UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PERI & SONS FARMS, INC., *et al.*,	)	
	)	
Plaintiffs,	)	
	)	**No. 19-cv-00034-TJK**
v.	)	
	)	
R. ALEXANDER ACOSTA, *et al.*,	)	
	)	
Defendants.	)	

PROPOSED DEFENDANT-INTERVENORS' JOINT OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

Proposed Intervenors United Farm Workers ("UFW") and Michael Cortez, Arnoldo Charles, and Olegario Lopez (together, "Farmworkers") respectfully submit this joint memorandum in opposition to Plaintiffs' Motion for Preliminary Injunction.

As part of the H-2A program, Congress charged the Department of Labor ("DOL") with ensuring that employment of temporary foreign agricultural workers will not adversely affect the wages and working conditions of U.S. agricultural workers. DOL carried out that directive by issuing a set of regulations to prevent the hiring of temporary foreign agricultural workers from undercutting U.S. farmworkers in the labor market. It has done so, in part, by requiring that growers pay the "adverse effect wage rate" ("AEWR"), which is calculated each year by applying a methodology established in those regulations. The methodology used by DOL to set each year's AEWR has been repeatedly upheld by the D.C. Circuit and this court.

Notwithstanding this precedent, Plaintiffs now complain that this methodology is unlawful and seek an injunction restraining its application in 2019. But Plaintiffs' challenge rests on the erroneous contention that, in setting wages under the H-2A statute, DOL must measure the magnitude of adverse effect rather than prevent adverse effect from occurring in the first place. Because this reading is incorrect, Plaintiffs' challenge to DOL's regulations, which have been in effect since 2010 (and substantively in place since 1989), is likely to fail on the merits. Moreover, Plaintiffs make only vague assertions of irreparable harm and offer an inadequate balancing of the equities to the detriment of both U.S. farmworkers and H-2A workers. Finally, Plaintiffs' assessment of the public interest ignores significant countervailing considerations. For these reasons, Plaintiffs have failed to carry their burden with respect to any of the four factors bearing on the issuance of preliminary relief. Their request should be denied.

In the event that such an injunction is granted in whole or in part, proposed intervenors urge the Court to condition the injunction on a requirement that any employer taking advantage of the injunction post adequate security and implement other procedures in concert with DOL. These requirements would be necessary to ensure that the affected U.S. and H-2A workers will receive the 2019 AEWR promptly for the entire 2019 season if the preliminary injunction is ultimately dissolved by this Court or reversed on appeal.

BACKGROUND

A. The H-2A Guestworker Program Requires Employers Of H-2A Workers To Offer Minimum Wage Rates Reflecting Labor Market Conditions In Agriculture.

The H-2A program allows employers to import and employ foreign workers for temporary or seasonal agricultural labor. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c), 1188. Before an employer may hire H-2A workers, the Secretary of Labor must find that:

> (A) there are not sufficient workers who are able, willing, and qualified . . . to perform the labor or services involved in the petition, and (B) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

8 U.S.C. § 1188(a)(1). These requirements "provide two assurances to United States workers": first, that "these workers are given a preference over foreign workers for jobs that become available within this country," and second, that "the working conditions of domestic employees are not to be adversely affected, nor are United States workers to be discriminated against in favor of foreign workers." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 596 (1982). Under the first element of 8 U.S.C. § 1188(a)(1), employers must meet several requirements regarding advertising, recruitment, and hiring to ensure that U.S. workers are not being passed over for the job. Under the second element, to ensure that wages and working conditions in the United States are not "adversely affected" by H-2A workers, the regulations require H-2A employers to offer

the highest of five minimum wage rates: the applicable federal or state minimum wage; the local prevailing wage for that occupation; any collectively bargained wage rate; or the AEWR. 20 C.F.R. § 655.120.

The AEWR is the "annual weighted average hourly wage for field and livestock workers (combined) in the States or regions as published annually by the U.S. Department of Agriculture (USDA) based on its quarterly wage survey." 20 C.F.R. § 655.103(b). The AEWR follows trends of the agricultural labor market, adjusting to meet wage averages as determined by supply and demand. This methodology was carefully developed after extensive notice-and-comment rulemaking, most recently in 2010. 75 Fed. Reg. 6,884 (Feb. 12, 2010) ("2010 Final Rule").

B. The History of Foreign Worker Programs Shows That The Policy And Rationale Behind Adverse Effect Wage Rates Have Remained Consistent Since The 1960s.

DOL first established AEWRs for the H-2 program (the predecessor to the H-2A program) for 28 states in 1964. 29 Fed. Reg. 19,101, 19,102 (Dec. 29, 1964). The methodology for determining those rates relied on the 1950 Census of Agriculture average hourly wage rate for each state, adjusted by the 1950 to 1963 trend in manufacturing wages. *See AFL-CIO v. Brock,* 668 F. Supp. 31, 34 (D.D.C.), *rev'd on other grounds*, 835 F.2d 912 (D.C. Cir. 1987). This methodology had the effect of raising the AEWR for each of the States above the average agricultural wage. *Id.* Beginning in 1968, DOL began calculating AEWRs by using the 1964 AEWR as a base and increasing it annually "by the same percentage as the percentage change in the Statewide annual average wage rates for field and livestock workers, as surveyed by the [USDA]." 52 Fed. Reg. 20,496, 20,503 (Jun. 1, 1987). This methodology produced AEWRs at approximately 20% above the average farm wage and was designed to offset past wage depression and avoid future depressive effects. *AFL-CIO v. Brock*, 668 F. Supp. at 34.

In 1987, Congress passed the Immigration Reform and Control Act ("IRCA"), which amended the INA and divided the H-2 temporary worker program into two parts: an H-2A program for agricultural workers and an H-2B program for non-agricultural workers. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(A) & (B). IRCA reinforced protections for H-2A workers by, among other things, codifying the prior regulatory requirement that DOL sought to address through the AEWR: that U.S. farmworkers not be adversely affected by the hiring of H-2A workers. *See United Farm Workers of Am. (UFW), AFL-CIO v. Chao*, 227 F. Supp. 2d 102, 108 n.12 (D.D.C. 2002) ("Prior to the IRCA of 1986, the 'adverse effect' requirement was contained in a regulation issued pursuant to the INA of 1952, not in the INA itself. The IRCA expressly incorporated the adverse effect prohibition contained in the previous regulations by amendment so that it became a statutory mandate that domestic workers should not be injured by depressed wages paid to foreign workers.") (citing Pub. L. No. 99–603, § 301(c), 100 Stat. 3359); 8 U.S.C. § 1188(a)(1)(B).

Following IRCA, DOL adopted a new methodology for determining AEWRs. *See* 52 Fed. Reg. at 20,502. This interim methodology eliminated the 20% upward adjustment designed to offset past adverse effects and instead merely required H-2A employers to pay no less than the average hourly wage for field and livestock workers as determined by the USDA survey (hereinafter "USDA methodology"). *Id.* This interim rule was replaced by a final rule in 1989. 54 Fed. Reg. 28,037 (Jul. 5, 1989). After several years of litigation (in which plaintiff NCAE appeared as an intervenor to defend the USDA methodology), the methodology was upheld as consistent with DOL's statutory mandate and neither arbitrary nor capricious. As the D.C. Circuit noted:

> The government's choice of methodology is really a policy decision taken within the bounds of a rather broad congressional delegation. The Department is obliged to balance the competing goals of the statute—providing an adequate labor supply and protecting the jobs of domestic workers. Striking that balance is a judgment

> call which Congress entrusted to the Department of Labor. The Department chose, in the face of imprecise and inconclusive data, the USDA hourly wage as the AEWR because, in its opinion, that rate will neither ratchet wages upward, driving growers out of business nor perpetuate wage depression.

