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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *et al.*,

Defendants.

Civil Action No.4:20-cv-07331-JSW

DEFENDANTS' NOTICE OF MOTION AND CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Date: November 23, 2020
Time: 10:00 a.m.
Courtroom: 5
Judge: Hon. Jeffrey S. White

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on November 23, 2020, at 10:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 5 of the above-entitled Court, located at 1301 Clay Street, Oakland, California, or by video teleconference, Defendants United States Department of Homeland Security, United States Department of Labor, Chad F. Wolf, in his official capacity as Acting Secretary of Homeland Security, and Eugene Scalia, in his official capacity as Secretary of Labor (collectively, the "Defendants"), by and through undersigned counsel, will move for partial summary judgment on Plaintiffs' claims that the DHS Rule and the DOL Rule were unlawfully issued without notice and comment (Counts I and II of the Complaint, ECF No. 1), for the reasons more fully set forth in the accompanying Memorandum of Points and Authorities.

Dated: November 6, 2020

Respectfully submitted,

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SUMMARY OF ARGUMENT

Plaintiffs challenge two rules recently promulgated by the Department of Labor and the Department of Homeland Security, making changes to the H-1B program under which certain foreign workers are admitted to the United States for temporary employment. These changes, as well as the H-1B program as a whole, are designed to ensure that the employment of H-1B workers benefits the U.S. economy without disadvantaging U.S. workers. Millions of U.S. workers have been drastically affected over the past few months by the national emergency created by the COVID-19 pandemic, which has resulted in a dramatic increase in unemployment rates and which threatens immediate and ongoing harm to the wages and job opportunities of U.S. workers. DHS and DOL reasonably concluded that their new rules were urgently needed to better protect the wages and job opportunities for U.S. workers in light of the ongoing pandemic. In addition, DOL concluded that employers might attempt to evade its new rule if it provided advance notice. Accordingly, both agencies reasonably concluded that good cause existed under the Administrative Procedure Act, 5 U.S.C. § 553(b)(B), to forgo advance notice and comment, and DOL also reasonably decided to make its rule effective immediately for the same reasons. The rules themselves and the materials cited therein establish that the agencies reasonably determined that good cause existed to forgo advance notice and comment. Accordingly, Defendants are entitled to partial summary judgment on Counts I and II of the Complaint.

INTRODUCTION

Plaintiffs challenge two rules recently promulgated by the Department of Labor ("DOL") and the Department of Homeland Security ("DHS"), making changes to the H-1B program under which certain foreign workers are admitted to the United States for temporary employment. The DHS rule at issue in this case revises and clarifies certain requirements governing the types of available employment, the employer-employee relationship, and other factors applicable to the H-1B visa program, to improve program integrity and to better ensure adherence to the statutory criteria for H-1B classification. *See* Strengthening the H-1B Nonimmigrant Visa Classification Program, 85 Fed. Reg. 63,918 (Oct. 8, 2020) ("DHS Rule"). The DOL rule changes the computations used by the Secretary of Labor to establish the prevailing wage for the job opportunities for which employers seek H-1B workers, to better reflect the actual wages earned by U.S. workers in similar occupations. *See* Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States, 85 Fed. Reg. 63,872 (Oct. 8, 2020) ("DOL Rule").

These changes, as well as the H-1B program as a whole, are designed to ensure that the employment of H-1B workers benefits the U.S. economy without disadvantaging U.S. workers. Millions of U.S. workers have been drastically affected over the past few months by the national emergency created by the COVID-19 pandemic, which has resulted in a dramatic increase in unemployment rates and which threatens immediate and ongoing harm to the wages and job opportunities of U.S. workers. DHS and DOL reasonably concluded that their new rules were urgently needed to better protect the wages and job opportunities for U.S. workers in light of the ongoing pandemic. In addition, DOL concluded that employers might attempt to evade its new rule if it provided advance notice. Accordingly, both agencies reasonably concluded that good cause existed under the Administrative Procedure Act, 5 U.S.C. § 553(b)(B), to forgo advance notice and comment, and DOL also reasonably decided to make its rule effective immediately for the same reasons. Accordingly, the agencies issued the two rules as interim final rules ("IFRs"), with an opportunity for comment immediately following promulgation. The rules themselves and the materials cited therein establish that the agencies' determinations that good cause existed to forgo

notice and comment were reasonable. Accordingly, Defendants are entitled to partial summary judgment on Counts I and II of the Complaint.

BACKGROUND

I. EXISTING STATUTORY AND REGULATORY FRAMEWORK

The Immigration and Nationality Act ("INA") provides for the admission of certain foreign nationals as nonimmigrants[1] on a temporary basis to perform work in the United States under the H-1B and related visa classifications. The H-1B program allows U.S. employers to temporarily employ foreign workers in specialty occupations, 8 U.S.C. § 1101(a)(15)(H)(i)(b), defined as occupations that require the "theoretical and practical application of a body of highly specialized knowledge" and a bachelor's or higher degree in the specific specialty, or its equivalent. *Id.* § 1184(i)(3)(A). The purpose of the program is to "allow[] an employer to reach outside of the U.S. to fill a temporary position because of a special need, presumably one that cannot be easily fulfilled within the U.S.," *Caremax Inc v. Holder*, 40 F. Supp. 3d 1182, 1187 (N.D. Cal. 2014), "not to replace American workers with foreign born professionals." 144 Cong. Rec. S12741, S12749 (daily ed. Oct. 21, 1998) (statement of Sen. Abraham) (describing the purpose of the H-1B provisions of the American Competiveness and Workforce Improvement Act). The H-1B program therefore contains certain requirements designed to ensure "meaningful protections for U.S. workers," H.R. Rep. No. 101-723, pt. 1, at 61, *as reprinted in* 1990 U.S.C.C.A.N. 6710, 6741, intended "to prevent displacement of the American workforce" by foreign labor. *Cyberworld Enter. Techs., Inc. v. Napolitano*, 602 F.3d 189, 199 (3d Cir. 2010). As described below, both DOL and DHS play important roles in this program.

