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11 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

12 RAMON TORRES HERNANDEZ, and
FAMILIAS UNIDAS POR LA JUSTICIA,
13 AFL-CIO, a labor organization;

14 Plaintiffs,

15 vs.

16 MARTIN WALSH, in his official capacity
as United States Secretary of Labor, and
17 UNITED STATES DEPARTMENT OF
LABOR,
18

19 and

20 WASHINGTON STATE EMPLOYMENT
SECURITY DEPARTMENT and CAMI
21 FEEK, in her official capacity as
Commissioner,
22

Defendants.

No. 1:20-CV-03241-SMJ

SECOND AMENDED
COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF

I. PRELIMINARY STATEMENT

1. For decades, the prevailing practice in Washington State's tree fruit industry has been to pay piece-rate wages to farmworkers who harvest our state's cherry, pear, and apple crops. Piece-rate wages benefit agricultural employers because they reward farmworkers who work quickly with wages well above minimum wage, and thus, ensure that highly perishable crops are harvested on-time to maximize grower profits.

2. By picking as many lugs or bins of fruit in a day as their bodies will tolerate, the average farmworker earns \$18 an hour on piece rate harvest wages while highly skilled farmworkers can earn wages well in excess of \$20 per hour. Impoverished farmworker families rely on peak piece-rate harvest wages to pay rent and buy food when seasonal work disappears during the winter and early spring.

3. For decades, Washington's piece-rate wage system has operated in a labor market in which growers had to set piece-rates based on principles of supply and demand. Farmworkers either accepted the offered wages and began work or negotiated for increased wages. If an agreement could not be reached, farmworkers had the freedom to pursue a better deal at the next orchard down the road.

4. The recent rise in the tree-fruit industry's use of the federal H-2A program to recruit thousands of foreign workers and their efforts to influence state

1 wage surveys, now threaten to undermine the decades-old prevailing practice of
2 paying higher piece-rate wages unless governmental agencies fulfill their statutory
3 mandate to protect the wages and working conditions of U.S. farmworkers.

4 5. Agricultural employers using the H-2A system realize they do not
5 need piece-rate wages to incentivize foreign H-2A workers to accept their jobs or
6 to meet production demands because those vulnerable workers are tied to a single
7 employer through their work visas and they have no ability to seek better wages or
8 working conditions at a neighboring orchard. Accordingly, H-2A employers can
9 attempt to reduce their labor costs by pegging harvest wages to lower hourly
10 minimum wages. This violates the statutory mandate of the H-2A program which
11 prohibits practices that adversely affect the wages and working conditions of U.S.
12 farmworkers.

13 6. This case challenges USDOL's role in arbitrarily interjecting the
14 "hourly wage guarantee" concept into Washington's prevailing wage surveys,
15 which mirrors changes advocated by the agricultural industry, resulting in the
16 elimination of higher piece-rate wages for the 2021 cherry, pear and apple
17 harvests, replacing them with the drastically lower minimum wage.¹ In addition,
18 the case challenges the arbitrary failure to use worker interviews to verify the data
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22 _____
23 ¹ Washington's current minimum wage is \$13.69.

1 supplied by employers and the arbitrary imposition of a “15 percent sample size”
2 threshold which have also contributed to the elimination of higher piece-rate wages
3 in the same harvests.

4 7. Ramon Torres Hernandez and Familias Unidas por la Justicia, AFL-
5 CIO (FUJ) seek immediate declaratory and injunctive relief to prevent this
6 arbitrary agency action from drastically slashing the wages of Washington
7 farmworkers and to preserve the status quo until a prevailing wage survey that
8 complies with federal law can be completed.
9

10 **II. JURISDICTION AND VENUE**

11 8. This Court has jurisdiction over this action pursuant to
12 28 U.S.C. § 1331 (federal question) and §2201(a) (declaratory relief). Jurisdiction
13 is also proper under the judicial review provision of the Administrative Procedure
14 Act, 5 U.S.C. § 702.
15

16 9. Declaratory and injunctive relief is sought consistent with
17 5 U.S.C. §§ 705 and 706 and as authorized in 28 U.S.C. §§ 2201 and 2202.
18

19 10. The proper venue for this action is in the Eastern District of
20 Washington pursuant to 28 U.S.C. § 1391(e)(1) because Defendants are an agency
21 of the United States and an officer acting in his official capacity, no real property is
22 involved in this action, and Plaintiff Ramon Torres Hernandez resides in the
23 District.

