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IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; NATIONAL ASSOCIATION OF MANUFACTURERS; BAY AREA COUNCIL; NATIONAL RETAIL FEDERATION; AMERICAN ASSOCIATION OF INTERNATIONAL HEALTHCARE RECRUITMENT; PRESIDENTS' ALLIANCE ON HIGHER EDUCATION AND IMMIGRATION; CALIFORNIA INSTITUTE OF TECHNOLOGY; CORNELL UNIVERSITY; THE BOARD OF TRUSTEES OF THE LELAND STANFORD JUNIOR UNIVERSITY; UNIVERSITY OF SOUTHERN CALIFORNIA; UNIVERSITY OF ROCHESTER; UNIVERSITY OF UTAH; and ARUP LABORATORIES,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY; UNITED STATES DEPARTMENT OF LABOR; CHAD F. WOLF, in his official capacity as Acting Secretary of Homeland Security; and EUGENE SCALIA, in his official capacity as Secretary of Labor,

Defendants.

Case No. 4:20-cv-7331-JSW

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION TO STAY AGENCY ACTION OR FOR PARTIAL SUMMARY JUDGMENT; AND OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases—continued

Statutes, Rules, and Regulations

Other Authorities

INTRODUCTION

This case presents the Court with the government's effort to use the COVID-19 pandemic as the veneer for anti-employer immigration policies that the Department of Homeland Security (DHS) and Department of Labor (DOL) have long favored but have been unable to enact over the last four years. Facing the end of 2020, DHS and DOL promulgated final rules that would fundamentally reshape the H-1B, EB-2, and EB-3 visa programs, restricting the occupations that would qualify and pricing out many of the 580,000 H-1B employees[1] currently in the country through massive increases in prevailing wage rates.[2] The agencies have implemented these Rules without the prior notice and comment mandated by the Administrative Procedure Act (APA), claiming instead that unemployment stemming from COVID-19 justifies invocation of the narrow and disfavored good-cause exception to notice-and-comment rulemaking.

But good cause is not satisfied here, for multiple independent reasons. First, the unemployment caused by COVID-19 has hardly affected the specific, high-skilled, and technologically sophisticated labor markets in which H-1B employees overwhelmingly operate—just as this Court recently concluded. *See Nat'l Ass'n of Mfrs. v. DHS*, 2020 WL 5847503, at *13 (N.D. Cal. Oct. 1, 2020) (*NAM*) (White, J.). Second, courts routinely reject claims of good cause when an agency delays promulgating a rule in the face of an emergency and then claims that that very emergency leaves no time for notice and comment—just as the agencies have done here. Finally, DOL's alternative good-cause justification—that advance announcement of an increase in wage levels would lead to evasive behavior by employers—fails both because the government *did* announce its intention to promulgate the DOL's rule in advance, and because Ninth Circuit precedent requires such claims to be supported by the record, not just the agency's conjecture about incentives. Despite its best efforts, the government cannot escape any of these conclusions. There is no good cause for disregarding the APA's notice and comment obligations, and both Rules

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[1] Thousands of these individuals are prospective green card recipients who intend to reside in the United States permanently.

[2] *Strengthening the H-1B Nonimmigrant Visa Classification Program*, 85 Fed. Reg. 63,918 (Oct. 8, 2020) (DHS Rule); *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States*, 85 Fed. Reg. 63,872 (Oct. 8, 2020) (DOL Rule).

should therefore be set aside.

To hold otherwise would be to invalidate the APA's general requirement of notice-and-cause rulemaking. The opportunity for the regulated public to participate in administrative rulemaking is via comments submitted to the agency. That is, notice-and-comment rulemaking fosters essential democratic values, including the ability to have a say in policies that have the force and effect of law. Under the government's view, a temporary unemployment spike would justify abandoning these fundamental protections. If that were so, the government would have a virtual blank check to engage in wide-ranging economic regulations whenever it contends that market conditions deviate from the norm. That has never been—and it should not be—the law.