A. DOL's Role in the H-1B Program

A prospective U.S. employer desiring to petition for an H-1B visa on behalf of a foreign worker in a specialty occupation must first file a labor condition application ("LCA") with DOL. 8 U.S.C. § 1101(a)(15)(H)(i)(b); 8 C.F.R. § 214.2(h)(2)(i)(E). As pertinent here, the LCA requires a

[1] There are two general categories of U.S. visas: immigrant and nonimmigrant. Immigrant visas are issued to foreign nationals who intend to live permanently in the United States. Nonimmigrant visas are for foreign nationals who enter the United States on a temporary basis—for tourism, medical treatment, business, temporary work, study, or other reasons. DOL Rule at 63,872 n.1.

prospective employer to attest that it will pay the nonimmigrant worker the greater of "the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question," or "the prevailing wage level for the occupational classification in the area of employment." 8 U.S.C. § 1182(n)(1)(A)(i)(I)-(II); *see also id.* § 1182(n)(1)(A)-(C) (describing other required attestations); 20 C.F.R. §§ 655.705(c)(1), 655.730(d). If there is an applicable collective bargaining agreement ("CBA") for the job, the CBA determines the prevailing wage. 20 C.F.R. §§ 655.731(a)(2)(i), 656.40(b)(1). If no CBA applies, an employer may base the prevailing wage calculation on one of several other specified sources, including an "independent authoritative source" or "another legitimate source of wage data." *Id.* § 655.731(a)(2)(ii)(B)-(C).

In the absence of any of the foregoing sources, DOL's National Prevailing Wage Center ("NPWC") (a component of the Office of Foreign Labor Certification ("OFLC")) will derive the appropriate prevailing wage for the foreign worker's job classification from the Bureau of Labor Statistics ("BLS") Occupational Employment Statistics ("OES") Survey. In 2004, Congress mandated that DOL, when using a governmental survey to determine the prevailing wage, include at least four wage levels "commensurate with experience, education, and the level of supervision." 8 U.S.C. § 1182(p)(4); *see* L-1B & H-1B Visa Reform Act, Pub. L. No. 108-447, tit. IV, subtit. B, § 423 (Dec. 8, 2004). Prior to the DOL Rule at issue in this case, DOL guidance set the four wage levels at roughly the 17th, 34th, 50th, and 67th percentiles of all wages for the particular position in the particular Metropolitan Statistical Area, as reported in the OES Survey. *See* DOL Rule at 63,875.[2]

The prevailing wage must be determined as of the time of the filing of the LCA. 20 C.F.R. § 655.731(a)(2). An employer may not file an LCA more than six months prior to the beginning date of the intended employment. *Id.* § 655.730. Unless the LCA is incomplete or obviously inaccurate,

[2] DOL also issues prevailing wage determinations for potential foreign employees seeking permanent immigration the United States on employment-based visas under the second and third preference categories (EB-2 and EB-3). These determinations are issued as part of the permanent labor certification ("PERM") process. *See* 20 C.F.R. §§ 656.15, 656.40; DOL Rule at 63,873. The PERM process uses the same prevailing wage system as the H-1B program. Compl. ¶¶ 57-59, ECF No. 1. As Plaintiffs' focus is on the H-1B program, this brief will not further describe the EB-2 and EB-3 programs.

the Secretary of Labor must certify it within seven working days of filing. 8 U.S.C. § 1182(n)(1); 20 C.F.R. § 655.740(a)(1).

B. DHS's Role in the H-1B Program

Once an employer receives a certified LCA from DOL, it may then file a petition with DHS to obtain classification of the foreign national as an H-1B worker. *See* 8 C.F.R. § 214.2(h)(2)(i)(A); 20 C.F.R. § 655.705(b). DHS determines, among other things, whether the employer's position qualifies as being in a specialty occupation and, if so, whether the nonimmigrant worker is qualified for the position. *Id.* If DHS grants the petition, current regulations provide that the worker's H-1B petition approval "shall be valid for a period of up to three years," with the opportunity for extension. 8 C.F.R. §§ 214.2(h)(9)(iii)(A)(1), 214.2(h)(15)(ii)(B). Finally, there is a statutory limit on the number of initial H-1B visas, or grants of initial H-1B status, of 65,000 per year (with certain exemptions), plus an additional 20,000 per year for Masters, Ph.D., and post-graduate-level graduates of U.S. institutions of higher education. 8 U.S.C. §§ 1184(g)(1)(A), 1184(5)(C). The annual numerical limit does not apply to workers seeking to renew their visas (or otherwise extend H-1B status) if such workers were previously counted toward an annual numerical allocation. *Id.* 1184(g)(7).

II. THE NEW DHS RULE

On October 8, 2020, DHS published the first IFR at issue in this case. The DHS Rule makes the following pertinent changes to the H-1B system:

- The rule revises the regulatory definition of and criteria for a "specialty occupation" to better align with the statutory definition of the term. DHS Rule at 63,924-26. Specifically, the rule amends the definition of a "specialty occupation" at 8 C.F.R.§ 214.2(h)(4)(ii) to clarify that there must be a direct relationship between the required degree field(s) and the duties of the position, and further revises 8 C.F.R. § 214.2(h)(4)(iii)(A) to require that a bachelor's or higher degree in a specific specialty, or its equivalent, be a minimum qualification for entry into the occupation (not that it only be "normally" or "commonly" required). *Id.*

- The DHS Rule also clarifies and provides a more extensive definition of the phrase "employer-employee relationship" in 8 C.F.R. § 4214.2(h)(4)(ii), based on a totality-of-factors

approach. DHS Rule at 63,930-32. The factors identified in the revised regulation now include "[w]hether the petitioner [*i.e.*, employer] supervises the beneficiary [*i.e.*, employee] and, if so, where such supervision takes place," and "[w]here the supervision is not at the petitioner's worksite, how the petitioner maintains such supervision." *Id.* at 63,931. Although DHS explained that these changes "will not represent a clear change in longstanding past practice," *id.* at 63,932, Plaintiffs claim that these changes may make it more difficult for employers petitioning for H-1B visas on behalf of workers employed at third-party job sites to establish the necessary employer-employee relationship. Compl. ¶ 97.

