UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Purdue University 610 Purdue Mall, West Lafayette, IN 47907 University of Michigan 500 S State St, Ann Arbor, MI 48109 University of Denver 2199 S. University Blvd. Denver, CO 80208 Dentists for America, LLC 8 The Green #11433 Dover, DE 19901 Physicians for American Healthcare Access P.O. Box 1895 Dover, DE 19903; United Methodist Homes and Services 1415 West Foster Avenue Chicago, Illinois 60640; Hodges Bonded Warehouse, Inc. 1065 N. Eastern Blvd. Montgomery, AL 36117 Chapman University 1 University Dr, Orange, CA 92866 Bard College 30 Campus Rd, Annandale-On-Hudson, NY 12504 International Institute of New England 2 Boylston Street, 3rd Floor Boston, MA 02116 Information Technology Industry Council 700 K St NW, Suite 600	Civil Action No.

AILA Doc. No. 20101906. (Posted 10/19/20)

Washington, D.C. 20001, USA Arizona State University PO Box 871004 Tempe AZ 85287-1004 Scripps College 1030 Columbia Ave. Claremont, CA 91711 Marana Health Center 13395 N. Marana Main St. Marana, AZ 85653 Northern Arizona University 1899 S. San Francisco St. Flagstaff, AZ 86011 Study Mississippi 14000 Hwy 82 West MVSU 5209 Itta Bena, MS 38941 Indiana University 301 University Blvd. Indianapolis, IN 46202 Plaintiffs, v. Eugene Scalia, Secretary of Labor U.S. Department of Labor Office of the Solicitor 200 Constitution Avenue, N.W. Room N-2700 Washington, D.C. 20210 United States Department of Labor 200 Constitution Ave NW Washington, DC 20210 Defendants.	

COMPLAINT

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American Immigration Council, "*Wages and High-Skilled Immigration: How the Government Calculates Prevailing Wages and Why It Matters*" (December 2017) ---------- 36
David J. Bier, *DOL's H-1B Wage Rule Massively Understates Wage Increases by up to 26 Percent,* CATO Institute (Oct. 9, 2020) ---------- 37
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I. INTRODUCTION

1. On October 6, 2020, Defendants unnecessarily and without regard to the disastrous consequences to the public, posted for public inspection an Interim Final Rule ("IFR") that fundamentally changed the wages that employers must pay foreign workers to sponsor certain categories of foreign nationals for temporary employment and lawful permanent residence in the United States. *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States*, (October 6, 2020) (Public Inspection Copy).

2. DOL released this as an IFR, that was made effective less than forty-eight hours later on October 8, 2020, when OIRA waived review as to the cost-benefit analysis of the rule, (1) without following the legal requirement for advance notice to the public, (2) without first providing an opportunity for the public to comment, (3) without complying with the obligation for the agency to consider and then respond to comment before adopting new

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legislative rules, and (4) only allowing for a thirty-day comment period after the rule was made effective. *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States*, 85 Fed. Reg. 63872 (October 8, 2020).

3. The procedural manner of legislative rulemaking of such magnitude is anything but normal; it may be unprecedented in its haste, and, at the very least, violates to procedural requirements of the Administrative Procedure Act ("APA").
4. The Defendants were single-minded in their rush to publish the IFE, without regard to the costs on the economy generally, and specifically the increased costs to employers dependent on foreign national and U.S. labor.
5. In a video announcement, Department of Labor Secretary Scalia said: "The U.S. Department of Labor is strengthening wage protections, addressing abuses in these visa programs, and ensuring American workers are not undercut by cheaper foreign labor." *See*, https://twitter.com/SecGeneScalia/status/1313623340276486144. He further stated, "[t]hese changes will strengthen our foreign worker programs and secure American workers' opportunities for stable, good-paying jobs." *Id.*
6. Defendants also claimed, without supporting evidence, that, the IFR will improve the accuracy of prevailing wages paid to foreign workers by bringing them in line with the wages paid to similarly employed U.S. workers. They alleged that this will ensure the Department more effectively protects the job opportunities and wages of American workers by removing the economic incentive to hire foreign workers on a permanent or temporary basis in the U.S over American workers. *See*, U.S. Department of Labor Press Release on Interim Final Rule, https://www.dol.gov/newsroom/releases/eta/eta2020100

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7. The IFR was made effective immediately and was unlawfully and intentionally meant to upset the U.S. labor market and disrupt the way businesses operate.
8. Plaintiffs represent a wide cross-section of academic institutions, businesses, organizations, and trade associations that have and will continue to suffer irreparable harm due to the unlawful process and substantive changes under the IFR,
9. The Defendants lacked good cause to waive the requirement of notice and comment and publishing this rule as an IFR. Even if good cause existed, which it does not, the substantive changes made remain based on faulty, undocumented, and irrational economic assumptions that do not account for the damage to Plaintiffs.
10. Under the IFR, plaintiffs and similarly situated employers now must pay dramatically higher wages for foreign national employees as compared to similarly situated Americans; in some case the required wages increased 50% overnight.
11. Had the rule been subject to notice and comment, the Defendants could have considered the significant reliance interests and harms at stake for Plaintiffs. They have routinely done so in the past and there is no reason why this time is different. The IFR is procedurally defective, contrary to law, and arbitrary and capricious under APA.
12. For these and other reasons, the IFR is unlawful and should be set aside.

II. JURISDICTION AND VENUE

13. This Court has subject matter jurisdiction over Plaintiffs' claims pursuant to 28 U.S.C. § 1331 (Federal Question Jurisdiction). This Court has authority to grant relief under the Declaratory Judgment Act (28 U.S.C. § 2201) and the Administrative Procedure Act, 5 U.S.C. § 702.

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14. This Court can also hold unlawful and set aside agency action that is contrary to law, an abuse of discretion, or arbitrary and capricious. 5 U.S.C. § 555(b), 5 U.S.C. § 706.
15. Venue in this judicial district is proper under 28 U.S.C. § 1391(e) because this is a civil action in which Defendants are federal officers and agencies of the United States, and a substantial part of the events or omissions giving rise to the claims occurred in this District.

III. THE PARTIES

16. Plaintiff **Purdue University** ("Purdue") is an Indiana public research university with its principal place of business at 610 Purdue Mall, West Lafayette, Indiana 47907. Purdue is classified by the Carnegie Classification of Institutions of Higher Education ("Carnegie") as a "Research 1 (R1) Doctoral University" for "very high research activity" and offers more than 200 majors for undergraduates, over 69 masters and doctoral programs, and professional degrees in pharmacy, nursing and veterinary medicine. Purdue employs both domestic and international faculty. All the faculty, regardless of home country, are highly skilled, highly educated and much sought-after leaders within their fields; and the wages Purdue pays are already as high as is feasible. Purdue's research programs are also staffed by more than 500 postdoctoral research scholars across 80 departments; and without the ability to hire these postdoctoral scholars, many of the university's research endeavors would not be viable. If Purdue is unable to hire international faculty and/or postdoctoral scholars due to wage increases under the IFR, the university's foundational mission will be adversely impacted across the board: impacting Purdue's ability to enroll students, properly staff its degree programs, and ensure that its students have a quality learning

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experience; impacting the university's efforts toward research and discovery, which encompasses both the institution's ability to advance knowledge and drive innovation for the betterment of the nation and world, as well as ensuring that student participation in the research and innovation experience; and impacting the university's contributions to growing the U.S. economy, advancing industrial opportunities, and supplying a highly competent workforce to the nation's employers. Additionally, the IFR's negative impact will extend beyond that of the university's H-1B faculty, staff, and postdoctoral scholars because the wage increases will necessitate increases to all comparable workers and the cumulative effect of the resulting compensation adjustments will pose an impracticable financial burden on universities, like Purdue, that prioritize the affordability and accessibility of a college degree.

1. Plaintiff **University of Michigan** ("Michigan") The University of Michigan was founded in 1817 and consists of three campuses in Ann Arbor, Dearborn and Flint as well as Michigan Medicine, a premier medical center, consisting of the Michigan Medical School, the UM Health System, Michigan Health Corporation, and one of the nation's largest biomedical research communities. The University of Michigan's main campus in Ann Arbor has grown to include 19 schools and colleges, covering the liberal arts and sciences as well as most professions. The fall 2019 enrollment of undergraduate, graduate and professional students in Ann Arbor was 48,090. (Total enrollment at all campuses exceeds 64,000 students.) According to the National Science Foundation, the University of Michigan is number one in research volume among U.S. public research universities, with more than $1.62 billion in research expenditures. Michigan Medicine has been ranked the number one hospital and number one children's hospital in Michigan. In 2019,

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Michigan Medicine was nationally ranked in 14 adult specialties and 10 children's specialties by U.S. News and World Report. In 2018, Michigan Medicine served more than 2.8 million patients. The University of Michigan is among the largest employers in Michigan, supporting over 52,000 regular faculty and staff employees, including teaching and research faculty in many scientific disciplines, postdoctoral research fellows, technical experts, research support personnel as well as physicians (including medical residents and fellows), nurses and other healthcare workers. Based on the U.S. Department of Labor data, the University of Michigan is among the largest academic H-1B petitioners and green card filers in the country; the University of Michigan files in excess of 400 H-1B petitions each year and employs more than 750 employees in H-1B status. As a result of the IFR, the reported wage statistics that serve as the basis of the prevailing wage calculations have been truncated. Several occupations for which data was previously reported are now assigned the default prevailing wage rate of $208,000 per year. The prevailing wage for an Engineering Teacher, Postsecondary, is now set at this arbitrary wage level. For occupations for which specific wage data is made available, the annual rates are similarly problematic and out of line with the true prevailing wage for the geographic area. As stated above, the University of Michigan employs individuals in a wide variety of professional disciplines. Many of the employees for whom the University of Michigan pursues employment-based immigration sponsorship hold research, teaching and clinical positions. Below are two examples of the impact of the U.S. Department of Labor's Interim Final Rule (IFR).

