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13 UNITED STATES DISTRICT COURT
14 EASTERN DISTRICT OF CALIFORNIA

15 UNITED FARM WORKERS, *et al.*,

16 Plaintiffs,

17 v.

18 UNITED STATES DEPARTMENT OF
19 LABOR, *et al.*,

20 Defendants.

No. 1:25-cv-1614-KES-EGC

**PROPOSED AMICI CURIAE BRIEF OF
FORMER U.S. SECRETARIES OF LABOR**

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TABLE OF CONTENTS

STATEMENT OF INTEREST OF AMICI CURIAE 1

ARGUMENT 1

I. The IFR’s Bifurcation of Skill Levels Will Adversely Affect U.S. Workers’ Wages 2

II. The IFR Is Arbitrary and Capricious Because It Inconsistently and Contradictorily Uses
Two Different Averages to Calculate the AEWR 5

III. The IFR’s Housing Deduction is Arbitrary, Capricious, and Contrary to Law 6

A. *The IFR’s Housing Deduction Is Contrary to Law Because It Contradicts DOL’s
Still-Existing Rule that Workers Receive Housing “At No Cost”* 7

B. *The IFR Failed to Consider Obvious and Viable Alternatives to Linking the Housing
Deduction to Visa Status* 8

IV. The IFR’s Majority-of-Hours Method for Determining the Applicable AEWR for Multi-
Role Positions Is Arbitrary and Capricious 10

V. DOL Lacked “Good Cause” to Forego Notice and Comment 13

CONCLUSION 15

1 **STATEMENT OF INTEREST OF AMICI CURIAE**

2 *Amicus* Julie Su served as the Acting U.S. Secretary of Labor from 2023 to 2025. *Amicus*
3 Martin J. Walsh served as the U.S. Secretary of Labor from 2021 to 2023. *Amicus* Thomas E.
4 Perez served as the U.S. Secretary of Labor from 2013 to 2017. *Amicus* Hilda Solis served as the
5 U.S. Secretary of Labor from 2009 to 2013. *Amicus* Robert Reich served as the U.S. Secretary of
6 Labor from 1993 to 1997. In their capacity as Secretaries of Labor, *amici* oversaw the U.S.
7 Department of Labor’s administration of the H-2A program, including the calculation of the
8 Adverse Effect Wage Rate and related agency rulemaking. *Amici* thus have unique insight into
9 the purpose, history, and requirements of the H-2A program and how the Department of Labor
10 has historically used the AEWR to protect U.S. workers from adverse effects on their wages and
11 working conditions.¹

12 **ARGUMENT**

13 When Congress established the H-2A program, it charged the Department of Labor (DOL)
14 with protecting U.S. workers from the adverse effects of introducing foreign workers into the
15 agricultural labor force.² Historically, the Adverse Effect Wage Rate (AEWR) has served as
16 DOL’s primary mechanism for protecting U.S. workers against such adverse effects. But DOL’s
17 new methodology for calculating the AEWR betrays that laudable statutory mandate by slashing
18 the wages of U.S. and H-2A farmworkers alike. To make matters worse, DOL promulgated its
19 interim final rule (IFR) without the notice-and-comment procedures designed to ensure informed
20 and rational decision-making. This Court should invalidate the IFR for at least five reasons.

21 First, DOL’s decision to split the AEWR into two skill levels will adversely affect U.S.
22 workers’ wages. Second, DOL inconsistently and incoherently employs different kinds of
23 averages as the basis for calculating the new AEWRs. Third, the IFR’s new housing deduction is
24 contrary to another DOL regulation still on the books and fails to consider whether DOL should

25
26

¹ *Amici* submit this brief in their personal capacities and not as representatives of any current
positions or roles.

27 ² No party’s counsel authored this brief in whole or in part. No person other than amici or their
28 counsel contributed money intended to fund the preparation or submission of this brief. *Cf.* Fed. R. App. P.
29(a)(4)(E).

1 have based any such deduction on a worker’s actual housing situation rather than their visa status.
2 Fourth, the IFR’s new majority-of-hours method for handling multi-role positions is arbitrary and
3 capricious, both because DOL cited problems with an already-vacated 2023 regulation as the
4 reason for its revisions, and because DOL failed to consider obvious alternatives to its chosen
5 policy. Finally, DOL’s flimsy rationales for skipping notice and comment do not constitute the
6 “good cause” the Administrative Procedure Act (APA) requires. This Court should grant
7 Plaintiffs’ motion for summary judgment and vacate and permanently enjoin the IFR.

8 **I. The IFR’s Bifurcation of Skill Levels Will Adversely Affect U.S. Workers’ Wages**

9 DOL’s decision to split the AEWR into two skill levels breaks with decades of agency
10 policy and will cause the very adverse effects on U.S. workers’ wages which the statute
11 commands DOL to prevent. That is unlawful. Accordingly, this Court should vacate the IFR as
12 arbitrary and capricious, contrary to law, and in excess of statutory authority.