- Finally, the DHS Rule limits the petition approval validity period for H-1B workers employed at third-party job sites to a maximum of one year, in contrast to the usual validity period of up to three years. DHS Rule at 63,935.

DHS explained that "[t]he primary purpose of [the changes instituted by the rule] is to better ensure that each H-1B nonimmigrant worker … will be working for a qualified employer in a job that meets the statutory definition of a 'specialty occupation'" and that, "in strengthening the integrity of the H-1B program, these changes will aid the program in functioning more effectively and efficiently." DHS Rule at 63,918. DHS then found good cause to waive advance notice and comment pursuant to 5 U.S.C. § 553(b)(B) because of the "unprecedented national emergency" created by the COVID-19 pandemic.[3] *Id.* at 63,939. DHS explained that the "COVID-19 pandemic is an unprecedented 'economic cataclysm,'" constituting one of the "direst national emergencies the United States has faced in its history." *Id.* at 63,938. It determined that "DHS must respond to this emergency immediately" and concluded that "these regulatory changes are urgently needed to ensure that the Nation continues toward economic recovery without disadvantaging U.S. workers," which it termed a "weighty, systemic interest." *Id.* at 63,940 (internal quotation marks omitted). DHS accordingly decided to forgo advance notice and comment. *Id.* Rather, DHS is seeking post-

[3] DHS also identified an alternate basis for finding good cause to waive advance notice and comment, namely that the rule is of relatively limited scope. DHS Rule at 63,940. But it does not rely on that alternate basis in this litigation.

promulgation comments and has provided a 60-day delayed effective date to ensure that affected parties have adequate time to adjust to these regulatory changes. *Id.*

III. THE NEW DOL RULE

On October 8, 2020, DOL published the second IFR at issue in this case. The DOL Rule updates the computation of prevailing wage levels under the existing four-tier wage structure "to more effectively ensure that the employment of immigrant and nonimmigrant workers admitted or otherwise provided status through the [H-1B program] does not adversely affect the wages and job opportunities of U.S. workers." DOL Rule at 63,872. DOL first concluded that the prevailing wage levels were "not advancing the purposes of the INA's wage provisions" because, "under the existing wage levels, artificially low prevailing wages provide an opportunity for employers to hire and retain foreign workers at wages well below what their U.S. counterparts … make, creating an incentive—entirely at odds with the statutory scheme—to prefer foreign workers to U.S. workers, and causing downward pressure on the wages of the domestic workforce." *Id.* at 63,877. After considering the kinds of specialized education and experience required of foreign nationals working in the H-1B and related immigrant worker classifications and the link between the H-1B program and those other classifications, as well as available wage data and numerous studies, DOL set the Level I and Level IV wage levels at roughly the 45th and 95th percentiles of surveyed OES wages, respectively. *Id.* at 63,894. DOL then used the statutory formula to establish the Level II and Level III wage levels at roughly the 62nd and 78th percentiles, respectively. *Id.*

DOL also determined that "[t]he need to … ensure [that] the wage levels are set in a manner consistent with the INA is especially pressing now, given the elevated unemployment and economic dislocation for U.S. workers caused by the COVID-19 pandemic." DOL Rule at 63,877. DOL therefore found good cause under 5 U.S.C. §§ 553(b)(B) and 553(d)(3) to issue the rule without prior notice and comment and to make it immediately effective, because providing advance notice and comment would be both impractical and contrary to the public interest. First, DOL determined that it would be impracticable to comply with notice and comment procedures while also fulfilling its statutory mandate to protect U.S. workers due to the "exigent circumstance[]" of widespread

unemployment caused by the COVID-19 pandemic, which "threaten[s] immediate harm to the wages and job prospects of U.S. workers." *Id.* at 63,898. Second, DOL found that advance notice and comment would enable employers to evade the new wage levels by rushing to lock in the lower wage levels during the notice-and-comment period. *Id.* at 63,900. Accordingly, DOL issued the rule as an immediately effective IFR. However, contemporaneous with the issuance of the IFR, DOL provided a comment period, which will close on November 9, 2020.

STANDARD OF REVIEW

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Where claims call for judicial review under the Administrative Procedure Act ("APA"), "summary judgment is an appropriate mechanism for deciding the legal question" presented. *Ctr. for Envtl. Health v. McCarthy*, 192 F. Supp. 3d 1036, 1040 (N.D. Cal. 2016) (citation omitted). In general, the court must uphold an agency decision unless the decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "contrary to constitutional right," or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2). The Ninth Circuit has not definitively decided whether a de novo or an abuse of discretion standard of review applies to an agency's determination that good cause exists to forgo advance notice and comment or to make a rule immediately effective. *See United States v. Valverde*, 628 F.3d 1159, 1162 (9th Cir. 2010). However, consistent with the APA, the Court should review the "'agency's legal conclusion of good cause is de novo,'" but "defer to the agency's 'factual findings and expert judgments therefrom, unless such findings and judgments are arbitrary and capricious.'" *Bauer v. DeVos*, 325 F. Supp. 3d 74, 97 (D.D.C. 2018) (quoting *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 706 & n.3 (D.C. Cir. 2014)). Under either standard, however, the agencies' determinations pass muster here.

ARGUMENT

I. THE AGENCIES HAD GOOD CAUSE TO FORGO ADVANCE NOTICE AND COMMENT

An agency may forgo advance notice and comment "when the agency for good cause finds … that notice and public procedure thereon are impracticable, unnecessary, or contrary to public interest." 5 U.S.C. § 553(b)(B). An agency may make a rule immediately effective if it finds good cause to do so and explains that rationale in the rule. *Id.* § 553(d)(3). While the good cause exception should be narrowly construed, it also serves as "an important safety valve to be used where delay would do real harm." *United States v. Dean*, 604 F.3d 1275, 1279 (11th Cir. 2010); *see also Hawaii Helicopter Operators Ass'n v. F.A.A.*, 51 F.3d 212, 214 (9th Cir. 1995) ("We have observed that notice and comment procedures should be waived only when 'delay would do real harm.'") (quoting *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982)).

