UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MIGUEL GARCIA, ALBERTO OLVERA GOMEZ, JOSE BOTELLA AVILA, GERALD PRINCILUS, and FARM LABOR ORGANIZING COMMITTEE, Plaintiffs, v. PATRICK PIZZELLA, in his official capacity as Acting Secretary of Labor, and U.S. DEPARTMENT OF LABOR, Defendants.	)	Civil Action No. 18-1968(RDM)

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, Plaintiffs Miguel Garcia, Alberto Olvera Gomez, Jose Botella Avila, Gerald Princilus, and Farm Labor Organizing Committee hereby move for summary judgment on the ground that there is no genuine issue of disputed material fact and that they are entitled to judgment as a matter of law.

In support of this motion, Plaintiffs submit the accompanying (1) memorandum of law, (2) Declaration of Adam R. Pulver and accompanying exhibits, and (3) a proposed order.

Dated: September 26, 2019

Respectfully submitted,

/s/ *Adam R. Pulver*

Adam R. Pulver
D.C. Bar No. 1020475
Michael T. Kirkpatrick
D.C. Bar No. 486293
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
apulver@citizen.org

Counsel for All Plaintiffs

Gregory S. Schell
Florida Bar No. 287199
SOUTHERN MIGRANT LEGAL SERVICES
A Project of Texas RioGrande Legal Aid, Inc.
9851 Daphne Avenue
Palm Beach Gardens, FL 33410-4734
(561) 627-2108
gschell@trla.org

Counsel for Plaintiff Garcia

Dave Mauch
Texas Bar No. 24086837
TEXAS RIOGRANDE LEGAL AID, INC.
6502 Nursery Drive, Suite 302
Victoria, TX 77904
(361) 237-1681
dmauch@trla.org

Counsel for Plaintiff Garcia

Douglas L. Stevick
Texas Bar No. 00797498
TEXAS RIOGRANDE LEGAL AID, INC.
5439 Lindenwood Avenue
Saint Louis, MO 63109
(314) 449-5161
dstevick@trla.org

Counsel for Plaintiff Garcia

Mark Heller
Ohio Bar No. 27027
Emily Brown
Ohio Bar No. 92553
ADVOCATES FOR BASIC LEGAL EQUALITY, INC.
525 Jefferson Avenue, Ste. 300
Toledo, OH 43604

Counsel for Plaintiffs Gomez, Avila, Princilus, and FLOC

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Gregory S. Schell
Florida Bar No. 287199
SOUTHERN MIGRANT LEGAL SERVICES
A Project of Texas RioGrande Legal Aid, Inc.
9851 Daphne Avenue
Palm Beach Gardens, FL 33410-4734

Dave Mauch
Texas Bar No. 24086837
TEXAS RIOGRANDE LEGAL AID, INC.
6502 Nursery Drive, Suite 302
Victoria, TX 77904

Douglas L. Stevick
Texas Bar No. 00797498
TEXAS RIOGRANDE LEGAL AID, INC.
5439 Lindenwood Avenue
Saint Louis, MO 63109

Counsel for Plaintiff Garcia

Adam R. Pulver
D.C. Bar No. 1020475
Michael T. Kirkpatrick
D.C. Bar No. 486293
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
apulver@citizen.org

Counsel for All Plaintiffs

Mark Heller
Ohio Bar No. 27027
Emily Brown
Ohio Bar No. 92553
ADVOCATES FOR BASIC LEGAL EQUALITY, INC.
525 Jefferson Avenue, Ste. 300
Toledo, OH 43604

Counsel for Plaintiffs Gomez, Avila, Princilus, and FLOC

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INTRODUCTION

When an agency issues a legislative rule, the agency must abide by that rule until and unless that rule is validly amended via notice-and-comment rulemaking. In this case, Plaintiffs challenge the Department of Labor's (DOL) violation of this requirement, via its adoption, and consistent application, of a de facto rule that is contrary to existing regulations and to the reasoning employed during the adoption of those regulations. DOL's resulting practice is contrary to law, arbitrary and capricious, and taken without observance of required procedure, and thus should be vacated pursuant to the Administrative Procedure Act.

Under the Immigration and Nationality Act (INA), DOL is required to ensure that the H-2A temporary guestworker program does not "adversely affect the wages and working conditions" of U.S. workers. 8 U.S.C. § 1188(a)(1). Pursuant to notice-and-comment rulemaking, DOL has determined that, to fulfill this mandate, it cannot issue an H-2A temporary foreign labor certification unless the employer is offering a wage that meets or exceeds the highest of *four* specified wages: (1) the "Adverse Effect Wage Rate" (AEWR); (2) "the prevailing hourly wage or piece rate"; (3) "the agreed-upon collective bargaining wage;" or (4) "the Federal or State minimum wage." 20 C.F.R. § 655.120(a) (the Offered Wage Rate provision).

Without engaging in notice-and-comment rulemaking, DOL has adopted a limitation on this rule—one that effectively reads out one of the four specified wages in the vast majority of cases. DOL will consider whether the offered wage meets or exceeds the "prevailing hourly wage or piece rate" only if a State Workforce Agency (SWA) has conducted a survey that resulted in a finding of a prevailing wage. DOL ignores the prevailing wage requirement in the absence of a SWA survey finding, even though such surveys are entirely discretionary and rare. Indeed, for forty of fifty-three states and territories, no such survey finding has been reported for 2019.

Moreover, DOL engages in this practice even though other sources of prevailing wage data exist; DOL uses one of these other data sources to calculate "the prevailing hourly wage" for other guestworker programs and has previously identified it as a valid prevailing wage methodology for the H-2A program.

The Offered Wage Rate provision unambiguously requires DOL to consider each of four wages before issuing a certification, and DOL's practice limiting its consideration of the prevailing wage to the minority of scenarios where a SWA has conducted a prevailing-wage survey resulting in a finding for a certain agricultural activity in a particular geographic area cannot be reconciled with the regulatory requirement. In addition, in light of DOL's previous statements as to the need to consider the prevailing wage to prevent depression of U.S. workers' wages to fulfill its statutory mandate, DOL's practice is contrary to the INA. Because DOL's policy and practice is both arbitrary and capricious and contrary to law, it should be set aside and enjoined.

Finally, by adopting a SWA survey limitation on its consideration of one of the four wages specified in the regulation, DOL has effectively amended the regulation without undertaking notice and comment procedures. Although the earlier versions of the relevant regulation made references to SWA surveys, and DOL has proposed to include a SWA survey limitation in a pending rulemaking, the Offered Wage Rate provision currently in effect contains neither any exception to the requirement that DOL consider the prevailing wage, nor any limitation on the sources of data

that can be used to determine the prevailing wage. Accordingly, DOL's policy and practice should be vacated and enjoined for failure to comply with required procedure.

BACKGROUND AND STATEMENT OF FACTS

I. Statutory and Regulatory Background

To address temporary labor shortages, Congress created a non-immigrant visa program that allows employers to hire foreign workers to perform agricultural labor when there are not enough qualified and available U.S. workers to fill open jobs. This program is referred to as the H-2A program, taking its name from one of the relevant provisions of the INA, 8 U.S.C. § 1101(a)(15)(H)(ii)(a). Under the INA, DOL is tasked with ensuring that the program does not "adversely affect the wages and working conditions" of U.S. workers. 8 U.S.C. § 1188(a)(1).