13 For over half a century, DOL has keyed the AEWR to the *average* wages farmworkers
14 earn in a given state. *See* Adverse Effect Wage Rate Methodology for the Temporary
15 Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States, 90 Fed.
16 Reg. 47,914, 47,916 (Oct. 2, 2025) (noting that when the AEWR “was introduced in 1963 . . . [it]
17 was based on the Census of Agriculture’s average earnings for each state”). That practice
18 continued for decades under administrations of both parties. *Id.* at 47,917 (noting that since
19 Congress established the modern H-2A program in 1986, DOL “has, with brief interruption, set
20 the AEWR for most agricultural workers at the average wage paid to similarly employed
21 workers”); *see also, e.g., Overdevest Nurseries, L.P. v. Walsh*, 2 F.4th 977, 980 (D.C. Cir. 2021)
22 (“Under [then-extant] regulations, employers must pay the [AEWR] . . . which is the average
23 hourly wage for agricultural workers”); *AFL-CIO v. Dole*, 923 F.2d 182, 184 (D.C. Cir.
24 1991) (describing DOL’s use of the “average hourly agricultural wage” to set the AEWR).

25 Setting AEWRs based on the average wages for farmworkers makes sense. Allowing
26 growers to pay H-2A workers *below*-average wages would systematically incentivize growers to
27 hire foreign workers over their U.S. counterparts. It would also undercut the bargaining power of
28 U.S. farmworkers to seek better wages and working conditions. Indeed, linking the AEWR to

average wages is not only sensible; it is legally mandatory. *AFL-CIO v. Brock*, 835 F.2d 912, 914 (D.C. Cir. 1987) (“Under the IRCA . . . each foreign worker must be paid at least the average rate that growers paid workers prior to that worker’s arrival.”).

In a schism with this decades-old policy, the IFR splits workers earning the AEWR into two tranches. Workers in Skill Level I perform roles which DOL has determined require only entry-level experience. 90 Fed. Reg. at 47,932. These workers earn only “the 17th percentile of the occupational wage distribution” in a given state.³ *Id.* DOL estimates that 92 percent of workers earning the AEWR will perform Skill Level I roles. 90 Fed. Reg. at 47,955. Thus, DOL’s bifurcation ensures the vast majority of H-2A workers will receive below-average wages.

Skill Level II roles are those which DOL believes require greater education, training, skill, or experience. 90 Fed. Reg. at 47,932. DOL estimates that only 8 percent of H-2A workers will work Skill Level II jobs. 90 Fed. Reg. at 47,955. And although Skill Level I workers are paid below-average wages, Skill Level II workers do not earn above-average wages to reflect their above-average “education, training, or experience.” *Id.* at 47,932. Instead, Skill Level II workers receive only the “average” or “the 50th percentile of the occupational wage distribution” applicable to their job. *Id.* at 47,933–34. The result of this bifurcation is that *no* H-2A worker paid the AEWR will earn above-average wages, and most will receive far less:

	Workers on H-2A visas and in corresponding employment paid the AEWR	U.S. farmworkers not in corresponding employment
Farmworkers paid below-average wages	92 percent	50 percent
Farmworkers paid average wages	8 percent	--
Farmworkers paid above-average wages	0 percent	50 percent

If such a proposal had come before *amici* during their time leading DOL, they would have

³ The IFR vacillates as to whether the Skill Level I and II AEWRs are based on arithmetic means or on median-based percentile calculations. As explained in Section II, *infra*, DOL’s inconsistent explanations as to whether it uses the mean or median to calculate the AEWR independently renders the IFR arbitrary and capricious. For purposes of Section I, the point is that whether DOL uses the mean or the median, the IFR ensures that the vast majority of workers will be paid well below that measure.

1 rejected it as illegal and ill-conceived. Under the new AEW methodolgy, the H-2A workforce
2 will constitute a subclass of workers who, on average, are paid far less than their non-H-2A
3 counterparts. The creation of an underpaid subclass of H-2A workers will drag down pay across
4 the farmworker sector. In other words, rather than preventing an adverse effect on the wages of
5 U.S. workers similarly employed, *see* 8 U.S.C. § 1188(a)(1)(B), the bifurcated pay structure
6 mathematically guarantees the depression of U.S. workers' wages.

7 DOL does not deny that the new pay structure will cut U.S. farmworkers' wages to the
8 benefit of employers. 90 Fed. Reg. at 47,928 (acknowledging the IFR will "result in wage
9 transfers to employers"). Indeed, the agency apparently considers the adverse effects of its policy
10 on H-2A workers and U.S. farmworkers alike to be a feature, not a bug. DOL explicitly states that
11 it promulgated the IFR to prevent "increase[d] labor costs for employers," 90 Fed. Reg. 47,923,
12 improve the "financial outlook" for employers, *id.*, protect "a sector where profit[] margins are
13 already thin," *id.*, ensure "the viability of [U.S.] farming operations," *id.* at 47,924, and to shield
14 "U.S. agricultural employers" from "increases in production costs," *id.* The Department
15 concludes the IFR by boasting that a "primary objective[] of the IFR" is to "avert irreparable
16 economic harm to agricultural employers." *Id.* at 47,959.

