. Fund*, 716 F.2d at 921.

2. The Economic Conditions for High-Skilled Labor Improved During the Delay

The current economic conditions for the employees targeted by the DOL rule combined with the undisputed improvement in national economic conditions from March to until October further undercut Defendants' claim that an economic "emergency" required it bypass the notice and comment process. Def. Mot. at 14; *see generally* ECF No. 16-1, *Amicus Brief* of the Chamber of Commerce of the United States of America, the National Association of Manufactures and Technet ("*Ch. Am.*") at 11-13. On November 6, 2020, the U.S. Bureau of Labor Statistics released its monthly payroll information for October: 1) "Total nonfarm payroll employment rose by 638,000 in October and has increased for 6 consecutive months" -- private payrolls increased by 906,000; 2) "Unemployment rates declined among all major worker groups" and "the unemployment rate declined to 6.9%"; for those with a bachelor's degree or higher, the unemployment rate declined from 4.2%. *See* U.S. Bureau of Labor Statistics, The Employment Situation—October 2020, at 1-2, Tbl. A-4, B-1, https://www.bls.gov/news.release/pdf/empsit.pdf.

Whatever emergency justification that may have existed materially diminished during the six months the DOL took no action. While it remains true that "a full recovery has not occurred," Def. Mot. at 14, by no means is there the type of emergency for the highly skilled workers targeted by the IFR that meets the standard for "good cause." *See id*; *Sorenson*, 755 F.3d at 706. As the DOL Rule identifies, employees working in "computer-related occupations" on an H-1B visa constitute nearly two-thirds of the approved H-1B visa petitions. *See, e.g.*, DOL Rule, 85 Fed. Reg. at 63,883. "The unemployment rate in computer occupations was 3.0% in January 2020 (before the economic impacts of the virus were felt) and [stood] at 3.5% in September 2020." Ch. Am. at 11 (citing *Nat'l Foundation for American Policy*, *Employment*

Data for Computer Occupations for January to September 2020 at 2-3 (Oct. 2020); **New NFAP Policy Brief:** An Analysis of the DOL H-1B Wage Rule, October 16 2020; *see also* Stuart Anderson, *Tech Unemployment Data Contradict Need for Quick H-1B Visa Rules*, Forbes (Oct. 13, 2020), https://www.forbes.com/sites/stuartanderson/2020/10/13/tech-employment-data-contradict-need-for-quick-h-1b-visa-rules/?sh=67c0df385ca2.

The current labor environment for highly skilled labor in the computer related occupations reflects that the demand for workers far outstrips supply. 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." Ch. Am. at 12 (citing *Nat'l Foundation for American Policy, Employment Data for Computer Occupations for January to September 2020* at 4 (Oct. 2020)). "In FY2019, 249,476 of H–1B petitions for continuing employment, i.e. petitions for workers already present in the U.S., were approved out of the 388,403 total approved petitions." [3] *See* 85 Fed. Reg. at 63900 (citing See U.S. Citizenship and Immigration Services, Characteristics of H–1B Specialty Occupation Workers Fiscal Year 2019 Annual
Report to Congress October 1, 2018–September 30, 2019 (2020), available at https://www.uscis.gov/sites/default/files/document/reports/Characteristics_of_Specialty_Occupation_Workers_H-1B_Fiscal_Year_2019.pdf.). Overall, "66 percent of H–1B petitions approved in FY2019 were for computer-related occupations." *Id*. Even the most generous estimate demonstrates that the number of total visas that were issued **annually** in 2019 for workers in the

[3] Data from the Department of State that in FY2019, the agency issued 188, 123 H-1B visas, issued 5,807 E-3 visas, and 1,724 H-1B1 visas. https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVWorkload/FY2019NIVWorkloadbyVisaCategory.pdf

computer or software industry would not satisfy the 655,000 jobs **currently** available in the computer industry. The uncontested record evidence therefore shows that as of October 8, 2020, the unemployment in the high-skilled labor markets in the crosshairs of the DOL Rule did not provide an "emergency," and certainly not one "so dire as to warrant dispensing with notice and comment procedures." *CAIR Coal.*, 2020 WL 3542481, at *13; Def. Mot. 14.