"To protect domestic jobs, the Department of Labor has promulgated regulations that set minimum wages and working conditions for H-2A workers and their domestic counterparts." *Hispanic Affairs Project v. Acosta*, 901 F.3d 378, 383 (D.C. Cir. 2018). These regulations establish a detailed process by which DOL's Office of Foreign Labor Certification (OFLC) grants H-2A employers "temporary employment certifications" after reviewing the proposed jobs for compliance with various requirements. 20 C.F.R. Part 655, Subpart B. The "Offered Wage Rate" provision mandates that employers of H-2A workers offer both U.S. workers and foreign workers the highest of four wages: (1) the AEWR, as calculated by DOL; (2) "the prevailing hourly wage or piece rate;" (3) "the agreed-upon collective bargaining wage;" or (4) "the Federal or State minimum wage." 20 C.F.R. § 655.120(a); *see also Hispanic Affairs Project*, 901 F.3d at 383 (summarizing provision). Regulations prohibit OFLC from granting certification where an employer is not in compliance with the Offered Wage Rate provision. 20 C.F.R. § 655.161(a).

The history of the H-2A regulations over the past eleven years provides important context for this case. "The Department's H-2A regulations remained largely unchanged" from 1987 until 2008. *See* DOL, Final Rule, Temporary Agricultural Employment of H-2A Aliens in the U.S., 75 Fed. Reg. 6884, 6884 (Feb. 12, 2010) (2010 Rule). Those regulations provided that employers must offer H-2A workers the highest of three wage rates: the AEWR, the prevailing wage, or the federal or state statutory minimum wage. *See* DOL, Interim Final Rule, Labor Certification Process for the Temporary Employment of Aliens in Agriculture and Logging in the United States, 52 Fed. Reg. 20496, 20502 (June 1, 1987).

In December 2008, DOL issued a new rule that substantially revised the H-2A program. *See* DOL, Final Rule, Temporary Agricultural Employment of H-2A Aliens in the U.S.; Modernizing the Labor Certification Process and Enforcement, 73 Fed. Reg. 77110 (Dec. 18, 2008) (2008 Rule). While maintaining the same basic "highest of three" structure, the 2008 Rule radically changed what those three wage rates were: providing for *two* different prevailing wage rates, as well as the state or local minimum wage. DOL explained that it was "adopt[ing] a methodology that will actually set AEWRs at prevailing wage rates," and, after considering various "methodologies for determining prevailing wage rates," it selected the Bureau of Labor Statistics (BLS) Occupational Employment Statistics (OES) survey for that purpose. *Id.* at 77167. At the same time, the rule also continued to refer to a "prevailing wage" requirement, and it defined the term "prevailing hourly wage" as "the hourly wage determined by the SWA to be prevailing in the area in accordance with State-based wage surveys." *Id.* at 77211 (20 C.F.R. § 655.100). DOL acknowledged that State-based wage surveys and the OES survey were two different ways of measuring the prevailing wage, but continued to call the OES-generated prevailing wage the

"AEWR" to "avoid the confusion that might result from calling two different wage levels both the 'prevailing' wage rate." *Id.* at 77168.

In May 2009, after notice-and-comment rulemaking, DOL suspended the 2008 Final Rule and temporarily restored the prior requirements. DOL, Final Rule, Temporary Employment of H-2A Aliens in the United States, 74 Fed. Reg. 25972 (May 29, 2009). It then conducted a new round of notice-and-comment rulemaking, resulting in the 2010 Rule, in which it abandoned the "two prevailing wage" approach in two relevant respects.[1] First, it restored the pre-2008 Rule approach of calculating the AEWR based on the USDA's Farm Labor Survey (FLS), rather than based on the OES prevailing wage. 75 Fed. Reg. at 6895 (current 20 C.F.R. § 655.103). Second, it altered the definitions regarding the prevailing wage by removing the definition of the term "prevailing hourly wage," along with its reference to "State-based wage surveys," and adding a definition of "prevailing wage" that cross-referenced then-existing 20 C.F.R. § 653.501(d)(4). *See* 2010 Rule, 75 Fed. Reg. at 6980 (current 20 C.F.R. § 655.103). That provision made no reference to wage surveys, but referred to "the prevailing wages and working conditions among similarly employed agricultural workers in the area of intended employment."[2] In addition to removing the reference to state-based wage surveys in the definition section, the 2010 Rule eliminated 20 C.F.R. § 655.107(b), which under the 2008 Rule had stated:

> If, as the result of a State agency prevailing wage survey determination, the prevailing wage rate in an area and agricultural activity (as determined by the State agency survey and verified by the OFLC Administrator) is found to be higher that the AEWR computed pursuant to paragraph (a) of this section, the higher prevailing wage rate shall be offered and paid to all workers by employers seeking temporary alien agricultural labor certification for that agricultural activity and area.

[1] In 2010, DOL also added the collective bargaining wage to the offered wage provision, converting what was a "highest of three" requirement into a "highest of four." 75 Fed. Reg. at 6901 (discussing current 20 § C.F.R. 655.120).

[2] As of October 17, 2016, that language was moved to 20 C.F.R. § 653.501(c)(2)(i). 20 C.F.R. § 653.501(d)(4) no longer references wages.

20 C.F.R. § 655.107(b) (effective June 29, 2009 through March 14, 2010).

DOL explained its changes, noting that the AEWR and prevailing wage serve different purposes and that *both* were necessarily included in the Offered Wage Rate provision. It explained that, due to mobility of U.S. workers across geographic areas and job categories, the prevailing wage might be lower than the AEWR, which utilizes broader geographic areas and applies to broader job categories, and that using the prevailing wage in such situations "would adversely affect domestic workers by filling job vacancies with foreign workers before wages were allowed to adjust upward to alleviate the labor shortage in the imperfectly functioning labor market information system." 2010 Rule, 75 Fed. Reg. at 6892–93.

Further, DOL explained that an offered wage requirement that required payment *only* of the AEWR would not sufficiently protect U.S. workers. Although DOL believed "the AEWR would be the highest of the [four] computed wage alternatives … in the vast majority of cases," it recognized that it would not always be the highest. 75 Fed. Reg. at 6893 n.7. And in such cases, the failure to utilize the prevailing wage would "disadvantage[]" "incumbent domestic workers." *Id*. at 6893.

> In these cases, the local shortage of labor exists despite a wage rate prevailing at a local level (or a mandated minimum wage or a collectively bargained wage) that is generally higher than wage average over a broader area, suggesting that wages have not fully adjusted to an equilibrium level. Therefore, in these cases, the AEWR is not binding on employers because use of a higher alternative wage would afford greater protection to incumbent workers. The difference between the local prevailing wage (which would be paid to temporary foreign workers) and the lower wage in the broader geographic or occupational definition area (represented by the AEWR) provides an incentive for domestic resident workers to shift their labor supply into the affected market and to benefit from additional employment opportunities and potentially higher wages than are available to them elsewhere.

Id.

The Offered Wage Rate provision has not been changed since 2010.