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New Research Faculty in Civil Engineering	
Civil Engineers, R&D (7/1/20 - 10/7/20)	**Civil Engineers, R&D (10/8/20 - 6/31/21)**
Area Title: Ann Arbor, MI	**Area Title:** Ann Arbor, MI
OES/SOC Code:17-2053	**OES/SOC Code:**17-2053
OES/SOC Title: Civil Engineers, R&D	**OES/SOC Title:** Civil Engineers, R&D
Level 1 Wage:$15.20 hour - $31,616 year	**Level 1 Wage:**$22.34 hour - $46,467 year
Level 2 Wage:$24.54 hour - $51,043 year	**Level 2 Wage:**$49.25 hour - $102,440 year
Level 3 Wage:$33.89 hour - $70,491 year	**Level 3 Wage:**$76.15 hour - $158,392 year
Level 4 Wage:$43.23 hour - $89,918 year	**Level 4 Wage:**$103.06 hour - $214,365 year
Mean Wage (H-2B):$33.89 hour - $70,491 year	**Mean Wage (H-2B):**$33.89 hour - $70,491 year

New Postdoc in Biochemistry/Biophysics	
Biochemists and Biophysicists (7/1/20 - 10/7/20)	**Biochemists and Biophysicists (10/8/20 - 6/31/21)**
Area Title: Ann Arbor, MI	**Area Title:** Ann Arbor, MI
OES/SOC Code:19-1021	**OES/SOC Code:**19-1021
OES/SOC Title: Biochemists and Biophysicists	**OES/SOC Title:** Biochemists and Biophysicists
Level 1 Wage:$19.60 hour - $40,768 year	**Level 1 Wage:**$27.58 hour - $57,366 year

Level 2 Wage:$24.68 hour - $51,334 year	**Level 2 Wage:**$36.93 hour - $76,814 year
Level 3 Wage:$29.75 hour - $61,880 year	**Level 3 Wage:**$46.29 hour - $96,283 year
Level 4 Wage:$34.83 hour - $72,446 year	**Level 4 Wage:**$55.64 hour - $115,731 year
Mean Wage (H-2B):$29.75 hour - $61,880 year	**Mean Wage (H-2B):**$29.75 hour - $61,880 year

Civil Engineers (R&D): generally, research faculty in engineering fields will be assessed a Level 3 prevailing wage. The wage increase for this occupation is illustrative of similar engineering occupations. Biochemists and Biophysicists: per the U.S. Department of Labor, this is one of the most commonly requested occupational classifications in higher education for purposes of prevailing wage determination requests. It is also frequently used at the University of Michigan. The Level 1 wages are higher than entry level postdoctoral research fellow wages at the University of Michigan. Even if the required wage for each employee is increased by $2,500 on a yearly basis, the total increase in annual salaries (excluding benefits) would conservatively be $1,000,000. It is likely that the budgetary impact would be significantly larger, both in direct wage obligations to affected international employees as well as in indirect wage pressure. Given current budgetary constraints occasioned by the pandemic, new H1B salary levels would be unsustainable. The University of Michigan also enrolls a large number of international students. The university's main campus enrolled over 8,000 international students in F-1 and J-1 status, including the relevant post-completion optional practical training and academic training. A significant portion of these students will seek to enter the US job

market on a temporary basis beyond their allotted training period. This IFR will negatively impact their ability to find gainful employment in often highly-specialized fields. As a result, this IFR jeopardizes the University of Michigan's intellectual mission and inserts uncertainty into the already complicated immigration process. In situations where the required wage will be too high to bear for an individual unit, this IFR will also negatively impact our ability to retain key personnel and, thus, jeopardizes the livelihoods of affected faculty and staff. The inability to retain key personnel, including research, clinical practitioners and teaching personnel, will also impact Michigan Medicine in its mission to stay on the forefront of biomedical research during a pandemic and to care for and treat those afflicted.

17. Plaintiff **University of Denver** ("DU") is a not-for-profit Colorado private research university with its principal place of business at 2199 S University Blvd, Denver, CO 80208. Each year, DU's faculty members bring in millions of dollars to conduct research for federal, state and local governments, as well as a variety of corporations and non-governmental organizations. This funding is spread through fields ranging from psychology, social work and the law, to engineering, biology and mathematics, ensuring the university's faculty and student researchers have all the tools they need. Involvement in scholarly research gives the university's students the opportunity to gain valuable experience and make new discoveries in our labs and communities; and DU's relationships and resources allow them to provide their student and faculty researchers with access to funding and laboratories that make innovation possible. Combining those relationships and resources with DU's campus-wide dedication to discovery promotes innovative research that goes beyond traditional boundaries. The university's

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involvement ranges from promoting peace and understanding internationally to creating long-lasting bonds through art, as well as engagement in social entrepreneurship and funding and outreach programs that help identify and solve the problems of the homeless, minority groups and nations in need of aid.

18. Plaintiff **Dentists for America, LLC** is a Delaware-based, non-profit membership organization. Dentists for America is comprised of international dentists primarily from India who have received their education and training in the United States and who advocate for better, fairer immigration laws and policies affecting their members and the broader international dental community in the United States. International dentists are foreign-trained dentists who have been educated abroad and then enter the US for a rigorous additional two to three years of education in a DMD/DDS program. Only 32 universities in the country offer such programs, slots are very limited, and the entry process is extremely competitive. International dentists typically work in rural, underserved areas where most American dentists are hesitant to work, there are already severe shortages of dentists, and payment of higher H-1B salaries – a singular $208,000 wage, regardless of location, experience, or specialization – in conjunction with the IFR are not simply possible. In addition, a large number of international dentists work in universities across the United States, actively teaching and training dental students. If unable to hire international dentists due to the IFR's wage increases, these university will not have the instructors and professors they need to train the U.S.-born dentists who are needed in the workforce.

19. Plaintiff **Physicians for American Healthcare Access** is ("PAHA") is a non-stock, non-profit corporation organized under the corporate law of the State of Missouri. PAHA's

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membership is comprised of licensed U.S. physicians, fellows, residents, and students. PAHA's mission is to improve access to healthcare for all Americans and to organize all like-minded physicians in the United States to develop and execute the plans in collaboration with lawmakers, community and healthcare organizations to promote better health care access to all. The goals of the organization are to increase awareness among policymakers about health care in underserved communities and thereby achieve better health care access for all Americans.

20. Plaintiff **United Methodist Homes and Service** ("UMH&S") is an Illinois 501(c)(3) senior care not-for-profit corporation with its principal place of business at 1415 West Foster Avenue, Chicago, Illinois 60640. UMH&S operates several rehabilitation and senior care facilities, as well as memory care and assisted living facilities, and participates in joint ventures with other non-profit senior care organizations within Illinois and beyond. UMH&S' nursing staff comprises approximately 25% of their workforce of approximately 300 employees and is vital in providing quality care to UMH&S' patients. The cost of the nursing care provided to UMH&S' patients is generally reimbursed to them by Medicare, Medicaid, and private insurance systems, and UMH&S depends on donations, events, and development work to meet their expenses. For approximately fifteen years, Plaintiff United Methodist Homes and Service has regularly filed immigrant petitions for registered nurses, most of whom have emigrated from the Philippines. UMH&S' senior nurse managers and administrators, including their Vice President for Nursing, are immigrants. A 25% increase in the cost of nursing care will require UMH&S to permanently stop hiring and employing foreign nurses, which will frustrate, if not permanently impair, their core mission to provide rehabilitation and

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health care at senior facilities to UMH&S vulnerable population seeking quality health care, who cannot receive health care elsewhere.

21. Plaintiff **Hodges Bonded Warehouse, Inc.** ("Hodges Bonded Warehouse" or "Hodges") is an Alabama warehousing, logistics, and transportation services corporation with its principal place of business at 125 6th Street, Montgomery, Alabama 36104. Hodges Bonded Warehouse has 108 permanent employees, most of whom are drivers, forklift and heavy equipment operators, dispatchers, and logistics specialists. At times they may employ over 15 temporary employees from local agencies. Presently, many of Hodges' clients are parts suppliers to Original Equipment Manufacturers ("OEMs") in the Southeast or to other suppliers who supply OEMs. Hodges Bonded Warehouse partners with Auburn University at Montgomery ("AUM") to cultivate talent in data analysis, information systems management, and supply chain management and to create data and logistics management techniques using commonly accessible software programs. Hodges has invested nearly $300,000 in this effort to modernize their systems, which includes training and software for the use of Xiaobei Cao ("Ms. Cao"), who is a citizen of China working to complete her Master of Science Degree in Information Management Systems at AUM and interning with Hodges on an H-1B visa. Hodges built their modernization effort around Ms. Cao, the prospect of being able to keep her employed at Hodges Bonded Warehouse, and the understanding that they would have to offer an approximate 15% salary increase in order to meet the prevailing wage requirement for the H-1B program. However, Hodges is financially unable to budget for an increase Ms. Cao's salary of 70% or larger under the IFR and will thus be unable to continue employing Ms. Cao. Without Ms. Cao, Hodges' modernization efforts will come to a grinding halt; they

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will suffer the loss of most of the value of the approximate $300,000 they have invested so far; it will likely take at least one year to recover financially and in terms of training a replacement; they will not be able to roll out their existing prototype system on their anticipated schedule, which may result in loss of clientele and business, lay-offs of existing drivers and warehouse personnel, loss of reputation and good will with the company's existing clients.