AFL-CIO v. Dole, 923 F.2d 182, 187 (D.C. Cir. 1991) (citations omitted). Since the 1989 Final Rule—with the exception of a brief interlude between 2008 and 2010 when DOL tried using the Bureau of Labor Statistics Occupational Employment Survey (OES) data to set AEWRs[1]—the AEWR methodology has remained the same. *See* 75 Fed. Reg. at 6,884 ("[DOL's] H-2A regulations remained largely unchanged from the 1987 Rule until 2008."). This methodology is currently embodied in DOL's 2010 Final Rule, under which the 2019 AEWR was issued. *See id.*

Thus, regardless of the specific data source used, since the 1960s DOL has sought to carry out its mandate to avoid adverse effects from the importation of temporary foreign agricultural workers by requiring payment of an AEWR that is set at or above the average farm wage. Since 1987, with the exception of 2008 and 2009, DOL has used the USDA's average farmworker wage survey results to determine the AEWR. At no time during the nearly 55 years that AEWRs have been in effect has DOL ever calculated the precise magnitude of the adverse effect that would occur in the absence of an AEWR, as Plaintiffs demand here. Courts recognized early on that the "adverse effect" is exactly *what DOL is trying to prevent* in the first place. *See, e.g.*, *Limoneira Co. v. Wirtz*, 225 F. Supp. 961, 964–65 (S.D. Cal. 1963), *aff'd*, 327 F.2d 499 (9th Cir. 1964) (upholding DOL's AEWR determination and explaining that "[t]he 'adverse effect' is what the statute is designed to prevent, and the fixing of a minimum wage rate would appear to be a much more effective means of preventing an 'adverse effect' than using the prevailing wage rate as a criteria.").

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[1] DOL abandoned the OES methodology in part because the OES data, unlike the USDA Farm Labor Survey, does not rely on data sourced directly from farmers. 75 Fed. Reg. at 6,896–98.

C. The 2019 AEWR Announcement Applies The Now Longstanding Methodology Articulated In The 2010 Final Rule.

On December 26, 2018, DOL issued a notice of the new AEWR rates for 2019. 83 Fed. Reg. 66,306 (Dec. 26, 2018). The new AEWRs are simply an application of the 2010 methodology, using the USDA Farm Labor Survey results for 2018 as the methodology requires. *See id.* at 66,306–07. Following this Court's denial of Plaintiffs' request for a temporary restraining order, the 2019 AEWR is now in effect. All employers currently employing H-2A workers should be paying at least that rate, and any employers seeking to obtain H-2A agricultural workers must offer to pay no less than that rate. 20 C.F.R. § 655.120(a).

To support their allegations of unfairness, plaintiffs have cherry-picked 2019 AEWR rates from just eight states with the highest annual increases in 2019 — ranging from 15.9% to 23% — while failing to acknowledge the broader, nationwide context for AEWR rates. *See* Pls.' Mem. Supp. Mot. Prelim. Relief 6, ECF No. 3. For example, in 2019, all other states have increases of less than 10%, and the nationwide average increase of the 2019 AEWR rates was 6%. *See* Goldstein Decl. Ex. A (DOL AEWR chart for 2013-2019). Moreover, although Plaintiffs seek a nationwide injunction against the 2019 AEWR, employers in three states (Florida, Iowa, and Missouri) will see a *decrease* in wage rates under the 2019 AEWRs and would have to pay higher wages if the injunction requested by Plaintiffs were issued. *See id.* More fundamentally, this single-year snapshot cannot capture farm labor market trends. Since 2011, several states have experienced periods of AEWR increases followed or preceded by periods of AEWR decreases, reflecting the reality of a fluctuating marketplace as captured by the USDA Farm Labor Survey. *See id.*

LEGAL STANDARD

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. NRDC*, 555 U.S. 7, 24 (2008). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20.

Plaintiffs carry the burden of clearly showing that they are entitled to a preliminary injunction. *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (quoting *Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004)) (ruling that a preliminary injunction is "an extraordinary remedy that should be granted only when the party seeking the relief, by a clear showing, carries the burden of persuasion"). A showing of irreparable harm alone is insufficient to justify a grant of preliminary injunction unless Plaintiffs also carry their burden of showing likelihood of success on the merits. *See, e.g.*, *Munaf v. Geren*, 553 U.S. 674, 690–91 (2008); *Sherley v. Sebelius*, 644 F.3d 388, 393 (D.C. Cir. 2011) ("Like our colleagues, we read *Winter* at least to suggest if not to hold that a likelihood of success is an independent, free-standing requirement for a preliminary injunction.") (internal quotation marks omitted).

Here, Plaintiffs must meet an even higher standard because they challenge the 2010 Final Rule and thereby seek to alter the status quo. "A motion for a preliminary injunction generally seeks to maintain the status quo pending a final determination of the suit on the merits." *City of Moundridge v. Exxon Mobil Corp.*, 429 F. Supp. 2d 117, 126 (D.D.C. 2006). A court should review a party's request to upend the status quo "with even greater circumspection than usual," *id.* at 127 (citing *Mylan Pharms, Inc. v. Shalala*, 81 F. Supp. 2d 30, 36 (D.D.C. 2000)), and its power to issue such mandatory injunctive relief "should be sparingly exercised," *Spadone v. McHugh*, 842 F. Supp. 2d 295, 301 (D.D.C. 2012).

The current AEWR methodology has existed since at least 2010, if not 1987. Year after year, the same methodology has been applied. Now, just weeks before H-2A workers are scheduled to arrive for the season's work, Plaintiffs challenge the entire 2010 methodology and the status quo. They do not offer an alternative approach to determine the wages set for this year, nor could they, because this adoption of a new methodology would require a new notice and comment rulemaking. Under these circumstances, Plaintiffs' request for a mandatory injunction should be viewed "with even greater circumspection than usual." *City of Moundridge*, 429 F. Supp. 2d at 127.

ARGUMENT

I. Plaintiffs Have Failed To Carry Their Burden Of Showing They Are Entitled To The Extraordinary Remedy Of A Preliminary Injunction.

A. Plaintiffs Are Unlikely To Prevail On The Merits.

Plaintiffs are unlikely to prevail on the merits for at least three reasons: (1) their claim is barred by the statute of limitations, (2) neither the 2010 Final Rule nor the 2019 application of it are contrary to DOL's statutory authority, and (3) DOL's AEWR methodology is neither arbitrary nor capricious. Moreover, Plaintiff NCAE is bound by its defense of the USDA methodology in the *AFL-CIO* litigation. Because Plaintiffs have failed to show a likelihood of success on the merits, their request for a preliminary injunction must be denied. *See Munaf*, 553 U.S. at 690–91.

1. Plaintiffs' Claims Are Barred By The Statute of Limitations.

Plaintiffs' claims are brought under § 706(2) of the Administrative Procedure Act (APA), *see* Compl. ¶¶ 39–45, ECF No. 1, and are therefore subject to the six-year statute of limitations in 28 U.S.C. § 2401. *See Mendoza v. Perez*, 754 F.3d 1002, 1018 (D.C. Cir. 2014). The limitation period under § 2401 begins to run "on the date of the final agency action," *Harris v. FAA*, 353

F.3d 1006, 1010 (D.C. Cir. 2004), which is when "rights or obligations have been determined or from which legal consequences will flow," *Mendoza*, 754 F.3d at 1018.

Here, DOL published the final rule stating the methodology for calculating AEWRs in 2010. *See* 75 Fed. Reg. 6,884 (Feb. 12, 2010). That methodology specifies that the AEWR is to be determined annually based on a weighted average of agricultural wages reported on the USDA's Farm Labor Survey. *Id.* Each year as new USDA survey results become available, a notice of new AEWRs is published in accordance with the methodology. *See, e.g.*, 83 Fed. Reg. 66,306 (Dec. 26, 2018) (2019 AEWR); 82 Fed. Reg. 60,628 (Dec. 21, 2017) (2018 AEWR); 81 Fed. Reg. 94,422 (Dec. 23, 2016) (2017 AEWR). Although Plaintiffs purport to be attacking the 2019 AEWR, they are actually challenging the content of the 2010 methodology. They do not allege that DOL misapplied the methodology in any way in 2019 or any other problem specific to the ministerial act of issuing the 2019 Notice; their complaint challenges the 2010 regulatory methodology that is used to calculate the 2019 AEWRs. Compl. ¶¶ 39–45, ECF No. 1. Indeed, Plaintiffs claim that the methodology itself is flawed because it allegedly does not find and measure an adverse effect and does not adequately take into account such things as differences in geographic area, occupations, skills, or experience. Compl. ¶¶ 41, 44–45, ECF No. 1. This challenge to DOL's AEWR methodology—almost eight years after it was finalized and published—is barred by the six-year statute of limitations.