In the present case, both DOL and DHS found that advance notice and comment would be impracticable, and DOL further found that those procedures would be contrary to the public interest. DOL Rule at 63,898; DHS Rule at 63,938, 63,940. Advance notice and comment is impracticable when it would "interfere with the agency's ability to fulfill its statutory mandate." *Nat. Res. Def. Council, Inc. v. Evans*, 316 F.3d 904, 906 (9th Cir. 2003); *see also Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1485 (9th Cir. 1992) (noting that the good cause exception "authorizes departures from the APA's requirements only when compliance would interfere with the agency's ability to carry out its mission"). Advance notice and comment procedures are contrary to the public interest where the public interest "would be defeated by any requirement of advance notice." United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 31 (1973); *see also Mack Trucks, Inc. v. E.P.A.*, 682 F.3d 87, 95 (D.C. Cir. 2012) ("The question is not whether *dispensing* with notice and comment would be contrary to the public interest, but whether *providing* notice and comment would be contrary to the public interest.").

DHS determined that there was good cause to forgo advance notice and comment here because of the on-going economic impact of the COVID-19 pandemic. DHS Rule at 63,938-39.

DOL, in turn, found that advance notice and comment would be impracticable and contrary to the public interest in this instance because of (1) the ongoing impact of the COVID-19 pandemic on employment in the United States, and (2) the risk that prior announcement of the rule would lead employers to "rush the gates" to lock in existing, below-market wages. DOL Rule at 63,898. Both of DOL's justifications are independently sufficient to constitute good cause. *See id.* at 63,901. Furthermore, even if the Court concludes that a single one of DOL's justifications, "standing alone," would not constitute good cause, the Court must consider whether the "combined effect" of that justification with the other suffices. *Nat'l Women, Infants, & Children Grocers Ass'n v. Food & Nutrition Serv.*, 416 F. Supp. 2d 92, 107 (D.D.C. 2006); *see also Mid-Tex Elec. Co-op, Inc. v. FERC*, 822 F.2d 1123, 1132-33 (D.C. Cir. 1987) ("[W]hile none of the other factors FERC pressed would constitute 'good cause' standing alone, the combined effect of the cited considerations leads us to accept FERC's conclusion that delaying its interim rule would be contrary to the public interest.").

A. Advance Notice and Comment Rulemaking Is Impracticable Given the Ongoing Impact of the COVID-19 Pandemic on the U.S. Labor Market

Courts have long recognized that the threat of "economic harm and disruption" may justify forgoing advance notice and comment. *Am. Fed'n of Gov't Emps., AFL-CIO v. Block*, 655 F.2d 1153, 1157 (D.C. Cir. 1981) (finding good cause to forgo advance notice and comment where "the absence of specific and immediate guidance" after an injunction would have "creat[ed] confusion … and caused economic harm and disruption"); *see also Sorenson Commc'ns, Inc*, 755 F.3d at 707 ("[A] fiscal calamity could conceivably justify bypassing the notice-and-comment requirement.").

The COVID-19 pandemic has produced widespread economic disruption for millions of Americans. The onset of the pandemic caused a significant "shock to the labor market" that led to "widespread unemployment," which "threaten[s] immediate harm to the wages and job prospects of U.S. workers." DOL Rule at 63,898; *see also* DHS Rule at 63,938 (describing the pandemic as "one of the direst national emergencies the United States has faced in its history"). At its peak in April 2020, the U.S. unemployment rate soared to 14.7 percent. *See* Bureau of Labor Statistics, U.S. Dep't of Labor, Unemployment rate rises to record high 14.7 percent in April 2020 (May 13, 2020),

https://www.bls.gov/opub/ted/2020/unemployment-rate-rises-to-record-high-14-point-7-percent-in-april-2020.htm?view%EF%81%9Ffull, *cited in* DOL Rule at 63,900 n.233; *see also* DHS Rule at 63,938 ("In just one week, unemployment claims skyrocketed from 'a historically low number' to the most extreme unemployment ever recorded.").

While the labor market has begun to improve over the last few months, the pandemic—and its devastating impact on the economy—is ongoing and may worsen. *See* DOL Rule at 63,899 (noting that "hiring in the U.S. has increased, with continued hiring across all sectors of the economy anticipated," but that "unemployment remains significantly above the historically low levels seen prior to the emergence of COVID-19 and the resultant economic emergency"); *see also* DHS Rule at 63,940 (noting that "the COVID-19 unemployment crisis is projected to last a decade"). In light of this significant and continuing "economic cataclysm," DHS Rule at 63,938, DOL and DHS each reasonably found that there was good cause to forgo notice and comment, in order to swiftly carry out their mandates and better ensure that the economic interests of U.S. workers are adequately protected during the workers' return to active employment following "one of the most significant, mass lay-off events in U.S. history." DOL Rule at 63,900; *see id.* at 63,898-901; *see also* DHS Rule at 63,983-40.

As explained in its rule, DOL found that "serious fiscal harm would befall U.S. workers absent immediate action by the Department because the wage and employment risks … posed to workers by recent mass-layoffs are greatly compounded by the inappropriately low prevailing wage rates" for foreign workers. *See* DOL Rule at 63,898; *see also id.* (finding that the prior prevailing wage rates "pose[d] an immediate threat to the livelihoods of U.S. workers"). DOL reasonably concluded not only that raising the prevailing wage levels would be *helpful* to U.S. workers, but that failing to do so promptly would be actively *harmful*—thus providing good cause to forgo notice and comment. *See Nat'l Fed'n of Federal Emps. v. Devine*, 671 F.2d 607, 611 (D.C. Cir. 1982) (finding good cause to depart from notice and comment where "the agency would [otherwise] have been compelled to take action which was not only impracticable but also potentially harmful").