III. PARTIES

11. Plaintiff Ramon Torres Hernandez (“Plaintiff Torres”) resides in Yakima County, Washington. Plaintiff Torres is a U.S. worker within the meaning of 20 C.F.R. § 655.103(b) who harvested cherries, pears, and apples in 2020, and intends to seek agricultural employment, including harvesting tree fruit in the Yakima Valley in 2021 and beyond. Plaintiff Torres is a member of Familias Unidas por la Justicia.

12. Plaintiff Familias Unidas por la Justicia (FUJ) is a farmworker labor union with approximately 900 members statewide and is affiliated with the Washington State Labor Council, AFL-CIO. FUJ’s members, many of whom have families with small children, earn annual wages that put them at or below federal poverty guidelines. USDOL’s failure to set prevailing wages as required by federal law will result in substantial decreases to FUJ members’ already meager wages. FUJ brings this action on behalf of its members and farmworkers who rely on higher piece-rate wages to support themselves and their families.

13. Defendant Martin Walsh is the Secretary of Labor and is charged with the supervision and management of all decisions and actions within the United States Department of Labor (USDOL). Plaintiffs sue Secretary Walsh in his official capacity.

1 14. Defendant USDOL is an agency of the United States within the
2 meaning of the APA. It is responsible for overseeing and approving annual wage
3 and working conditions surveys under the H-2A program to primarily protect the
4 working conditions of domestic farmworkers and must only issue labor
5 certifications to import foreign workers if sufficient domestic workers are not
6 available to fill the jobs, as set forth in the Immigration and Nationality Act (INA),
7 8 U.S.C. § 1188.

9 15. Defendant Cami Feek is the Commissioner of the Washington State
10 Employment Security Department (ESD) and is charged with the supervision and
11 management of all decisions and actions within ESD. Plaintiffs sue Commissioner
12 Feek in her official capacity.

14 16. Defendant ESD is an agency of the State of Washington. It is
15 designated as the State Workforce Agency (SWA) within the Wagner-Peyser
16 interstate job order system. For purposes of the H-2A temporary agricultural visa
17 system, and it is responsible, among other things, for conducting prevailing wage
18 surveys for agriculture in Washington based on federal statutory and regulatory
19 requirements from USDOL.

21 **IV. STATUTORY AND REGULATORY BACKGROUND**

22 17. The H-2A program allows U.S. employers to bring foreign nationals
23 to the United States to fill temporary agricultural jobs where the supply of U.S.

1 workers is insufficient, if and only if, the importation of such workers does not
2 depress the wages and working conditions of domestic farmworkers.

3 18. The modern-day H-2A program traces back to 1952, when Congress
4 passed the Immigration and Nationality Act. The 1952 program authorized the use
5 of temporary foreign labor but did not distinguish between agricultural and non-
6 agricultural workers. The “H-2” program was available to employers for
7 agriculture and non-agriculture jobs until 1986, when the Immigration Reform and
8 Control Act of 1986 (IRCA), P.L. 99-603, § 301, 100 Stat. 3359 (1986), amended
9 the INA by establishing a separate H-2A visa classification for agricultural workers
10 and H-2B for non-agricultural temporary foreign workers.
11

12 19. The 1986 revisions to the foreign guestworker program were
13 motivated by Congress’s desire to ameliorate the various problems experienced
14 under the Bracero program, the most significant of which was the “inadequacy of
15 ... protections for farmworkers.” H.R. Rep. 99-682, at 80 (1986); *see Labor*
16 *Certification Process for the Temporary Employment of Aliens in Agriculture and*
17 *Logging in the United States*, 52 Fed. Reg. 20,496 (June 1, 1987). The protections
18 afforded to U.S. and foreign guest workers under the H-2A program are thus
19 informed by, and should be considered in the context of, the problems with the
20 Bracero program.
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22
23

1 20. The Bracero program was intended to increase the number of
2 available farmworkers in the United States during the World War II worker
3 shortage by authorizing the entry of Mexican nationals for temporary farm work.
4 The program existed from 1942 to 1964. *See* Adam B. Cox & Cristina M.
5 Rodriguez, *The President and Immigration Law*, 119 Yale L.J. 458, 487-90 (Dec.
6 2009).