Plaintiffs cannot escape the limitations bar of § 2401 by claiming that the publication of the 2019 AEWR Notice re-started limitations. The "reopening doctrine" extends the limitations period only "when the agency . . . by some new promulgation creates the opportunity for renewed comment and objection[.]" *P & V. Enters. v. U.S. Army Corps of Eng'rs*, 516 F.3d 1021, 1024 (D.C. Cir. 2008). The 2019 AEWR Notice, however, inserted the current version of the data mandated by the 2010 methodology and announced the result. That ministerial publication of AEWRs based on survey results did not alter the 2010 methodology or the data sets to be used in setting the wage. It was, as its name suggests, simply a notice of the results of the methodology. Thus, the publication of the 2019 AEWR Notice did not restart the limitations period for the methodology published in the 2010 Final Rule. *See, e.g.*, *Outdoor Amusement Bus. Ass'n Inc. v. DHS*, 334 F. Supp. 3d 697, 713–14 (D. Md. 2018) (holding that publishing of and requesting comments on other aspects of the H-2B labor certification rules in 2015 did not reopen policy announced in 2008, making labor certifications mandatory); *Alaska Cmty. Action on Toxics v. EPA*, 943 F. Supp. 2d 96, 103 (D.D.C. 2013) (limitations period for challenging EPA policy published in 1984 was not restarted by the publication of periodic "product schedules" based on that 1984 policy). Accordingly, the merits of Plaintiffs' claims are barred by limitations.

2. Neither The 2010 Final Rule Nor The 2019 Application Of That Rule Are Contrary To 8 U.S.C. § 1188(a)(1)(B).

a. Section 1188 Imposes No Duty On DOL To Measure The Magnitude of Wage Depression And Leaves The AEWR Methodology To DOL's Discretion.

Plaintiffs' first cause of action alleges that the 2019 AEWR (and therefore, the 2010 Final Rule) is contrary to 8 U.S.C. §1188(a)(1)(B) because DOL did not attempt "to find adverse effect" before imposing AEWRs. Compl. ¶ 41, ECF No. 1. Determining whether the AEWR regulation is consistent with its statutory mandate requires the Court to apply the principles set forth in *Chevron U.S.A. v. Nat. Res. Defense Council,* 467 U.S. 837 (1984).

The first step in the *Chevron* analysis is to ask whether Congress has spoken directly on the issue, or whether it has left a gap for the DOL to fill. *Id.* at 842–43. Section § 1188(a)(1)(B) states that H-2A foreign agricultural workers may not be admitted to the United States without a certification from the Secretary of Labor that "the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed." Nothing in this statutory text defines "adverse effect." As the D.C. Circuit noted in a challenge to a USDA methodology that is the same methodology challenged here, "Congress . . . has never paid any attention to the method or policy of calculating AEWRs . . . . Throughout [the 1960's through the passage of IRCA in 1987], calculating AEWRs has been left entirely to the Department's discretion." *AFL-CIO v. Brock*, 835 F.2d 912, 915 (D.C. Cir. 1987); *see also UFW*, 227 F. Supp. 2d at 108 ("The INA leaves to DOL the task of designing an AEWR policy that does not 'adversely affect' domestic wages."). Thus, Plaintiffs' claim that the statute requires DOL to "find" an adverse effect before acting to offset that effect is wholly without merit.

Indeed, the argument that DOL must make findings concerning the magnitude of an adverse effect before it can set an AEWR misconceives the purpose of the adverse effect requirement imposed by Congress. DOL's duty is to *prevent* adverse effects prospectively by ensuring that "the employment of the alien in such labor or services *will not* adversely affect the wages and working conditions of workers in the United States similarly employed."[2] 8 U.S.C. § 1188(a)(1)(B) (emphasis added). DOL's methodology accomplishes this prospective purpose by setting wages at the current average wage as measured by the USDA survey. As the D.C. Circuit found in upholding this methodology, paying H-2A workers "at least the average rate that growers paid workers prior to that worker's arrival" ensures that "the importation of a farmworker *cannot* by itself have a future adverse effect on wages." *AFL-CIO v. Brock*, 835 F.2d at 914

[2] Although prior to 1987 DOL did attempt to offset the depressive effects of past use of undocumented labor by adding a 20% upward adjustment to the average wage, DOL ended that practice in 1987 by simply requiring payment of the USDA average wage. 52 Fed. Reg. at 20,502; *accord AFL-CIO v. Brock*, 668 F. Supp. at 35.

(emphasis in original); *see also UFW*, 227 F. Supp. 2d at 104–05 ("Consistent with the statutory purpose of avoiding adverse effects on domestic wages, the language requires that AEWRs equal the annual USDA rates."). Moreover, this methodology was implicitly sanctioned by Congress in the enactment of IRCA, under which Congress expressly incorporated DOL's former regulatory requirement of no adverse effect, a requirement that DOL sought to address through the AEWR program.[3] *See UFW*, 227 F. Supp. 2d at 108. Thus, Plaintiffs' argument that DOL must first measure the magnitude of the adverse effects of importing foreign agricultural labor before setting the AEWR misses the mark.

Although Plaintiffs' first cause of action does not specify what other aspect of the AEWR, if any, they believe is "beyond the authority provided to [DOL] by Congress," Compl. ¶¶ 41, ECF No. 1, the D.C. Circuit's decision in *AFL-CIO* upholding the USDA methodology as reasonable and consistent with the statute would make any such claim unsustainable. 835 F.2d at 915.

b. DOL's AEWR Methodology Is Neither Arbitrary Nor Capricious.

Because Congress has not directed DOL on how to define or prevent an adverse effect, but rather left the issue to DOL's discretion, the Court must proceed to *Chevron* step two and decide whether DOL's interpretation is "permissible." 467 U.S. at 843. If DOL's interpretation is "permissible"—*i.e.*, if it is not "arbitrary, capricious, or manifestly contrary to the statute," it is entitled to controlling weight. *Id.* at 844. As to the AEWR methodology, the D.C. Circuit has already held that it is "well within the range of reasonable methodological choices open to the

[3] Courts should "accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration . . . [e]specially [] where Congress has re-enacted the statute without pertinent change. In these circumstances, congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *NLRB v. Bell Aerospace Co. Div. of Textron*, 416 U.S. 267, 274–75 (1974), *distinguishing dicta on other grounds*, *NLRB v. Hendricks Cnty. Rural Elec. Corp.*, 454 U.S. 170 (1981).

Department." *AFL-CIO v. Dole,* 923 F.2d at 187. The appeals court explained that "[t]he government's choice of methodology is . . . taken within the bounds of a rather broader congressional delegation" and that "[s]triking the balance is a judgment call which Congress entrusted to the Department of Labor." *Id.* (citations omitted). The USDA survey methodology is "well within the range of reasonable methodological choices open to the Department," *id.*, and thus entitled to controlling weight under *Chevron*, 467 U.S. at 844.

Plaintiffs' second cause of action contends that the methodology is arbitrary because DOL "fail[ed] to consider essential information." Compl. ¶¶ 43–45, ECF No. 1. Specifically, Plaintiffs claim that DOL did not attempt to find or quantify an adverse effect or "look to those 'similarly situated,' . . . take into consideration differences in geographic areas, occupation, skills, or experience, and . . . consider additional Department-mandated costs of H-2A employment above and beyond the required AEWR[.]" Compl. ¶ 44, ECF No. 1. Although DOL is not obligated to make findings about how each of Plaintiffs' proposed groups may be adversely affected, a review of the 2010 rulemaking shows that DOL did consider each factor listed by Plaintiffs. *See, e.g.*, 75 Fed. Reg. at 6,893, 6,895, 6,899 (discussing geographical differences in response to comments suggesting use of local prevailing wage); *id.* at 6,899–900 (discussing occupational differences in response to comments suggesting AEWR should correspond to wage data relating to specific occupation); *id.* (discussing skills and experience in response to comments noting OES data more clearly differentiates by skill and experience level); *id.* at 6,909–11 (discussing additional costs on employers in responding to comments on proposed changes to housing, meal, and tool costs).[4]

[4] It is not clear that any commenter asked DOL to take into account the additional costs of the H–2A program in setting the AEWR, but it is clear that such costs are primarily for the benefit of H-2A employers and cannot be counted as wages that benefit workers. *See, e.g., Ramos-Barrientos v. Bland*, 661 F.3d 587, 596–97 (11th Cir. 2011) (H-2A housing for benefit of employer); *Arriaga*

Furthermore, DOL considered whether it had to "find an adverse effect" before requiring an AEWR and concluding that it did not:

> First and foremost, regardless of any past adverse effect that the use of low-skilled foreign labor may or may not have had on the wages paid to authorized agricultural workers, the Department considers the forward-looking need to protect U.S. workers whose low skills make them particularly vulnerable to even relatively mild—and thus very difficult to capture empirically—wage stagnation or deflation that has the potential to result from the hiring of immigrant labor. The lack of evidence of wage depression at present is not evidence that an AEWR is unnecessary; rather it may be evidence that the imposition of the AEWR heretofore has been successful in shielding domestic farm workers from the potentially wage depressing effects of overly large numbers of temporary foreign workers.