In making this determination, DOL cited evidence that inappropriately low prevailing wage rates could "allow[] employers to pay wages to foreign workers at a rate below the market rate for similarly employed U.S. workers."[4] DOL Rule at 63,899. DOL further found that the availability of these lower wages for H-1B workers could lead employers to hire foreign workers over U.S. workers, and, in turn, "impede U.S. workers' return to the workforce at income levels comparable to what they were making before the downturn."[5] *Id.* Similarly, DHS found that "regulatory changes are urgently needed to ensure that the Nation continues toward economic recovery without disadvantaging U.S. workers." DHS Rule at 63,940. In light of the need for quick action, DHS reasonably concluded that advance notice and comment would "threaten[] a 'weighty, systemic interest' that [the DHS Rule] protects: Ensuring the employment of H-1B workers is consistent with the statutory requirements for the program and thus is not disadvantaging U.S. workers." *Id.* at

[4] For example, the DOL Rule cites a study (at 63,882 n.119) that found that, in FY2017, 78% of approved H-1B applications for computer systems analysts in the Silicon Valley area were for Level 1 or Level 2 workers—and that the prevailing wage for those workers was far less than the wages paid to the average American in the same job market. Ron Hira & Bharath Gopalaswamy, Reforming US' High-Skilled Guestworker Program, Atlantic Council 9-11 (2019), https://www.atlanticcouncil.org/wp-content/uploads/2019/09/Reforming_US_High-Skilled_Guestworkers_Program.pdf. Other studies cited in the DOL Rule reach similar conclusions. *See generally* Norman Matloff, *On the Need for Reform of the H–1B Non-Immigrant Work Visa in Computer-Related Occupations*, 36 U. Mich. J.L. Reform 815 (2003), *cited in* DOL Rule at 63,882 n.119; *see id.* at 876-77 (describing results of a National Research Council study); *see also id.* at 877 (citing a study that found that "H-1B workers in jobs requiring lower levels of IT skill received lower wages, less senior job titles, smaller signing bonuses, and smaller pay and compensation increases than would be typical for the work they actually did"); John Miano, *Wages and Skill Levels for H-1B Computer Workers, 2005: Low Salaries for Low Skills*, Center for Immigration Studies (2007), https://cis.org/Report/Wages-and-Skill-Levels-H1B-Computer-Workers-2005 (finding that "[w]ages for H-1B workers averaged $12,000 below the median wage for U.S. workers in the same occupation and location"), *cited in* DOL Rule at 63,883 n.124.

[5] In support of that finding, DOL cited one study which "compared winning and losing firms in the FY2006 and FY2007 lotteries for H-1B visas" and found that H-1B workers "essentially crowd out" winning firms' employment of other workers. DOL Rule at 63,883-84 n.131 (citing Kirk Doran *et al.*, *The Effects of High-Skilled Immigration Policy on Firms: Evidence from Visa Lotteries*, Nat'l Bureau of Economic Research Working Paper No. 20668 (2016), https://gspp.berkeley.edu/assets/uploads/research/pdf/h1b.pdf). The researchers also found "evidence that extra H-1B visas lead to a decrease in median earnings per employee." Doran, *et al.*, at 32-33. Another study modeled the impact of computer scientists holding H-1B visas on the U.S. economy and found that "the influx of foreign high-skill workers will both crowd out and lower the wages of US high-skill workers." *See* John Bound *et al.*, *Understanding the Economic Impact of the H-1B Program on the U.S.*, Nat'l Bureau of Economic Research Working Paper Series (Feb. 2017), https://www.nber.org/system/files/working_papers/w23153/w23153.pdf, *cited in* DOL Rule at 63,884 n.133.

63,940 (quoting *Mack Trucks*, 682 F.3d at 94). Because of the dramatic impact of the COVID-19 crisis on the U.S. labor market and the need for immediate action to carry out their statutory mandates to protect U.S. workers**,** both agencies reasonably concluded that advance notice and comment would be impracticable in light of the harms caused by the ongoing COVID-19 pandemic and resulting economic crisis. *See Evans*, 316 F.3d at 906 (advance notice and comment is impracticable where it would "interfere with the agency's ability to fulfill its statutory mandate").

Plaintiffs contend that "an emergency that was apparent in March" cannot justify waiving notice and comment seven months later, in October. *See* Pls.' Mot. for Prelim. Inj. 6-8, ECF No. 31 ("Pls.' Mot."). Plaintiffs suggest that DOL and DHS should have begun rulemaking immediately after COVID-19 began to ravage the U.S. labor market, and that therefore any time that passed between March 2020 and promulgation of the rule amounts to "delay" by the agencies that undercuts their reasons for immediate issuance of the rules. *See id.* But this argument fails to take into account the complex and ongoing impact of the COVID-19 pandemic on the U.S. labor market. First, Plaintiffs' reasoning would mean that when an emergency upends the country, an agency may forgo advance notice and comment only in the initial stages of that emergency—regardless of how the emergency evolves over time. But that makes little sense when the country is grappling with an ongoing crisis. When the initial shock to the labor market began in March 2020, it was not immediately apparent how quickly the U.S. labor market would recover or what that recovery would look like. In other words, even if the agencies "knew about COVID-19's effects on unemployment beginning in late March," Pls.' Mot. at 8, they did not know what would happen over the following months. As the pandemic continued, however, it became clear to both DOL and DHS that continued unemployment resulting from the COVID-19 pandemic posed a significant risk to U.S. workers—particularly as workers began to cross over into more detrimental "long-term unemployment." DOL Rule at 63,900 (identifying October 2020 as a "critical moment" for mitigating against the effects of long-term unemployment due to COVID-19); *see also* DHS Rule at 63,939 (citing ongoing high unemployment caused by COVID-19). The pandemic's continued impact on U.S. workers required the agencies to act quickly to improve the integrity of the H-1B