22. Plaintiff **Chapman University** ("Chapman") is a California mid-size private university with its principal place of business at One University Drive, Orange, California 92866. Chapman is classified by Carnegie as a "Research 2 – high research activity" institution and offers personalized education to more than 9,000 undergraduate and graduate students. Chapman's institutional mission of global citizenry requires their students have access to global scholars and scholars who work in the area of diversity. For example, Chapman is in the process of hiring an H-1B scholar from the United Kingdom whose work is instrumental in understanding the lives, experiences, and cultural productions (social, economic, and political) of the African Diaspora generally and Britain, specifically providing a global context for race relations. This type of scholar is not readily found without the United States and is vital to the university's teaching in diversity and student development consistent with the university's mission. The changes to the wage structure imposed by the IFR will create a substantial financial hardship by raising wages at a time when higher education has already faced great economic challenges due to the impact of COVID-19. Following COVID-19 related travel restrictions and delays, these wage increase will negatively impact the university's ability

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to recruit international scholars and to prepare their students to contribute on a global level to solving the most complex issues facing the United States and the world.

23. Plaintiff **Bard College** ("Bard") is a New York private liberal arts college with its principal place of business at 30 Campus Road, Annandale-On-Hudson, New York 12504. Bard enrolls approximately 1,900 undergraduate students at its Annandale campus, and more than 600 graduate students' study in Bard programs, plus nearly 1,200 students in Bard's early colleges and 2,500 students at Bard's global affiliates.

24. Plaintiff **International Institute of New England** ("IINE") is a non-profit organization with its principal place of business at 2 Boylston Street, 3rd Floor Boston, Massachusetts 02116. IINE also has affiliate branches in Lowell, Massachusetts and Manchester, New Hampshire. IINE's community-based sites feature a core of common services essential to their mission, which is to create opportunities for refugees and immigrants to succeed through resettlement, education, career advancement and pathways to citizenship. IINE employs 50 full-time and 20 part-time employees to support its refugee resettlement, case management, health services navigation, employment, education and literacy, and citizenship programming; and IINE's leadership team carries wide-ranging expertise in education, social work, workforce development, program design, and community advocacy. Since 1980, IINE have placed more than 15,000 refugees in New England communities; and presently, IINE's Central American family reunification program is the largest in the Greater Boston area. In 2019, more than 2,500 immigrants and refugees took part in IINE's family reunification, education, skills training, job placement, and legal services programs offered in Boston and Lowell, Massachusetts, and Manchester, New Hampshire. Furthermore, IINE's work is critical to

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the growth the region's economy. Approximately 28% of Boston's population is foreign-born, and both New Hampshire and Massachusetts are in desperate need of people to work in a broad variety of industries. Each year IINE places hundreds of well-trained and ambitious immigrants in jobs in companies in Massachusetts and New Hampshire, which helps to grow the region's and the U.S. economy. Currently, IINE derives 48% of its funding from public sources and 52% from private sources, including fundraising and modest fees charged for some education and training programming as well as legal, interpretation, and translation services. Just three years ago, nearly 80% of IINE's funding came from governmental sources. The organization's ability to shift to a model in which they seek both private and public support for our work has made IINE a nimbler organization that is better able to offer a broad range of services to new Americans.

25. Plaintiff **Information Technology Industry Council** ("ITI") is a Washington, D.C.-based trade association that represents an array of vanguard companies, including cybersecurity, digital services, hardware, internet, semiconductor, software, and network equipment companies that are located across the United States and have offices around the globe. Members of ITI are at the forefront of research and development investment in the United States and, subsequently, drive domestic economic growth and job creation. To achieve these objectives, ITI members rely on U.S. citizen, lawful permanent resident, and temporary non-immigrant employees educated and trained in specialized fields, such as science, technology, engineering, and mathematics, as well as the ability to recruit these high-skilled professionals in the United States and globally. As an advocacy and policy organization for the world's leading innovation companies, ITI navigates the relationship between policymakers, companies, and non-governmental organizations,

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providing creative solutions that advance the development and use of technology in the United States and around the world. For over 100 years, ITI has advocated on behalf of its ITI member companies before the Executive branch, Congress, and the courts to advance high-skilled immigration policies that supplement and augment the U.S. workforce, protect the integrity of the employment-based, high-skilled immigration system, and enhance the education and training of domestic talent. Given its scope, the IFR has an immediate, negative impact on the technology sector, including ITI member companies that sponsor employees for employment-based immigrant visas and utilize the H-1B visa program. Numerous ITI members face a current labor shortage of high-skilled, available candidates to fill countless job vacancies. When these businesses are unable to fill an open position with a talented worker from the United States, they recruit potential employees from abroad who enter the country on an employment-based or H-1B visa. Foreign professionals on immigrant and nonimmigrant visas work alongside U.S. workers to drive innovation, economic productivity, and U.S. job growth across the technology sector. Often, foreign national individuals contribute significantly to research and development efforts that yield in the creation of new patents, business segments, and future jobs. However, due to the IFR, members of ITI will not have the capacity to hire workers from abroad and many jobs in the United States will go unfilled, which ultimately will stifle growth and the employment of U.S. workers. Moreover, due to the truncated rulemaking process, ITI was unable to engage in the rule-making process and submit comments on the IFR on behalf of the membership before the rule went into effect and, consequently, was unable to effectively fulfill its mission to support the organization's members. Additionally, as a result of the IFR, ITI has been forced to

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materially shift its resource base to respond to and attempt to mitigate the rule's immediate negative effects, diverting resources from ITI's carefully planned initiatives and programs, which may have included, given the opportunity, an initiative to educate and participate on any rule-making to help our members and their employees build a better future.

26. Plaintiff **Arizona State University** ("ASU") is an Arizona public research university with its principal place of business at 1151 S Forest Ave, Tempe, AZ 85281. ASU is classified by Carnegie as an R1 Doctoral University for its extensive research activity and offers more than 350 undergraduate degree programs and majors and more than 450 highly ranked graduate degree and certificate programs to nearly 120,000 undergraduate and graduate students. ASU is ranked number 1 in the United States for innovation by U.S. News & World Report (2021) and fifth in the world for global impact in research, outreach, and stewardship, for advancing the United Nations' Sustainable Development Goals, including global impact on poverty and hunger, developing solutions for clean water and energy and promoting gender equality. ASU's nationally ranked programs have positioned the university as a "top-tier" recruiting and hiring institution by more than 50 of the country's top corporations, according to professional recruiters and rankings services around the world. By redefining the 21st-century university as a knowledge enterprise, ASU has inspired its faculty and students to lead discovery, most notably space exploration, electron microscopy, sustainability and human origins. The university's interdisciplinary, solutions-focused approach to research, entrepreneurship and economic development is centered on discovery that matters and the fusion of intellectual disciplines in order to solve complex problems. One of the top-performing

U.S. universities for inventions and licensing deals, ASU has been the launching pad for more than 150 startup companies, generating $575 million in gross state product and $52 million in state and local tax revenues from 2016 through 2019. Since 2003, ASU research has resulted in more than 3,800 invention disclosures, more than 845 U.S. issued patents, and startups based on ASU intellectual property have generated more than $833 million in investment capital.

27. Plaintiff **Scripps College** ("Scripps") is a private liberal arts women's college with its principal place of business at 1030 N Columbia Ave, Claremont, CA 91711. Scripps offers more than 65-degree programs to more than 1,000 undergraduate and 20 post-baccalaureate students. Scripps confers a higher percentage of Science, Technology, Engineering, and Mathematics ("STEM") degrees than any other women's college in the nation and is ranked third among top liberal arts colleges in the percentage of women graduates who are STEM majors. Scripps is also ranked in the top 25 among U.S. baccalaureate institutions credited with producing the greatest number of Fulbright Scholars.

28. Plaintiff **Marana Health Care** ("Marana") MHC Healthcare is the oldest community health center in the Tucson area, providing continuous health care since its incorporation in 1957. The center began in 1957 providing medical care to migratory farm workers and other locals in Marana. By 1964, Marana had established a Sliding Fee Scale, making it possible to deliver healthcare to a wider population, especially low income and medically underserved patients. In 1972, Marana was declared a Critical Health Manpower Shortage area and Marana signed an agreement with the National Health Services Corps to provide healthcare workers for the entire community. Just three years later in 1975, the

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University of Arizona Department of Family and Community Medicine awarded Marana the Hill-Burton Grant, allowing Marana to substantially enlarge its clinic building. MHC Healthcare has grown to a network of 16 Health Centers, employs over 500 staff, and serves over 50,000 patients. Marana has remained committed to removing barriers towards healthcare services.

29. Plaintiff **Northern Arizona University** ("NAU") is an Arizona public research university with its principal place of business at 1899 S. San Francisco Street, Flagstaff, AZ 86011. NAU is classified by Carnegie as an R2 "high research activity" institution and offers more than 150 combined undergraduate and graduate degree programs to nearly 30,000 undergraduate and graduate students, distinguished by an ongoing commitment to close student-faculty relationships.

30. Plaintiff **Study Mississippi** ("SM") is a consortium of accredited educational institutions in Mississippi, whose purpose is to connect international students and professionals with quality Mississippi education and training and to provide opportunities for U.S. students to have international experiences. SM's member schools include K-12, community colleges, English language training institutes, and public and private colleges and universities, including schools in the top Carnegie Classifications for research activities. Mississippi's schools are known worldwide for their academic excellence an educational innovation in a wide variety of fields, including four renowned research institutions, several public-private research-and-development partnerships, and one medical school. SM member schools educate students at all levels, collaborate with local and multinational companies to generate increased career opportunities through research and development, and produce a talented and highly educated workforce that can help

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companies remain globally competitive and thrive in the world market. Indeed, having faculty and researchers from other countries enable U.S. students to make connections and to develop cultural competence and the skills necessary to compete in a global workforce. As such, the IFR will harm the ability of these schools to remain competitive, to support top candidates for its positions, and to hire freely the teachers and researchers needed to prepare students for excellence in a global environment.