75 Fed. Reg. at 6,893.[5]

Plaintiffs' argument that DOL may not "take into account whether the wage is sufficient to attract U.S. workers into the position," Pls.' Mem. Supp. Mot. Prelim. Relief 8, ECF No. 3, is a red herring. Plaintiffs supply no evidence to suggest that the AEWR was designed to set an "attractive" wage, as opposed to one that avoids an adverse effect. Plaintiffs also lack any valid justification for characterizing the AEWR as a "premium wage." Compl. ¶¶ 16, 24, ECF No. 1. Instead, the AEWR is the average wage as measured by USDA (for the *prior* year). It is the wage that DOL, in its discretion, has determined will ensure that the importation of foreign agricultural workers will not depress U.S. workers' wages, in accordance with the statutory purpose. Even

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v. Fla. Pac. Farms, LLC, 305 F.3d 1228, 1241–45 (11th Cir. 2002) (H-2A visa, transportation and recruitment fees for the benefit of employer).

[5] DOL elaborated:

> Economic theory provides the initial justification for the use of an AEWR. Economic theory holds that, other things being constant, any increase in the supply of labor available in a labor market segment would result in a decrease in the equilibrium wage. This theory-based observation of the effect of increased labor supply is the basis for the concern that currently employed, or incumbent, farm workers would be adversely affected by lowered wages as a result of an influx of temporary foreign farm workers.

75 Fed. Reg. at 6,891; *see also id.* at 6,894 (elaborating on this point).

authority cited by Plaintiffs recognizes that DOL has the "authority to insure against a lowering of wages." *Williams v. Usery*, 531 F.2d 305, 307 (5th Cir. 1976).

In sum, DOL articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made. *See Hispanic Affairs Project v. Acosta*, 901 F.3d 378, 391 (D.C. Cir. 2018) (upholding DOL rule on workweek, where DOL "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made") (citations omitted). Accordingly, even aside from the statute of limitations, Plaintiffs have no chance of succeeding on the merits.

3. Plaintiff NCAE Is Bound By Its Defense Of The USDA Methodology In The *AFL-CIO* Litigation.

A party that successfully asserts a position in litigation "may not, thereafter, simply because its interests have changed, assume a contrary position." *New Hampshire v. Maine,* 532 U.S. 742, 749 (2001). NCAE was a defendant-intervenor in the *AFL-CIO v. Brock* litigation, in which it actively supported DOL's position that the USDA survey methodology for determining AEWRs was consistent with 8 U.S.C. § 1188(a) and was neither arbitrary nor capricious. *See AFL-CIO v. Brock*, 835 F.2d at 913 n.1. NCAE specifically told the Court of Appeals that the USDA methodology was proper and lawful because "Congress intended only eliminate wage depression prospectively." [6] *Id.* at 916. Having successfully defended the USDA methodology as consistent with the Congressional mandate, NCAE should be judicially estopped here from attacking that same methodology as contrary to law in this case.

[6] Although there were two intervenors in *AFL-CIO,* they filed one joint brief. *See* 835 F.2d at 912.

B. Plaintiffs Have Not Shown Irreparable Harm.

The standard for establishing irreparable harm in the D.C. Circuit is high. *See Chaplaincy of Full Gospel Churches*, 454 F.3d at 297. Indeed, "proving irreparable injury is a considerable burden, requiring proof that the movant's injury is *certain, great and actual*—not theoretical—and *imminent,* creating a clear and present need for extraordinary equitable relief to prevent harm." *Power Mobility Coal v. Leavitt*, 404 F. Supp. 2d 190, 204 (D.D.C. 2005) (internal quotation marks omitted) (emphasis in original); *see also Comm. in Solidarity with People of El Salvador v. Sessions*, 929 F.2d 742, 745–46 (D.C. Cir. 1991) ("Injunctions . . . will not issue to prevent injuries neither extant nor presently threatened, but only merely 'feared.'") (citations omitted). "[A] plaintiff's failure to meet its burden of establishing irreparable harm is sufficient, in itself, to deny emergency relief." *Power Mobility Coal*, 404 F. Supp. 2d at 204.

1. Plaintiffs Who Currently Employ H-2A Workers Are Not Suffering Irreparable Harm Because They Are Contractually Bound To Pay The 2019 AEWR.

Many agricultural employers, including Plaintiff Peri & Sons, will not be irreparably harmed if the court declines to enter an injunction because they are contractually bound to pay the 2019 AEWR. Promises made in an H-2A labor certification application constitute contractual promises enforceable by the U.S. and H-2A workers recruited pursuant to those applications. *See Frederick Cty. Fruit Growers Ass'n, Inc. v. Martin,* 968 F.2d 1265, 1268 (D.C. Cir. 1992) ("Each grower's promise [of a wage rate] in the job clearance order created a contractual obligation running from that grower to each of its workers."); *Cuellar-Aguilar v. Deggeller Attractions, Inc.*, 812 F.3d 614, 619 (8th Cir. 2015) (holding that "the terms of the labor certification applications, including the agreement to pay the prevailing wage, represented the law in effect at the time the contracts [were] made, and, therefore, under Arkansas law these terms form part of the workers' contracts") (internal quotation marks and brackets omitted); *Salazar-Calderon v. Presidio Valley*

Farmers Ass'n, 765 F.2d 1334, 1341 (5th Cir. 1985) (stating that "because [the H-2] regulations have the force of law, these terms were part of [the workers'] employment agreement").

Plaintiff Peri & Sons, as well as affiants Olson's Greenhouse and Tagawa Greenhouse Enterprises, Inc., aver that they are currently employing H-2A workers or have entered into contracts with such workers. Johnston Decl. ¶ 7, ECF No. 3-3; Olson Decl. ¶¶ 3, 12, ECF No. 3-2; Kluth Decl. ¶¶ 3, 7, ECF No. 3-4. Plaintiff NCAE also avers that some of its members are currently employing H-2A workers. Marsh Decl. ¶ 7, ECF No. 3-5. To obtain these workers, each of these employers filed H-2A labor certification applications that contained, among other things, a declaration by the employer under penalty of perjury stating that it would raise employee wages to the 2019 AEWR when published:

> The employer understands that it must offer, recruit at, and pay a wage that is at least the highest of the adverse effect wage rate in effect at the time the job order is placed, the prevailing hourly or piece rate, the agreed-upon collective bargaining rate[], or the Federal or State minimum wage, and, furthermore, that *if a new Adverse Effect Wage Rate is published . . . the employer will increase the pay of all employees in the same job occupation to the higher rate.*

Goldstein Decl. Ex. B (H-2A Application for Temporary Employment Certification, Form ETA-9142A - Appendix A) (emphasis added). By signing this certification and recruiting workers based on it, Plaintiff Peri & Sons, affiants Tagawa and Olson, and any member of NCAE currently employing H-2A workers contracted with their workers to increase wages to the 2019 AEWR. That promise, by its terms, became effective upon publication of the 2019 AEWR on December 26, 2018. 83 Fed. Reg. at 66,306.

The fact that Plaintiffs challenge the legality of the 2019 wage does not alter the binding nature of their contractual promise to increase wages to that level, at least for workers hired pursuant to the certification. Thus, in *Frederick Cty. Fruit Growers*, 968 F.2d at 1269, where employers challenged the 1985 wage rate to avoid contractual liability for the promises they made to pay the challenged wage in their labor certification applications, on the basis that the wage rate was illegal, the D.C. Circuit held the employers to their contractual promise:

> Even assuming . . . that the Secretary was . . . mistaken in requiring the growers to agree to pay the higher piece rate for the 1985 harvest, the fact remains that the growers did promise to do so. . . . [T]he growers fail to assert any ground that might excuse non-performance of their contract; therefore they remain bound by their voluntary and unconditional promise to pay the workers the higher piece rate . . . .

Id. at 1269. Indeed, Plaintiffs acknowledge this point. Pls.' Mem. Supp. Mot. Prelim. Relief 6, ECF No. 3.