The magnitude of these regulations should not escape the Court's attention. As we earlier explained (Mot., Dkt. 31, at 12), by DOL's own calculation, its regulation will alone cost employers $198.29 billion over the next 10 years, with an annualized cost of $23.25 billion. DOL Rule, 85 Fed. Reg. at 63,908. In 2014, plaintiff U.S. Chamber catalogued the most expensive regulations then promulgated. At that time, the costliest regulation in history was an automotive standard, which had an annualized cost of $11.37 billion. *See* Chamber of Commerce of the United States of America, *Charting Federal Costs and Benefits*, at 10, tbl.1 (2014), perma.cc/W4ZU-4JW9. As of 2014, only three regulations ever eclipsed an annualized cost of $10 billion. The DOL regulation is more than *twice* as expensive. Meanwhile, as we demonstrated (Mot. 11-12), the DHS regulation puts at risk roughly 200,000 existing jobs. These two Rules would have staggering impact on the economy—taken together, they may well be the regulations with the greatest financial impact *ever*. Yet Defendants promulgated them absent notice-and-comment rulemaking anyway.

ARGUMENT

A. The only remaining issue is whether good cause existed, which the Court addresses de novo.

Now that the government has stipulated to consolidation under Rule 65(a)(2), the only remaining issue is whether there was, in fact, good cause for the agencies to dispense with notice and comment in promulgating the challenged Rules. Significantly, the government does not con-

test that plaintiffs have standing; that the absence of notice and comment is prejudicial; or that the equitable factors for injunctive relief are satisfied. *See generally* Gov't Opp., Dkt. 55. Any objection to those issues (save Article III standing) is therefore waived. *See, e.g.*, *In re Polycom, Inc.*, 78 F. Supp. 3d 1006, 1014 n.6 (N.D. Cal. 2015) ("[I]n most circumstances, failure to respond in an opposition brief to an argument put forward in an opening brief constitutes waiver or abandonment in regard to the uncontested issue.") (quoting *Stichting Pensioenfonds ABP v. Countrywide Fin. Corp.*, 802 F. Supp. 2d 1125, 1132 (C.D. Cal. 2011)).

As for the merits of the good-cause exception, the government agrees that the standard of review is de novo. *See* Gov't Opp. 7 ("[C]onsistent with the APA, the Court should review the 'agency's legal conclusion of good cause [] de novo.'") (quoting *Bauer v. DeVos*, 325 F. Supp. 3d 74, 97 (D.D.C. 2018)). Yet it goes on to suggest, repeatedly, that it must prevail because "the agencies' determinations that good cause existed to forgo notice and comment *were reasonable*." *Id*. at 1-2 (emphasis added); *see also, e.g.*, *id.* at 10 ("DOL and DHS each reasonably found that there was good cause."), 12 ("[B]oth agencies reasonably concluded that advance notice and comment would be impracticable.").

But that is not de novo review. Whether good cause exists is a "legal conclusion" that has a right and wrong answer, not a matter of agency discretion that a court will sustain so long as the agency acted reasonably. *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014). Indeed, the D.C. Circuit explicitly rejected *any* "measure of deference" for good-cause determinations—which is exactly what a reasonableness standard would entail. *Id.*; *see Reno-Sparks Indian Colony v. EPA*, 336 F.3d 899, 909 n.11 (9th Cir. 2003) ("[T]he agency's decision not to follow the APA's notice and comment provisions . . . is not entitled to deference because complying with the notice and comment procedures when required by the APA is not a matter of agency choice.") (quotation marks omitted); *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 777 n.16 (9th Cir. 2018) (*E. Bay I*) (rejecting government's argument that "courts cannot 'second-guess' the reason for invoking the good cause exception as long as the reason is 'rational.'").

The single question for the Court, therefore, is whether the government has demonstrated that good cause *actually* existed, not whether the agency's *assertion* that it existed is reasonable.

See also, e.g., *Nat'l Educ. Ass'n v. DeVos*, 379 F. Supp. 3d 1001, 1021 (N.D. Cal. 2019) ("The burden is on the agency to demonstrate that it has good cause."). As discussed below, the government falls far short of this showing.

One final point: Because the government has agreed to consolidation of a hearing on the merits (which means that our motion for summary judgment is now operative), the Court should "set aside" both Rules. 5 U.S.C. § 706; *see also* Mot. 1, 25 (invoking APA § 705, which provides for relief pending judicial review). That is consistent with the scope of relief Plaintiffs requested (*see* Mot. 25), and the government does not dispute the scope of that relief.[3]

B. Pandemic-related unemployment does not provide good cause here.

The government's good-cause justification based on pandemic-related unemployment fails for two independent reasons, either of which is sufficient on its own to reject the government's claims. First, the government may not fail to act for months in the face of an apparent emergency, and then turn around and claim that the emergency must be addressed so quickly as to justify an extraordinary departure from the agency's legal obligations under the APA. Mot. 6-8. Second, COVID-related unemployment simply does not constitute good cause to rush *these* Rules into effect without notice and comment, particularly given that the affected population is largely employed in jobs for which unemployment continues to remain remarkably low. *Id.* at 9-15.