II. DOL's Ongoing "SWA or Nothing" Policy and Practice

Despite DOL's 2010 recognition that the AEWR and the prevailing wage each serve an independent function in the Offered Wage Rate provision, and the elimination of any reference to state wage surveys in the text of the regulations, DOL has adopted a de facto rule that it will only consider the prevailing wage where a SWA has conducted a survey of the relevant job resulting in a "finding." As it recently explained for the first time in a Federal Register document, DOL analyzes such surveys based on requirements contained in "Handbook 385," a document from 1981 that is not referenced anywhere in either the 2010 Rule or the 2009 NPRM. *See* DOL, Proposed Rule, Temporary Agricultural Employment of H-2A Nonimmigrants in the U.S., 84 Fed. Reg. 36168, 36179 (July 26, 2019) (2019 NPRM) (stating that DOL "currently relies on Handbook 385, which pre-dates the creation of the H-2A program and was last updated in 1981, to set the standards that govern the prevailing wage surveys that the SWAs conduct to establish prevailing wage rates for all agricultural job orders"). This practice is confirmed by an undated PowerPoint presentation included in the administrative record, which appears to be an internal DOL training document. *See* AR60–76.[3]

Additional material in the administrative record produced by DOL in this action both confirms DOL's practice and demonstrates its consequences. Over the last two years, DOL has sent Training and Employment Guidance Letters (TEGLs) to SWA Administrators about the preparation and submission of their annual applications for grant funding for a variety of activities related to foreign labor certification, "including the placement of employer job orders, inspection

[3] Although the 2019 NPRM is not in the administrative record, the Court may consider materials outside of the record for "the distinct and permissible purpose of proving that the Department … has a practice or policy … that is alleged to contravene both the Immigration and Nationality Act and its own regulations." *Hispanic Affairs Project*, 901 F.3d at 386 n.4 (citing *Venetian Casino Resort, LLC v. EEOC*, 530 F.3d 925, 930 (D.C. Cir. 2008)).

of housing for agricultural workers, and the administration of prevailing wage and practice surveys." AR28; *see generally* AR27–59 (TEGL No. 21-18); AR77–104 (TEGL No. 15-17). Among other things, these TEGLs inform SWAs that they "*can* collect and provide information to OFLC with respect to whether a prevailing hourly wage or piece rate exists for the occupation or crop in the area of intended employment." AR37 (emphasis added); AR85 (same). They also require SWAs to include in their annual plan the number of H-2A prevailing wage surveys they conducted in the prior fiscal year, how many they have already conducted in the current fiscal year, and how many they project they will conduct in the current fiscal year. AR39, 47–48; AR87, 95–96.

Although SWAs are required to report the results of surveys they conduct, and whether or not they plan to conduct such surveys, "SWAs have discretion to decide if, how, and when to conduct prevailing wage surveys based on many factors and guidelines." Pulver Decl., Ex. 1 at 3 (Pasternak Decl. ¶ 11).[4] In light of these factors and guidelines, many SWAs decide to conduct no surveys at all. Indeed, the administrative record shows that for 2019, twenty-nine states and territories did just that.[5] According to DOL's most recent data, these states include four of the top

[4] The Pasternak declaration, submitted by DOL in other pending litigation, is not contained in the administrative record, but it is properly considered as "'background information' in order to determine whether the agency considered all of the relevant factors." *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008); *see also NRDC v. Rauch*, 244 F. Supp. 3d 66, 89 n.25 (D.D.C. 2017) (noting propriety of considering "undisputed background material[] for the purpose of elucidating the issues presented").

[5] These 29 states and territories are Alabama, Alaska, Arkansas, California, Colorado, Delaware, Guam, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Northern Mariana Islands, Oregon, Puerto Rico, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virgin Islands, Virginia, Wisconsin, and Wyoming. *See* AR2376, 2377–78, 2380, 2381, 2382, 2385, 2389, 2390, 2391, 2392, 2393, 2395, 2396, 2397, 2409, 2410, 2417, 2423, 2426, 2428, 2429, 2430, 2431, 2432, 2434, 2437, 2438, 2441, 2442.

ten states for H-2A certifications so far in FY 2019, which alone collectively account for 19.2percent of the certifications granted this year.[6]

DOL issues "prevailing wage determinations" for the H-2A program via memoranda from its National Prevailing Wage Center in Washington, DC, to its National Processing Center in Chicago. *See, e.g.*, AR2178–2312. No such memoranda, however, are issued for states that do not conduct prevailing wage surveys. For example, New Mexico's Department of Workforce Solutions does not conduct prevailing wage surveys, *see* AR1734, and no prevailing wage determination memoranda for New Mexico appear in the administrative record. The lack of a prevailing wage determination for such states is also reflected in DOL's "Agricultural Online Wage Library" (AOWL), where DOL directs employers to determine the prevailing wage for crop activities or occupations in their applications for temporary employment certifications. *See* DOL, AOWL, https://www.foreignlaborcert.doleta.gov/aowl.cfm. For states like New Mexico, which has not conducted any prevailing wage surveys, the AOWL page simply states: "There is no data available for this state." *See* AR2417.

The other twenty-four states have conducted prevailing wage surveys for one or more crop activities or occupations, and thus DOL has issued prevailing wage determinations for those specific activities or occupations. But for many of those states and activities or occupations, the prevailing wage determination simply reflects "no finding" and does not determine a prevailing wage. DOL has acknowledged this problem, recently explaining that "the SWAs are often required to report 'no finding' from prevailing wage surveys; therefore, the surveys are both costly and fail

[6] *See* DOL, H-2A Temporary Agricultural Labor Certification Program – Selected Statistics, FY 2019 YTD (June 30, 2019), https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2019/H-2A_Selected_Statistics_FY2019_Q3.pdf (listing California, Kentucky, Louisiana, and South Carolina as "Top 10 states").

to meet the aim of producing reliable prevailing wage rates." 2019 NPRM, 84 Fed. Reg. at 36171. In such instances, DOL's prevailing wage memoranda and AOWL pages explicitly state:

> if a prevailing wage determination results in a No Finding for the particular crop activity, the employer shall offer and pay the worker(s) the legal state or Federal minimum, the agreed upon collective bargaining rate or the Adverse Effect Wage Rate (AEWR) for that state, whichever is highest.

See, e.g., AR2215; AR2384. For example, Connecticut's SWA conducted prevailing wage surveys for twelve horticultural activities for 2019; according to DOL, these surveys yielded "No Findings" for each of the twelve activities, and thus DOL required employers to pay the highest of only the other three wage rates—the AEWR, the collective bargaining wage, and the federal or state minimum wage. AR2214–2215. DOL indicates "No Findings" determinations for one or more activities or occupations in twenty states in 2019.[7]

Since DOL only considers the results of SWA surveys compliant with Handbook 385 as a potential source of a prevailing wage, DOL has found a prevailing wage to exist for one or more activities or occupations in only twelve states this year.[8] Even in those states, findings of a prevailing wage are rare. In North Carolina, for example, the SWA conducted 33 surveys, but only one produced an OFLC-approved finding. *See* AR2420–21. All told, in 2019, for the entire country, DOL has only identified a prevailing wage for 29 job/locality combinations, all based on SWA surveys. *See* AR2182, AR2208, AR2222–23, AR2235, AR2256, AR2266, AR2291. The

[7] Those twenty states are Arizona, Connecticut, Florida, Georgia, Iowa, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Texas, and Vermont. *See* AR2379, 2383–84, 2386, 2387–88, 2394, 2398–2400, 2402, 2406–07, 2407, 2411, 2412, 2415–16, 2418–19, 2420–21, 2422, 2424, 2425, 2427, 2433, 2435–36.

[8] Those twelve states are Arizona, Georgia, Maine, Maryland, Michigan, Nevada, New Hampshire, New Jersey, New York, North Carolina, Texas, and West Virginia. *See* AR 2379, 2387–88, 2398–2400, 2401, 2413, 2414, 2415–16, 2418–19, 2420–21, 2433, 2440.

administrative record does not indicate that DOL makes any other attempt to determine the prevailing wage prior to issuing a certification for other jobs—*i.e.*, the overwhelming majority of H-2A jobs.

