

1 Mark D. Selwyn (SBN 244180)
2 Mark.Selwyn@wilmerhale.com
3 WILMER CUTLER PICKERING
4 HALE AND DORR LLP
5 2600 El Camino Real,
6 Suite 400
7 Palo Alto, California 94306
8 Telephone: (650) 858-6031
9 Facsimile: (650) 858-6100

10 *Attorney for Plaintiffs*

11 **UNITED STATES DISTRICT COURT**
12 **EASTERN DISTRICT OF CALIFORNIA**
13 **FRESNO DIVISION**

14 UNITED FARM WORKERS and UFW
15 FOUNDATION,

16 Plaintiffs,

17 v.

18 SONNY PERDUE, WILLIAM NORTHEY, and
19 THE UNITED STATES DEPARTMENT OF
20 AGRICULTURE,

21 Defendants.

Case No. 1:20-CV-01452-DAD-JLT

**PLAINTIFFS' RESPONSE TO
DEFENDANTS' NOTICE (ECF 30)**

22 Defendants' "Notice" only underscores the importance for this Court to order the U.S.
23 Department of Agriculture (USDA) to conduct the Farm Labor Survey (FLS), as it has done for
24 more than a century. That the U.S. Department of Labor (DOL) has transferred a draft final rule to
25 the Office of Information and Regulatory Affairs (OIRA) in no way assures that an adequate
26 replacement methodology for calculating the Adverse Effect Wage Rates (AEWRs) will be
27 promulgated and effective in the short remaining time before DOL must promulgate AEWRs for
28 2021. The only way to assure that the DOL can promulgate AEWRs for 2021 is to require the
USDA to continue with its practice of conducting the FLS and publishing the Farm Labor Report
(FLR).

DOL's transfer of this draft final rule to OIRA—more than two months after the final rule's promulgation was planned¹—confirms that the timing of any replacement regulation for the determination of 2021 AEWRs remains uncertain.² OIRA has as many as 90 days to review the rule under Executive Order 12866; the OMB director can extend that period another 30 days, and the Secretary of Labor could extend OIRA review indefinitely. *See* Exec. Order No. 12,866, 58 Fed. Reg. 51735 § 6(b)(2) (Oct. 4, 1993).

Nor does DOL's transfer of a draft final rule to OIRA alleviate the irreparable injury that hundreds of thousands of farmworkers will suffer absent a temporary restraining order. Under current law, DOL cannot set the 2021 AEWRs unless USDA timely conducts the FLS and publishes the November FLR. *See* 20 C.F.R. § 655.103. Defendants admitted as much in their brief, *see* ECF 27 at 10-11; in the Declaration of Brian D. Pasternak, *see* ECF 27-1 at ¶ 7; and at oral argument. Therefore, if no replacement regulation has become effective and USDA has neither conducted the FLS nor published the November FLR, hundreds of thousands of farmworkers will lose the AEWRs' legal protection and suffer severe economic hardship.

Dated: October 21, 2020

Respectfully submitted,

/s/ Mark D. Selwyn
 MARK D. SELWYN (SBN 244180)
 WILMER CUTLER PICKERING
 HALE AND DORR LLP
 2600 El Camino Real,
 Suite 400
 Palo Alto, California 94306
 Telephone: (650) 858-6031
 Facsimile: (650) 858-6100

Attorney for Plaintiffs

¹ According to DOL's official rulemaking timetable, the final rule was expected at the beginning of August 2020. *See* Temporary Agricultural Employment of H-2A Nonimmigrants in the United States, regulations.gov (last visited Oct. 21, 2020), <https://www.regulations.gov/docket?D=ETA-2019-0007>.

² Even if a final rule were promulgated in time to set 2021 AEWRs, that rule will likely be subject to judicial challenge, as the Government acknowledged at oral argument. Indeed, regulations affecting the H-2A program have a long history of drawing judicial challenges from both farmworkers and employers, so even a hypothetical final rule favorable to farmworkers would not be insulated from further delay. *See, e.g., Shoreham Co-op. Apple Producers v. Donovan*, 764 F.2d 135, 137-138 (2d Cir. 1985); *Virginia Agr. Growers Ass'n, Inc. v. Donovan*, 774 F.2d 89 (4th Cir. 1985); *N. Carolina Growers' Ass'n, Inc. v. Solis*, 644 F. Supp. 2d 664, 667 (M.D.N.C. 2009); *United Farm Workers*