1. To begin with, even assuming COVID-related unemployment *did* constitute an emergency relevant to the Rules here (*but see* pages 7-9, *infra*), the government "is foreclosed from relying on the good cause exception by its own delay in promulgating" the Rules. *Air Transp. Ass'n of Am. v. Dep't of Transp.*, 900 F.2d 369, 379 (D.C. Cir. 1990), *vacated on other grounds*, 498 U.S. 1077 (1991). That is, because the agencies "could have realized [their] objective short of disregarding [their] obligations under the APA" by conducting notice and comment in the more than six months after the unemployment effects of COVID-19 became apparent, they may not claim that an exigency requires them to jettison the APA's procedures now. *Id.*; *see* Mot. 6-8 (collecting cases).

[3] Any argument now regarding the scope of appropriate relief is waived. *See In re Polycom, Inc.*, 78 F. Supp. 3d at 1014 n.6.

The government does not contest the rule established by these cases: that good cause should be "rejected" if the agency "could have initiated the notice-and-comment process" but instead "delays implementing its decision." *Nat'l Venture Capital Ass'n v. Duke*, 291 F. Supp. 3d 5, 16 (D.D.C. 2017); *accord, e.g., Nat'l Ass'n of Farmworkers Orgs. v. Marshall*, 628 F.2d 604, 622 (D.C. Cir. 1980) ("[W]e cannot sustain the suspension of notice and comment" where "[t]he Department waited nearly seven months" and "found it quite possible to consult with . . . interested parties" during that time).

Instead, the government argues that its failure to act for seven months should be excused because COVID-19 unemployment is "complex and ongoing" and "constantly changing." Gov't Opp. 12-13. But the government has not identified *how* pandemic-related unemployment has "constantly chang[ed]" over the agencies' seven months of inaction such that it now "requires swift agency action" (*id.* at 13) that was not apparent months ago. For example, the government points to no worsening of economic conditions that has made the emergency more acute—to the contrary, as we demonstrated (Mot. 12-13), overall unemployment has in fact "constantly" *lessened* every month since April.[4] Nor does it explain how it is "complex" or "constantly changing" in the particular job categories where H-1B visa recipients are employed. The government fails to offer any *facts* that justify their substantial delay. Again, the agencies could have, but did not, undertake notice and comment during their period of delay.

The government also highlights DOL's conclusion that October 2020 was a "critical moment" at which those who lost their jobs early in the pandemic would cross into "more detrimental 'long-term unemployment'" (Gov't Opp. 12)—but that deadline, based on a simple 27-week countdown from the mass layoffs (*see* DOL Rule, 85 Fed. Reg. at 63,900), was entirely predictable as soon as unemployment spiked in April. In other words, once the April unemployment numbers revealed the "unprecedented 'economic cataclysm'" caused by the coronavirus (DHS Rule, 85 Fed. Reg. at 63,938), it would have been obvious to the agency that, 27 weeks later, long-term unemployment would begin—because long-term unemployment is defined as un-

[4] The newest statistics show a continuation of the same pattern: The overall unemployment rate for October was down again, to 6.9%. *See* U.S. Dep't of Labor, Bureau of Labor Statistics, *The Employment Situation – October 2020*, at 1 (Nov. 6, 2020), perma.cc/9WUQ-YGLV.

employment of 27 weeks or more (DOL Rule, 85 Fed. Reg. at 63,900). Once again, the agencies "could have initiated the notice-and-comment process" during those 27 weeks, but chose not to. *Nat'l Venture Capital Ass'n*, 291 F. Supp. 3d at 16. Just as the "impending harvest" did not supply good cause when the agency "waited nearly seven months" in *National Association of Farmworkers Organizations*, for example, the wholly foreseeable onset of long-term unemployment cannot supply good cause here in light of the agencies' delay. 628 F.2d at 622; *see also, e.g.*, *Air Transp. Ass'n*, 900 F.2d at 395 ("[I]nsofar as the [agency's] own failure to act materially contributed to its perceived deadline pressure, the agency cannot now invoke the need for expeditious action as 'good cause' to avoid the obligations of section 553(b).").[5]