31. Plaintiff **Indiana University** in Bloomington is the flagship residential, doctoral-extensive campus of Indiana University. Its mission is to create, disseminate, preserve, and apply knowledge. It does so through its commitments to cutting-edge research, scholarship, arts, and creative activity; to challenging and inspired undergraduate, graduate, professional, and lifelong education; to culturally diverse and international educational programs and communities; to first-rate library and museum collections; to economic development in the state and region; and to meaningful experiences outside the classroom. The Bloomington campus is committed to full diversity, academic freedom, and meeting the changing educational and research needs of the state, the nation, and the world.

32. Defendant **Eugene Scalia** is the Secretary of the U.S. Department of Labor. He is sued in his official capacity.

33. Defendant **United States Department of Labor** is a federal agency of the United States.

IV. LEGAL AND FACTUAL FRAMEWORK

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A. THE IMMIGRATION AND NATIONALITY ACT ALLOWS THE ADMISSION OF FOREIGN NATIONAL EMPLOYEES ON A TEMPORARY AND PERMANENT BASIS

34. Congress has carefully crafted a complex scheme for the admission of nonimmigrants and immigrants to the United States. See, e.g., Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 ("INA"); 8 U.S.C. §§ 1101, et seq. Immigrant visas are issued to foreign nationals who intend to live permanently in the U.S. and, with limited exceptions, require a sponsor from a qualifying a United States citizen or permanent resident family member or a qualifying employer. See id. 8 U.S.C. § 1151, 8 U.S.C. §1153. Nonimmigrant visas are for foreign nationals who enter the U.S. on a temporary basis—for tourism, medical treatment, business, temporary work, study, or other reasons. See id. 8 U.S.C. § 1101(a)(15); 8 U.S.C. §1184.

1. Permanent Labor Certifications

35. The INA prohibits the admission of certain employment-based immigrants unless the Secretary of Labor:

> has determined and certified to the Secretary of State and the Attorney General that (I) there are not sufficient workers who are able, willing, qualified . . . and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

8 U.S.C. § 1182(a)(5)(A).

36. The "labor certification" requirement does not apply to all employment-based immigrants. The INA provides five "preference" categories or immigrant visa classes,

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only two of which—the second and third preference employment categories (commonly called the EB-2 and EB-3 immigrant visa classifications)—require a labor certification. *See* 8 U.S.C. §§ 1153(b)(2), 8 U.S.C. § 1153 (b)(3), 8 U.S.C. §1182(a)(5)(D).

37. For example, 8 U.S.C. §1153(b)(2) governs the EB-2 classification of immigrant work visas granted to foreign workers who are either professionals holding advanced degrees (master's degree or above) or foreign equivalents of such degrees, or persons of "exceptional ability" in the sciences, arts, or business. To gain entry in this category, the foreign worker must have prearranged employment with a U.S. employer that meets the requirements of labor certification, unless the work he or she is seeking admission to perform is in the "national interest," such as to qualify for a waiver of the job offer (and hence, the labor certification) requirement under 8 U.S.C. § 1153(b)(2)(B).

38. Section 8 U.S.C. §1153(b)(3) governs the EB-3 classification of immigrant work visas granted to foreign workers who are either "skilled workers," "professionals," or "other" (unskilled) workers, as defined by the statute. To gain entry in this category, the foreign worker must have prearranged employment with a U.S. employer that meets the requirements of labor certification, without exception.

39. An employer seeking to sponsor a foreign worker for an immigrant visa under the EB-2 or EB-3 immigrant visa classifications generally must file a visa petition with the Department of Homeland Security (DHS) on the worker's behalf, which must include a labor certification from the Secretary of Labor. 8 U.S.C. § 1154(a)(1)(F), 8 U.S.C. §1182(a)(5)(A) and 8 U.S.C. §1182(a)(5)(D). Further, the Department of State (DOS) may not issue a visa unless the Secretary of Labor has issued a labor certification in

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conformity with the relevant provisions of the INA. 8 U.S.C. § 1153(b)(3)(C), 8 U.S.C. §1153(b)(2), 8 U.S.C. §1201(g).

40. If the Secretary determines both that there are not sufficient able, willing, qualified, and available U.S. workers and that employment of the foreign worker will not adversely affect the wages and working conditions of similarly employed U.S. workers, the Secretary will certify a permanent labor certification for purposes of approving an immigrant visa.

2. H-1B Nonimmigrant Visa Program

41. The H-1B nonimmigrant visa program allows U.S. employers to temporarily employ foreign workers in specialty occupations. "Specialty occupation" is defined by statute as an occupation that requires 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, as a minimum for entry into the occupation in the U.S. See 8 U.S.C § 1101(a)(15)(H)(i)(b), 8 U.S.C. §1184(i).

42. The maximum number of H-1B visas (cap and cap-exempt) that may be issued is currently 65,000 per year, plus an additional 20,000 per year for Master's and post-level graduates of U.S. Universities. 8 U.S.C. § 1184(g)(1)(a), 8 U.S.C. §1184(g)(5)(C).

43. The spouses and minor children of H-1B sponsored employees may accompany those employees to the United States as derivatives on H-4 visas. 8 C.F.R. § 214.2(h)(9)(iv); Pub. L. No. 91-225, 84 Stat. 116 (1970). The status of H-4 derivatives depends on the continued employment of the H-1B employee. 8 C.F.R. § 214.2(h)(9)(iv).

44. Most H-4 derivative visa holders are not legally authorized to work in the United States. Only H-4 spouses (not H-4 children) may obtain such authorization, and they may do so

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only by applying for an Employment Authorization Document (EAD), which is generally available only if the H-1B visa holder has an approved I-140 petition to obtain a permanent immigrant visa. 8 C.F.R. § 214.2(h)(9)(iv).

3. H-1B1 and E-3 Visa Programs

45. Similar to the H-1B visa classification, the H-1B1 and E-3 nonimmigrant visa classifications also allow U.S. employers to temporarily employ foreign workers in specialty occupations, except that these classifications specifically apply to the nationals of certain countries: the H-1B1 visa classification applies to foreign workers in specialty occupations from Chile and Singapore, 8 U.S.C. § 1101(a)(15)(H)(i)(b)(1), and the E-3 visa classification applies to foreign workers in specialty occupations from Australia. 8 U.S.C. § 1101(a)(15)(E)(iii).

4. The Labor Condition Application

46. The Secretary must certify a Labor Condition Application (LCA) filed by the foreign worker's prospective U.S. employer before the prospective employer may file a petition with DHS on behalf of a foreign worker for H-1B, H-1B1, or E-3 nonimmigrant classification. 8 U.S.C. § 1101(a)(15)(E)(iii), (a)(15)(H)(i)(b), 8 U.S.C. §(a)(15)(H)(i)(b)(1); 8 C.F.R § 214.2(h)(2)(i)(E).

47. The LCA requires various attestations from the employer about the wages and working conditions that it will provide the foreign worker. *See generally* 8 U.S.C. §1182(n), 8 U.S.C. §1182(t); 20 C.F.R. part 655, subpart H.[1] Similar to Permanent Labor

[1] In addition, any "H-1B dependent employer"—an employer for whom H-1B skilled workers constitute a specified minimum percentage of its workforce, depending on the size of the

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Certifications, employers must agree to pay temporary workers seeking H-1B, H-1B1, and E-3 nonimmigrant visas 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." INA § 212(n)(1); 8 U.S.C. § 1182(n)(1).

48. The DOL is tasked with making this determination based on the "best information available." INA §212(n)(1)(A)(II); 8 U.S.C. §1182(n)(1)(A)(II).

5. History of the Wage Methodology Employed by DOL for Immigrant and Nonimmigrants

49. Where the Secretary of Labor uses, or makes available to employers, a governmental survey to determine the prevailing wage, the INA states that such a survey "shall provide at least 4 levels of wages commensurate with experience, education, and the level of supervision." INA § 212(p)(4); 8 U.S.C. § 1182(p)(4).

50. For employers sponsoring an individual for permanent residence through employment, the employer must pay, the higher of the actual wage paid to U.S. workers in the same occupational classification, or the prevailing wage based on the individual's experience, education, and skill level as determined by the Department of Labor's Office of Foreign Labor Certification's National Prevailing Wage Center. *See* 20 C.F.R § 656.40.Prior to the IFR, DOL, which holds the delegated authority to set wage levels according to the

business—must also affirm in its LCA that hiring an H-1B worker would not displace any U.S. workers and that it has taken good-faith steps to recruit U.S. workers for the job for which it seeks the H-1B worker. 20 C.F.R. § 655.739; see 8 U.S.C. § 1182(n).

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INA, provided four wage levels with the following descriptions of their skillset as compared to the Department's "standard" job requirements found on the "O*Net":[2]

> **Level I** (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.
>
> **Level II** (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones.
>
> **Level III** (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O*NET Job Zones would be indicators that a Level III wage should be considered.
>
> **Level IV** (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound

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[2] *See* United States Department of Labor, Employment and Training Administration, *Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs* (Nov. 2009), available at: https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/NPWHC_Guidance_Revised_11_2009.pdf

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judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.

51. In order to be "commensurate" with the education, experience, and supervisory duties these wage levels hold, DOL assigned a percentile of the total wage rates for a given "Metropolitan Statistical Area," and employers were not permitted to pay a wage below that assigned "prevailing wage." These prevailing wages were determined to fit the following percentiles:

    Wage Level I (entry), 17th percentile – or higher than 17% of all wages for that particular position in that particular Metropolitan Statistical Area;

    Wage Level II (qualified), 34th percentile – or higher than 34% of all wages for that particular position in that particular Metropolitan Statistical Area;

    Wage Level III (experienced), 50th percentile – or higher than 50% of all wages for that particular position in that particular Metropolitan Statistical Area;

    Wage Level IV (fully competent), 67th percentile, or higher than 67% of all wages for that particular position in that particular Metropolitan Statistical Area.