17 But 8 U.S.C. § 1188(a)(1)(B) neither commands nor permits DOL to use the AEW to
18 juice employers' profits. Rather, the statute requires DOL to design the AEW to avoid an
19 "adverse[] [e]ffect [on] the wages . . . of workers in the United States similarly employed." 8
20 U.S.C. § 1188(a)(1)(B). The bifurcated pay scale thus violates the APA twice over: it is contrary
21 to law and in excess of statutory authority because it violates § 1188(a)(1)(B)'s command to
22 prevent adverse effects on U.S. workers, 5 U.S.C. § 706(2)(A), (C); and it is arbitrary and
23 capricious because by changing the AEW with an eye towards bolstering employers' balance
24 sheets, the agency "relied on factors which Congress has not intended it to consider." *Motor*
25 *Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

1 **II. The IFR Is Arbitrary and Capricious Because It Inconsistently and**
2 **Contradictorily Uses Two Different Averages to Calculate the AEWR**

3 Throughout the IFR, DOL improperly conflates two distinct averages: means and
4 medians. For instance, DOL states that “[i]n accordance with new paragraph (b)(2)(ii), a Skill
5 Level II AEWR will be computed as [the] average hourly gross wage paid to all workers in the
6 [Big Five] SOC codes . . . or, for occupations outside of that category, the average hourly gross
7 wage paid to all workers in the specific SOC code assigned to the employer’s job opportunity.”
8 90 Fed. Reg. at 47,932–33; *see also* Pls.’ Mot. Summ. J. 6, Dkt. No. 72 (explaining the “Big
9 Five” SOC codes). The rule’s text makes clear the “average” described in the aforementioned
10 “paragraph (b)(2)(ii)” is the *mean* average. 90 Fed. Reg. at 47,963 (“Skill level II shall be
11 computed as the arithmetic mean of the entire wage distribution for the occupation(s).”) (to be
12 codified at 20 C.F.R. § 655.120(b)(2)(ii)). But in the very next sentence, DOL states that “[a]
13 Skill-Level II AEWR is computed at the equivalent of the 50th percentile [*i.e.*, the median] of the
14 occupational wage distribution.” *Id.* at 47,933. Similarly, for Skill Level I AEWRs, DOL
15 simultaneously states that the AEWR is both “the 17th percentile of the occupational wage
16 distribution,” a median-based calculation, *id.* at 47,932, and “the arithmetic mean of the first one-
17 third of the wage distribution for the occupation,” a mean-based calculation, *id.* at 47,963.

18 DOL’s ping-ponging between means and medians implies the two are interchangeable. Of
19 course, they are not.⁴ Nor is the distinction academic; the difference between means and medians
20 matters a great deal for workers and employers alike. Consider SOC code 45-2092
21 (“Farmworkers and Laborers, Crop, Nursery, and Greenhouse”).⁵ Per the most recent OEWS
22 data, the *mean* wage for that SOC code in California is \$18.20/hr, while the *median* wage is
23 \$17.11/hr. *See* Dep’t of Lab., *Occupational Employment and & Wage Statistics Query System*,

24
25 ⁴ Means and medians are two different kinds of average. The mean is the sum of values in a set
26 divided by the number of entries in the set. The median is the value in an ordered set below and above
27 which there is an equal number of values, *i.e.*, the 50th percentile.

28 ⁵ Because Standard Occupational Classification (SOC) code 45-2092 is one of the Big Five SOC
29 codes, this worker would actually be paid the combined rate for the Big Five codes. 90 Fed. Reg. at
30 47,946. *Amici* use the OEWS figures for SOC code 45-2092 merely to illustrate that DOL’s chosen dataset
31 reports both mean and median wages and that these numbers differ.

1 Bureau Lab. Stats. May 2025, <https://data.bls.gov/oes/#/home> (last accessed July 7, 2026). So
2 which is it? Does a worker earning the Skill Level II AEW R earn “the 50th percentile of the
3 occupational wage distribution” of \$17.11/hr? *See* 90 Fed. Reg. at 47,933. Or “the arithmetic
4 mean” wage of \$18.20/hr? *See id.* at 47,963. Impossibly, the IFR says both.

5 DOL’s incoherent and self-contradictory explanations as to whether it uses mean- or
6 median-based calculations renders the agency’s chosen AEW R methodology arbitrary and
7 capricious. *Nat’l Parks Conservation Ass’n v. EPA*, 788 F.3d 1134, 1141 (9th Cir. 2015) (“[A]n
8 internally inconsistent analysis is arbitrary and capricious.”); *World Shipping Council v. Fed.*
9 *Mar. Comm’n*, 152 F.4th 215, 221 (D.C. Cir. 2025) (similar). This Court should accordingly
10 vacate the IFR under 5 U.S.C. § 706(2)(A).