Furthermore, Defendants' reference to an "ongoing crisis" cannot provide "good cause" given that they attended to many issues quite unrelated to COVID-19 during the past 8 months. Defendants have issued many different regulations and proposed regulations over this timeframe that have no bearing on COVID-19. Mot. 10 n.8. Although it may be that, in the face of an emergency, an agency can undertake a variety of emergency-related actions in sequence, an agency cannot invoke good cause to justify departure from notice-and-comment rulemaking where, as here, the agency prioritizes actions unrelated to the emergency. *Air Transp. Ass'n*, 900 F.2d at 379 (rejecting good cause where agency delayed promulgating rules "largely [as] a product of the agency's decision to attend to other obligations"). Defendants could have focused their resources on these Rules back in March, April or May; their decision not to do so forecloses their invocation of the "good cause" exception now.

In short, the government may not dispense with notice and comment in circumstances where, as here, it "could have realized [its] objective short of disregarding its obligations under the APA" by initiating notice and comment at a much earlier date. *Air Transp. Ass'n*, 900 F.2d at 379. Against this backdrop, the Court should reject the government's effort to invoke the "nar-

[5] This "long-term unemployment" justification is also absent from the DHS Rule, and therefore could not justify that Rule even if it were persuasive. *See, e.g.*, *Nat'l Venture Capital Ass'n*, 291 F. Supp. 3d at 15-16 ("The Court . . . must examine closely the agency's explanation [for invoking the good-cause exception] *as outlined in the rule*.") (quotation marks omitted; emphasis added); *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm*, 463 U.S. 29, 50 (1983) ("It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.").

rowly construed and only reluctantly countenanced" exception to the requirement of notice-and-comment rulemaking. *California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018).

2. Separately, the government does not even attempt to respond to our demonstration that H-1B workers overwhelmingly work in high-skilled "computer occupations," and that the latest statistics available when the Rules were issued showed unemployment in these occupations was up only half a percentage point from the pre-pandemic rates. *See* Mot. 13-15; Hughes Decl. Exs. 12, 17, 19; *see also* Mot. 14 (statistics showing over 655,000 active job vacancy postings in common computer occupations over the 30 days ending October 2, indicating high demand for such positions). A half-percentage-point rise cannot possibly be sufficient to "overcome [the] high bar" required for the good-cause exception, which the Ninth Circuit instructs "is to be 'narrowly construed and only reluctantly countenanced.'" *Azar*, 911 F.3d at 575 (quoting *Alacaraz v. Block*, 746 F.2d 593, 612 (9th Cir. 1984), and *United States v. Valverde*, 628 F.3d 1159, 1164-65 (9th Cir. 2010)); *accord, e.g., Sorenson*, 755 F.3d at 706. To hold otherwise would allow the good cause exception to "swallow the rule," an outcome that the Ninth Circuit has repeatedly decried. *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982); *see also, e.g., Azar*, 911 F.3d at 575 ("[I]t is antithetical to the structure and purpose of the APA for an agency to implement a rule first, and then seek comment later.") (quoting *Paulsen v. Daniels*, 413 F.3d 999, 1005 (9th Cir. 2005)).

The government's only rejoinder is an effort to distinguish this Court's recent decision in *NAM*, in which the Court found another work-based visa restriction unlawful based on the same "mismatch" between COVID-related unemployment and the positions generally filled by H-1B employees. *NAM*, 2020 WL 5847503, at *13; *see* Gov't Opp. 15-16.

First, it is simply not true that "[t]he legal issues in dispute were . . . entirely different." Gov't Opp. 15. The relevant legal issue in *NAM* was whether a "find[ing]" in Presidential Proclamation 10052—that the entry of H-1B employees into the United States during pandemic-related unemployment "would be detrimental to the interest of the United States"—was adequately "supported" by the facts. *NAM*, 2020 WL 5847503, at *11-13.[6] Here, the issue is whether the

[6] To be sure, the Court *also* "enjoined the Proclamation because it believed that the Proclama-

agencies have adequately demonstrated that providing notice and comment—thereby delaying the Rules' new restrictions on the H-1B program—is "impracticable" due to the need to "protect[]" "the economic interests of U.S. workers" during the "widespread unemployment" caused by COVID-19. Gov't Opp. 9-10. The Court's conclusion in *NAM* that "[t]he statistics regarding pandemic-related unemployment actually indicate that unemployment is concentrated in service occupations and that large number of job vacancies remain in the area most affected by the ban, computer operations which require high-skilled workers" (*NAM*, 2020 WL 5847503, at *13) is thus entirely applicable here.