Plaintiffs have identified several examples of DOL's practice of granting certifications without considering the prevailing wage, including four 2018 certifications identified in their complaint. *See* Dkt. 1 at 9–14 (Compl. ¶¶ 31, 37, 40, 43).[9] Those examples included certifications for work in states where SWAs did not conduct any prevailing wage surveys at all, *see, e.g.*, *id.* at 12–13 (Compl. ¶ 43) (certification granted for Spartanburg County, SC), AR1945, 2431 (noting no surveys conducted in South Carolina for 2018); states where SWAs did not conduct prevailing wage surveys for the relevant job, *see, e.g.*, Dkt. 1 at 11–12 (Compl. ¶ 40) (certification granted for agricultural equipment operator in Mountrail County, ND), AR2422 (AOWL profile with no prevailing wage for agricultural equipment operator); and states where SWA surveys yielded "no finding" for the relevant job category, *see, e.g.*, Dkt. 1 at 9–10 (Compl. ¶ 31) (certification granted for agricultural equipment operator work in Sheridan County, MT), AR2411 (reflecting "no finding" for agricultural equipment operator work in Montana). For each of the relevant jobs, although DOL did not issue an H-2A prevailing wage determination, DOL did calculate a mean prevailing wage rate pursuant to the OES it conducts; that mean prevailing wage rate exceeded the

[9] Because Defendants refused to respond to these allegations, *see* Dkt. 26 at 5–7 (Answer ¶¶ 31, 37, 41, 43), the allegations are deemed admitted. *See* Fed. R. Civ. Pro. 8(b)(6). Plaintiffs included a fifth certification in their complaint, involving crop work in Nevada, Dkt. 1 at 10 (Compl. ¶ 34), but the administrative record, as explained by Defendants' counsel during the parties' discussions of the contents of the administrative record, suggests there may have been a prevailing wage determination relevant to that certification. Thus, Plaintiffs no longer rely on that certification.

offered wage DOL approved. *See* Dkt. 1 at 9–12 (Compl. ¶¶ 31, 34, 37, 40, 43); Dkt. 26 at 4–5 (Answer ¶ 26).

Publicly available materials indicate that DOL continues to engage in this practice, granting labor certifications for jobs for which it has not issued an H-2A prevailing wage determination, and for which the offered wage is lower than the OES prevailing wage. Examples of such certifications are summarized in the below table:

Employer, Place of Employment (Date of Certification)	**Job** (Dates)	**Offered Wage**	**AOWL "Prevailing Wage"[10]**	**OES Prevailing Wage[11]**
Southern Planting Co., Leland, MS (1/9/19)	Farmworker (Agricultural Equipment Operators) (2/20/19–12/1/19)	$10.73 (Ex. 2)[12]	No data (AR2409)	$15.26 (Ex. 3)
Alma Plantation, LLC, Lakeland, LA (2/4/19)	Sugar Cane Field Workers (Agricultural Equipment Operators) (3/15/19–1/15/20)	$11.33 (Ex. 4)	No data (AR2397)	$15.51 (Ex. 5)
Trump Vineyard Estates, LLC, Charlottesville, VA (2/22/19)	Vineyard Farmworker (3/18/19–10/25/19)	$12.25 (Ex. 6)	No data (AR2438)	$15.11 (Ex. 7)
Farm-Op Kuzzens H2A, LLC, Eastern SC (4/16/19)	Farmworker and Laborers, Crop (5/31/19–7/11/19)	$11.13 (Ex. 8)	No data (AR2430)	$12.75 (Ex. 9)
Jim D Jandt, Peshtigo, WI (5/1/19)	Farmworker (6/10/19–10/20/19)	$13.54 (Ex. 10)	No data (AR2441)	$14.76 (Ex. 11)
Daniels Produce, LLC, Columbus, NE (6/4/19)	Harvest Worker (7/5/19–11/30/19)	$14.38 (Ex. 12)	"No finding" (AR2412)	$15.28 (Ex. 13)

[10] Defendants' counsel has explained that the determinations in the AOWL are valid for one year from the date they were made. Therefore, the data in this field reflects a determination made in 2018 or 2019, depending on the dates of employment and surveys.

[11] This column reflects the "H-2B" prevailing wage on DOL's website (https://flcdatacenter.com/) for the OES occupation title contained in the employer's application, as shown in each exhibit.

[12] The Exhibits cited in this chart are exhibits to the Declaration of Adam Pulver, filed concurrently with this motion.

Tuxedo Corn Co., Southwest CO (7/9/19)	Farm Worker (7/21/19–1/10/20)	$13.13 (Ex. 14)	No data (AR2382)	$15.80 (Ex. 15)

The individual plaintiffs would be qualified for several of these jobs. *See, e.g.*, Dkt. 10-4 at 1–2 (Garcia Decl. ¶¶ 3, 6) (noting Plaintiff Garcia's experience and willingness to work around the country as an agricultural equipment operator); Dkt. 11-2 at 2 (Gomez Decl. at ¶¶ 3, 8) (noting Plaintiff Gomez would apply for work at Daniels Produce and willingness to travel across western United States); Dkt. 11-3 at 1–2 (Princilus Decl. ¶¶ 2–3) (noting Plaintiff Princilus's sugar cane work experience and willingness to travel throughout United States). FLOC members work in at least one of these areas. *See* Dkt. 10-3 at 1 (Velasquez Decl. ¶ 5) (noting presence of FLOC members in South Carolina).

III. The 2019 NPRM

Nearly a year after Plaintiffs filed this lawsuit, DOL issued a notice of proposed rulemaking to "modernize" the H-2A program. 2019 NPRM, 84 Fed. Reg. at 36168. Parts of the proposed rule would "modify the methodologies by which the Department establishes the AEWRs and prevailing wages." *Id.* at 36178. The proposal would change the AEWR from a single rate for all agricultural workers in a given state or region to one that varies for each particular agricultural occupation, based largely on the FLS, or on the OES survey where no FLS results are available. *Id.* at 36179. As to the prevailing wage, DOL acknowledges its current reliance on Handbook 385 to govern SWA surveys, noting that the standards it contains "are inconsistent with modern survey methods and the level of appropriated funding at the State and Federal levels" and that DOL's reliance on SWA surveys as the sole basis for prevailing wage determination was not "producing reliable

prevailing wage rates." *Id.* DOL thus is proposing to abandon the Handbook 385 standards and adopt new standards for SWA prevailing wage surveys. 84 Fed. Reg. at 36184–88.

Most relevant to this action, DOL is proposing to codify its practice of not considering the prevailing wage in the absence of a SWA survey:

> [T]he Department proposes to clarify that the requirement to offer and pay the prevailing wage applies only "if the OFLC Administrator has approved a prevailing wage survey for the applicable crop activity or agricultural activity meeting the requirements of paragraph (c)" of § 655.120. This revision is intended to clarify that the Department is not obligated to establish a prevailing wage separate from the AEWR for every occupation and agricultural activity in every State.

Id. at 36179.

IV. Procedural History

Plaintiffs Miguel Garcia, Alberto Olvera Gomez, Jose Botella Avila, and Gerard Princilus (the Individual Plaintiffs) and plaintiff Farm Labor Organizing Committee (FLOC) commenced this action pursuant to sections 702 and 706(2) of the Administrative Procedure Act (APA), 5 U.S.C. §§ 702, 706(2), on August 23, 2018. Plaintiffs challenged both five individual certifications and DOL's practice as whole, which effectively serves as an amendment to a final regulation. The Individual Plaintiffs are U.S. workers who regularly migrate around the country to obtain temporary farmworker employment. *See* Dkt. 10-4, 11-1, 11-2, 11-3 (declarations of Individual Plaintiffs). FLOC is a farmworker labor union with nearly 8000 members throughout the eastern half of the United States. Many of its members are Mexican nationals participating in the H-2A program. *See* Dkt. 10-3 (Velasquez Decl.).