11 **III. The IFR’s Housing Deduction is Arbitrary, Capricious, and Contrary to Law**

12 Since Congress established the modern H-2A program four decades ago, DOL has
13 required employers to provide workers on H-2A visas and many U.S. workers in corresponding
14 employment with free housing. 20 C.F.R. § 655.122(d)(1) (“The employer must provide housing
15 at no cost to the H-2A workers and those workers in corresponding employment”); *Labor*
16 *Certification Process for the Temporary Employment of Aliens in Agric. & Logging in the United*
17 *States*, 52 Fed. Reg. 20,496, 20,513 (June 1, 1987) (DOL’s post-IRCA regulations requiring
18 employers to provide housing “without charge to the worker”).⁶ But for the first time, the IFR
19 allows employers to lop off between \$0.71/hr and \$3.18/hr from the AEW R for H-2A workers to
20 reflect the purported cost of housing such workers.⁷ DOL says this change reflects that “unlike
21 most U.S. workers,” workers on H-2A visas “receive additional non-wage compensation in the
22 form of free housing.” 90 Fed. Reg. at 47,947.

24 ⁶ The regulations do not require employers to provide no-cost housing to H-2A workers or U.S.
25 workers in corresponding employment who are “reasonably able to return to their residence within the
26 same day.” 20 C.F.R. § 655.122(d)(1). Like most H-2A workers, U.S. workers in corresponding
employment are often unable to return home at the end of the day and are thus entitled to no-cost
employer-provided housing on the same terms as their H-2A colleagues.

27 ⁷ Under the 2025-26 AEW Rs, the housing deduction ranges from \$0.71/hr in Puerto Rico to
28 \$3.18/hr in Hawai’i. *See* U.S. Dep’t of Lab., Off. of Foreign Lab. Certification, *2025–26 Statewide AEW Rs*
for Non-Range Occupations, <https://perma.cc/G6K8-7G7B>. In the contiguous 48 states, the housing
deduction ranges between \$1/hr and \$3/hr. *Id.*

1 This change is arbitrary, capricious, and contrary to law for two reasons. First, DOL now
2 has contradictory regulations: the older rule that housing be provided “at no cost” to workers
3 (which the IFR did not alter), and the newer rule allowing employers to impose housing costs on
4 their workers. Second, assuming for the sake of argument that some form of housing deduction is
5 appropriate, DOL failed to consider and explain why its chosen methodology is preferable to an
6 obvious alternative: applying the housing deduction based on whether a worker actually stays in
7 housing, rather than on visa status.

8 A. *The IFR’s Housing Deduction Is Contrary to Law Because It Contradicts*
9 *DOL’s Still-Existing Rule that Workers Receive Housing “At No Cost”*

10 The IFR violates the APA because it creates a regulatory paradox. On the one hand,
11 employers are still required to “provide housing *at no cost* to the H-2A workers and those
12 workers in corresponding employment” who do not live nearby. 20 C.F.R. § 655.122(d)(1)
13 (emphasis added). On the other hand, the IFR purports to let employers cut their H-2A workers’
14 pay to offset the “significant costs” employers incur by providing housing. 90 Fed. Reg. at
15 47,947. In other words, DOL’s regulations now simultaneously forbid and allow employers to
16 recoup the cost of housing from their H-2A employees.

17 The IFR is thus contrary to law because it is contrary to 20 C.F.R. § 655.122(d)(1)’s still-
18 existing prohibition on recouping housing costs from H-2A workers. It is hornbook
19 administrative law that an “agency is not free to ignore or violate its regulations while they
20 remain in effect.” *Nat’l Env’t Dev. Ass’n’s Clean Air Project v. EPA*, 752 F.3d 999, 1009 (D.C.
21 Cir. 2014) (citation omitted); accord *Nat’l Ass’n of Home Builders v. Norton*, 340 F.3d 835, 852
22 (9th Cir. 2003) (invalidating agency action because it violated a still-extant agency regulation); *E.*
23 *Band of Cherokee Indians v. Dep’t of Interior*, 534 F. Supp. 3d 86, 97 (D.D.C. 2021) (“Agency
24 action is obviously ‘not in accordance with law’ [under 5 U.S.C. § 706(2)(A)] if it violates some
25 extant federal . . . regulation.”).

26 The IFR attempts to square this circle by arguing that cutting a worker’s wages to reflect
27 the employer’s cost of providing housing somehow “does not authorize an employer to . . . deduct
28 housing costs from . . . wages.” 90 Fed. Reg. at 47,950. That is risible. This Court should call a

1 spade a spade: the AEWR housing deduction, which DOL states is supposed to shift the
2 “significant [housing] costs” that “employers face” to H-2A workers, 90 Fed. Reg. at 47,947, is in
3 fact a “cost” of housing imposed upon those workers in violation of 20 C.F.R. § 655.122(d)(1).
4 Given DOL’s decision to adopt self-conflicting regulations, this Court should vacate the IFR as
5 contrary to law. 5 U.S.C. § 706(2)(A).