8 21. While the Bracero program was in effect, it “was the chief source of
9 foreign labor in the United States.” Robert C. McElroy & Earle E. Garrett, USDA
10 Econ. Research Serv., *Termination of the Bracero Program: Some Effects on Farm*
11 *Labor and Migrant Housing Needs*, Agric. Econ. Report No. 77 (June 17, 1965).
12 Although the United States benefitted from this cheap source of labor, Congress
13 acknowledged that “[t]he Bracero program has been likened by some to indentured
14 slavery where employer exploitation was rampant and inhumane.” H.R. Rep. 99-
15 682, at 83. Some of the major problems under the Bracero program included
16 underpayment, dangerous working conditions, unhealthy living conditions, and
17 threats of deportation by employers.
18

19 22. Beyond the substandard working and living conditions experienced by
20 Mexican Bracero workers, the program also caused the wages paid to U.S. workers
21 in the agriculture and railroad sectors to decline sharply, despite the inclusion in
22 the Bracero program of mechanisms designed to prevent adverse wage effects on
23

1 U.S. workers. *See, e.g.,* Cong. Research Serv., *The Effects on U.S. Farm Workers*
2 *of an Agricultural Guest Worker Program* 4-5 (Dec. 28, 2009),
3 <https://www.everycrsreport.com/reports/95-712.html>.

4 23. Outrage over the inhumane treatment of Bracero workers and the
5 program's downward pressure on wages led Congress to end the program in 1964.
6 When enacting the modern H-2A program, Congress was well aware of the past
7 problems in the Bracero program. *See* H.R. Rep. 99-682, at 83.

8 24. As a result of Congress's attempt to avoid replicating the problems in
9 the H-2A program, in order for employers to secure the benefits of foreign labor
10 under the current H-2A program, they must complete a multi-step process.

11 25. Prior to filing a petition with U.S. Citizenship and Immigration
12 Services (USCIS), a division of the Department of Homeland Security, the
13 employer must obtain a temporary labor certification from USDOL's Office of
14 Foreign Labor Certification (OFLC) that "there are not sufficient workers who are
15 able, willing, and qualified, and who will be available at the time and place needed,
16 to perform the labor or services involved in the petition," and that "**the**
17 **employment of [foreign] labor . . . will not adversely affect the wages and**
18 **working conditions of workers in the United States similarly employed.**"
19
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22 8 U.S.C. § 1188(a)(1) (emphasis added).
23

1 26. Employer use of the H-2A program has risen in recent years. In
2 Fiscal Year 2020, USDOL certified 275,430 positions to be potentially filled by
3 H-2A workers. Declaration of Arasele Bueno (Bueno Decl.), [ECF No. 6-22](#). The
4 vast majority of these certifications were for crop workers (88.1% of the
5 certifications), agricultural equipment operators (5.6%), or ranch or aquaculture
6 workers (4.0%). [Id.](#) In Fiscal Year 2020, USDOL certified 26,832 positions in
7 Washington State, making it the third highest user of H-2A workers in the nation.
8
9 [Id.](#)

10 27. The USDOL has promulgated regulations that govern the H-2A labor
11 certification process. 20 C.F.R. Ch. V, Pt. 655, Subpt. B. These regulations contain
12 numerous specific requirements for employers seeking to hire workers through the
13 H-2A program.
14

15 28. To fulfill its duty to prevent an adverse effect on the wages of
16 domestic farmworkers, USDOL regulations require that employers pay a wage that
17 is the highest of the AEWR,² the prevailing hourly wage or piece rate, the agreed-
18

19 ² The Adverse Effect Wage Rate (AEWR) is defined as:

20 the minimum wage rate that the Administrator of the Office of
21 Foreign Labor Certification (OFLC) has determined must be offered
22 and paid to every H-2A worker employed under the DOL-approved
23 Application for Temporary Employment Certification in a particular
occupation and/or area, as well as to U.S. workers hired by employers
into corresponding employment during the H-2A recruitment period,

1 upon collective bargaining wage, or the Federal or State minimum wage.
2 20 C.F.R. § 655.120(a); *see also* 20 C.F.R. § 655.122(l).

