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IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA  
FRESNO DIVISION

UNITED FARM WORKERS and UFW  
FOUNDATION,

Plaintiffs,

v.

THE UNITED STATES DEPARTMENT OF  
LABOR and MARTIN J. WALSH, in his  
official capacity as United States Secretary of  
Labor,<sup>1</sup>

Defendants.

**Case No. 1:20-cv-01690-DAD-JLT**

**PLAINTIFF'S REPLY IN FURTHER  
SUPPORT OF THEIR  
MOTION TO ENFORCE  
COMPLIANCE WITH THE COURT'S  
PRELIMINARY INJUNCTION**

**Motion Date:** April 20, 2021

<sup>1</sup> Pursuant to Fed. R. Civ. P. 25(d), Secretary Martin J. Walsh has been automatically substituted for former Acting Secretary Milton Al Stewart.

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## OTHER AUTHORITIES

U.S. Dep't of Labor, Employment and Training Administration – Announcements (Jan. 15, 2021), <a href="https://www.dol.gov/agencies/eta/foreign-labor/news">https://www.dol.gov/agencies/eta/foreign-labor/news</a> .....	11
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---	---

U.S. Dep't of Labor, Employment and Training Administration – Performance Data – H-2A Disclosure Data FY2021 Q1, <a href="https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H2A_Disclosure_Data_FY2021_Q1.xlsx">https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H2A_Disclosure_Data_FY2021_Q1.xlsx</a> (last visited Mar. 10, 2021) .....	1
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## INTRODUCTION

H-2A workers and U.S. farmworkers in corresponding employment were denied the wage increases to which they were entitled for the first two months of 2021, likely costing the typical California farmworker \$325 and farmworkers nationwide more than \$10 million in aggregate.<sup>2</sup> For farmworkers and their families already struggling to survive on subsistence incomes, this is a significant loss. And they suffered that loss solely because the U.S. Department of Labor (DOL), in coordination with the U.S. Department of Agriculture (USDA), unlawfully sought to alter the H-2A program to transfer billions of dollars from farmworkers to growers through an unpermitted freeze of DOL's Adverse Effect Wage Rates (AEWRs). Had the Government complied promptly with this Court's injunction in *United Farm Workers v. Perdue*, No. 1:20-cv-1452-DAD-JLT (E.D. Cal. Oct. 28, 2020) (*Perdue* Injunction), DOL would have been able to promulgate updated 2021 AEWRs before the end of calendar year 2020, as the H-2A program regulations require, and rates would have increased accordingly. But DOL nonetheless failed to timely publish updated AEWRs as the law requires. Plaintiffs now respectfully request that the Court order Defendants to direct growers to reimburse farmworkers for the wages lost between January 1, 2021 and February 23, 2021, to prevent farmworkers from bearing the costs of the Government's illegal administrative actions, as contemplated by the Court's preliminary injunction and supplemental order of January 12, 2021. *See* Order, *United Farm Workers v. Dep't of Labor*, No. 1:20-cv-1690-DAD-JLT (E.D. Cal. Dec. 23, 2020), ECF No. 37 (PI Order); Suppl. Order Regarding Prelim. Inj. Relief, *United Farm Workers v. Dep't of Labor*, No. 1:20-cv-1690-DAD-JLT (E.D. Cal. Dec. 23, 2020), ECF No. 39 (Suppl. Order).

Defendants contest relatively little of Plaintiff's motion. They dispute neither the likely amounts due to qualifying farmworkers nor the Government's sole responsibility for those lost wages. Nor does DOL suggest that Plaintiffs' proposed remedy would be administratively impracticable.

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<sup>2</sup> *See* U.S. Dep't of Labor, Employment and Training Administration – Performance Data – H-2A Disclosure Data FY2021 Q1, [https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H2A\\_Disclosure\\_Data\\_FY2021\\_Q1.xlsx](https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H2A_Disclosure_Data_FY2021_Q1.xlsx) (last visited Mar. 10, 2021); U.S. Dep't of Labor, Employment and Training Administration – Performance Data – H-2A Disclosure Data FY2020, [https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H2A\\_Disclosure\\_Data\\_FY2020.xlsx](https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H2A_Disclosure_Data_FY2020.xlsx) (last visited Mar. 10, 2021).

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