3. The DOL Rule Seeks to Correct an Alleged Long-Standing Problem

If the DOL believes a new rule is necessary to mitigate alleged long-term "wage-scarring" and long-term jobs displacement due to the prevailing wage calculations, Def. Mot. 15-19, the APA allows it to do so, but not without adhering to notice and comment procedures. 5 U.S.C. §§ 553(b)-(c). The agency admits that the rule is designed to benefit "U.S. workers' wages over the long term." Def. Mot. at 14. The agency also "acknowledges" that "[t]he reforms to the prevailing wage levels that the Department is undertaking in this rulemaking . . . should have been undertaken years ago." *See* 85 Fed. Reg. at 63,900. The agency's conclusion after months of delay and six months of economic recovery that "now is a critical moment to mitigate" **long-standing** problems to the wages that must be paid to certain foreign nationals is not an exigent circumstance that could justify the narrow and demanding exception to the notice and comment process and justify the harm to the Plaintiffs and public forced to react; if anything, Defendants' unprecedented action created an emergency for Plaintiffs and those similarly affected. Def. Mot. at 15-18; Pls. Mot. at 34-43. Regardless of the agency's wisdom for deciding to take action and make substantive rule changes to the wages paid to highly skilled labor, the APA required the agency to follow the notice and comment process before doing so because there was admittedly no "emergency" that made notice and comment for such dramatic changes "impracticable" on October 8, 2020. *See, e.g., Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004) (finding "good cause" where post-9/11 airline security measures would "prevent a

possible imminent hazard to aircraft, persons, and property within the United States"); *Haw. Helicopter Operators Ass'n v. FAA,* 51 F.3d 212, 214 (9th Cir. 1995) (emergency regulations responding to a "recent escalation of fatal air tour accidents"); *see also Sorenson*, 755 F.3d at 706 ("[W]e have approved an agency's decision to bypass notice and comment where delay would imminently threaten life or physical property.") (citing cases involving 9/11 restrictions and mine-safety measures "of life-saving importance"). Accordingly, Defendants failed to support the need for dispensing with notice and comment and thus the IFR must be set aside. *See* 5 U.S.C. §§ 706(2)(A), (D).

C. Defendants' Bare Prediction of "Regulatory Evasion" Fails to Meet the Demanding Standard for "Good Cause"

Defendants' bare assertion that employers would have "rush[ed]" to avoid the DOL Rule during any notice and comment period does not meet the demanding standard to show "good cause." Def. Mot. at 22-23. If this Court had to "defer" to such an unsupported claim, as Defendants argue, it would permit what the law forbids; it would allow the "demanding" and "narrow" exception to swallow the rule. *Sorenson*, 755 F.3d at 706; Def. Mot. 22-23.

This Court recently rejected a similarly unsupported claim in striking down an IFR. In *CAIR Coal.*, the Department of Justice and Department of Homeland Security jointly issued an IFR that limited the eligibility for noncitizens to apply for asylum crossing through the southern border of the United States and the agencies asserted 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. at 33,841). Judge Kelly acknowledged intuitive basis for such a claim, but struck down the unsupported claim for purposes of the APA stating, in relevant part:

> 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 (emphasis added). Judge Kelly concluded that the IFR lacked the necessary evidence to justify "such an exigency.'" *Id.* at *15 (quoting *Sorenson*, 755 F.3d at 707).

The same is true here. Defendants cite to nothing in the IFR that support its regulatory evasion argument and there is nothing within the IFR to support the claim. Def. Mot. at 22-23. Instead, they claim this Court must defer to its predictions that employers would rush to evade the changes wrought by the rule and the consequences would have been so dire that they were justified in dispensing with notice and comment procedures. *Id*. The standard in this circuit, as recognized in *CAIR Coal*, 2020 WL 3542481, at *13-15, undercuts Defendants' claim.