3 29. Additional regulations promulgated under the Wagner-Peyser Act,³
4 29 U.S.C. § 49 *et seq.*, require the State Workforce Agency (SWA) to ensure for
5 all agricultural job orders, H-2A and non-H-2A, that “wages . . . offered are not
6

7 to ensure that the wages of similarly employed U.S. workers will not
8 be adversely affected.

9 29 C.F.R. § 502.10. The AEWR is often referred to as the minimum hourly wage
10 for the H-2A program.

11 ³ The Wagner-Peyser Act, passed by Congress during the Great Depression,
12 created a public employment system aimed at improving the employment
13 prospects and lives of farmworkers in the United States. *See Alfred L. Snapp &*
14 *Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 594-96 (1982). The system
15 was intended to protect against wage depression for local farmworkers through the
16 recruitment of more desperate workers willing to accept lower wages. *See id.* The
17 current regulatory structure is the result of litigation challenging the abject failure
18 of state job service agencies to protect the wages and working conditions of
19 domestic farmworkers. *See NAACP, W. Region v. Brennan*, 360 F. Supp. 1006,
20 1014 (D.D.C. 1973) (commonly referred to as the Judge Richey decision); 45 Fed.
21 Reg. 39454 (Jun. 10, 1980).
22
23

1 less than the prevailing wages . . . among similarly employed farmworkers in the
2 area of intended employment or the applicable Federal or State minimum wage,
3 whichever is higher.” 20 C.F.R. § 501(c)(2)(i).

4 30. The SWA in Washington State is the Employment Security
5 Department (ESD).
6

7 31. ESD, as the SWA, is required to conduct prevailing wage surveys
8 using the standards set forth by USDOL in Handbook 385. *See* 84 Fed. Reg.
9 36168, 36184 (Jul. 26, 2019). The Handbook pre-dates the creation of the H-2A
10 program and has not been updated since 1981. *Id.* at 36185. The prevailing wage is
11 intended to provide an additional safeguard against wage depression in local areas
12 through the importation of outside labor. 85 Fed. Reg. 70445, 70450 (Nov. 5,
13 2020).
14

15 32. The first sentence in Handbook 385 states the purpose of prevailing
16 wage surveys: “Accurate farm wage data are essential to the effective operation of
17 the Public Employment Service in serving farm employers and farm workers and
18 in implementing the Secretary’s regulations on the intra/interstate recruitment of
19 farmworkers. (20 C.F.R. § 653.501)”. [ECF No. 6-2](#) at 102 [I-111].
20

21 33. Handbook 385 also provides: “Data supplied by employers **must** be
22 verified through worker interviews.” *Id.* at 108 [I-116] (emphasis added).
23

V. STATEMENT OF FACTS

A. Prevailing Piece-Rates Exceeding Statutory Minimums Are Well Established in Washington State

34. From 2006-2018, the wage survey process in Washington State determined, consistent with the agricultural industry's decades-old practice, that piece-rate wages were the prevailing wages for the harvest of apples, cherries and pears. *See* U.S. Dep't of Labor, Agricultural Online Wage Library, <https://www.foreignlaborcert.doleta.gov/reader-archive.cfm?abbr=WA>.

35. Those findings were also consistent with what the agricultural industry touted as a wage system that benefitted both growers and farmworkers.

36. In January 2015, when the issue of whether farmworkers being paid the piece rate were entitled to paid rest breaks was before the Washington Supreme Court, three agricultural industry entities, including the Washington Farm Labor Association ("WAFLA"),⁴ filed an amicus brief asserting that piece rates are the common method of payment for hand harvesting crops. [ECF No. 6-3](#) at 152.