6 B. *The IFR Failed to Consider Obvious and Viable Alternatives to Linking the*
7 *Housing Deduction to Visa Status*

8 DOL justifies reducing the AEWR for workers on H-2A visas because most H-2A visa-
9 holders reside in employer-provided housing, while most U.S. workers similarly employed do
10 not. 90 Fed. Reg. at 47,947. But the key word there is *most*. Not all. Plenty of U.S. workers
11 similarly employed do live in employer-provided housing, because—as the agency itself notes—
12 such U.S. workers “face significant challenges finding and maintaining affordable housing” near
13 their jobs other than employer-provided housing. *Id.*; *see also id.* at 47,948 (noting that 12 percent
14 of migrant U.S. farmworkers and 7 percent of non-migrant U.S. farmworkers also live in
15 employer-provided housing for free). Indeed, employers are legally required to offer free housing
16 to U.S. workers in corresponding employment if those U.S. workers “are not reasonably able to
17 return to their residence within the same day.” 20 C.F.R. § 655.122(d). Moreover, though rare,
18 some workers on H-2A visas choose to live somewhere other than employer-provided housing.

19 But rather than consider tying the AEWR housing adjustment to an employee’s actual
20 housing situation, DOL leapfrogged to applying the adjustment based only on a worker’s visa
21 status. Thus, U.S. workers who earn the AEWR cost their employer between \$1 and \$3 more per
22 hour than workers on H-2A visas. This remains true even if the U.S. worker lives in employer-
23 provided housing, and even if the H-2A worker chooses not to. *See, e.g.*, 90 Fed. Reg. at 47,926
24 (noting that in Alabama, an employer must offer a “U.S. worker[] no less than \$11.25 per hour”
25 and “any H-2A worker[] . . . no less than \$10.05 per hour” regardless of whether either worker
26 resides in employer-provided housing). That delta creates a clear incentive for an employer to hire
27 H-2A workers, who will cost the employer less in wages but the same (or less) in housing costs as
28 U.S. workers residing at the employer’s housing. The IFR makes H-2A workers, as a class,

1 cheaper than their U.S. counterparts, guaranteeing the adverse effects on U.S. workers which
2 DOL is supposed to prevent, and thus violating 8 U.S.C. § 1188(a)(1)(B).

3 Instead of making the AEWB housing deduction contingent on whether a worker has an
4 H-2A visa, DOL could and should have “consider[ed] [the] feasible alternative[.]” of simply
5 applying the housing deduction if a worker actually lives in employer-provided housing. *Nat’l*
6 *TPS All. v. Noem*, 166 F.4th 739, 772 (9th Cir. 2026) (Mendoza, J., concurring, for a majority);
7 *see also Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 30 (2020) (holding
8 that when an agency changes “a prior policy its reasoned analysis must consider the ‘alternatives’
9 that are ‘within the ambit of the existing policy’” (quoting *State Farm*, 463 U.S. at 42) (cleaned
10 up)); Defs.’ Opp’n Mot. Prelim. Inj. 15, Dkt. No. 28 (acknowledging the APA requires agencies
11 to consider alternatives); Defs.’ Mem. Supp. Mot. Summ. J. 12, Dkt. No 73-1 (same).

12 DOL offers no reason why applying the housing deduction based on whether a worker
13 lives in employer-provided housing would be less administrable than its chosen option, nor is any
14 such feasibility issue apparent from the record. Moreover, such an alternative would have solved
15 the problem DOL identified—that most H-2A workers reside in employer housing, while some
16 U.S. workers do not—without making H-2A workers, on the whole, cheaper than U.S. workers
17 similarly employed.

18 To be clear, *amici* do not suggest the agency *should* make a housing deduction contingent
19 on a worker’s housing status. The far better policy is what DOL has done for decades: require
20 employers to provide housing “at no cost” to their workers, which reflects that H-2A workers face
21 unique challenges in obtaining housing near their temporary worksites and are present on the
22 employer’s property primarily for the employer’s benefit. But assuming *arguendo* that decades-
23 old policy should change, the agency’s failure even to acknowledge the “significant and viable
24 and obvious alternative[.]” of tying the housing deduction to a worker’s housing situation, rather
25 than their visa status, renders DOL’s decision arbitrary and capricious. *Dist. Hosp. Partners, L.P.*
26 *v. Burwell*, 786 F.3d 46, 59 (D.C. Cir. 2015) (citation omitted).