Second, the government suggests that "the *NAM* decision rested on the Court's view that foreign workers were 'already prevented, by statute, from competing with jobs for United States citizens,'" while the agencies have found otherwise with respect to H-1B workers. Gov't Opp. 15 (quoting *NAM*, 2020 WL 5847503, at *13). That is an obfuscation. As the Court is well aware, the Proclamation at issue in *NAM* barred multiple work-based visa categories; the language highlighted by the government pertained to H-2B workers, who are indeed prevented from competing with United States citizens. *See NAM*, 2020 WL 5847503, at *10 ("The pre-existing law already guarantees that issuance of an H-2B visa will not disadvantage American native-born workers.") (citing 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6)(iv)(A); 20 C.F.R. § 655.50(b)). The Proclamation also covered H-1B workers, and this Court's conclusion about *H-1B* workers, by contrast, was the one just noted: that the Proclamation's "finding" that pandemic-related unemployment justifies excluding H-1B workers "does not comport with actual facts" given that a "large number of job vacancies remain in the area most affected by the ban, computer operations which require high-skilled workers." *NAM*, 2020 WL 5847503, at *13. The same "actual facts" that undermined the Proclamation in *NAM*—namely, that COVID-related unemployment has largely spared the specific high-skilled labor markets that the H-1B program primarily serves—similarly doom the government's good-cause assertions here.

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tion exceeded the President's authority and improperly interfered with the existing statutory scheme" (Gov't Opp. 15)—but that was a separate claim. The Court ruled for the plaintiffs *both* on that theory, *and* on their claim that the ban on H-1B workers was unsupported by the evidence on pandemic-related unemployment. *See NAM*, 2020 WL 5847503, at *11, 13.

This case is different from *NAM* in one important respect: the degree of deference due the government. In *NAM*, all agreed that significant deference was due to the President's exercise of Section 212(f) authority. Even so, the Court found that, notwithstanding this broad authority, Presidential Proclamation 10052 transgressed the essential limitations on executive action. This case is far different because there is *no* deference due the Defendants. *See* pages 2-3, *supra*. In this setting, it is substantially harder to countenance Defendants' efforts at tying their extraordinary efforts to avoid longstanding administrative procedures to COVID-19.

Moreover, even if it *could* distinguish *NAM*, that would not get the government anywhere—because the government utterly fails to respond to our factual demonstration in *this* case that unemployment in the occupational categories commonly filled by H-1B workers remains low. *Compare* Mot. 13-15 (citing extensive statistical analyses proving this point), *with* Gov't Opp. 15-16 (not contesting this factual demonstration whatsoever). Even putting the persuasive effect of *NAM* to one side, therefore, the government has completely failed to demonstrate that unemployment in the occupations actually affected by these Rules is "so dire as to warrant dispensing with notice and comment procedures." *Capital Area Immigrants' Rights Coal. v. Trump*, 2020 WL 3542481, at *13 (D.D.C. June 30, 2020) (*CAIR Coal.*); *see also, e.g.*, *Sorenson*, 755 F.3d at 707 (good cause requires "record support proving the emergency"); *Nat'l Educ. Ass'n*, 379 F. Supp. 3d at 1021 ("The burden is on the agency to demonstrate that it has good cause.").

C. DOL's alternative theory of good cause fails as well.

DOL's alternative theory of good cause—that the agency's plans to raise the wage levels for H-1B, EB-2, and EB-3 workers could not be announced in advance because employers might rush to lock in the existing rates during the comment period—also fails, again for two independent reasons. *See* Mot. 15-18.

1. First, even if this theory were theoretically viable, it is unavailable here because the government had already publicly announced its intention to raise the wage levels three months before the DOL Rule was issued. That is, the government cannot seriously maintain that the need for secrecy justifies dispensing with notice and comment when the supposed "secret" was announced at a White House press briefing months earlier. *See* Mot. 15.