⁴ At this time, WAFLA asserted it was an association comprising hundreds of agricultural employers in Washington State and that its members included companies that employ hundreds to thousands of workers on a piece rate basis. It further asserted that it filed approximately 80 percent of the H-2A applications in

1 37. More specifically, the agricultural industry asserted that “Washington
2 is number one in the harvest of: apples, sweet cherries and pears, all of which are
3 traditionally handpicked at piece rate wages.” *Id.* at 154.

4 38. Moreover, the agricultural industry argued that skilled piece-rate
5 workers often make more than \$20 an hour under this system. *Id.*

6 39. The agricultural industry further argued that both farmers and
7 farmworkers benefit under a piece-rate system of pay. *Id.* at 152-53.

8 40. The agricultural industry argued that with the advent of the
9 Washington minimum wage, piece rate compensation was tethered to an “hourly
10 minimum wage guarantee.” *Id.* at 152

11 41. The Washington State minimum wage and the AEWR, for growers
12 using the H-2A program, were the *only* hourly wage guarantees referenced as
13 being used in connection with the piece-rate system. *See id.* at 152-56.

14 42. In July 2015, the Washington Supreme Court held that farmworkers
15 being paid the piece rate were entitled to be paid for rest periods at their regular
16 rate of pay or the minimum wage, whichever was greater. *Lopez Demetrio v.*
17 *Sakuma Bros. Farms, Inc.*, 183 Wn.2d 649, 663, 355 P.3d 258, 266 (2015).

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22 Washington and was the second largest employer of H-2A foreign workers in the
23 nation.

1 43. In response to that decision, tree fruit growers sought relief from
2 liability for back wages owed for failure to pay farmworkers for their rest breaks
3 from the Washington State Legislature.

4 44. During a legislative hearing on the bill in February 2017, the
5 agricultural industry presented a video in support of the piece-rate system
6 including worker testimony that the piece-rate system gives them a chance to make
7 more money, estimating workers earn \$250 to \$300 per day during the cherry
8 harvest.⁵

9 45. During that same hearing West Mathison testified as the President of
10 Stemilt Growers, the largest grower of apples and pears in the United States, and
11 on behalf of the industry and 80 other growers who bring their fruit to Stemilt's
12 fruit packing warehouses. Mr. Mathison testified that the average piece-rate pay
13 was approximately \$18.00 per hour.⁶

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19 ⁵ Testimony available at: [https://www.tvw.org/watch/?clientID=9375922947](https://www.tvw.org/watch/?clientID=9375922947&eventID=2017021224&eventID=2017021224&startStreamAt=2068&stopStreamAt=2293&autoStartStream=true)
20 [https://www.tvw.org/watch/?clientID=9375922947](https://www.tvw.org/watch/?clientID=9375922947&eventID=2017021224&eventID=2017021224&startStreamAt=2068&stopStreamAt=2293&autoStartStream=true)
21 [https://www.tvw.org/watch/?clientID=9375922947](https://www.tvw.org/watch/?clientID=9375922947&eventID=2017021224&eventID=2017021224&startStreamAt=2068&stopStreamAt=2293&autoStartStream=true)
22 [https://www.tvw.org/watch/?clientID=9375922947](https://www.tvw.org/watch/?clientID=9375922947&eventID=2017021224&eventID=2017021224&startStreamAt=2068&stopStreamAt=2293&autoStartStream=true) (starting at approximately 34:00).

23 ⁶ *Id.* (starting at approximately 100:52).

1 46. Mr. Mathison further testified that piece-rate wages allow Stemilt to
2 “fairly compensate [farmworkers] at rates higher than minimum wage and with
3 better productivity to the company.”