52. DOL first codified the LCA requirements, including the prevailing wage levels in 1991.

53. Prior to doing so, DOL followed the normal "notice and comment" process and opened the window for comments, multiple times, before finalizing the rule: First, it welcomed comments in an Advanced Notice of Proposed Rule Making, see 56 Fed. Reg. 11705 (March 20, 1991), and then provided a second opportunity for comments in a Notice of Proposed Rulemaking. 56 Fed. Reg. 37175 (August 5, 1991)._ DOL followed with an Interim Final Rule where it explained the DOL's consideration of the comments previously provided in both to both the ANPRM and NPRM and allowed further comment. *See* 56 Fed. Reg. 54720 (October 22, 1991).

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54. DOL received public comments from the regulated community as reflected in this summary of the Department's obligations from 1991: "The Department believes that Congress, in enacting the Act [the Immigration Act of 1990, that created the LCA obligation and the requirement for employers to pay the greater of actual or prevailing wages], intended to provide greater protection than under prior law for U.S. and foreign workers without interfering with an employer's ability to obtain the H-1B workers it needs on a timely basis." 56 Fed. Reg. 54720 at 54271 (October 22, 1991).

B. IRREGULAR RULEMAKING

1. The IFR Did Not Follow Notice and Comment Rulemaking

55. . Unlike the process in the 1991 Rule, which comported with the requirements of the APA, the October 8, 2020 IFR immediately changed the well-established scheme to determine prevailing without allowing any opportunity for written comments.

56. The IFR did not comply with the procedural requirements set forth in the APA, which provide that the issuing agency "shall" publish a notice of proposed rulemaking in the Federal Register, justify the rule by reference to legal authority, describe "the subjects and issues involved" in the rule, and allow interested parties to submit comments. 5 U.S.C. §553(b); 5 U.S.C. §553(c).

57. This "notice and comment" period is such a critical component of rulemaking that Congress only allows an agency to forego this procedure in the narrowest circumstances when the agency, for good cause, finds that it is impracticable, unnecessary, or contrary to the public interest, and the agency incorporates this finding and reasons therefore in the rules issued. 5 U.S.C. § 553(b)(3)(B).

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58. First, notice and comment is “impracticable” when an agency finds that timely execution of its functions would be impeded by such procedure, as when a safety investigation reveals an immediate need for a new safety rule. *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001) (citing *U.S. Department of Justice, Attorney General's Manual on the Administrative Procedure Act* 30-31 (1947)).

59. Second, notice and comment is “unnecessary” only in “situations in which the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public.” *Util. Solid Waste Activities Grp.*, 236 F.3d at 755.

60. Third, notice and comment is “contrary to the public interest” when the interest of the public is defeated by providing notice and comment. *Id.* (citing *U.S. Department of Justice, Attorney General's Manual on the Administrative Procedure Act* 31 (1947)). The public interest prong is invoked “only in the rare circumstance” where ordinary procedures meant to serve public interest would in fact harm that interest. *See Mack Trucks, Inc. v. EPA*, 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.”).

61. The D.C. Circuit has “repeatedly made clear that the good cause exception ‘it to be narrowly construed and only reluctantly countenanced.’” *Mack Trucks, Inc.*, 682 F.3d at 93; (quoting *Util. Solid Waste Activities Grp*. v. *EPA*, 236 F.3d at 754).

62. Defendants lacked good cause to issue the IFR without notice and comment.

2. OIRA’s Unexplained Waiver of Review

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63. Prior to issuance, the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) made the surprise, unexplained decision to waive review.

64. Under Executive Order 12866, any rulemaking that "is likely to result in a rule that may . . . have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities" requires further review by OIRA. 58 Fed. Reg. 51735 (1993) (directing agencies to follow certain principles in rulemaking, such as consideration of alternatives and analysis of benefits and costs, and describing OIRA's role in the rulemaking process).

65. As part of this review process, OIRA or the rulemaking agency must disclose certain elements of the review process to the public, including the changes made at OIRA's recommendation. *Id.*

66. OIRA may waive review on a planned regulatory action designated by the agency as significant. This waiver is discretionary. However, historically, such a waiver has not been employed with respect to Department of Labor rulemaking.

67. Even as late as October 31, 2019, in guidance issued related to Executive Order 13891, entitled "Promoting the Rule of Law Through Improved Agency Guidance Documents" OIRA had limits on granting such a waiver: **Q33**: Is it possible to waive the need for a significance determination or EO 12866 review in the event of an emergency? **A:** Agencies may request that a significance determination or review be waived due to exigency, safety, or other compelling cause. A senior policy official must explain the nature of the emergency and why following the normal clearance procedures would result

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in specific harm. The OIRA Administrator will review and make a determination as to whether granting such a request is appropriate. See, Document M-20-2, dated October 31, 2019, issued by the Office of Management and Budget, https://www.whitehouse.gov/wp-content/uploads/2019/10/M-20-02-Guidance-Memo.pdf (emphasis added)

68. On September 30, 2020, the OIRA website was updated to show that OIRA concluded its review of DOL's IFR and DOL withdrew its rule from OIRA consideration, which was later learned to be the result of DOL waiving its review pursuant to Section 6(a)(3)(A) of Executive Order 128666, although no explanation and justification of the use of this waiver has been provided, contrary to current Administration policy. Aside from the information on its website, OIRA does not publicly provide information on rules that have been withdrawn from OIRA review or the basis of any waivers OIRA provides.

69. DOL's wholesale changes, after 30 years, dramatically inverts the employer obligation to attest to its commitment to pay the greater of actual or prevailing wages to one to pay a new required wage manufactured by DOL.

70. To say this is "contradictory" to what DOL knows is the importance and complexity of the underlying substance of the prevailing wage rule to the regulated community reflects the poverty of Plaintiffs' vocabulary.

71. The IFR published on October 8, 2020, does not protect U.S. workers and directly interferes with an employer's ability to obtain the H-1B workers it needs.

3. DOL's Unsupported and Irrational Assertions of Good Cause

72. The DOL recognized the significant and dramatic changes to the complex scheme it and employers relied upon for prevailing wages.

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73. The Department asserted, however, that good cause existed to excuse its failure to comply with the notice and comment process. *See* 85 Fed. Reg. at 63898-99.

74. First, DOL claimed, without citing to evidence, that "the shock to the labor market caused by the widespread unemployment resulting from the coronavirus public health emergency has created exigent circumstances that threaten immediate harm to the wages and job prospects of U.S. workers." *Id.* As such, the Department alleged, that the delay a notice and comment period would create in issuing the rule would make it "impracticable for the Department to fulfill its statutory mandate and carry out the 'due and required execution of [its] agency functions' to protect U.S. workers." *Id.*

75. Second, the Department claimed, again without citing evidence in support, that "[a]dvance notice of the intended changes would create an opportunity, and the incentive to use it, for employers to attempt to evade the adjusted wage requirements," which would run contrary to the public's interest. *Id*

76. The Defendants justification lacks an evidentiary basis, is irrational and did not establish good cause for ignoring the notice and comment requirements.

4. The IFR's Reasoning is Insufficient, Incorrect, Irrational, and not in Accordance with Law

77. The IFR relies on insufficient and incorrect information, makes incorrect calculations, and rests on irrational, arbitrary and capricious assumptions of the labor market.

78. In 1991, when the wage levels were first codified, DOL had provided only two levels, the entry level (average of the bottom one-third of surveyed wages) and the experienced level

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(average of the top two-thirds of surveyed wages).[3] Congress intended DOL to include at least four wages and the INA requires that levels 2 and 3 represent two points equidistant between the level 1 and 4 points. INA §212(p)(4); 8 U.S.C. 1182(p)(4).

79. The old level 1 was the average of bottom one-third of the surveyed wages in the Occupational Employment Statistics (OES) survey, or about the 17th percentile, and old level 4 was the average of the top two-thirds of the surveyed wages in the OES survey, or about the 67th percentile.

80. The IFR creates new level 1 and level 4 points in the OES data. The new level 1 is the arithmetic mean of the fifth decile (or the 45th percentile of surveyed OES wages). The new level 4 is the arithmetic mean of the tenth decile (the 95th percentile of surveyed OES wages). 85 Fed. Reg. at. 63915

81. Although the new level four is supposed to be arithmetic mean of the tenth decile (or the 95th percentile of surveyed OES wage), the new formula does not work out mathematically such that the law complies with the requirements of the IFR. The reason for this is that there are significant, very high-paying, outlier level 4 wages that skew the average of the top decile (90-100) higher which artificially skews the level 2 and 3 wages to be much higher.

82. Because the new level 4 does not lead to an average of the top decile that equates to the 95th percentile (averaging the top decile includes averaging in very high outlier wages) and instead results in a level 4 above the 95th percentile, this automatically impacts the

[3] See, American Immigration Council, "*Wages and High-Skilled Immigration: How the Government Calculates Prevailing Wages and Why It Matters*" (December 2017) at p. 6, available at file:///Users/marmernice/Documents/AIC%20wages_and_high-skilled_immigration%2012-2017.pdf

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calculation of levels 2 and 3, by simultaneously ratcheting them upward as well, based on the statutory formula (212)(p)(4) of the INA). This means that the representations DOL made in the preamble, and the regulatory text as a statement of agency policy, are mathematically inaccurate and skewed, and that the regulatory text itself is not being implemented (level 2 is not at the 62nd percentile of wages and level 3 is not at the 78th percentile — both are actually mathematically higher because level 4 is higher).[4]

83. Thus, the IFR itself, is incorrect and needs to be immediately set aside.

84. An additional problem with implementation takes place at the other end of the prevailing wage levels. DOL takes the position that many level 1 jobs do not qualify for H-1B visa because for level 1 jobs a bachelor's degree in the specific specialty is not "normally" or "usually" required for entry into the position.

85. The IFR rule states, "After consulting the statutory criteria for who qualifies for the relevant visa classifications, as well as the demographic characteristics of actual H–1B nonimmigrants, the Department has determined that **an individual with a master's degree and little-to-no work experience is the appropriate comparator for entry-level workers** in the Department's PERM and specialty occupation programs for purposes of estimating the percentile at which such workers' wages fall within the OES wage distribution."