The government has little to say in response. It first ventures that "there is a significant difference . . . between a non-DOL official announcing the administration's *hope* that DOL will make certain changes to its rules by an unspecified date and the agency itself proposing" a rule. Gov't Opp. 20 (emphasis added). This argument both insults the intelligence of anyone who reads it and mistakes the facts. The announcement in question was not merely of the administration's "hope" about DOL's future behavior. Rather, it was that "[t]he President" had explicitly "*instructed*" DOL "to change the prevailing wage calculation," and that in response to this direct order from the chief executive, "the Department of Labor is going to fix all that, with the idea of setting the prevailing wage floor at the 50th percentile." Hughes Decl. Ex. 4 (emphasis added); *see* Mot. 15. And the President himself followed up with his own announcement in August that, "[a]s we speak, we're finalizing [H-1B] regulations" aimed at ensuring H-1B visas are restricted to "highly paid talent." Hughes Decl. Ex. 8, at 2. A declaration by the President of the United States that "regulations" are being "finaliz[ed]" "[a]s we speak" is hardly the kind of aspirational statement that, as the government would have it, employers might disregard. Rather, there was no secret, specifically because the White House—months before DOL issued its Rule—announced what DOL was going to do. Given this history, DOL cannot now maintain that a supposed need for secrecy justified the failure to allow the public to participate in its massively costly regulation.

In addition, DOL is quite simply wrong to suggest that a notice of proposed rulemaking would typically include "a specific effective date." Gov't Opp. 20. Rather, such notices announce a date by which comments must be submitted. The agency then receives those comments, reviews them, makes changes to the regulation as appropriate in response to the comments, and then it works with the Office of Information and Regulatory Affairs (OIRA) to finalize the regulation. This is a highly variable process, and agencies rarely, if ever, know at the outset how long it will take.[7] Thus, the issuance of a notice of proposed rulemaking by DOL would not have introduced

[7] For example, the Department of Labor's own recent notices of proposed rulemaking do not include a date on which the rule, if ultimately finalized, will become effective. The most recent proposed rule is entitled *Fiduciary Duties Regarding Proxy Voting and Shareholder Rights*, 85 Fed. Reg. 55,219 (Sept. 4, 2020). In the section titled "Effective date," it states that "[t]he section shall be effective [30 days after date of publication of final rule]." *Id.* at 55,243. The brackets are in the original, underscoring that the ultimate effective date is wholly unknown at the time that the proposed rule is published. *See also Grandfathered Group Health Plans and Grandfathered*

more concrete facts regarding timing than did the information provided by the White House here.

The government's only other contention on this point is that, "[g]iven the narrow timeframe in which employers may submit LCAs, it would not make sense for employers wishing to lock in the old wage rate to rush to submit LCAs absent an effective date." Gov't Opp. 20. This argument fails on several levels. First, a *proposed* rule need not provide an effective date, either. Thus, DOL's fundamental contention—that issuing a notice of proposed rulemaking and permitting comments in the normal course would have provided the public advance notice of the "effective date"—is simply erroneous.

Second, it is hard to see what the government means by this: Such an open-ended announcement would seem to incentivize businesses to submit LCAs under the old rate as soon as possible—that is, immediately once the start date for employment is less than six months away. Finally, this argument attributes to DOL a supposedly "reasonable predictive judgment" (Gov't Opp. 20)—that the announcement of a fixed effective date incentivizes businesses differently than an announcement of changes on an imminent but unspecified timeline—which appears nowhere in the DOL Rule, and therefore cannot justify the agency's action. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 50 ("It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself."); *Arrington v. Daniels*, 516 F.3d 1106, 1113 (9th Cir. 2008) ("*Post hoc* explanations of agency action by appellate counsel cannot substitute for the agency's own articulation of the basis for its decision.").

In sum, the White House's explicit announcement of the coming rule change guts DOL's contention that it had good cause to dispense with notice-and-comment rulemaking out of a putative need for secrecy.