On October 26, 2018, Defendants moved to dismiss the action for lack of subject-matter jurisdiction, or, in the alternative, to transfer the case to the U.S. District Court for the Northern District of Illinois or stay all proceedings. *See* Dkt. 9. On June 24, 2019, the Court granted in part and denied in part Defendants' motion. The Court found that challenges to the individual

certifications were moot because those certifications had expired since the filing of the complaint and therefore dismissed the first two of Plaintiffs' claims. *See* Dkt. 24 at 10–12. The Court rejected Defendants' arguments as to the remaining three claims, finding that the challenge to DOL's policy and practice was ripe for adjudication. *Id.* at 12–18. In so doing, the Court found that "[w]hether the Offered Wage Rate provision precludes the Secretary from certifying a wage lower than the 'prevailing hourly wage,'" and "whether the Secretary's failure to enforce that requirement constitutes a procedural or substantive violation of the APA" were purely legal questions. *Id.* at 14. The Court also rejected Defendants' request to transfer or stay the action. *Id.* at 18–23.

LEGAL STANDARD

Summary judgment is appropriate when "there is no dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In deciding a motion for summary judgment, the Court draws all reasonable inferences in the non-movant's favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Under the APA, this Court "shall hold unlawful and set aside agency action" that is "found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "in excess of statutory jurisdiction, authority, or limitations," or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (C)–(D).

ARGUMENT

I. DOL's Policy and Practice of Ignoring the Prevailing Wage Requirement Absent a Handbook-Compliant SWA Survey Is a Reviewable Final Agency Action.

DOL's policy and practice of issuing temporary foreign labor certifications without determining whether the offered wage rate meets or exceeds the prevailing wage is final agency action subject to review under the APA, 5 U.S.C. § 704. Although DOL has not formally pronounced as a rule its decision to ignore the prevailing wage in the majority of cases, "[a]n

agency's unannounced departure in practice from a written regulation is a distinct form of agency action that is challengeable, separate and apart from adoption of the regulation itself." *Hispanic Affairs Project*, 901 F.3d at 387; *see also Venetian Casino Resort*, 530 F.3d at 929–30 (subjecting unwritten policy to APA review); *Cancino Castellar v. McAleenan*, 388 F. Supp. 3d 1218, 1247 (S.D. Cal. 2019) (same); *Al Otro Lado, Inc. v. McAleenan*, No. 17-02366, 2019 WL 3413406 (S.D. Cal. July 29, 2019) (same); *Aracely, R. v. Nielsen*, 319 F. Supp. 3d 110, 138–39 (D.D.C. 2018) (same); *Ramirez v. U.S. Immigration & Customs Enforcement*, 310 F. Supp. 3d 7, 21 n.4 (D.D.C. 2018) (same). "A contrary rule 'would allow an agency to shield its decisions from judicial review simply by refusing to put those decisions in writing.'" *Aracely, R.*, 319 F. Supp. 3d at 139 (quoting *Grand Canyon Tr. v. Pub. Serv. Co. of N.M.*, 283 F. Supp. 2d 1249, 1252 (D.N.M. 2003)); *see also R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 184 (D.D.C. 2015) ("Denying review of agency action that is essentially conceded but ostensibly unwritten would fly in the face of the Supreme Court's instruction that finality be interpreted 'pragmatic[ally].'" (quoting *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 239 (1980))). While "[a] plaintiff may not simply attach a policy label to disparate agency practices or conduct," *Al Otro Lado*, 2019 WL 3413406, at *23, here, Plaintiffs challenge a specific, discrete policy and practice, and they "target[] [their] argument to an identified transgression of [the H-2A] statutory and regulatory language." *Hispanic Affairs Project*, 901 F.3d at 388.[13]

Written or not, a policy or practice is reviewable when it is not "merely tentative or interlocutory nature," and is one "from which legal consequences [] flow," *Bennett v. Spear*,

[13] Although DOL's practice effects a change to a legislative rule, interpretive rules can likewise be "final" for purposes of APA review. As the D.C. Circuit recently stated, "the test for finality is independent of the analysis for whether an agency action is a legislative rule rather than an interpretive rule." *Cal. Communities Against Toxics v. EPA*, No. 18-1085, 2019 WL 3917540, at *4 (D.C. Cir. Aug. 20, 2019) (citing *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199 (2015)).

520 U.S. 154, 178 (1997) (citing *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatl.*, 400 U.S. 62, 71 (1970)). DOL's action meets both prongs of the *Bennett* test.

In applying the first *Bennett* prong, courts consider the agency's behavior and written materials "to evaluate whether an action marked the consummation of an agency's decisionmaking." *Am. Bar Ass'n v. U.S. Dep't of Educ.*, 370 F. Supp. 3d 1, 21 (D.D.C. 2019) (quoting *Sw. Airlines Co. v. U.S. Dep't of Transp.*, 832 F.3d 270, 275 (D.C. Cir. 2016); *Holistic Candlers & Consumers Ass'n v. FDA*, 664 F.3d 940, 944 (D.C. Cir. 2012)). Here, DOL's behavior shows that its practice with respect to consideration of the "prevailing wage" in the Offered Wage Rate provision is a final agency action. As discussed above, the administrative record confirms that DOL considers whether the wage offered by an employer meets or exceeds the prevailing wage *only* where a SWA has conducted a Handbook-compliant survey resulting in a finding. *See* AR60–76 (DOL "H-2A Prevailing Wage Training" PowerPoint presentation). Accordingly, in the absence of a SWA survey, DOL has repeatedly granted labor certifications for jobs where it has made no determination as to compliance with the prevailing wage, despite access to other forms of prevailing wage data. *See supra* pp. 11–13; Dkt. 26 at 4–5 (Answer at ¶ 26) (admitting DOL use of OES prevailing wage data for other purposes). DOL's repeated practice is strong evidence that its policy is final. *See, e.g.*, *Am. Bar Ass'n*, 370 F. Supp. 3d at 27–32 (finding agency correspondence evidence of policy and practice); *Amadei v. Nielsen*, 348 F. Supp. 3d 145, 165–66 (E.D.N.Y. 2018) (noting relevance of agency's behavior in determining existence of a practice); *Roshandel v. Chertoff*, 554 F. Supp. 2d 1194, 1202 n.3 (W.D. Wash. 2008) (repeated application shows existence of policy). Moreover, DOL's statements in the 2019 NPRM further confirm that DOL's policy and practice is to issue certifications without determining whether the offered wage

meets or exceeds the prevailing wage, as would be required by its regulation, unless a SWA has done a survey that has yielded a finding. 2019 NPRM, 84 Fed. Reg. at 36179–80.[14]

DOL's policy and practice also satisfies the second *Bennett* prong because the practice of certifying wages without considering the prevailing wage directly impacts both Plaintiffs' legal rights under the INA and employers' corresponding legal obligations. *See, e.g.*, *Aracely, R.*, 319 F. Supp. 3d at 139 (finding final agency action where policy had "actual or immediately threatened effects"); *Ramirez*, 310 F. Supp. 3d at 23 (same where agency decision had "immediate and significant legal consequences"). Plaintiffs have offered evidence to show how DOL's practice has harmed them and continues to harm them by reducing the wages available to them in specific instances. *See, e.g.*, Dkt. 10-3 at 2 (Velasquez Decl. ¶¶ 5–6). The practice also limits employers' legal obligations by allowing them to pay a lower wage than would otherwise be required. As the D.C. Circuit has noted, whether a policy or practice leaves agency officials with discretion is a key part of the finality inquiry. *See, e.g.*, *Ctr. for Auto Safety v. Nat'l Hwy. Traffic Safety Admin.*, 452 F.3d 798, 806 (D.C. Cir 2006); *CropLife Am. v. EPA*, 329 F.3d 876, 883 (D.C. Cir. 2003). Here, under DOL's practice, officials do not retain discretion to consider a non-SWA source of prevailing wage data in evaluating a labor certification application.