1 **IV. The IFR’s Majority-of-Hours Method for Determining the Applicable AEW for**
2 **Multi-Role Positions Is Arbitrary and Capricious**

3 H-2A positions sometimes involve duties not encompassed within the “Big Five” SOC
4 codes covering most tasks H-2A workers perform. Imagine, for example, a worker who spends a
5 third of her time driving heavy trucks (SOC 53-3032) and two-thirds of her time harvesting crops
6 (SOC 45-2092). The latter is a “Big Five” SOC code, but the former is not. In 2023, DOL
7 promulgated a rule under which the AEW would have been the highest rate applicable to any of
8 a job’s duties. In the hypothetical worker’s case, that means she would earn the rate for heavy-
9 truck drivers, including for the time she spent harvesting crops, because heavy-truck drivers
10 generally earn more money than crop-workers. *See* Adverse Effect Wage Rate Methodology for
11 the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United
12 States, 88 Fed. Reg. 12,760, 12,778 (Feb. 8, 2023).⁸

13 A district court vacated the 2023 rule before DOL issued the IFR. But DOL nevertheless
14 believes the 2023 methodology “needs revision.” 90 Fed. Reg. at 47,938. And the agency’s
15 chosen replacement is to require employers to pay our hypothetical worker the lower rate for
16 crop-harvesting, including for the time she spends driving heavy trucks, because she spends most
17 of her time in the field. That decision was arbitrary and capricious for at least two reasons.

18 First, DOL acted arbitrarily and capriciously because it failed to apprehend which wage
19 methodology for multi-role positions was actually in effect when it adopted the IFR. As noted
20 above, DOL decided to adopt a new rule because the agency now believes “the standards
21 contained in the 2023 AEW Final Rule . . . [were] insufficiently justified and not necessary” and
22 “must be reconsidered.” *Id.*; *see generally id.* at 47,938–39 (citing purported flaws in the 2023
23 Rule as the reason for adopting a new rule). But DOL issued the IFR five weeks *after* a district
24

25 ⁸ The May 2025 OEWS survey estimated the national mean wage for heavy truck drivers (SOC
26 53-3032) to be \$28.71/hr. *See* Dep’t of Lab., *Occupational Employment and Wage Statistics Query*
27 *System*, May 2025 (last accessed July 7, 2026), <https://data.bls.gov/oes/#/home>. The most recent national
28 average AEW (prior to the IFR) applicable to the most prominent SOC codes governing H-2A workers’
duties was \$17.74/hr. *Labor Certification Process for the Temporary Employment of Foreign Workers in*
Agriculture in the United States: Adverse Effect Wage Rates for Non-Range Occupations, 89 Fed. Reg.
101,628, 101,629 (Dec. 16, 2024).

1 court in Louisiana had already vacated the 2023 AEW rule. *See Teche Vermilion Sugar Cane*
2 *Growers Ass’n Inc. v. Chavez-Deremer*, No. 6:23-cv-831, 2025 WL 2472461 (W.D. La. Aug. 26,
3 2025). Thus, when DOL issued the IFR, the earlier 2010 rule—not the 2023 rule—provided the
4 applicable AEW methodology. *See Temporary Agricultural Employment of H-2A Aliens in the*
5 *United States*, 75 Fed. Reg. 6,884 (Feb. 12, 2010). The 2010 rule did not use the highest-paid-
6 SOC method—which DOL now finds so objectionable—for choosing an AEW for multi-role
7 positions. Rather, a state’s AEW under the 2010 rule was simply “the annual average combined
8 hourly wage for field and livestock workers” derived from the SOC codes covering most H-2A
9 work, even when a worker performs tasks outside those codes. *Id.* at 6,895. Thus, in promulgating
10 the IFR, DOL asserted a need to fix issues with a nonexistent rule, rather than any problem with
11 the regulation actually in effect.

12 This is quintessentially arbitrary and capricious decision-making. To be sure, the APA
13 does not require an agency to “demonstrate to a court’s satisfaction that the reasons for the new
14 policy are *better* than the reasons for the old one,” only “that the agency *believes* it to be better”
15 than the status quo. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). But that still
16 requires the agency to demonstrate that it knows what the status quo is. *Id.* (explaining that when
17 changing positions, an agency must “display awareness” that it is doing so). By citing purported
18 defects in the defunct 2023 methodology as the reason for adopting a new policy, rather than any
19 problem with the governing 2010 rule, DOL flunked this requirement.⁹

20 Second, DOL failed to consider obvious alternatives and to draw a rational connection
21 between the asserted need to revise the 2023 rule and the majority-of-hours method it chose. As
22 noted *supra*, when agencies change their policies, they must abide by the APA’s requirement to
23 “provide reasoned explanation[s]” for their changes, *id.*, including “consider[ing] feasible
24 alternatives and articulat[ing] a rational connection between the facts found and the choice
25 made.” *Nat’l TPS All.*, 166 F.4th at 772; *see also Regents of the Univ. of Cal.*, 591 U.S. at 30.

26 ⁹ Befuddlingly, DOL elsewhere acknowledges that *Teche Vermilion* vacated the 2023 rule, thus
27 reverting the AEW methodology to the 2010 regulations. *See, e.g.*, 90 Fed. Reg. at 47,919. The agency’s
28 effort to justify the new majority-of-hours rule based on asserted flaws in the 2023 rule is all the more
incomprehensible given that DOL elsewhere seems to grasp the import of that vacatur.