Accordingly, those Plaintiffs and affiants currently employing H-2A workers will not suffer irreparable harm in the absence of the requested preliminary injunction.

2. Employers Who Are Not Yet Employing H-2A Workers Are Suffering No Immediate Harm And Can Avoid Future Harm.

Those NCAE members who are not currently employing H-2A workers cannot be experiencing an imminent threat of injury that creates a "clear and present need for extraordinary equitable relief to prevent harm." *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985); *Power Mobility Coal*, 404 F. Supp. 2d at 204. Any harm from the 2019 AEWR Notice will only arise at the point they (1) voluntarily make the contractual promise quoted above and (2) voluntarily recruit workers pursuant to that promise. Nothing in Plaintiffs' moving or supporting papers identifies any specific employers who will be filing H-2A applications and hiring workers in the near future. Thus, nothing in Plaintiffs' papers indicates that preliminary injunctive relief is needed. Proceeding expeditiously to address the merits of this litigation is a more appropriate way to address Plaintiffs' concerns. Alternatively, the Court could simply consolidate the preliminary injunction hearing with the merits of the case pursuant to Rule 65(a)(2). *See* Fed. R. Civ. P. 65(a)(2).

Employers who have not yet made a contractual promise to pay the AEWR cannot show irreparable injury for a second reason: Participation in the H-2A program is entirely voluntary. No statute or regulation requires an employer to file an H-2A application and contractually bind itself to payment of the 2019 AEWR. And employers have no legal right to demand access to H-2A workers at terms other than those set by DOL, even if such workers are vital to their businesses: "To recognize a legal right to use alien workers upon a showing of business justification would be to negate the policy which permeates the immigration statutes, that domestic workers rather than aliens be employed wherever possible." *Elton Orchards, Inc. v. Brennan*, 508 F.2d 493, 500 (1st Cir. 1974) (affirming DOL decision to refer all available U.S. workers to one orchard and thereby deny that orchard access to the experienced foreign workers the employer preferred); *see also Va. Agric. Growers Ass'n, Inc. v. DOL,* 756 F.2d 1025, 1030 (4th Cir. 1985) (same); *Salazar-Calderon,* 765 F.2d at 1342–43 ("There is no hardship exception to DOL's labor standards for H-2 workers.") (internal quotation marks omitted); *Comité De Apoyo A Los Trabajadores Agricolas v. Solis*, No. 09-240, 2011 WL 2414555 at *4 (E.D. Pa. June 16, 2011) (holding that DOL cannot consider hardship on employers as a reason for delaying the effective date of a substantial increase in the minimum wage applicable to the importation of H-2B workers).

Thus, NCAE members who have not already hired H-2A workers (and thus are not contractually bound by the 2019 AEWR) can avoid the harm they allege by choosing not to participate in the H-2A program and, instead, focus their efforts on hiring U.S. workers at whatever wages they deem necessary and appropriate, just like any other business. Harm that arises from a party's voluntary choice cannot, as a matter of law, constitute irreparable harm. *See* 11A Charles Alan Wright & Arthur R. Miller, *et al.*, *Federal Practice and Procedure* § 2948.1 (3d ed. 2018) ("[A] party may not satisfy the irreparable harm requirement if the harm complained of is self-inflicted."); *see also Adtrader, Inc. v. Google LLC*, No. 17-cv-07082-BLF, 2018 WL 1876950, at *4 (N.D. Cal. Apr. 19, 2018) ("Harm does not constitute irreparable injury if it is self-inflicted.").

Plaintiffs will, no doubt, claim that U.S. workers are difficult to find, but Plaintiffs have offered no evidence detailing their efforts to locate and hire U.S. workers beyond the bare minimum recruitment efforts and labor standards set by the H-2A program. No doubt, Plaintiffs, like the apple grower in *Elton Orchards*, may prefer to hire the dependable foreign workers they have used in the past. *See* 508 F.2d at 500 (affirming that DOL's decision to fill the labor needs of one orchard with inexperienced U.S. workers while admitting experienced foreign workers to work for competitor orchards is consistent with Congressional policy). But simply because Plaintiffs prefer to hire dependable foreign workers does not allow this Court to assume, as Plaintiffs invite the Court to do, that there are no qualified U.S. workers available to fill Plaintiffs' labor needs or that participation in the H-2A program is anything other than voluntary.

3. Plaintiffs Have Failed To Produce Evidence of Economic Injury.

Economic harm constitutes irreparable injury sufficient to warrant a preliminary injunction only when "the loss threatens the very existence of the movant's business." *Wis. Gas Co.*, 758 F.2d at 674. It is not enough to merely assert in conclusory fashion that a plaintiff faces severe injury to its business. A plaintiff seeking to benefit from a preliminary injunction must "adequately *describe and quantify the level of harm* its members face," *Nat'l Ass'n of Mortg. Brokers v. Bd. of Governors of Fed. Reserve Sys.*, 773 F. Supp. 2d 151, 181 (D.D.C. 2011) (emphasis added), and produce evidence of its alleged lost profits *in the context of its overall financial health* before the Court can find that its alleged losses are "certain" or "great," as is required to grant preliminary injunction. *Cardinal Health, Inc. v. Holder*, 846 F. Supp. 2d 203, 211 (D.D.C. 2012).

Plaintiffs attempt to meet this standard by offering two affidavits of NCAE that assert generalized claims of harm on behalf of unnamed members and members of members[7] and the affidavits of just eight of the more than 7,000 employers who use H-2A workers annually. To begin with, the affidavits of Plaintiff Peri & Sons, Johnston Decls., ECF Nos. 3-3, 14-1, fail to meet Plaintiffs' burden. Peri & Sons has operations in California, where it paid an AEWR of $13.18 in 2018 and will pay $13.92 in 2019. Peri makes no attempt to explain why paying $13.13 in Nevada in 2019 is unsustainable while paying those higher wages in California is viable. *See, e.g.*, Johnston Decls., ECF Nos. 3-3, 14-1.

As to the other affidavits, none quantifies the level of harm the business will face or places that harm in the context of the businesses' overall health. *See Huntco Pawn Holdings, LLC v. U.S. Dep't of Def.*, 240 F. Supp. 3d 206, 235 (D.D.C. 2016) (finding affidavits insufficient to show harm because, although quantifying loss, "they do not demonstrate what portion of their total revenue this constitutes"); *Nat'l Mining Ass'n v. Jackson*, 768 F. Supp. 2d 34, 52 (D.D.C. 2011) (rejecting affidavit's claim of economic harm because it did "not offer a projection of anticipated future losses, tie that to an accounting of the company's current assets, or explain with any specificity how he arrived at the conclusion that he would be forced out of business in eighteen months"). For example, the affidavit of Tagawa Greenhouse, Kluth Decl., ECF No. 3-4, asserts that its labor costs will go up $400,000, which will "impact[] our ability to make capital

[7] Attached to the Declaration of Michael Marsh of NCAE are 17 unsworn letters (excluding the Leitz letter, which was later memorialized in a declaration), Marsh Decl. 7–28, ECF No. 3-5, which may not be considered in evaluating Plaintiffs' motion for preliminary injunction. *See Haynes v. Navy Fed. Credit Union*, 841 F. Supp. 2d 221, 223 (D.D.C. 2012) (holding that an unsworn statement is not competent evidence in support of injunction); *Lee v. Christian Coal. of Am., Inc.*, 160 F. Supp. 2d 14, 35 (D.D.C. 2001) (disregarding unauthenticated documentation on a motion for a preliminary injunction). In any case, these letters are even more conclusory and devoid of financial detail than Plaintiffs' affidavits and thus fail to establish irreparable harm.

improvements and planned growth for our customers and employees." *Id*. at ¶ 6. The inability to expand is quite different than a "threat[] [to] the very existence of the [] business," *Wis. Gas Co.*, 758 F.2d at 674, and, in any event, Tagawa offers no evidence to explain the impact on the ability to expand, *e.g.*, would it diminish expansion plans by 1%, 5%, or 10%? It is impossible to know. The $400,000 figure used in the affidavit is also misleading because it represents the total cost of raising the wages for both seasonal staff (H-2As) and full-time U.S. employees. *See* Kluth Decl. ¶ 6, ECF No. 3-4. Nothing in the 2019 AEWR or any other H-2A regulation requires Tagawa to raise the wages of all its full-time employees; that is a voluntary decision by Tagawa. It is impossible to tell from the affidavit what portion of the $400,000 is attributable to AEWR increases and how much that amount would impact Tagawa's business. Olson's Greenhouse affidavit is similarly unclear as to whose wages are included in figures described. Olson Decl. ¶ 8, ECF No. 3-2.