86. Entry-level Level 1 wages for H-1B positions with Bachelor's degree qualifications must now be irrationally determined with reference to wage data for entry-level positions for

[4] David J. Bier, *DOL's H-1B Wage Rule Massively Understates Wage Increases by up to 26 Percent,* CATO Institute (Oct. 9, 2020), available at: https://www.cato.org/blog/dols-h-1b-wage-rule-massively-understates-wage-increases-26

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individuals with Master's degrees. The DOL further notes that (i) such individuals fall within the 32nd and 49th percentiles of the wage distribution, (ii) noting that the average of these wages would actually come out at the 40th percentile, and, instead (iii) "calculating the average of a subset of the data located at the higher end of the identified wage range" to arrive at "the entry-level wage being placed at approximately the 45th percentile."

87. The new Level 1 requirement conflicts with other sections of the statute and regulation that specifically state that certain professions are "specialty occupations," by their nature. The regulatory definition of "specialty occupation" first repeats the statutory definition and then provides a non-exhaustive list of fields as examples of specialty occupations:

> "Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, *architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts*, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States."

8 C.F.R. § 214.2(h)(4)(ii)(emphasis added).

88. Anyone in these specified fields of endeavor are specialty occupation by nature of a *bachelor's* degree in the field, the rule as proposed conflicts with DOL's own definition of Specialty Occupation because one section recognizes that a bachelor's degree establishes specialty occupation by nature while the other regulation states that a Master's degree is normal for level 1 H-1B jobs and that they must be paid the 45th percentile wage accordingly.

89. Yet, the problems with the IFR's new methodology go beyond the irrational changes at the low and high ends of the wage scale. Across the board, wages have increased. Wage

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Level 1 is now at the 45th percentile, up from the 17th percentile prior to the rule. Wage Level 2 is now at the 62nd percentile, up from the 34th. Wage Level 3 is now at the 78th percentile, up from the 50th and Level 4 is at the 95th percentile up from the 67th prior to the rule.

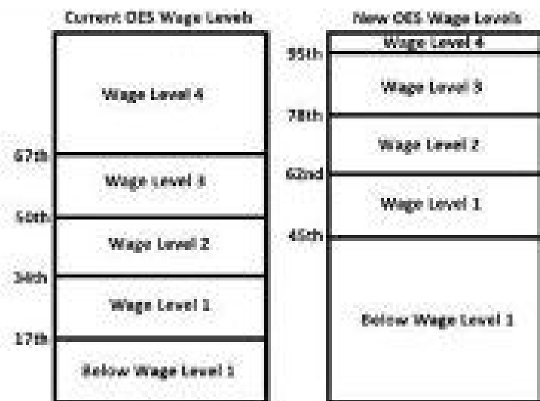
New Regulation

DOL Wage Level (2009)	Wage Percentile (OES)	New Percentile
Level 1	17%	45%
Level 2	34%	62%
Level 3	50%	78%
Level 4	67%	95%

DOL is changing how it maps foreign worker wage levels to the underlying BLS data.

DOL is not changing what level an employee is. Instead, they are changing the data point for each employee level.

Wage Mapping



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90. The IFR keeps the same four levels of wages, but arbitrarily moves them so dramatically higher that the wages themselves are no longer rationally connected to the labor market of the United States, and in many cases result in only one wage identified for a job, regardless of the level of experience.

91. For example, in the Washington D.C. Metropolitan Statistical Area (MSA), the mandated minimum wage for a newly gradated attorney with no experience seeking work under an H-1B visa is now $208,000, with the DOL now saying there is only 1 wage level, in contravention to statutory requirements. See, Foreign Labor Certification Data Center

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Online Wage Library,

https://www.flcdatacenter.com/OesQuickResults.aspx?area=47900&code=23-1011&year=21&source=3. Importantly *this was not discussed within the Interim Final Rule, nor is it supported by statute.*

92. Under the new methodology, *any wage*, for *any* lawyer position that is greater than $63.00 per hour, automatically upgrades to $100.00 per hour which equates to $208,000 per hour for *entry* level these wage levels have been eliminated altogether. The rule provides no explanation for this and the only explanation is that the leveled wages cannot be provided "due to limitations in the OES data. Employer provided surveys may be considered under the appropriate regulation, unless the provision of a survey is not permitted. **The wage data may be at least: $100.00-hour, $208,000 year.**"[5]

93. The unlawful collapse of distinct wage levels is not unique to Washington D.C. and is not unique to lawyers. All positions, nationwide, with a mean wage of more than approximately $63.00-hour are now considered "highly compensated positions" that default to $100-hour for all wage levels. Examples of this capricious treatment include a Software Developer in San Francisco, a General Manager in Phoenix, and, most troubling, even doctors in rural areas.[6] It is estimated that the number of jobs that have the default $100-hour wage exceeds 15,000 positions.

94. The practical applications of these new use of wage levels further demonstrates how detached the IFR is from the reality of the job and labor market. Under the IFR, a level 1,

[5] https://www.flcdatacenter.com/OesQuickResults.aspx?code=29-1069&area=19740&year=21&source=3

[6] https://www.flcdatacenter.com/OesQuickResults.aspx?code=29-1062&area=800001&year=21&source=3

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entry level "Computer Programmer" in the Seattle Metropolitan Statistical Area would necessarily have to be paid a minimum of $208,000.[7] A level 3, experienced "Software Developer" would necessarily have to be paid a minimum of $195,936 per year.[8] Yet the traditional job duties for a Software Developer, as discussed in the O*Net, include "may supervise Computer Programmers." Thus, the Software Developer, acting in a supervisory role over entry level Computer Programmers, could be paid less than his or her subordinate.[9]

95. Significantly, employers who want to sponsor foreign workers for H-1B, H-1B1 and E-3 visas are required to establish the prevailing wage before filing based on the "best information available." 20 C.F.R. §655.731(a)(2). The employer can choose to get a prevailing wage determination from the National Prevailing Wage Center of the Department of Labor, or they can choose to pay for and obtain a private wage survey.

96. However, in order to obtain safe harbor in the case of an audit, the employer is required to utilize the official prevailing wage from the Department of Labor. *Id.* at 20 C.F.R. § 655.731(a)(2)(ii)(A)(3).

97. Because OES has no data for the wages at the levels they have created, employers will now be required to pay for costly private surveys and forced to justify the wages in the survey in the case of an audit. It is clear that the wages in the private surveys are going to be far apart from the DOL determined wages and there are likely to be many audits as a result.

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[7] https://www.flcdatacenter.com/OesQuickResults.aspx?area=42660&code=15-1131&year=21&source=3

[8] https://www.flcdatacenter.com/OesQuickResults.aspx?area=42660&code=15-1132&year=21&source=3

[9] https://www.onetonline.org/link/summary/15-1132.00

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98. A further look at the massive impact the IFR will have on rural healthcare demonstrates its arbitrary attempt to distort and impair the labor market. Foreign Medical Graduates may work on J-1 visas for extended periods of time where they are employed in an underserved, and often rural, area. *See* INA § 214(l); 8 U.S.C. § 1184(l). Under what is known as the "CONRAD 30" program, these J-1 Foreign Medical Graduates could change their status to that of an H-1B worker and remain in the U.S. while working in an underserved area for a minimum of three years. 8 U.S.C. §1182(l)(1)(C).

99. Under the IFR, Foreign Medical Graduates, must be paid a minimum of $208,000 per year despite only having just graduated medical school, which is dramatically higher than the market rate for these employees and clearly more than rural hospital and medical centers are able to pay.

100. By devising a regulation where the underlying data does not allow calculation of wage levels for purposes of high-skilled immigration and imposing a default $208,000 annual salary, underserved populations in rural areas will remain underserved.[10] Employers will no longer be able to hire high level and high skilled workers. Indeed, even for the most basic of positions, the H-1B and PERM statutory programs will be effectively ended. There are material factors the DOL failed to consider.

101. For example, the IFR will force employers to pay artificially inflated wages to an H-1B, H-1B1 or E-3 workers in New York. The old entry level wage for a Software

[10] Roger A. Roseblatt & L. Gary Hart, *Physicians in Rural America,* 173 West. J. Med., 348 (Nov. 2000), available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1071163/#__sec1title

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Developer, Systems in New York was $78, 811.[11] The new entry level wage in New York for a Software Developer, Systems is $116, 251.[12]

102. Under New York State's Pay Equity Law, paying an employee with status within one of the protected classes less than one without status within one of the protected classes for equal or substantially similar work is unlawful.[13] "Protected Class" includes gender, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or domestic violence victim.

103. The IFR forces the employer to violate existing DOL rules governing the H-1B visa program. Under 20 CFR § 656.731(a), the employer must pay the higher of the prevailing or the actual wage. The actual wage is the wage paid to all other individuals with similar experience and qualifications for the specific employment in question. If the employer offered the wage to a Software Engineer at the prevailing wage of $78,811 the day before the rule change, and is now forced to offer the higher wage of $116,251 to another H-1B worker the day after the rule change, the employer will be paying less than the actual wage to the first employee and thus in violation of 20 CFR § 656.731(a). Although the employer may come into compliance by raising the wage of all similarly

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[11] See https://www.flcdatacenter.com/OesQuickResults.aspx?code=15-1133&area=35620&year=21&source=1

[12] See https://www.flcdatacenter.com/OesQuickResults.aspx?area=35620&code=15-1133&year=21&source=3

[13] N.Y. Labor Law art. 6, § 194 (1) (2019). See also Iowa Code § 216.6A (2009), which prohibits paying an employee who is a member of a protected class lower wages than an employee not within a protected class who is performing "equal work" within the same establishment.

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situated workers, the employer would be forced to pay artificially high wages without any warning or budgetary planning, which in turn will cause it grave economic harm resulting in the termination of existing employees and postponement of the hiring of future.