Because DOL's decision to rely exclusively on sporadic SWA surveys as evidence of the prevailing wage—and so to routinely certify employer wages without determining whether an

[14] Although the 2019 NPRM proposes an approach similar to the current practice, DOL's practice is reviewable now because it is "being applied in a binding manner and has been implemented," even though DOL is now receiving comments on the proposed approach. *Nat'l Mining Ass'n v. Jackson*, 768 F. Supp. 2d 34, 45 (D.D.C. 2011). As the Court noted in its ruling on DOL's motion to dismiss, "even if the NPRM proposed to modify § 655.120(a) in material respects, 'the fact that a law may be altered in the future has nothing to do with whether it is subject to judicial review at the moment.'" Dkt. 24 at 16 (quoting *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022 (D.C. Cir. 2000)).

offered wage meets or exceeds the prevailing wages—satisfies both *Bennett* prongs, it is a reviewable final agency action.

II. DOL's Practice Is Contrary to DOL Regulations.

"One of the most well-known limitations on agency action is the longstanding prohibition on agency determinations that contradict the agency's own regulations." *HealthAlliance Hosps., Inc. v. Azar*, 346 F. Supp. 3d 43, 55 (D.D.C. 2018). Here, DOL made a determination that contradicts its highest-of-four regulation: refusing to consider the prevailing wage unless a SWA has conducted a Handbook-compliant prevailing wage survey resulting in an affirmative finding.

"[W]hen determining whether or not an agency has acted in a manner that is contrary to its regulations, the court must first determine what the regulations require." *Id*. The Offered Wage Rate provision, in conjunction with 20 C.F.R. § 655.161, prohibits the agency from granting a temporary foreign labor certification where an employer does not "offer, advertise in its recruitment, and pay a wage that is the highest of the AEWR, the prevailing hourly wage or piece rate, the agreed-upon collective bargaining wage, or the Federal or State minimum wage, except where a special procedure is approved for an occupation or specific class of agricultural employment." 20 C.F.R. § 655.120. The regulation does not limit this requirement to scenarios where a SWA conducted a Handbook-compliant prevailing wage survey resulting in a finding, nor does it define a "prevailing hourly wage or piece rate" to be a function of a SWA survey.

DOL maintains that its practice of looking to the prevailing wage only if a Handbook-compliant SWA survey has been conducted reflects an "interpret[ation]" of its obligation "to determine and apply the prevailing wage rate when issuing H-2A certifications." Dkt. 30-1 (AR Certification). To the extent that DOL purports to be interpreting the regulation, its interpretation is not entitled to deference. Although the regulations do not define how the prevailing wage is

established, *see* 2019 NPRM, 84 Fed. Reg. at 36176 ("nothing in part 653 addresses how that prevailing wage is established"), the lack of a definition does not translate into carte blanche for DOL. The plain text of the regulation requires DOL to consider the prevailing wage, with no exceptions. In the absence of ambiguity, "there is no plausible reason for deference. The regulation then just means what it means—and the court must give it effect, as the court would any law." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019). Moreover, although the regulation does not specify a particular method for determining the prevailing wage, DOL's choice to rely exclusively on SWA survey findings, and in the absence of those findings to disregard the prevailing wage, is unreasonable in light of the paucity of SWA survey findings and the availability of other data sources. DOL's policy and practice effectively reads the prevailing wage requirement out of the regulation in the lion's share of states and occupations and, therefore, is contrary to law.

A. The Term "Prevailing Hourly Wage or Piece Rate" Is Not Reasonably Limited to the Results of SWA-Conducted Surveys.

There is no basis to conclude that the current regulations limit DOL to considering Handbook-compliant SWA surveys in determining whether an offered wage meets or exceeds the "prevailing hourly wage or piece rate." In both the H-2A program and other temporary worker programs, DOL has acknowledged several methods for calculating a "prevailing wage." In the 2008 Rule, for example, the agency explicitly noted "its choice of methodologies for determining prevailing wage rates," and ultimately selected the OES survey. 73 Fed. Reg. at 77167; *see also* 2010 Rule, 75 Fed. Reg. at 6892 n.6 (acknowledging that AEWR based on OES survey was "essentially the same as the prevailing wage"). DOL acknowledges that it currently uses the OES survey to establish the prevailing wage for other temporary worker programs. Dkt. 26 at 4 (Answer ¶ 26). Thus, DOL has acknowledged that SWA surveys are not the only available method for determining a prevailing wage.

In addition, in construing statutory or regulatory language, courts presume "amendments are intended to have real and substantial effect." *Stone v. INS*, 514 U.S. 386, 397 (1995); *cf. Hazardous Waste Treatment Council v. U.S. EPA*, 861 F.2d 270, 276 (D.C. Cir. 1988) ("When a statutory provision is deleted in a subsequent reenactment, the omitted term cannot be read into the later statute."). Here, the 2010 Rule *eliminated* the language in the H-2A regulations relating to SWA surveys in two separate places: The 2008 Rule had defined "prevailing hourly wage" as "the hourly wage determined by the SWA to be prevailing in the area in accordance with State-based wage surveys." 73 Fed. Reg. at 77168, 77211 (20 C.F.R § 655.100 (effective Jan. 18, 2009, through June 28, 2009)); *see also* 20 C.F.R. § 655.107(b) (effective June 29, 2009, through March 14, 2010) (referring to "State agency prevailing wage survey determination"). The current regulations contain no reference *at all* to SWA surveys. Thus, to read the current regulations as limiting the term "prevailing hourly wage" to one generated by a SWA survey would "negate [the 2010 Rule's] revision, and indeed would render it a largely meaningless exercise." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 58 (2006). And DOL's 2019 proposal to reinstate such limiting language, *see* 84 Fed. Reg. at 36179, 36180, likewise strongly suggests that the limitation does not exist in the current regulations.

B. DOL's Practice of Ignoring the Prevailing Wage Requirement in the Absence of Handbook-Compliant SWA Surveys Is Contrary to Its Regulation.

Although the regulation allows DOL flexibility in *how* it calculates the prevailing wage, the regulation allows DOL no discretion as to *whether* it examines whether an offered wage meets or exceeds the prevailing wage. As such, exclusively relying on a source of evidence for determining the prevailing wage that results in no prevailing wage determination in the vast majority of instances and for more than half the country cannot be reconciled with the regulation.

By considering whether an offered wage meets or exceeds the prevailing wage only if a SWA survey has been performed, DOL is not interpreting its obligation to determine whether an employer is offering the highest of four prevailing wages: It is creating an exception to that obligation. As the D.C. Circuit explained in rejecting another DOL attempt to create an exception to the H-2A offered wage rate provision, DOL "cannot claim to be interpreting the very regulatory provision from which its own rules declare it departs." *Mendoza v. Perez*, 754 F.3d 1002, 1023 (D.C. Cir. 2014). By limiting when DOL will determine whether an offered wage meets or exceeds the prevailing wage, DOL has "impermissibly create[d] '*de facto* another regulation.'" *Zhang v. U.S. Citizenship & Immigration Servs.*, 344 F. Supp. 3d 32, 50 (D.D.C. 2018) (quoting *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000)); *see also Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1048 (D.C. Cir. 2001) (courts "should not defer to an agency's interpretation imputing a limiting provision to a rule that is silent on the subject").