Olson's affidavit also illustrates another deficiency found across many of the affidavits: It states that the AEWR increase "will result in the realistic possibility of going from profitable to unprofitable in Colorado[.]" Olson Decl. ¶ 10, ECF No. 3-2. Not only does the affidavit provide no context for evaluating that claim, but a mere "possibility" of unprofitability is not sufficient "immediate harm" to justify an injunction. This kind of "remote and speculative" prediction is the type that has been held insufficient to support a preliminary injunction. *See e.g.*, *Nat'l. Min. Ass'n*, 768 F. Supp. 2d at 52.

Other affidavits offered by Plaintiffs are even more conclusory and less specific. *See, e.g.*, Petrocco Decl. 2, ECF No. 14-3 (listing increase in total labor costs—including non-H-2A full time employees—and claiming without explanation that the AEWR increase "threaten[s] the viability of our family business"); Leitz Decl. ¶ 7, ECF No. 14-4 (giving total labor costs and stating in conclusory fashion that AEWR increase will result in lost profits, going from profitable to unprofitable "continuing a 3-year trend"); Wada Decl. ¶ 5, ECF No. 14-7 (asserting AEWR will cause $592,000 loss that will put business "at a severe disadvantage to our competitors in other areas of the U.S."). For example, two NCAE affidavits, both signed by NCAE President Michael L.H. Marsh, make general statements such as "if the 2019 AEWRs take effect [NCAE members'] viability as legacy agricultural family farms and ranches will be in jeopardy." Marsh Decls., ECF Nos. 3-5 at ¶¶ 14, 15, 14-2 at ¶ 8. However, Marsh does not identify which farms (or even how many farms he is talking about), much less provide the kind of detailed evidence of lost profits and overall financial condition of those farms that D.C. Circuit courts require. *See Nat'l Min. Ass'n,* 768 F. Supp. 2d at 51–52 (finding conclusory affidavit insufficient to show that small business members of the mining association will be driven out of business).

Not only do the affidavits lack specificity, many cite external events that are having serious negative impacts on farming operations, *e.g.*, a downturn in commodity prices due to "the current trade war and tariffs," Marshall Decl. ¶ 8, ECF No. 14-6; increased costs of supplies; and increased competition from low price imports. *See, e.g.*, Leitz Decl. ¶ 7, ECF No. 14-4; Schaeffer Decl. ¶ 7, ECF No. 14-5; Marshall Decl. ¶ 8, ECF No. 14-6; Wada Decl. ¶ 4, ECF No. 14-7. As NCAE itself candidly admits, "[f]arm bankruptcies are growing in frequency." Marsh Decl. ¶ 8, ECF No. 14-2. Workers' wages should not be enjoined on a preliminary basis to make up for economic problems affecting the agricultural sector as a result of other factors, such as U.S. trade policy. Moreover, the affidavits all assume that a farm business's profitability and viability are determined in one-year intervals rather than over the medium-to-long term, an assumption belied by the affidavits themselves. *See, e.g.*, Leitz Decl. ¶ 7, ECF No. 14-4 (referring to a three-year trend in lost profits). Indeed, the employer affidavits offer no evidence to explain over what period the increased wages will be unsustainable or to show that they cannot offset the effects of the AEWR increase in future years. Indeed, the fact that the AEWR itself could potentially decrease in future years (as it has in the past) underscores the inherent uncertainty of Plaintiffs' predictions of financial distress caused by the AEWR.

Moreover, Plaintiffs' claim that they would be put out of business without a preliminary injunction is wholly inconsistent with their statement that they will pay full compensation if they lose on the merits. Pls. Mot. TRO & Prelim. Inj. 4, ECF No. 2 ("If the Court ultimately concludes that the Notice complies with the statutory requirements of the [Immigration and Nationality Act] for the H-2A program, then any work performed pursuant to an H-2A contract on or after January 9, 2019 will be compensated at the rates published in the Notice."). If agricultural employers have the financial capacity to make a lump-sum payment to workers at the end of this case, they have the capacity to pay their workers the salary they are legally entitled to today.[8]

4. Plaintiffs Have Failed To Show Harm Justifying A Nationwide Injunction.

In addition to failing to show irreparable harm to Plaintiffs themselves, Plaintiffs' affidavits fall far short of justifying a nationwide injunction. Seven of the eight affiants are located in four

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[8] This would not be the first time that Plaintiffs exaggerate the impact of the AEWR program on employers. For example, a grower testified before Congress as early as 2004 that "the rising cost of participation in the H-2A program is penalizing me to the point that I can no longer compete with my non-H-2A growers, and I am having to consider getting out of this program," and again in 2013 that the AEWR is "the #1 reason reported by producers across the country for not using the H-2A program." *See Temporary Guest Worker Proposals in The Agricultural Sector: Hearing Before The H. Comm. on Agriculture*, 108th Cong. 47 (2004) (statement of Chalmers R. Carr III, President, Titan Farms); *Agricultural Labor: From H-2A to a Workable Agricultural Guestworker Program: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 25 (2013) (written statement of Chalmers R. Carr III, President, Titan Farms). Today, the same grower claims that it is the "largest peach grower on the east coast, with over 6,200 acres of peaches in production" and "is proud to participate in the H-2A temporary seasonal worker program." Titan Farms, *History, available at* http://titanfarms.com/about-us/history.aspx (last visited Jan. 22, 2019); Titan Farms, *About Us, available at* http://titanfarms.com/about-us.aspx (last visited Jan. 22, 2019).

of the eight states that will experience the greatest increase in wages (Nev. 22.8%, Colo. 22.8%, Utah 22.8%, Idaho, 15.9%).[9] *See* Goldstein Decl. Ex. A. These are outlier states. The other 41 states will experience increases of less than 10%. *Id.* The national average AEWR increase is 6.2%, *id.*, and half of all H-2A jobs nationwide are in states that will experience increases of 4% or less, *see* Schell Decl. Ex. A. The affiants' statements about the impact of wage increases in some states cannot be taken as representative of the effects of the 2019 AEWR on employers facing a lower increase, and cannot justify extending an injunction to those states.

Furthermore, the lack of merit in Plaintiffs' request for a nationwide injunction based on the affidavits of eight employers from the five states experiencing the highest increases is highlighted by the fact that in at least three states—Florida, Iowa and Missouri—the 2019 AEWR is *less* than the 2018 AEWR. *See* Goldstein Decl. Ex. A. For employers in those states (who employ 14.6% of all H-2A workers, *see* Schell Decl. Ex. A), the nationwide injunction requested by Plaintiffs would impose a wage *increase*.

Moreover, Plaintiffs' own affiants make clear that they view increases of 2% to 4% as normal and anticipated. *See* Olson Decl. ¶ 12, ECF No. 3-2 (3-4% increase more in line with national level); Schaeffer Decl. ¶ 6, ECF No. 14-5 (typical wage increase is 3% annually); Marshall Decl. ¶ 6, ECF No. 14-6 (3% "the traditional standard"); Wada Decl. ¶ 2, ECF No. 14-7 (Cedar Farms "expect[s] to see . . . an increase in our cost of production of roughly 2% to 3% annually"). Accordingly, Plaintiffs' own evidence rebuts their call for an injunction on behalf of employers in

[9] The sole exception is Leitz Farms, which is in Michigan and will experience a 3.7% increase. Leitz Decl. ¶¶ 2, 6, ECF No. 14-4. But the Leitz affidavit is hardly convincing. Not only does it fail to provide the financial data necessary to evaluate the possible harm it may suffer, but it actually states that the increase in labor costs will be less this year than the average for the past five years. Leitz Decl. ¶ 8, ECF No. 14-4. If Leitz could sustain those yearly increases, it is difficult to understand why it cannot sustain the lesser increase this year, or why it did not plan for this year's increase.

the 25 states that will experience an increase of 4% or less, Goldstein Decl. Ex. A, representing 45% of all H-2A employers, *see* Schell Decl. Ex. A.