2. DOL's theory of a mad rush to submit LCAs under the old wage levels further fails

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Group Health Insurance Coverage, 85 Fed. Reg. 42,782, 42,788 (July 15, 2020) ("The amendments to the 2015 final rules that are included in these proposed rules would apply to grandfathered group health plans and grandfathered group health insurance coverage beginning 30 days after the publication of any final rules."); *Financial Factors in Selecting Plan Investments*, 85 Fed. Reg. 39,113, 39,128 (June 30, 2020) ("(g) Effective date. This section shall be effective on [60 days after date of publication of final rule]."). Plaintiffs include institutional litigants who routinely address agency rulemaking, and they confidently affirm that most proposed rules do not include an effective date for the *final* rule. To issue a proposed rule in this context, DOL certainly did not have to identify a "specific effective date." Gov't Opp. 20.

under clear Ninth Circuit precedent because the contention is unsupported by the record. Mot. 16-18. The government's attempts to explain away that precedent fail to persuade.

The Ninth Circuit's twin decisions in the *East Bay* cases establish a simple rule: When the government claims good cause based on its prediction that regulated entities would evade the new rules during any comment period, the government must base that prediction on actual "evidence" and not merely its view of the relevant "incentive[s]." *E. Bay I*, 932 F.3d at 777; *see also E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1278 (9th Cir. 2020) (*E. Bay II*) (rejecting good cause because "[t]he government's reasoning continues to be largely speculative; no evidence has been offered to suggest that any of its predictions are rationally likely to be true.") (citation omitted); *Azar*, 911 F.3d at 577 ("[S]peculation unsupported by the administrative record . . . is not sufficient to constitute good cause."); Mot. 16-17. And the DOL Rule fails that simple test, because it proffers no evidence in support of its predictions about employer behavior. Mot. 17.

In response, the government does not contend that the DOL Rule marshals any evidence; rather, it argues that the agency need not have done so. *See* Gov't Opp. 16-20. The government's reading of the *East Bay* cases stretches the Ninth Circuit's reasoning past its breaking point, however. The government asserts that those cases "stand for the proposition" merely "that an agency's predictive judgment must be reasoned rather than purely speculative," and that "DOL's judgment satisfies this requirement." *Id.* at 19. But that is an incoherent dichotomy: By definition, what makes a conclusion "speculative" is not a lack of reasoning, but a lack of grounding in concrete facts. *See, e.g.*, Speculative, *Oxford English Dictionary* ("characterized by[] speculation or theory in contrast to practical or positive knowledge"), perma.cc/65MC-679U; Speculative, *Oxford Lexico* ("based on conjecture rather than knowledge"), perma.cc/BN4J-2KS6. Indeed, the Ninth Circuit in *East Bay* explicitly *acknowledged* the abstract logic behind the government's predictions. *E. Bay I*, 932 F.3d at 777 ("We recognize that, theoretically, an announcement of a proposed rule 'creates an incentive' for those affected to act 'prior to a final administrative determination.'"). In the final analysis, what rendered the government's predictions impermissibly "speculative"—and therefore insufficient to support good cause—was precisely the fact that, even *admitting* their abstract logic, "no *evidence* has been offered" in support of those predictions. *E.*

Bay II, 950 F.3d at 1278 (emphasis added).

Nor is this rule—that predictions of rule-evading behavior must be backed up with evidence in order to constitute good cause—unique to the Ninth Circuit. *Cf.* Gov't Opp. 19. To the contrary, the very same rule prevails in the D.C. Circuit. As one district court explained in rejecting precisely the sort of good-cause claim the DOL Rule presses here:

> Common sense dictates that the announcement of a proposed rule may, at least to some extent and in some circumstances, encourage those affected by it to act before it is finalized. *But this rationale cannot satisfy the D.C. Circuit's standard in this case unless it is adequately supported by evidence in the administrative record* suggesting that this dynamic might have led to the consequences predicted by the Departments—consequences so dire as to warrant dispensing with notice and comment procedures. *See Sorenson*, 755 F.3d at 707.

CAIR Coal., 2020 WL 3542481, at *13 (emphasis added). Like the Ninth Circuit in *East Bay*, the court recognized the abstract logic of the government's incentives-based argument, but held that logic insufficient as a matter of law unless buttressed by record evidence. This is because the D.C. Circuit, like the Ninth Circuit, holds that "record support proving the emergency" is necessary for a successful good-cause showing. *Sorenson*, 755 F.3d at 707; *see also id.* ("[S]omething more than an unsupported assertion is required."); *accord Azar*, 911 F.3d at 577 ("[S]peculation unsupported by the administrative record . . . is not sufficient to constitute good cause.").