"Not only is [DOL's] interpretation without a textual or structural basis, but it is also unmoored from the purposes animating" both the Offered Wage Rate provision and DOL's statutory mandate under 8 U.S.C. § 1188(a)(1). *See Zhang*, 344 F. Supp. 3d at 55. DOL has acknowledged the distinct role that the "prevailing wage" element of the Offered Wage Rate Provision plays in fulfilling DOL's statutory mandate. *See* 2010 Rule, 75 Fed. Reg. at 6893. It has noted that including the prevailing wage in the Offered Wage Rate provision is necessary to "ensure[] that domestic workers receive the greatest potential protection from adverse effects on their wages and working conditions, including the adverse effect of being denied access to the opportunity to earn a higher equilibrium wage that would have resulted as the market (perhaps slowly) adjusted in the absence of the guest workers." *Id.* And the agency has recognized that, in scenarios where the prevailing wage exceeds the AEWR, the prevailing wage "afford[s] greater

protection to incumbent workers." *Id.* Failing to make any determination as to whether an offered wage meets or exceeds the prevailing wage absent a Handbook-compliant SWA survey does not ensure that workers have that protection.

Importantly, a Handbook-compliant SWA survey is not needed to determine a reasonable prevailing wage. OFLC could conduct its own surveys, or it could utilize the wages identified by DOL's Bureau of Labor Statistics in the OES—the same source that DOL utilizes to determine the prevailing wage for other programs and identifies as one of several "methodologies for determining prevailing wage rates" in the 2008 Rule. 73 Fed. Reg. at 77167. In the related United States Employment Service program, which utilizes the same regulatory definitions as the H-2A program, DOL has recognized its duty to make *some* sort of prevailing wage determination to assess each offered wage, even if it cannot do so under its preferred methodology. For example, in *Comite de Apoyo a los Trabajadores Agricolas (CATA) v. U.S. Department of Labor*, 995 F.2d 510, 512 (4th Cir. 1993), DOL "confronted the problem of correlating a piece rate [prevailing wage rate] to an hourly rate" offered by an employer. Initially, the agency simply threw up its hands, but after being sued, it confessed error and, on remand, developed a "wage-correlation methodology" to come up with a prevailing hourly rate. *Id.* at 512. Here, the administrative record does not indicate that DOL has considered *any* option other than ignoring the prevailing wage requirement in its entirety.

The Third Circuit's decision in *Comité de Apoyo A Los Trabajadores Agricolas v. Perez*, 774 F.3d 173 (3d Cir. 2014) (*CATA III*), is also instructive. There, the Third Circuit invalidated a rule that changed the way prevailing wages were calculated for purposes of the H-2B program. "[P]rior to 2005, DOL would not consider employer wage surveys in prevailing wage determinations when an applicable governmental wage survey such as those of the DBA, SCA, or

OES was available for that purpose." *Id*. at 188. In 2005 guidance and 2008 and 2011 rules, however, it decided to allow employer wage surveys. *Id.* The Third Circuit concluded that such a change was arbitrary and capricious to the extent "it permitted—and by its policies, structurally encouraged—employers to rely on details of a private survey when there was a valid OES wage survey available for use in determining the prevailing wage for the implicated employment." *Id.* at 189. Particularly relevant to the situation here, the Third Circuit held that DOL's policy was arbitrary because it created a dual system—one for employers who could afford to conduct their own wage surveys and one for those who relied on OES and other government data. 774 F.3d at 189–90.

Likewise here, DOL's practice has created two different systems: one for workers in states that conduct surveys, who are entitled to the full benefit of the Offered Wage Rate provision, and one for everyone else. For job certification applications in 29 states and territories, no one —not at a SWA and not at DOL—has even *tried* to ascertain what the prevailing wage is. To allow states, in their discretion, to determine whether workers in their states will receive the protections of a federal law is unreasonable.

For all these reasons, DOL's policy and practice of not even attempting to ascertain the prevailing wage in the majority of instances, despite the availability of other prevailing wage data, is contrary to law.

III. DOL's Practice Is Arbitrary and Capricious.

An agency action that is contrary to its own regulations is not only contrary to law, but also inherently arbitrary and capricious, and may be set aside on those grounds. *Erie Boulevard Hydropower, LP v. Fed. Energy Regulatory Comm'n*, 878 F.3d 258, 269 (D.C. Cir. 2017) (citing *Nat'l Envtl. Dev. Ass'n's Clear Air Project v. EPA*, 752 F.3d 999, 1009 (D.C. Cir. 2014)). As

explained above, *see supra* Part II, DOL's SWA-or-Nothing practice is contrary to the Offered Wage Rate provision as the agency is not even attempting to determine whether employers' wages meet or exceed the prevailing wage, and thus is also arbitrary and capricious.

Even if DOL's practices are not directly contrary to its own regulations, considering the prevailing wage only when it receives SWA survey findings is still arbitrary and capricious. Here, DOL's practice was not "the product of reasoned decision making," *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983), and is arbitrary and capricious.

"It is textbook administrative law" that agencies must consider "reasonably obvious alternatives." *Multicultural Media, Telecom & Internet Council v. FCC*, 873 F.3d 932, 942 (D.C. Cir. 2017). Courts are "particularly reluctant to blink at an agency's ignoring ostensibly reasonable alternatives" where, as here, "the choice embraced suffers from noteworthy flaws." *City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1169 (D.C. Cir. 1987) (cited in *Multicultural Media*, 873 F.3d at 942). In light of the paucity of SWA-conducted prevailing wage surveys, and DOL's own recognition that the prevailing wage requirement has independent value and importance in protecting wages, for DOL to rely exclusively on Handbook-compliant SWA wage surveys to determine the prevailing wage is arbitrary and capricious. This case is not one in which DOL is relying on data that is merely "less than perfect." *Cf. Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 61 (D.C. Cir. 2015) (in such a case, noting "imperfection alone does not amount to arbitrary decision-making"). DOL is aware that the consequence of exclusive reliance on SWA surveys is nullification of the prevailing wage requirement in more than half the country. *See* AR111-2177 (state plan submissions for 2018 and 2019 indicating number of surveys conducted and planned to be conducted each year). Yet DOL has turned a blind eye to alternative data for determining the prevailing wage in its possession, such as the OES survey, which DOL previously

endorsed as a valid prevailing wage methodology. *See* 73 Fed. Reg. at 77167; *see also CATA III*, 774 F.3d at 189 (noting DOL's historic endorsements of OES wages for prevailing wage purposes). There is no evidence in the administrative record that DOL has considered any alternatives at all.

DOL's action here is similar to that set aside by the D.C. Circuit in *AFL-CIO v. Brock*, 835 F.2d 912, 919 (D.C. Cir. 1987). There, DOL attempted to justify its abandonment of a policy of enhancing AEWRs by citing its "inability to secure persuasive data." *Id.* The court found this explanation insufficient, explaining that the lack of persuasive data does not dictate a single policy choice. It "could just as logically suggest that adjustments were needed, but in an upward direction rather than a total elimination." *Id.* Here too, the lack of Handbook-compliant SWA survey results for the majority of states and occupations does not logically compel the conclusion that DOL should disregard the prevailing wage requirement. There are alternatives, and DOL has not explained its disregard of those alternatives. *Cf. CATA III*, 774 F.3d at 187–88 (finding DOL's unexplained decision to allow employers to rely on private surveys to determine the prevailing wage when OES surveys were available arbitrary and capricious). DOL's failure to consider and explain its rejection of alternatives is arbitrary and capricious, and the policy and practice should thus be set aside.