1 Here, rather than leaping straight to a majority-of-hours rule, DOL could and should have
2 considered as an alternative a weighting method, under which the AEWR for a given H-2A
3 position would be a combination of the wage rates for a position's different roles, adjusted for the
4 proportion of time a worker would perform each role. Thus, returning to the hypothetical worker
5 who spends a third of her time driving heavy trucks and two-thirds harvesting crops, the AEWR
6 would be: $(1/3) \times (\text{wage rate for heavy-truck drivers}) + (2/3) \times (\text{wage rate for crop harvesting})$.

7 This method would be preferable to DOL's majority-of-hours rule because it would avoid
8 underpaying workers for the minority of their work-hours they spend performing higher-wage
9 roles, while still accomplishing DOL's goal of not overpaying workers for the time they spend
10 performing lower-wage work. A weighting method would also better prevent an adverse effect on
11 U.S. workers similarly employed—*e.g.*, U.S. heavy truck drivers who, under the IFR's
12 methodology, will compete with H-2A workers driving similar trucks part-time for far less pay.
13 And it would better accomplish DOL's stated goal of not basing the AEWR "on *any* [single] duty
14 identified in the employer's job offer while essentially disregarding the preponderance of other
15 duties"—a critique of the 2023 methodology which applies with equal force to DOL's chosen
16 majority-of-hours rule. 90 Fed. Reg. 47,938.

17 Further, given that DOL's chosen methodology already requires employers to provide the
18 information necessary to calculate a weighted AEWR—descriptions of duties sufficient to assign
19 SOC codes and breakdowns of how much time workers will spend on those duties—the simple
20 math necessary to compute a weighted rate would not meaningfully increase the administrative
21 burden on DOL or employers.

22 Perhaps DOL could have reasonably rejected alternatives like the aforementioned
23 weighting methodology after careful consideration. But it did not. And perhaps DOL could have
24 devised even better alternatives than either weighting or the majority-hours rule. But it identified
25 none. Indeed, it does not even appear to have occurred to DOL to consider *any* alternative to the
26 majority-of-hours rule.¹⁰ The IFR is thus arbitrary and capricious because DOL "fail[ed] to

27
28 ¹⁰ The IFR indicates the only two alternatives DOL considered were "apply[ing] the Skill Level I
... AEWR rate to all positions, rather than using the two-skill AEWR methodology" and a different

1 consider significant and viable and obvious alternatives,” *Dist. Hosp. Partners, L.P.*, 786 F.3d at
2 59 (cleaned up), and because its choice of the majority-of-hours rule over available alternatives
3 was not “reasonably explained,” *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021).

4 **V. DOL Lacked “Good Cause” to Forego Notice and Comment**

5 DOL claims it had “good cause” to bypass the APA’s notice-and-comment procedures
6 because notice and comment would have been “impracticable, unnecessary, or contrary to the
7 public interest.” 5 U.S.C. § 553(b)(B). But the APA’s good-cause exception “is to be ‘narrowly
8 construed and only reluctantly countenanced.’” *California v. Azar*, 911 F.3d 558, 575–76 (9th
9 Cir. 2018 (citation omitted). “As such, the good cause exception is usually invoked in
10 emergencies, and an agency must ‘overcome a high bar’ to do so.” *Id.* (citation omitted). This is
11 why, during their time leading the agency, *amici* were cautious and narrowly focused when
12 invoking the good-cause exception. Here, in contrast, DOL cites two putative crises: the degree to
13 which the current administration is harming farmers via its immigration policy, and the end of the
14 Farm Labor Survey (FLS). Neither satisfies DOL’s heavy burden.

15 To start, these are both problems of the government’s own making. The caselaw is clear
16 that agencies cannot rely on such government-created crises to circumvent notice and comment.
17 *See, e.g., Nat. Res. Def. Council v. Abraham*, 355 F.3d 179, 205 (2d Cir. 2004) (“We cannot
18 agree, though, that an emergency of DOE’s own making can constitute good cause.”); *Regeneron*
19 *Pharms., Inc. v. Dep’t of Health & Hum. Servs.*, 510 F. Supp. 3d 29, 47 (S.D.N.Y. 2020) (“Put
20 bluntly, an agency’s self-imposed delay cannot support a finding of good cause.”); *Nat. Res. Def.*
21 *Council v. NHTSA*, 894 F.3d 95, 114–15 (2d Cir. 2018) (finding no good cause because “[a]ny
22 imminence was NHTSA’s own creation.”).

23 But even if the government could theoretically rely on self-generated emergencies to
24 satisfy the APA’s “good cause” standard, neither of DOL’s reasons for skipping notice and
25 comment holds water.

27 method for calculating the housing adjustment. 90 Fed. Reg. at 47,958. Neither has anything to do to with
28 the multi-role issue the majority-hours rule is intended to address, indicating DOL considered no relevant
alternatives to its chosen policy.