Indeed, even the government's own cases undermine its position. For its contentions about deference to agency predictive judgments, the government relies heavily on the D.C. Circuit's decision in *Tennessee Gas Pipeline Co. v. FERC*, 969 F.2d 1141 (D.C. Cir. 1992). *See* Gov't Mem. 16, 18. But the government neglects to mention that the D.C. Circuit actually *rejected* good cause in that case—notwithstanding "the regulator's prediction of the regulateds' reaction to [the] proposed rulemaking"—*precisely because* the regulator "provided little factual basis" for that prediction. *Id.* at 1145; *see also id.* at 1145-46 (the "ample practical experience" supporting the agency's prediction "does not excuse the [agency's] failure to cite such examples in support of its claim of a good cause exception from the APA's notice and comment requirements."). And while the court did note one line of cases in which the now-defunct Temporary Emergency Court of Appeals "allowed use of the good cause exception based on bare predictions of regulatory avoidance" (*id.* at 1146; *see* Gov't Opp. 16), it did so only in the course of cabining those cases to their

own "special circumstances," and denying their broader applicability (*Tenn. Gas Pipeline Co.*, 969 F.2d at 1146).[8]

In sum, all these cases stand for the same proposition: courts do *not* "defer to an agency's predictive judgment that a notice and comment period would enable rule evasion" (Gov't Opp. 18), where that "predictive judgment" is based only on the agency's say-so, and not on record evidence. *See E. Bay I*, 932 F.3d at 777; *E. Bay II*, 950 F.3d at 1278; *CAIR Coal*, 2020 WL 3542481, at *13; *Tenn. Gas Pipeline Co.*, 969 F.2d at 1145. To the contrary, such an uncorroborated prediction is precisely the sort of "speculation unsupported by the administrative record" that "is not sufficient to constitute good cause." *Azar*, 911 F.3d at 577. For this independent reason, too, the DOL Rule's alternative good-cause justification must fail.[9]

CONCLUSION

The Court should grant plaintiffs partial summary judgment and set aside the DHS Rule and the DOL Rule.

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[8] Apart from being non-binding (*see* Mot. 17 n.23), these price-control cases are *sui generis* because of the speed at which commodity prices can be changed—and huge transactions funneled through—"to accommodate shifts in regulatory policy." *Tenn. Gas Pipeline Co.*, 969 F.2d at 1145. By contrast, the international hiring and workforce-planning decisions at issue here are much more like the construction projects in *Tennessee Gas*—which "are planned well in advance and take time to accomplish"—and the "migratory patterns" in *CAIR Coalition*, both of which cases explicitly rejected the government's attempted reliance on the *Mobil Oil* line of price-control cases. *See Tenn. Gas Pipeline Co.*, 969 F.2d at 1146; *CAIR Coal.*, 2020 WL 3542481, at *14 n.17.

[9] *Amici* U.S. Tech Workers assert that even if good cause does not exist, the Court should nevertheless stay its vacatur of the Rules. Dkt. 66-1, at 10. There is no justification for this approach. Unlike technical failures that can be easily remedied, "deficient notice is a 'fundamental flaw' that almost always requires vacatur." *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014) (quoting *Heartland Regional Med. Ctr. v. Sebelius*, 566 F.3d 193, 199 (D.C. Cir. 2009)); *accord, e.g.*, *CAIR Coal.*, 2020 WL 3542481, at *21-23 (rejecting stay of vacatur where agency improperly relied on good-cause exception); *California v. Bernhardt*, 2020 WL 4001480, at *43 (N.D. Cal. July 15, 2020) ("[C]ircumventing notice-and-comment requirements is not a minor error" that can permit "remand without vacatur."). And unlike the case cited by *amici*, here there has been no detrimental reliance on the new Rules that could justify retaining them temporarily. *Compare Wash. All. of Tech. Workers v. DHS*, 156 F. Supp. 3d 123, 148-49 (D.D.C. 2015) (staying vacatur only because immediately "vacating the 2008 Rule would force thousands of foreign students with work authorizations to scramble to depart the United States.") (quotation marks and ellipsis omitted). In any event, the government itself has not requested any such relief, and "[a]n amicus cannot raise issues not already raised by the parties themselves." *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 2005 WL 8177401, at *1 (N.D. Cal. July 1, 2005); *see also, e.g.*, *United States v. Wahchumwah*, 710 F.3d 862, 868 n.2 (9th Cir. 2013) ("[T]he court will not consider arguments raised only in amicus briefs.").

Respectfully submitted,

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