IV. DOL's Policy and Practice Is Contrary to the INA.

DOL is authorized by statute to grant a temporary foreign labor certification only where the certification "will not adversely affect the wages and working conditions of workers in the United States similarly employed." 8 U.S.C. § 1188(a)(1). In the 2010 Rule, DOL stated that certifications can comply with this statutory requirement only if the agency determines that the offered wages meet or exceed each of four specified wages, including the prevailing wage. DOL

acknowledged that there will be scenarios where the prevailing wage exceeds the AEWR and that allowing employers to pay the lower of the prevailing wage and the AEWR would "disadvantage[]" domestic workers. 75 Fed. Reg. at 6893. Yet under DOL's current practice, it is not determining whether any offered wage in 40 states or territories, as well as numerous jobs within the remaining states, falls below the prevailing wage. Thus, DOL is not complying with its statutory obligation.

This scenario is thus similar to that addressed in *Comite de Apoyo a los Trabajadores Agricolas v. Solis*, 933 F. Supp. 2d 700 (E.D. Pa. 2013) (*CATA II*). There, the court found that DOL was violating similar statutory language when it applied a rule that permitted H-2B labor certifications that had a depressive effect on the wages of U.S. workers. 933 F. Supp. 2d at 713. Where DOL is not conditioning wage certifications on a finding that they "will not adversely affect wages and working conditions of workers in the United States similarly employed," 8 U.S.C. §1188(a)(1), it is violating the statute. Because DOL's practice means that DOL will fail to make such findings in the majority of cases, it is contrary to the statute and should be set aside.

V. DOL Could Not Lawfully Adopt Its De Facto Rule Without Notice and Comment.

DOL did not comply with the notice-and-comment rulemaking procedures mandated by 5 U.S.C. § 553 in adopting the policy and practice challenged here. DOL is wrong to suggest that those requirements do not apply because its practice is an "interpretation" of the Offered Wage Rate provision. The action challenged here is a DOL determination, contained nowhere in existing regulations, that wages measured by SWA surveys, subject to requirements contained in a 1981 Handbook and never subjected to notice-and-comment rulemaking, are the exclusive standard for determining whether H-2A wages "adversely affect the wages and working conditions of American workers." 8 U.S.C. § 1188(a)(1). DOL's implementation of that determination effected

an alteration to the existing substantive rule and, accordingly, is itself a substantive rule that could be adopted only through notice-and-comment rulemaking.

The central question "in distinguishing legislative rules from interpretative rules 'is whether the new rule effects a substantive regulatory change to the statutory or regulatory regime.'" *Mendoza*, 754 F.3d at 1021 (quoting *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 6–7 (D.C. Cir. 2011)). "To be interpretative, a rule 'must derive a proposition from an existing document whose meaning compels or logically justifies the proposition.'" *Id.* (quoting *Catholic Health Initiatives v. Sebelius,* 617 F.3d 490, 494 (D.C. Cir. 2010)). In contrast, a legislative rule "adopts a new position inconsistent with existing regulations, or otherwise effects a substantive change in existing law or policy." *Mendoza*, 754 F.3d at 1021.

"It is well-settled that a policy that adds a requirement not found in the relevant regulation is a substantive rule that is invalid unless promulgated after notice and comment." *Zhang*, 344 F. Supp. 3d at 58. That is the case here: DOL's action "effectively amend[ed] a prior legislative rule" by creating an exception to the requirement that DOL determine whether an offered wage meets or exceeds the prevailing wage, when the regulation itself contains no exception. *See Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993); *see also Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 95 (D.C. Cir. 1997) ("a substantive rule *modifies* or *adds* to a legal norm based on the agency's own authority" (emphasis in original)); *Tex. Children's Hosp. v. Azar*, 315 F. Supp. 3d 322, 337 (D.D.C. 2018) (guidance that "effectively amends" a rule is legislative). In this respect, the policy is similar to the action set aside in *Mendoza*. There, in the H-2A context, DOL had previously required employers to offer sheepherders the highest of three wages: "the prevailing wage rate, a special monthly AEWR set by the Department of Labor, or the legal minimum wage." 754 F.3d at 1019. Through guidance, though, DOL "remove[d] the option

for the Department to establish a special monthly AEWR, thus allowing employers to pay the higher of only the prevailing wage rate or the legal minimum wage rate." *Id.* The D.C. Circuit held that this change was a substantive one because it eliminated the requirement that employers pay a wage that met or exceeded the special AEWR. 754 F.3d at 1024–25. So too here, by effectively eliminating the prevailing wage requirement for the majority of jobs, DOL has made a substantive alteration to a rule.

In addition, DOL's action is a substantive rule because it limits the source of data DOL uses for calculating the prevailing wage to a select methodology, when the regulation contains no such limitation. "When agencies base rules on arbitrary choices[,] they are legislating," and thus notice-and-comment rulemaking is required. *Hoctor v. U.S. Dep't of Agric.*, 82 F.3d 165, 170–71 (7th Cir. 1996) (quoted in *Catholic Health Initiatives*, 617 F.3d at 495); *see also Comité De Apoyo A Los Trabajadores Agrícolas v. Solis*, No. CIV.A 09-240, 2010 WL 3431761, at *19 (E.D. Pa. Aug. 30, 2010) (*CATA I*) (finding that adoption of four-tier structure of skill levels for H-2B prevailing wage calculations, which was "untethered from any other statutory or regulatory provisions, and which affirmatively creates the wages paid to H-2B workers—constitute[d] a legislative rule which must be subjected to notice and comment").

Moreover, DOL's practice has other hallmarks of a legislative rule: It has "significant effects on private interests" and "narrowly constrict[s] the discretion of agency officials." *Batterton v. Marshall*, 648 F.2d 694, 702 (D.C. Cir. 1980). It relieves employers of the obligation to pay workers a wage that meets or exceeds the prevailing wage in the vast majority of cases, and it deprives workers of their right to a prevailing wage unless a SWA has conducted a very specific survey. For these reasons as well, DOL's policy and practice constitutes a legislative rule adopted without observance of procedure required by law.

CONCLUSION

For the above-stated reasons, the Court should grant Plaintiffs' motion for summary judgment, declare DOL's policy and practice unlawful, and enjoin Defendants from granting foreign labor certifications without determining whether the offered wage meets or exceeds the prevailing wage.

Dated: September 26, 2019

Respectfully submitted,

/s/ Adam R. Pulver

Adam R. Pulver
D.C. Bar No. 1020475
Michael T. Kirkpatrick
D.C. Bar No. 486293
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
apulver@citizen.org

Counsel for All Plaintiffs

Gregory S. Schell
Florida Bar No. 287199
SOUTHERN MIGRANT LEGAL SERVICES
A Project of Texas RioGrande Legal Aid, Inc.
9851 Daphne Avenue
Palm Beach Gardens, FL 33410-4734
(561) 627-2108
gschell@trla.org

Counsel for Plaintiff Garcia

Dave Mauch
Texas Bar No. 24086837
TEXAS RIOGRANDE LEGAL AID, INC.
6502 Nursery Drive, Suite 302
Victoria, TX 77904
(361) 237-1681
dmauch@trla.org
Counsel for Plaintiff Garcia

Douglas L. Stevick
Texas Bar No. 00797498
TEXAS RIOGRANDE LEGAL AID, INC.
5439 Lindenwood Avenue
Saint Louis, MO 63109
(314) 449-5161
dstevick@trla.org

Counsel for Plaintiff Garcia

Mark Heller
Ohio Bar No. 27027
Emily Brown
Ohio Bar No. 92553
ADVOCATES FOR BASIC LEGAL EQUALITY, INC.
525 Jefferson Avenue, Ste. 300
Toledo, OH 43604

Counsel for Plaintiffs Gomez, Avila, Princilus, and FLOC