program to address severe economic disruptions caused by COVID-19, which persist to this day. Thus, this situation differs significantly from the situations at issue in the cases cited by Plaintiffs (*see* Pls.' Mot. at 6-7), where an agency "'wait[ed] until the eve of a statutory, judicial, or administrative deadline'" to act, and then forgoes notice and comment because of the pending deadline. *Nat'l Venture Capital Ass'n v. Duke*, 291 F. Supp. 3d 5, 16 (D.D.C. 2017) (quoting *Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 581 (D.C. Cir. 1981)); *see also, e.g.*, *Air Transp. Ass'n of Am. v. Dep't of Transp.*, 900 F.2d 369, 379 (D.C. Cir. 1990) ("[I[nsofar as the FAA's own failure to act materially contributed to its perceived deadline pressure, the agency cannot now invoke the need for expeditious action as 'good cause' to avoid the obligations of section 553(b)"). The COVID-19 pandemic is not a "self-created 'emergency,'" but a complex and constantly changing crisis that requires swift agency action. *Cf. Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 202 F. Supp. 3d 20, 27 (D.D.C. 2016), *aff'd sub nom Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 857 F.3d 907 (D.C. Cir. 2017).

Plaintiffs also wrongly suggest that the economic threat has subsided because the unemployment rate has declined from its earlier heights. *See* Pls.' Mot. at 12-13. The fact that the overall unemployment rate has fallen from 14.7% to 7.9% does not erase the harms caused by the steep rise earlier in the year, nor the need for urgent action to prevent further harms. As the DOL and DHS Rules explain, such a dramatic spike in the unemployment rate can have lasting consequences, even as people return to work. Indeed, when DOL and DHS invoked the good-cause exception, they focused not only on the initial surge in unemployment, but also considered the amount of time needed for full recovery, including the future long-term impacts on workers. In particular, the DOL Rule focused on the fact that even though the labor market is starting to recover, workers remain "highly vulnerable to extreme vicissitudes in the labor market" and are in need of protection. DOL Rule at 63,900. DOL further explained that this is a critical moment to mitigate the potential consequences of long-term unemployment during a recession, known as "wage scarring." *See id.* at 63,899-900. As noted in the DOL Rule, "[e]xtensive academic research shows that mass lay-offs that occur during times of elevated unemployment have dramatic and persistent consequences for individuals' earnings for years following the lay-off event." DOL Rule at 63,899.

During an economic downturn, laid-off workers may be forced to accept employment at a lower wage, which can have long-term consequences.[6] As some unemployed workers return to work and others tip over into "long-term unemployment," DOL reasonably concluded that it was important to act swiftly to "protect[] the interests of, and preserv[e] job opportunities for American workers," consistent with its mission. *Id.* at 63,877. Similarly, the DHS Rule acknowledged that "[l]oss or prolonged lack of employment reduces or eliminates an unemployed person's income, and therefore has the tendency to reduce that person's demand for goods and services as a consumer." DHS Rule at 63,940. DHS further recognized that "[t]his reduced demand can cause further job losses among the producers that would otherwise supply the unemployed person's demands." *See id.* DHS thus reasonably concluded that "[e]ach effort to strengthen the United States labor market for U.S. workers during this emergency, however marginal in isolation, is necessary to accomplish the goal of facilitating an economic recovery in the aggregate" and therefore needed to be taken as soon as possible. *Id.*

Plaintiffs focus on DOL's statement that its actions to reform the prevailing wage calculations "should have been undertaken years ago," claiming that this statement somehow proves that the agency's decision to act now was pretextual. Plaintiffs also point out that DHS considered, as far back as 2017, the possibility of revising some of the same definitions amended by the DHS Rule. *See* Pls.' Mot. at 10-11. However, the fact that DOL and DHS considered implementing similar changes in the past does not mean that their decision to act now was pretextual, or that the agencies decided

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[6] One analysis of the impact of the Great Recession found that workers who were displaced in 2007-2009 and re-employed by early 2010 saw their inflation-adjusted weekly earnings drop by an average of 17.5%. *See* Ben Leubsdorf, *Six Ways the Recession Inflicted Scars on Millions of Unemployed Americans*, Wall St. J. (May 10, 2016), https://blogs.wsj.com/economics/2016/05/10/six-ways-the-recession-inflicted-scars-on-millions-of-unemployed-americans/, *cited in* DOL Rule at 63,899 n.230. These negative wage effects can last well beyond the recession that caused them. *See, e.g.*, Justin Barnette & Amanda Michaud, *Wage Scars and Human Capital Theory* at 1 (Oct. 2, 2017), https://ammichau.github.io/papers/JBAMWageScar.pdf (finding that laid-off workers see their wages "fall initially by an average of 15.4% and remain much lower than their non-separated counterparts more than 20 years later"), *cited in* DOL Rule at 63,900 n.231; *see also* Steve J. Davis & Till Von Wachter, *Recessions and the Cost of Job Loss*, Brookings Papers on Economic Activity (Fall 2011), https://www.brookings.edu/wp-content/uploads/2011/09/2011b_bpea_davis.pdf (finding that men who experience job displacement during a recession lose an average of 2.8 years of predisplacement earnings in certain circumstances), *cited in* DOL Rule at 63,899 n.229.

to delay promulgating these rules until an emergency occurred—rather, at most, it suggests that in the face of widespread economic risk to U.S. workers, the agencies chose to accelerate the promulgation of regulations previously under consideration that they believed would mitigate that risk. Put differently, both agencies determined that flaws in the H-1B system became particularly damaging (and therefore untenable) in light of the continuing economic crisis. An agency should not be prevented from taking necessary action to respond to an emergency simply because the agency previously suggested that such steps would be beneficial even in the absence of such an emergency.