1 As to the asserted farm-labor shortage induced by the administration’s immigration
2 policy, DOL provides no meaningful evidence that the administration has or will remove so many
3 undocumented workers that it will precipitate a labor crisis of such magnitude that DOL must
4 ignore notice and comment procedures. To be sure, DOL touts various decontextualized statistics
5 about border crossings, *see, e.g.*, 90 Fed. Reg. at 47,921, and provides plenty of rhetoric about the
6 purported successes of the current President’s immigration policy in general. But as DOL itself
7 acknowledges, whatever the efficacy of the government’s efforts to reduce crossings at the
8 border, the vast majority of undocumented farmworkers are already “settled [in the United States]
9 and relatively immobile.” *Id.* at 47,922. DOL provides no indication that the government is on
10 track to remove enough of these “settled” workers to precipitate a labor crisis. *Id.* Indeed, DOL
11 does not even hazard a guess at what proportion of the farm labor force the current administration
12 may remove.¹¹ DOL’s table-banging about the importance of immigration enforcement is devoid
13 of any actual, non-speculative evidence that current immigration policy will have such a massive
14 effect on the undocumented farm workforce already present in the United States that the agency
15 cannot afford to wait for notice and comment. DOL thus failed to establish good cause for not
16 proceeding through notice and comment. *See Tenn. Gas Pipeline Co. v. FERC*, 969 F.2d 1141,
17 1145 (D.C. Cir. 1992) (finding good cause not established where IFR’s “justification rests on the
18 regulator’s prediction” for which it “provided little factual basis”).

19 Additionally, even if DOL had substantiated its claim that immigration enforcement is
20 causing a sector-wide labor crisis, there is an obvious solution: the H-2A program, which
21 provides an uncapped number of visas to fill such labor shortages. DOL provides no compelling
22 reason why the H-2A program as it existed before the IFR could not fill any gap created by the
23 administration’s immigration policies, instead asserting that many employers find the H-2A
24 program expensive. 90 Fed. Reg. at 47,923–25. But as explained in Section I, *supra*, Congress did
25 not permit DOL to reshape the AEWR with an eye towards enhancing growers’ profit. It follows

26
27 ¹¹ DOL quotes a few scattered third-party estimates of the workforce effects different immigration
28 policies might have on the agricultural workforce. *See* 90 Fed. Reg. at 47,922 nn. 67–68. But the agency
does not assert that the assumptions underpinning those hypotheticals describe the administration’s actual
immigration policy.

1 that DOL cannot skip notice and comment to do so. Moreover, DOL’s justification contradicts
2 itself. The agency asserts it must slash workers’ pay without waiting for notice and comment
3 because the current method for determining the AEWRS is “unworkable,” *id.* at 47,924, while
4 also noting that the program has grown dramatically over the past decade, *id.*¹² Clearly,
5 employers do not find the program to be as “unworkable” as the agency claims.

6 As to the FLS’s cancellation, DOL’s reach exceeds its grasp. The end of the FLS might, at
7 most, justify switching the data source for the AEWRS to the OEWS without notice and
8 comment. But the IFR goes far beyond that, adopting sweeping changes including the skill-level
9 bifurcation, the majority-of-hours rule for handling multi-role positions, and the housing
10 deduction. None of these alterations has anything to do with the FLS’s end. Indeed, the agency
11 explicitly says so in its severability section. *See* 90 Fed. Reg. at 47,951; *see also* Defs.’ Mem.
12 Supp. Mot. Summ. J. 23 (arguing “the various provisions of the IFR are severable”).¹³ Given that
13 even the agency believes its switch from the FLS to the OEWS “is capable of operating
14 independently from” any of the other changes in the IFR, Defs.’ Mem. Supp. Mot. Summ. J. 23,
15 Defendants cannot use the end of the FLS to justify foregoing notice and comment for any
16 provision other than switching from that now-defunct dataset to the OEWS.

17 CONCLUSION

18 For the foregoing reasons, *amici* urge this Court to grant Plaintiffs’ motion for summary
19 judgment, vacate the Interim Final Rule pursuant to 5 U.S.C. § 706(2), and permanently enjoin
20 the Interim Final Rule.

22 ¹² DOL notes that the program’s growth slowed in the years following the 2023 AEWRS rule. 90
23 Fed. Reg. at 47,924. But following *Teche Vermilion*, the 2010 rule, not the 2023 rule, would govern in the
24 absence of the IFR, just as it did in the years in which “the average annual rate of growth in employer
demand for H-2A worker positions was almost 15 percent.” *Id.*

25 ¹³ DOL asserts that the FLS’s cancellation justifies skipping notice and comment for the skill-level
bifurcation (but not the housing deduction or majority-of-hours rule) because “retain[ing] a single-average
26 approach would have squandered the principal benefit of the” OEWS, namely that OEWS data are fine-
grained enough to let DOL split the AEWRS in two. Defs.’ Mem. Supp. Mot. Summ. J. 22. But that is no
27 argument that the skill-level bifurcation is *necessary* to the switch from the FLS to the OEWS; it is merely
an assertion that DOL wants to enact the skill-level bifurcation as a matter of policy preference. Whatever
28 the (dubious) merits of that policy, DOL cannot distort the APA’s “good cause” exception far enough to
ram that change through without allowing the public a chance to comment.

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Respectfully submitted,

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**PHV Application Forthcoming*

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