104. The increase in wage levels prices the hiring of recent graduates in H-1B status out of reach for employers. To hire a graduate requires the employer to pay that graduate, without experience, an additional 45% higher than the wages offered to similarly situation Americans.

105. When fully implemented, the demand for engineers and computer science professionals on H-1B visas will dry up.

106. The DOL did not consider the reliance interests of those impacted by the IFR, s including academic institutions and foreign national students who will not seek to study in the United States. There are several reasons Universities find it advantageous to encourage foreign students to study at their schools. The financial return from foreign students is one significant factor, but not the only one. In addition, the foreign students create a diverse student body, enhancing the education of their fellow students. The students who will find the United States unwelcoming will find other world class universities to attend, enhancing universities in Europe, Australia, Russia and China to the detriment of US institutions. Ultimately, the innovation that these students would bring to this country will migrate to other parts of the world. The long-term impact of this regulation will harm American universities and the innovation and technology that makes the United States a global leader.

5. The IFR's Immediate Unforeseen Consequences to individual workers

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107. The new rule may also jeopardize the status of an H-1B worker. If the employer needs to file a request for extension of status on behalf of an H-1B worker whose status is expiring, the new wage system may hinder the ability of the employer to do that. For example, the OES wage data for a Software Developer, Systems in San Francisco provided a wage at the following levels prior to the rule change: Level 1 - $96,616 per year, Level 2 - $120,931 per year, Level 3 - $145,246 per year and Level 4 - $169,562 per year.[14]

108. If the employer cannot afford to pay this artificially high wage, or if it does, will be forced to violate other laws such as the "actual wage" regulations, the H-1B worker's status will be jeopardized if the request for an H-1B extension is not filed in a timely manner. H-1B workers who are unable to seek extensions will have to abruptly leave the US with their spouses and children in order to avoid falling out of status.

6. The IFR Immediately and Irreparably Harms Plaintiffs and the Public

109. Plaintiffs include employers that rely on highly skilled and highly educated professionals in the healthcare industry, including nurses, physical therapists, occupational therapists, dentists, and similarly situated health care workers. These medical professionals provide critical care to our rapidly aging population in nursing homes, assisted living facilities and hospitals. They also provide therapy services to injured workers and the foreign national nurses are on the front lines in the fight against Covid-19. Nurses and Physical Therapists are recognized shortage occupations and, unlike non-shortage occupations,

[14] See https://www.flcdatacenter.com/OesQuickResults.aspx?code=15-1133&area=41860&year=21&source=1

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their U.S. employers are not required to test the labor market in permanent residence filings as the Federal government acknowledges there are not enough U.S. workers in these occupations. Many (if not most) of the facilities that employ these professionals do not directly hire them and – instead – turn to expert staffing services. These services operate on very tight margins to provide staff to the affected facilities at rates that are presently affordable for elderly residents, and patients and at rates which insurance companies are willing to reimburse. Almost overnight, Plaintiffs, including United Methodist Homes and Services can no longer afford to pay the salaries mandated under the IFR. Given the recognized shortages in these occupations, America's aging parents and grandparents, injured workers and people needing nursing care more generally will have greatly reduced or, in some locations, no access to these healthcare services.

110. Approximately 1/3 of the U.S. Physician workforce is comprised of international medical graduates. These physicians are not only working on the frontlines of the COVID-19 response, but also dedicate their lives to the provision of healthcare in our most vulnerable and underserved medical populations in the U.S. These wages force U.S. Employers to default to a $208,000/year default for not only our U.S. residents and fellows in training, but also our practicing physicians. Theis upward departure from industry norms dramatically hinders or U.S. Healthcare system from employing the best and brightest international talent that has a direct and immediate impact on the provision of medical care to all aspects of our healthcare system, and particularly when we are fighting the global COVID pandemic.

111. Companies that are members of the technology industry and members of ITI provide vital technology to our military, businesses, infrastructure, transportation, healthcare, and other

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industries. Our demand for the latest technology to keep us safe, secure, efficient and ahead of our competitors means that we must rely on highly skilled foreign workers in the high-tech industry. These foreign nationals are dependent on the H-1B visa for entry into the United States and service to the economy. If wages are increased arbitrarily as they are in this rule, and technology companies are required to increase wages by as minimum of 50% and, in most cases increase wages to the default rate of $208,000 a year, technology companies, start-ups, research and development firms and other users of H-1B, E-3 and PERM will simply have to outsources those jobs overseas.

112. Plaintiff universities face an enormous challenge these days in creating global citizens in a world that is increasingly digitized. Studies regularly report the under-representation of African American/Black and Hispanic/Latinx recipients of doctoral degrees in the United States. As reported by PBS News Hour, the biggest problem for colleges looking to diversify is finding non-white faculty. It further stated that only 6.4% of U.S. Citizens or permanent residents research doctoral recipients in 2014 were Black, and only 6.5 were Hispanic. The competition for diverse faculty is immense. Limiting access to international scholars has a considerable impact on recruiting diverse faculty and faculty who can educate our students on the mission to create global citizens. To find that type of global faculty, Universities must rely on foreign professors, researchers, post-doctorate fellows and other highly educated foreign scholars. The changes to the wage structure imposed by the IFR will create a substantial financial hardship by raising wages at time when higher education has already faced great economic challenges due to the impact of the COVID-19. Not only are enrollment and other revenue sources down, the costs of setting on up online instruction in addition to implementing testing and other safety

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protocols are high. Increasing the salaries of international scholars will not just impact the international scholars and post-doctoral fellows but will drive up the overall wages for faculty at a time when campuses can ill afford the added expense. International scholars already faced delays in starting due to COVID-19 related travel restrictions. Adding these additional barriers will the United States a less competitive option for recruiting international scholars we require for the unique and important contributions to preparing our students to contribute on a global level. Overall, the wage rate imposed by the new DOL rules creates significant barriers to engaging talent Universities need to prepare the next generation of students to solve the most complex issues facing the country and the world.

113. The IFR and its immediate implementation will harm Plaintiffs' missions and operations, including ITI whose members depend on the organization to meaningfully participate in the rulemaking process and foster reasonable regulations that promote innovation and economic growth. The unlawful process that led to the IFR and irrational policy made it impossible for ITI to fulfill its mission and it has now diverted precious, unrecoverable resources to ameliorate the harm to members.

114. Plaintiffs have immediately experienced an increase in operational costs due to the IFR. Plaintiffs have had to divert resources away from providing core services to understand the IFR , update their internal and public-facing materials to conform with the IFR , develop materials and webinar presentations to inform and train members on the contours and effects of the IFR , develop materials to explain the IFR to the communities they serve, and conduct community outreach on the IFR . The sheer number of significant

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changes to wage levels in the rule made immediately effective amplifies these effects, as Plaintiffs scramble to understand the contours of the complex changes.

115. The IFR have damaged the reputations that Plaintiffs have built over time. Plaintiffs enjoy strong reputations among members, their employees, and customers. The IFR now makes it impossible for Plaintiffs to maintain the same level of programming at the same cost, and Plaintiffs are already having to forego hiring and terminate employees subject to the new rule, or U.S. workers, which will inevitably put them at risk of failing to meet the expectations of customers and those they serve.

116. The IFR is causing and will continue to cause a decline in morale among Plaintiffs' staffs. Plaintiffs' staffs work with vulnerable, low-income individuals, which is challenging on its own. The IFR denigrates this work.

7. Material Damage to Public and Communities

117. Employers will not have the ability to hire H-1B workers under the IFR's arbitrary and irrational wage mechanisms. This gravely harms plaintiffs who will not hire much needed skilled workers in the United States.

118. Startup companies will particularly impacted and so will nonprofit organizations who lack the ability to shift employees or operations abroad.

119. The federal government's interference in the hiring processes of private sector employers that are engaging in the normal recruiting and selection of professionals in the U.S. labor market to fill jobs to be performed in the United States would harm rather than protect

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US workers. Studies have shown that H-1B workers in fact benefit US workers even during this economic downturn caused by the coronavirus.[15]

120. The existence of the H-1B program causes some employers to expand – or at least not decrease – the number of jobs open to American workers, even workers who hold jobs similar to those held by H-1B workers. If not enough U.S. workers are available and an employer cannot use the H-1B program, the employer may move jobs in a given position overseas, ultimately reducing job opportunities for American workers.

V. CLAIMS FOR RELIEF

A. FIRST CAUSE OF ACTION

(Agency Failure to Observe Procedure Required by Law in Violation of the Administrative Procedure Act (5 U.S.C. §§ 553(b),706(2))

121. Under the APA, a court "shall" set "aside agency action" that is "not in accordance with law." 5 U.S.C. § 706(2)(A).

122. The IFR constitutes final agency action as it has the force of law, and thus constitutes a legislative rule. 5 U.S.C. § 553(b).

[15] For overview of value of H-1B professionals to the United States economy see, Alex Nowsareth, *Don't Ban H-1B Workers: They are Worth their Weith in Innovation,* CATO Institute (May 14, 2020) available at: https://www.cato.org/blog/dont-ban-h-1b-workers-they-are-worth-their-weight-patents and Madeline Zavodny, *The Impact of H-1B Visa Holders on the U.S. Workforce*, National Foundation for American Policy Brief (May 2020), available at https://nfap.com/wp-content/uploads/2020/05/The-Impact-of-H-1B-Visa-Holders-on-the-U.S.-Workforce.NFAP-Policy-Brief.May-2020.pdf.

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123. The IFR represents unlawful rulemaking because no good cause exists for its failure to comply with notice and comment rulemaking. 5 U.S.C. §§ 553(b)-(c). Defendants provided 36 hours (about 1 and a half days) of advance notice between posting the IFR at the public inspection desk of the Federal Register on October 6, 2020 and publishing the IFR the morning of October 8, 2020, and changing the law governing the determination of prevailing wages. The rule provided virtually no notice, did not take into account the harms to plaintiffs and the public, did not consider the reliance interests of the plaintiffs and public, and did not afford the requisite opportunity for those interested to comment and submit written materials.