Plaintiffs also contend that the agencies' reasoning fails to account for low unemployment rates among occupations that employ H-1B workers, relying on *National Association of Manufacturers v. U.S. Department of Homeland Security ("NAM")*, No. 20-cv-04887-JSW, --- F. Supp. 3d ---, 2020 WL 5847503 (N.D. Cal. Oct. 1, 2020), which enjoined Presidential Proclamation 10052.[7] Pls.' Mot. at 26-28. However, that case differs in important respects from this one. First, the plaintiffs in *NAM* challenged the President's authority to issue a Proclamation under the INA, not an agency's ability to waive notice and comment. *NAM*, 2020 WL 5847503, at *6-13 (addressing Presidential authority under 8 U.S.C. § 1182(f)). The legal issues in dispute were thus entirely different. This Court enjoined the Proclamation because it believed that the Proclamation exceeded the President's authority and improperly interfered with the existing statutory scheme. *Id.* at *10. This Court further stated that the Proclamation "disregard[ed] both economic reality and the preexisting statutory framework." *Id.* at *13. In this case, by contrast, neither DOL nor DHS has departed from the existing statutory framework—instead, both agencies are attempting to better align their policies with the statutory framework so that the H-1B program can achieve its intended purpose of "balanc[ing] the needs of American business and American labor." *Id.* at *10. Second, the *NAM* decision rested on the Court's view that foreign workers were "already prevented, by statute, from competing with jobs for United States citizens." *Id.* at *13. But the DOL Rule cited ample evidence that H-1B workers are in fact competing with U.S. workers. As discussed above, DOL cited evidence that, under the prior

[7] Presidential Proclamation 10052, *Suspension of Entry of Immigrants and Nonimmigrants Who May Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak*, 85 Fed. Reg. 38,263 (June 22, 2020).

prevailing wage levels, H-1B workers often received lower wages than U.S. workers (*see* page 11 n.4, *supra*) and that H-1B workers could crowd out U.S. workers and drive down wages in certain professions (*see* page 11 n.5, *supra*). Thus, DOL concluded, in the exercise of its expertise, that the computation of the prior wage levels was not sufficient to protect U.S. workers from the negative effects associated with underpaid H-1B workers. And, as the DHS Rule explained, the regulations at issue here implicate both new H-1B workers and those seeking to renew their authorization, a total of over half a million foreign workers in the United States. *See* DHS Rule at 63,939 (noting that as of September 2019, "the total H-1B authorized-to-work population was approximately 583,420"). Because these regulations apply to such a broad swath of H-1B workers, they "have the potential to impact the availability of job opportunities for similarly situated U.S. workers who may be competing for jobs with H-1B workers as well as their wages and working conditions." *Id.*

B. Providing Advance Notice and Comment for the DOL Rule Would Have Been Contrary to the Public Interest Because It Would Have Fostered Regulatory Evasion

The second reason that the Department of Labor gave for invoking the "good cause exception" to advance notice-and-comment rulemaking was the need to protect the public interest by preventing employers from evading the new wage requirements by filing for wage determinations before the IFR takes effect. *See* DOL Rule at 63,898.

Courts have recognized that preventing rule evasion can constitute good cause for forgoing advance notice-and-comment rulemaking pursuant to the public interest prong. *See Tenn. Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1146 (D.C. Cir. 1992) ("[C]ourts have allowed use of the good cause exception based on bare predictions of regulatory avoidance."); *see also Util. Solid Waste Activities Gp.*, 236 F.3d 749, 755 (D.C. Cir. 2001) (stating that this exception applies when the agency "needed to forego notice and comment in order to prevent the … rule from being evaded"). Plaintiffs argue that the Ninth Circuit has rejected this rationale, citing to *East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242 (9th Cir. 2020) ("*East Bay II*"). Not so. In *East Bay II*, the Ninth Circuit rejected the government's claim that it had good cause to forgo advance notice and comment for a rule narrowing asylum eligibility because advance publication of the rule would incentivize undocumented

immigrants to cross the border before the rule took effect. There was no good cause, the court held, because the government lacked sufficient support for its prediction that there would be a surge at the border during notice and comment. *Id.* at 1278. The court added, in dicta, that it is "likely often" the case that the government's announcement of a rule change will "precipitate activity by affected parties that would harm the public welfare," and expressed concern that allowing agencies to invoke the good cause exception in *all* such cases would allow the exception to swallow the rule. *Id.* The court did not, however, hold that preventing regulatory evasion is *never* grounds for invoking the good cause exception to notice and comment. In fact, in a prior case, the Ninth Circuit had acknowledged that "theoretically, an announcement of a proposed rule creates an incentive for those affected to act prior to a final administrative determination." *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 777 (9th Cir. 2018) ("*East Bay I*") (internal quotation marks omitted).

The Ninth Circuit's statements in both *East Bay* cases are consistent with holdings of other courts that have found that preventing rule evasion constitutes good cause to waive advance notice and comment. *See, e.g.*, *Mobil Oil Corp. v. Dep't of Energy*, 728 F.2d 1477, 1492 (Temp. Emer. Ct. App. 1983). In *Mobil Oil*, for example, the Temporary Emergency Court of Appeals upheld the Federal Energy Administration's invocation of the good cause exception for a rule equalizing oil prices during the 1970s energy crisis. *Id.* The court found that it was reasonable to assume that announcing the rule in advance would have caused companies to evade the regulation by entering long-term contracts under the existing system during the notice and comment period. *Id.*

Similarly, here, DOL found it reasonable to assume that announcing the DOL Rule in advance would have led employers to rush to lock in below-market wages under the prior prevailing wage standards. DOL Rule at 63,898. Furthermore, the consequences of such a rush to evade the new wage requirements would be especially detrimental to U.S. workers in light of the continuing economic effects of the COVID-19 pandemic. There is no reason to conclude that permitting DOL to invoke the good cause exception under the circumstances of this case—which include an ongoing pandemic—would permit the exception to swallow the rule.