In addition, even the cases Defendants rely upon recognize that good cause requires **record evidence** that the regulated parties would **in fact** attempt to evade new restrictions during the notice and comment period, and incentives alone are insufficient. Def. Mot. at 21. For example, in *Tenn. Gas Pipeline Co. v. Federal Energy Regulatory Commission*, 969 F.2d 1141, 1145 (D.C. Cir. 1992), the Court rejected the "regulatory evasion" argument because "the Commission … provided little factual basis for its belief that pipelines will seek to avoid its future rule by rushing new construction and replacements." In *CAIR Coal*., Judge Kelly astutely observed that "[t]he court also rejected the agency's vague and conclusory invocation of its subject-matter expertise, observing that it "'does not excuse the [agency's] failure to cite such

examples in support of its claim.'" *CAIR Coal.*, 2020 WL 3542481, at *14 (quoting *Tenn. Gas. Pipeline Co.*, 969 F.2d at 1145 and citing *id.* at 1146 (noting that "if the agency has . . . a wealth of practical experience on which to draw in order to justify its action, then it was not forced to rely on the 'self-evident' need for the interim rule"). In the absence of record evidence, Defendants' claim that this court must defer to its regulatory evasion claim lacks merit. Def. Mot. at 22-23

The 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 also demonstrate that "good cause" demands more than the bare predictions offered here. *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); Def. Mot. at 21. In *Mobil Oil Corp.* and the related cases, the emergency government action concerned price controls placed on commodities; courts have previously recognized the unique circumstances presented to markets susceptible to *immediate* evasion through "price fixing" and distinguished cases on this basis. *See Tenn. Gas Pipeline Co.*, 969 F.2d at 1146 ("the success of its price control regulation depended on its being given immediate effect," which is unlike 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"); *see also* 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); *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1278 (9th Cir. 2020) (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).[4]

Here, the DOL did not provide the necessary record support proving that employers would attempt to engage in commodity-like price fixing to evade the rule. 85 Fed. Reg. at 63901. The belief that employers would "rush" to file Labor Condition Applications ("LCA") under the old wage levels if provided the opportunity to engage in the notice and comment process, standing alone, does not meet the standard of good cause under the APA and the process of notice of comment which was designed to provide the affected parties subject to a new legislative rule with "an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *See CAIR Coal*., 2020 WL 3542481, at *11. The DOL's unsupported prediction takes a highly negative view of this process that is at odds with Congress's statutory design for administrative rulemaking. *Id*. More fundamentally, its view that adhering to the intended APA procedures "*could* result in [a] 'massive rush'" demanded evidentiary support that was not provided. DOL Rule, 85 Fed. Reg. at

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[4] 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).

63,898, 63,901 (emphasis added). Accordingly, the DOL's barebones assertion that regulatory evasion fails 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.

As a final matter, Defendants' claim that the notice and comment process would have set back the benefits of the new rule "by some months *beyond* the close of notice and comment" supports Plaintiffs' claim. Def. Mot. at 22. Even assuming some employers would have the ability to file an LCA during the notice and comment period, the agency's admission that it would only set back its plan to solve a longstanding problem for "some months *beyond* the close of notice and comment" diminishes its claim that the DOL had to take immediate action. Def. Mot. at 22. The admission that any evasion behavior would only lead to a temporary delay whereby some employers would file LCAs under the current wage levels (levels effective for almost two decades) undercuts its position that the evidence of record shows that it met the narrow and demanding burden of showing that the circumstances, as they existed on October 8, 2020, were "so dire as to warrant dispensing with notice and comment procedures." *CAIR Coal.*, 2020 WL 3542481, at *13. In sum, Defendants' economic-need theory and regulatory evasion theory, whether considered apart or in the aggregate, fail just the same. The DOL did not demonstrate "good cause" to dispense with notice and comment when promulgating Interim Final Rule, *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States*, 85 Fed. Reg. 63872 (October 8, 2020). Accordingly, the IFR "shall" be set aside. 5 U.S.C. § 706(2)(A).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request this Court to issue partial summary judgment in their favor as to Count 1 of their Complaint, deny Defendants' cross motion for summary judgment, and set aside the DOL Rule because Defendants lacked good cause to dispense with notice and comment procedures in promulgation of the Rule.

Dated: November 9, 2020

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that the foregoing pleading was submitted via the Court's EM/ECF system on November 9, 2020. Counsel for Defendants have submitted a notice of appearance using the EM/ECF system and hereby have been properly served.

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