Finally, the affidavit of NCAE states that it (or its members) represent 85% of H-2A employers nationwide. Marsh Decl. ¶ 4, ECF No. 3-5. To date, we are unaware of any non-NCAE members who have filed suit to enjoin the 2019 AEWR. It is clear that the impact of the 2019 AEWR on a business is a highly individualized question. Any preliminary relief designed to avoid injury from the AEWR should be limited to those employers, if any, whose affidavits show with sufficient detail that, absent preliminary injunctive relief, they will suffer irreparable harm.

C. Plaintiffs Have Failed To Establish That The Balance of Equities Tips In Their Favor.

Plaintiffs give short shrift to the final two preliminary injunction factors: the balance of equities and the public interest. But these factors cannot be treated as an afterthought. *See, e.g.*, *Winter*, 555 U.S. at 26 ("Despite the importance of assessing the balance of equities and the public interest in determining whether to grant a preliminary injunction, the District Court addressed these considerations in only a cursory fashion.").

The balance of equities factor requires the court to "balance the competing claims of injury and . . . consider the effect on each party of the granting or withholding of the requested relief." *M.G.U. v. Nielsen*, 325 F. Supp. 3d 111, 123 (D.D.C. 2018). Plaintiffs' nearly decade-long delay in bringing a challenge to the AEWR methodology weighs against a preliminary injunction. *See, e.g.*, *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) ("In considering the balance of equities among the parties, we think that plaintiffs' unnecessary, years-long delay in asking for preliminary injunctive relief weighed against their request.") (citations omitted). Plaintiffs also have not shown that, during this lengthy time period, they submitted a petition for rulemaking to

DOL to revise or repeal the adverse effect wage rate methodology, which would have obligated the DOL to respond. 5 U.S.C. §§ 553(e), 555(e).

Furthermore, a preliminary injunction would merely shift any harm from Plaintiffs onto the shoulders of hundreds of thousands of farmworkers. Collectively, farmworkers will lose the same amount of money in wages that Plaintiffs hope to keep. This fact weighs against a preliminary injunction. *See, e.g.*, *Allina Health Servs. v. Sebelius*, 756 F. Supp. 2d 61, 69 (D.D.C. 2010) ("The balance of equities weighs against an injunction as the alleged irreparable economic injury suffered by the Plaintiffs would be offset by the corresponding economic injury to the [government] or [third parties].").[10]

Moreover, the financial harm to farmworkers will be just as significant if an injunction is issued and then subsequently reversed. In Fiscal Year 2018, more than 11,000 employers were certified to import H-2A workers, for a total of 242,762 positions (not including corresponding U.S. workers).[11] Many farm workers will only work part of the year despite having to support their families for the entire year. *See, e.g.*, Fraide Decl., Engl. Trans. ¶ 9 ("[B]ecause my job is seasonal, I must save for those times when there is not work."); Perez Decl. ¶ 10 ("I am a single mother and am sole support for my two children. I also have to put aside money from my weekly paychecks to cover the days between seasonal jobs when I have no income."). For families that live paycheck to paycheck, the denial of an expected pay increase would cause financial hardship,

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[10] *See also Huntco Pawn Holdings, LLC*, 240 F. Supp. 3d at 235 (holding that injunctive relief is improper when "the 'harm' these few pawnshops fear would simply be shifted to Service members and their dependents"); *ConverDyn v. Moniz*, 68 F. Supp. 3d 34, 53 (D.D.C. 2014) ("When the issuance of a preliminary injunction, while preventing harm to one party, causes injury to the other, this factor does not weigh in favor of granting preliminary injunctive relief.").

[11] *See* Goldstein Decl. Ex. C (OFFICE OF FOREIGN LABOR CERTIFICATION, H-2A TEMPORARY AGRICULTURAL LABOR CERTIFICATION PROGRAM - SELECTED STATISTICS, FY 2018 (Sept. 30, 2018)).

especially as living costs rise every year. *See, e.g.*, Fraide Decl., Engl. Trans. ¶ 9 (stating that declarant pays "$1,600 per month for housing" and "$200.00 for gas per month," and provides for a large family while living "paycheck to paycheck"); *id*. (stating that "with the rising cost of housing, if wages don't increase at a similar rate, secure housing can become an issue for my family and me."); Perez Decl. ¶ 10 ("Since I pay $35 to $40 for a tank of gas, and $577.00 per month for rent, and buy food, electricity, clothes, and school supplies for my two children, that $40.00 can make a real difference."). Back pay at the end of litigation will not alleviate those daily financial concerns.

In addition, employers are in a better position to make financial adjustments than farmworkers because farmworkers earn less than half the average annual incomes of all workers in the United States.[12] *See, e.g.*, Bureau of Labor Statistics, *May 2017 National Occupational Employment and Wage Estimates* (Mar. 30, 2018), *available at* https://www.bls.gov/oes/2017/may/oes_nat.htm#00-0000 (showing that as of May 2017, "Farmworkers and Laborers, Crop, Nursery, and Greenhouse" positions were paid only a mean hourly wage of $12.05 and a mean annual wage of $25,070, but for "All Occupations" in the United States, the mean hourly wage is $24.34 and the mean annual wage is $50,620).

This should not come as a surprise—historically and today, farmworkers have had little bargaining power. *See, e.g.*, Michael Holley, *Disadvantaged By Design: How the Law Inhibits Agricultural Guest Workers from Enforcing Their Rights*, 18 Hofstra Lab. & Emp. L.J. 575, 582, 588 (2001) (discussing domestic farmworkers' limited ability to engage in collective bargaining under federal statutes); *see also* 75 Fed. Reg. at 6,894:

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[12] Moreover, Plaintiffs do not acknowledge that the H-2A program already provides H-2A employers with certain financial benefits, *e.g.*, they need not pay Social Security contributions or unemployment tax on the guestworkers' wages. 26 U.S.C. §§ 3121(b)(1), 3306(c)(1)(B).

> There is ample evidence that agricultural workers are a particularly vulnerable population. They are often hired on a seasonal basis and are required to move from place to place. In part as a consequence of their low educational attainment, low skills, low rates of unionization and high rates of unemployment, agricultural workers have limited ability to negotiate wages and working conditions with farm operators or agricultural services employers.[13]

For all of the above reasons, the harm to Plaintiffs is outweighed by the harm to the Farmworkers.

D. Plaintiffs Have Not Shown That An Injunction Is In The Public Interest.

Lastly, Plaintiffs have failed to show that a preliminary injunction would be in the public interest. *See Winter*, 555 U.S. at 24 ("In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.").

To begin with, because Plaintiffs are unlikely to succeed on the merits, the public interest factor weighs in favor of DOL and Proposed Intervenors. *See, e.g.*, *ViroPharma, Inc. v. Hamburg*, 898 F. Supp. 2d 1, 29–30 (D.D.C. 2012) (holding that, where plaintiff was unlikely to establish that agency action did not comply with the law, the public interest factor weighed against granting an injunction); *Hubbard v. United States*, 496 F. Supp. 2d 194, 203 (D.D.C. 2007) ("Because it concludes that the plaintiff has not demonstrated a likelihood of success on the merits, the court need not linger long to discuss . . . public interest considerations [as] . . . [i]t is in the public interest to deny injunctive relief when the relief is not likely deserved under law."). That alone should be dispositive of the issue.

[13] In fact, guestworkers may even fare worse, due to their lack of familiarity with the U.S. labor market or legal system, language barriers, geographic isolation, and other factors. *See, e.g.*, *State v. Shack*, 277 A.2d 369, 372 (N.J. 1971) ("The migrant farmworkers are a community within but apart from the local scene. They are rootless and isolated. Although the need for their labors is evident, they are unorganized and without economic or political power.").

Several other public interest concerns weigh against a preliminary injunction. First, regulatory stability is in the public interest. Plaintiffs' hasty but belated attempt to enjoin the annual ministerial application of a longstanding regulation merely weeks or months before H-2A workers will arrive in the United States disrupts the settled expectations of both those workers and agricultural employers. Without knowing their expected wages, farmworkers cannot plan and make financial and spending decisions for the year. A preliminary injunction could even harm the employers, who will not be able to effectively make hiring decisions and plan for expected labor costs—for both this season and the next—while the preliminary injunction is in place. *See, e.g.*, 2010 Final Rule at 6,892 (explaining that the AEWR was meant to assist farmers plan for labor costs by improving the flow of labor market information). Should this litigation and any subsequent appeal not be resolved within the calendar year, then these parties will remain uncertain as to the applicable wage for another season or more. These disruptions would almost certainly result in negative impacts to agricultural output and productivity over time, ultimately harming the public's access to agricultural products.