Courts defer to an agency's predictive judgment that a notice and comment period would enable rule evasion so long as the prediction is reasonable. Good cause justifications that "rest[] on the regulator's prediction of the regulateds' reaction to a proposed rulemaking … necessarily involve deductions based on expert knowledge of the [a]gency." *Tenn. Gas*, 969 F.2d at 1145 (quoting *Mobil Oil*, 728 F.2d at 1492) (internal quotation marks omitted); *see also Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961) ("[A] forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency."). For this reason, such predictions are entitled to deference. *Tenn. Gas*, 969 F.2d at 1145; *N.A.A.C.P. v. F.C.C.*, 682 F.2d 993, 1001 (D.C. Cir. 1982) ("It is important … that greater discretion is given administrative bodies when their decisions are based upon judgmental or predictive conclusions."), *abrogated on other grounds by F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009). The appropriate inquiry for this Court is therefore whether DOL's prediction was reasonable in light of the bases on which it was founded. *Tenn. Gas*, 969 F.2d at 1145 ("[A]t a minimum, an agency must indicate the basis for its prediction so that the reviewing court may be in a position to determine whether it acted reasonably."); *see Mobil Oil*, 728 F.2d at 1492 (holding that a court should evaluate an agency's predictive judgment by considering whether the agency "explain[ed] the facts and policy concerns it relie[d] on and that, given these, a reasonable person could have made the judgment the agency did").

DOL's prediction that employers would rush to get their LCAs approved under the old wage calculations during the notice and comment period was well founded and reasonable. The regulations permit employers to file LCAs as early as six months before the intended start date of a position. 20 C.F.R. § 655.730(b). If DOL had undergone advance notice and comment for the IFR, any employer intending to hire or re-hire a foreign worker on one of the affected visas within the next six months could have filed for a prevailing wage determination under the old, lower wage rates during the comment period, a determination that then might have been valid for up to three years. *Id.* § 655.750(a). The notice and comment procedure would therefore have set back the implementation of the IFR's protections not only by the length of the notice and comment period, but by many months (and even years) *beyond* the close of notice and comment. Especially in light of the emergent

circumstances created by the COVID-19 pandemic, such a delay could have "result[ed] in serious harm" to the public interest. *Jifry v. F.A.A.*, 370 F.3d 1174, 1179 (D.C. Cir. 2004); *see* DOL Rule at 63,900 ("Any delay in taking this action would mean … that [the Department of Labor's] application of the existing, faulty wage levels during the recovery would be an active source of harm exacerbating the long term consequences of the public health emergency for workers' livelihoods.").

Plaintiffs maintain that the Ninth Circuit has rejected agency predictions of the behavior of regulated entities as a basis for good cause determinations, Pls.' Mot. at 16-17, but the precedent is more nuanced. In *East Bay I*, to which Plaintiffs cite, the Ninth Circuit held that the government had insufficiently supported its prediction that notice and comment would lead potential immigrants to rush the border to avoid implementation of the rule's asylum eligibility limitations because the rule, in itself, did not "change eligibility for asylum for any alien seeking to enter the United States." 932 F.3d at 777. Rather, no change could be "effected until the Rule [wa]s combined with a presidential proclamation." *Id.* The government also admitted that it could not determine what decisions potential immigrants would make on the basis of the rule's publication. *Id.* Given these facts, the court found the inference that immigrants would surge across the border as a result of the rule alone "too difficult to credit." *Id.* In summarizing its decision, the court stated that the government's reasoning was "*only* speculative at th[at] juncture." *Id.* at 778 (emphasis added). When, in *East Bay II*, the government attempted to justify its prediction with a news article discussing attempts to evade a separate immigration policy, the Ninth Circuit held that the article was insufficient support for the prediction because the article did not relate to asylum requirements whatsoever. *East Bay II*, 950 F.3d at 1278.

Contrary to Plaintiffs' argument, the *East Bay* cases do not stand for the proposition that an agency may not forgo advance notice and comment to prevent rule evasion without hard evidence that such rule evasion would occur. Instead, these cases indicate, as many other courts have before them, that an agency's predictive judgment must be reasoned rather than purely speculative. *See, e.g.*, *Tenn. Gas*, 969 F.2d at 1145; *Mobil Oil*, 728 F.2d at 1492. DOL's judgment satisfies this requirement. Here, in contrast to the *East Bay* cases, DOL's rule *itself* would change how the affected parties are

regulated. In other words, the chain of inferences that the Ninth Circuit rejected in those cases is not present here. Additionally, DOL's expertise is directly relevant to its prediction that employers would rush to lock in lower wages during notice and comment. In the *East Bay* cases, by contrast, the agencies admitted that they could not determine how their policy changes would motivate potential undocumented immigrants, who are affected by a wide variety of personal and political factors, unlike employers who are motivated primarily by economic factors, with which DOL has extensive experience.

Plaintiffs also contend that that DOL's "rushing the gates" justification for publishing its rule without advance notice and comment is factually inaccurate because a senior, non-DOL administrative official previewed the rule change in June. Pls.' Mot. at 15. There is a significant difference, however, between a non-DOL official announcing the administration's hope that DOL will make certain changes to its rules by an unspecified date and the agency itself proposing for notice and comment a rule with a specific effective date. Given the narrow timeframe in which employers may submit LCAs, it would not make sense for employers wishing to lock in the old wage rate to rush to submit LCAs absent an effective date, which the June statement did not provide. A notice and comment period, on the other hand, would have provided the timeframe necessary for employers to rush to lock in the lower wages. This reasonable predictive judgment is entitled to deference.

Finally, Plaintiffs argue that any "rushing the gates" behavior would have been limited in scope, because employers may not file an LCA more than six months in advance of the beginning date of intended employment. Pls.' Mot. at 17-18. This application timeframe is accurate, but Plaintiffs fail to acknowledge that the prevailing wage determinations issued for LCAs can last for as long as three-and-a-half years after they are issued. *See* 20 C.F.R. § 655.750(a). If DOL had provided a notice and comment period, employers could have filed several months' worth of LCAs within that period and even moved up anticipated hiring timelines, locking in damaging, lower wage levels for years to come. DOL's invocation of the good cause exception to avoid regulatory evasion by employers was therefore justified.

CONCLUSION

For the foregoing reasons, Defendants' cross-motion for partial summary judgment on Counts I and II of the Complaint should be granted and Plaintiffs' motion for partial summary judgment should be denied.[8]

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Respectfully submitted,

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[8] In the event that the Court rules against Defendants, DOL notes that Plaintiffs have not sought re-issuance of any prevailing wage determinations. DOL advises that such a task, should it be contemplated by the Court, could take several weeks.