124. The IFR should be set aside in its entirety.

B. SECOND CAUSE OF ACTION
(Agency Action is Substantively Arbitrary and Capricious in Violation of the Administrative Procedure Act (5 U.S.C. § 706(2)(A))

125. Plaintiffs repeat and incorporate by reference each allegation contained in the preceding paragraphs of this Complaint.

126. Courts will invalidate agency action that fails to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43 (citation omitted).

127. Furthermore, when an agency substantially alters a position, it must "supply a reasoned analysis for the change," *State Farm*, 463 U.S. at 42, and may not "depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009) (citing *United States v. Nixon*, 418 U.S. 683, 696 (1974))

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128. The IFR is unlawful under the APA for several independent reasons, each of which is sufficient to require that the IFR be set aside.

129. Defendants did not justify the change in rationale for its unprecedented change to the prevailing wage determination.

130. Defendants acted arbitrarily and capriciously by failing to consider the interests of the various industries impacted by this rule, including each of the Plaintiffs subject to the irrational wage levels, and how such changes impact their ability to conduct their missions and carry out their organizations.

131. Defendants acted arbitrarily and capriciously by setting wages in such an irrational manner that there is not sufficient data to provide 4 wage levels for over approximately 15,000 jobs, and in so doing, treating these jobs at the same wage level regardless of the location of the job, experience or education level of the worker, nature of the duties performed or other important factors. As a result, a rural doctor must be paid the same as a big city anesthesiologist and both of these doctors would be paid the same as a labor specialist or a first-year lawyer.

C. THIRD CAUSE OF ACTION

(Agency Action is in Excess of Statutory Jurisdiction, Authority, or Limitations, or Short of Statutory Right (5 U.S.C. § 706(2)(C))

132. Plaintiffs repeat and reallege the averments in all preceding paragraphs of this complaint.

133. The IFR is unlawful because it is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2). Because the IFR conflicts with immigration laws, it must be set aside.

134. 8 U.S.C. § 1182(p)(4) states that where the Secretary of Labor uses, or makes available to employers, a governmental survey to determine the prevailing wage, the INA states that

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such a survey "shall provide at least 4 levels of wages *commensurate with experience, education, and the level of supervision*."

135. One of the most basic canons of statutory construction is that words should be given their ordinary, everyday meanings absent a specific definition provided by Congress. U.S. Congressional Research Service, Statutory Interpretation: Theories, Tools, and Trends (R45153, Apr. 5, 2018)

136. "Commensurate" is defined by Merriam-Webster as "corresponding in size, extend, amount, or degree." *See Commensurate*, Merriam-Webster

137. By the Department of Labor's definitions, the various wage levels correspond to the 4 wage levels divided by experience.

138. The IFR violates the statutory 4 level division as set forth in 8 U.S.C. § 1182(p)(4). Under the IFR, "beginning level employees who have only a basic understanding of the occupation," in other words, entry level workers, must be paid only 5% under the mean wage for the occupation in the Metropolitan Statistical Area. A doctor who had just graduated from medical school must be paid, at minimum, in the 45th percentile of all doctor's wages. An experienced, but not yet fully competent worker would have to be paid in the *78th* percentile of all workers in that individual's field and Metropolitan Statistical Area. One who is fully competent, but not at the top of their field, would have to be paid, at minimum, over the *95th percentile* of all workers in that individual's field.

139. These wage levels no longer "corresponding in size, extent, amount, or degree" with the individual's experience, education, and level of supervision as the INA requires.

D. FOURTH CAUSE OF ACTION

(Agency Action is in Excess of Statutory Jurisdiction, Authority, or Limitations, or Short of Statutory Right (5 U.S.C. § 706(2)(C))

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140. Plaintiffs repeat and reallege the averments in all preceding paragraphs of this complaint.

141. Under the INA, employers must agree to pay temporary workers seeking H-1B, H-1B1, and E-3 nonimmigrant visas 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." INA § 212(n)(1); 8 U.S.C. § 1182(n)(1).

142. The Department of Labor is tasked with making this determination based on the "best information available." 8 U.S.C. §1182(n)(1)(A)(II).

143. The IFR violates 8 U.S.C. §1182(n)(1)(A)(II), because the new methodology will always exceed the actual wages US employers pay US employees for the same position in the same occupational classification.

144. Because the rule contravenes the INA, the IFR is not in accordance with law, and must be set aside in its entirety. 5 U.S.C. § 706(2)(C).

E. FIFTH CAUSE OF ACTION
(Agency Action is in Excess of Statutory Jurisdiction, Authority, or Limitations, or Short of Statutory Right (5 U.S.C. § 706(2)(C))

145. Plaintiffs repeat and reallege the averments in all preceding paragraphs of this complaint.

146. 8 U.S.C. §1182(n) requires that applicants for H-1B visas file an LCA application attesting that the employer is paying the higher of the actual wage paid to other U.S. workers or the prevailing wage as determined by the Department of Labor.

147. If the employer relies on a prevailing wage from the Department of Labor, that wage is to be determined based on the "best information available." 8 U.S.C. §1182(n)(1)(A)(II).

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148. Due to the IFR, over 14,000 jobs have defaulted to the $100.00 per hour or $208,000 per year wage that DOL readily admits is not based on the "best information available." See http://www.bls.gov/oes/ for an explanation of why OES includes the footnote."

149. The IFR's contravenes the INA's requirement that prevailing wages be based on the best information available and thus is not in accordance with law and must be set aside.

F. SIXTH CAUSE OF ACTION
(Agency Action is in Excess of Statutory Jurisdiction, Authority, or Limitations, or Short of Statutory Right (5 U.S.C. § 706(2)(C))

150. Plaintiffs repeat and reallege the averments in all preceding paragraphs of this complaint.

151. The INA requires 4 levels of wages commensurate with experience, education, and the level of supervision. 8 U.S.C. §1182(p)(4).

152. The IFR violates this statute in two ways. First, it violates the statute because it collapses 14,000 jobs to a singular wage across all geographic areas, skill levels and regardless of experience, education, skill set or other factors. Second, the IFR violates 212(p)(4) because the methodology is mathematically flawed.

153. Because the new level 4 does not lead to an average of the top decile that equates to the 95th percentile (averaging the top decile includes averaging in very high outlier wages) and instead results in a level 4 above the 95th percentile, this automatically impacts the calculation of levels 2 and 3, by simultaneously ratcheting them upward as well, based on the statutory formula (212)(p)(4) of the INA). This means that the representations DOL made in the preamble, and the regulatory text as a statement of agency policy, are mathematically inaccurate and skewed, and that the regulatory text itself is not being implemented (level 2 is not at the 62nd percentile of wages and level 3 is not at the 78th percentile — both are actually mathematically higher because level 4 is higher).

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154. The new calculation of wages across all levels violates the INA not (level because Level 2 and 3 are not equidistant. 8 U.S.C. §1182(p)(4).

155. The IFR therefore contravenes the INA and must be set aside.

G. SEVENTH CAUSE OF ACTION
(Agency Action is in Excess of Statutory Jurisdiction, Authority, or Limitations, or Short of Statutory Right (5 U.S.C. § 706(2)(C))

156. Plaintiffs repeat and reallege the averments in all preceding paragraphs of this complaint.

157. The IFR unlawfully conflicts with 8 C.F.R. § 214.2(h)(4)(ii).

158. Under the IFR " **an individual with a master's degree and little-to-no work experience is the appropriate comparator for entry-level workers** in the Department's PERM and specialty occupation programs for purposes of estimating the percentile at which such workers' wages fall within the OES wage distribution."

159. This means that entry-level Level I wages for H-1B positions are being determined with reference to wage data for entry-level positions for individuals with Master's degrees. The DOL further notes that (i) such individuals fall within the 32nd and 49th percentiles of the wage distribution, (ii) noting that the average of these wages would actually come out at the 40th percentile, and, instead (iii) "calculating the average of a subset of the data located at the higher end of the identified wage range" to arrive at "the entry-level wage being placed at approximately the 45th percentile."

160. The IFR contravenes the regulations that specifically designate certain professions as "specialty occupations" that do not require a Master's degree. 8 C.F.R. § 214.2(h)(4)(ii).

161. The IFR therefore contravenes the INA and must be set aside

RESERVATION OF RIGHTS

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Plaintiffs reserve the right to add additional allegations of agency error and related causes of action upon receiving the certified administrative record.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that this Court grant the following relief:

A. Assume jurisdiction over the matter;

B. Immediately enjoin the Department of Labor from implementing the new calculations for wage levels or otherwise implementing the October 8, 2020 IFR;

C. Order that the promulgation of the October 8, 2020 IFR violated notice and comment procedures under the APA and therefore must be set aside pursuant to 5 U.S.C. § 706(2)(A);

D. Require Defendants to immediately reissue all prevailing wage determinations issued under the IFR using the formulas and data in place as of October 7, 2020;

E. Award Plaintiffs costs of suit and attorney's fees under the Equal Access to Justice Act, 42 U.S.C. § 1988 and any other applicable law;

F. Enter all necessary relief, injunctions, and orders as justice and equity as appropriate to remedy the harms to plaintiffs;

G. Grant such further relief as this Court deems just and proper.

Respectfully Submitted this 19th day of October, 2020,

__/s/ Jeff Joseph_
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CERTIFICATE OF SERVICE

I, Jeff Joseph, hereby certify that on October 19., 2020, I filed the foregoing with the Clerk of Court using the CM/ECF system, and I hereby certify that I have mailed a hard copy of the document to the above individual pursuant to Fed.R.Civ.P. 4 via first-class mail to:

Civil Process Clerk
United States Attorney's Office
District of Columbia
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Washington, D.C. 20530

Eugene Scalia, Secretary of Labor
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Respectfully submitted,

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