Second, a preliminary injunction would conflict with Congress's purpose in passing IRCA: to prevent U.S. workers from bearing the burdens of wage depression and diminished opportunity for jobs caused by recruitment of imported guestworkers at substandard wages. *See AFL-CIO v. Brock*, 835 F.2d at 915 ("The committee and floor discussion on the IRCA, cited by both parties, confirms only Congress' general intent to protect United States workers against adverse effects from imported labor."). A preliminary injunction would result in harm to U.S. workers that could not be undone *even if* wages were paid back to them at 2019 AEWR levels. Rather, the injunction would mean that Plaintiffs need only offer the 2018 AEWR, which DOL says is now substandard, and U.S. workers cannot be expected to compete for jobs at substandard wages below those mandated by the DOL. As a result, they will be unable to restore lost job opportunities caused by their displacement from the work force this year and for any subsequent year that substandard wages apply. Here, deference to Congress' assessment of the public interest weighs heavily against issuing an injunction.

Finally, the public interest is served by discouraging regulated parties, such as Plaintiffs, from waiting years before bringing a challenge to a well-settled agency regulation and only running to court when they feel that the prevailing market conditions no longer suit them. They should not be rewarded for their delay and be permitted to claim an emergency mere weeks or months before seasonal farm work begins.

* * *

In summary, Plaintiffs have failed to carry their burden of showing that their preliminary injunction request is justified under any of the four *Winter* factors, and therefore the injunction should be denied.

II. If An Injunction Is Issued, Plaintiffs Must Provide Adequate Security To Workers.

If the Court concludes that some or all of the Plaintiffs have carried their burden to show entitlement to a preliminary injunction, any injunction should be crafted to preserve the ability of farmworkers to obtain the wage if the 2019 AEWRs ultimately take effect. *See, e.g.*, *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) ("[A] court need not grant the total relief sought by the applicant but may mold its decree to meet the exigencies of the particular case.") (internal quotation marks omitted). Rather than the broad order that Plaintiffs request enjoining enforcement of the 2019 AEWR, the Court should condition any injunction on Plaintiffs' agreement to the following conditions:

> (1) that all employers submitting H-2A labor certification applications during the pendency of this litigation must pay the lawful 2019 AEWR when determined (either as a result of the current 2019 AEWR being upheld or as a result of a new,

> lawful one being set) retroactively to all H-2A and similarly employed U.S. workers;
>
> (2) that all employers applying for and/or obtaining H-2A labor certification applications agree to pay the difference between the 2018 AEWR (or the wage actually paid if higher) and the current 2019 AEWR for each hour worked into an escrow account (or post security for that amount) on a monthly basis as the wages are earned and preserve the wage records supporting the amount escrowed or secured until this case is concluded and the escrow funds disbursed to employers or to workers; and
>
> (3) that all employers applying for and/or obtaining H-2A labor certifications notify their workers of the existence of the escrow or security and the promise to pay the 2019 wage when established and to notify them of the importance of keeping their employers and the parties to this suit informed of any changes in their permanent home addresses, telephone numbers, and email addresses.

By conditioning a preliminary injunction on the above requirements, Plaintiffs no longer have to be concerned with irreparable injury since, if their suit is successful, employers will recover promptly any escrowed or secured funds that exceed the *lawful* 2019 AEWR as determined by this Court. Moreover, workers will also be able to recover the disputed wages if Plaintiffs' challenges are unsuccessful. Although there is no doubt that the public interest will still be harmed—because U.S. workers will only be able to compete for jobs on the basis of a *promise* to pay the lawful 2019 AEWR when it is ultimately established, rather than receive payment of that wage as it is earned—the above conditions would reduce that harm.

These conditions are not novel. Courts, including courts in the D.C. Circuit, have imposed such conditions on preliminary injunctions on behalf of employers challenging DOL wage rates for temporary foreign workers. For example, in *Virginia Agricultural Growers Association, Inc. v. Donovan*, 597 F. Supp. 45 (W.D. Va. 1985), tobacco growers sought to challenge the validity of DOL's AEWR methodology. *Id*. at 47. The employers sought temporary and preliminary relief from the wage rate for the same reasons that Plaintiffs here do—*i.e.*, once they paid the wages calculated pursuant to the challenged methodology there would be no way to recover the wages if the AEWR methodology was ultimately found to be illegal. The Court granted the injunction, but in order to ensure that workers (including workers recruited in the meantime) would receive the wages if the rate was ultimately upheld, the Court required the employers to agree in their labor certification applications to pay the AEWR ultimately approved by the court. Logistically, this required placing the disputed wages in an escrow account monthly or, alternatively, providing bank letters of credit sufficient to cover the wages and interest on the wages. *See* Goldstein Decl. Ex. D, at 3–5 (Temporary Injunction Order). In addition, the order required the employers to obtain the addresses of all workers whose wages were being escrowed and to provide workers with a notice explaining the escrow account and the need for the workers to keep their employer informed of their addresses until the case was resolved. *Id.* at 5–6. DOL's AEWR methodology was ultimately upheld, *Va. Agric. Growers Ass'n, Inc. v. Donovan*, 774 F.2d 89 (4th Cir. 1985), and the escrow funds were distributed to the workers. Preliminary injunctions were granted in similar challenges to the 1983 AEWR methodology in other circuits, *see, e.g.*, *Fla. Fruit & Vegetable Ass'n v. Brock*, 771 F.2d 1455 (11th Cir. 1985); *Shoreham Coop. Apple Producers Ass'n, Inc. v. Donovan*, 764 F.2d 135 (2d Cir. 1984), and in both challenges, the lower courts conditioned the injunction on escrow requirements similar to those ordered in the Fourth Circuit case.

In *Frederick County Fruit Growers Association, Inc. v. Brock*, No. 85-0142D (W.D. Va. Dec. 17, 1985), apple and tobacco employers challenged the legality of DOL's H-2A piece rate rule. The Court granted an injunction but conditioned it on the employers escrowing the disputed wages as they were earned, maintaining records, and providing notice to workers explaining the existence of the escrow account. Goldstein Decl. Ex. E, at ¶¶ 1–4 (Temporary Restraining Order). To ensure that the order was complied with, the court required the employers to obtain signed acknowledgements from their workers stating that they had received the notices. *Id.* at ¶ 4. A similar injunction conditioned on escrowing disputed piece rates was entered in *Tri-County Growers v. Brock*, No. 85-28M (N.D. W.Va. Aug. 28, 1985). *See* Goldstein Decl. Ex. F, at 2–5 (Order). The escrow funds in both cases were ultimately paid to the workers when the D.C. Circuit upheld DOL's piece rate rule, *see Martin*, 968 F.2d at 1276, and the Fourth Circuit dissolved the *Tri-County Growers* injunction, *see Feller v. Brock*, 802 F.2d 722, 731 (4th Cir. 1986) (ordering "immediate distribution of the funds escrowed pursuant to this injunction"); *see also NAACP v. Donovan*, 558 F. Supp. 218, 225–26 (D.D.C. 1982) (in challenge to DOL's failure to promulgate 1982 AEWRs, granting final relief and ordering funds escrowed by employers pursuant to preliminary injunction to ensure payment of 1982 AEWR, once set, to be paid to workers); *Freeman v. USDA*, 350 F. Supp. 457, 461–62 (D.D.C. 1972) (in challenge to USDA's failure to issue a "fair and reasonable wage" for 1971 as required by the Sugar Act, entering a preliminary injunction restraining USDA "from making any further subsidy payments" to employers to ensure that employers reimbursed workers for the difference between the wage paid and the lawful 1971 wage, to be later set, for work already performed).

Here, similar relief is critical to ensure that workers will receive the disputed wages if the requested injunction is dissolved or reversed on appeal. Not to impose such conditions would effectively allow Plaintiffs to escape liability for the 2019 AEWR even if that rate is later upheld by the Court and would result in the very adverse effect on U.S. workers that the statute is designed to prohibit.

CONCLUSION

For all of the foregoing reasons, Plaintiffs' motion for preliminary injunctive relief should be denied. In the event that such relief is granted to some or all Plaintiffs, the injunction should impose the conditions stated above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing documents via the Court's ECF system, which will send notice of this filing to all registered users.

<u>/s/ Bruce Goldstein</u>
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Farmworker Justice