4 47. Wage data obtained from Stemilt affirms the agricultural industry’s
5 representations to the Washington Supreme Court: domestic piece-rate workers
6 earned on average \$20.00 per hour picking cherries in 2016 and \$24.10 per hour in
7 2017. [ECF No. 6-3](#) at 143-44 ¶ 5; *see also* Declaration of Rachael Pashkowski
8 (Pashkowski Decl.) [ECF No. 7](#) ¶ 14 (calculating average earnings for domestic and
9 foreign H-2A workers).
10

11 48. An East Wenatchee grower recently reported that his 2019 cherry
12 pickers averaged \$35 per hour when their piece rate is converted to an hourly rate.
13 Bueno Decl., [ECF No. 6-7](#).
14

15 49. Plaintiff Torres can make more than \$30 per hour when picking
16 cherries by the piece rate, harvesting five bins in about eight hours, depending on
17 conditions and the piece-rate, consistent with worker testimony in the legislative
18 process. Declaration of Ramon Torres Hernandez (Torres Decl.) [ECF No. 4](#) ¶ 8.
19

20 50. An organizer with the United Farm Workers (UFW) who submitted a
21 declaration in connection with ESD’s 2019 Wage Survey Results declared that
22 farmworkers when being paid by the piece rate for harvesting cherries commonly
23 earn over \$20.00 an hour. [ECF No. 6-3](#) at 142.

B. Washington Agricultural Industry Efforts to Replace Higher Paying Piece Rates with the Minimum Wage

51. In the fall of 2015 following the Washington Supreme Court's landmark decision in *Lopez Demetrio* in July, the piece-rate rest-break case, the agricultural industry, led by the director of WAFLA, Dan Fazio, engaged in a concerted campaign to eliminate prevailing piece-rate wage findings in connection with Washington's Agricultural Wage survey.

52. Mr. Fazio implored growers to report on their wage survey forms that they had paid Washington State minimum wage or the AEWR for the harvesting of tree fruit, rather than reporting the piece rates actually paid. Mr. Fazio justified this false reporting on the basis that these hourly minimum wages were "guaranteed hourly" rates. See [ECF No. 6-3](#) at 133, 136 & 137.

53. The WAFLA campaign orchestrated by Mr. Fazio directly contradicted the amicus brief filed by WAFLA and other agricultural industry groups just months earlier with the Washington Supreme Court. *Supra* ¶¶ 34-39; Cf. [ECF No. 6-3](#) at 134 & 153-54.

54. After an investigation, ESD concluded that the wage survey data was tainted, with apple, pear and cherry growers improperly influenced by the WAFLA campaign. [ECF Nos 6-8](#), [6-9](#) at 262-63, & [6-10](#). Had ESD not removed the tainted

1 data many harvest activities would have been reduced to the Washington State
2 minimum wage rather than higher prevailing piece-rate wages.

3 55. In response to grower manipulation of the 2015 wage survey,
4 farmworker advocates called upon ESD to conduct worker surveys as required by
5 Handbook 385.
6

7 56. ESD had not previously collected wage data using worker surveys,
8 but pledged to do so beginning in 2016. *See* [ECF No. 6-11](#) at 386.

9 57. Despite the mandate to verify wage data supplied by employers
10 through a worker survey, USDOL has failed to use the worker survey data
11 collected by ESD to verify employer data and has informed ESD that the worker
12 data cannot be used in reaching the prevailing wage findings. [ECF No. 6-32](#) at 794.
13

14 58. Following the agricultural industry interference with the 2015 wage
15 survey, for the first time, the 2016 wage survey in Washington included the
16 “guaranteed hourly wage” concept. *See* [ECF No. 6-3](#) at 133. On information and
17 belief, ESD added the question about hourly guarantees to the wage survey in
18 response to Mr. Fazio’s advocacy and USDOL’s approval. *See* [id.](#)
19

20 59. USDOL ignored the fact that the “hourly guarantee” concept was
21 meaningless given that the Washington State minimum wage and the AEWR are
22 statutorily mandated and therefore apply to all employers, whether employers
23 report them or not. *See* [id.](#) at 134 (explaining the hourly guarantee concept as an

1 anachronism from a time when many farmworkers were not covered by minimum
2 wage laws, but Puerto Rican workers had enhanced wage protections under Public
3 Law 87); *infra* ¶ 94.

4
5 60. For the first time, the wage survey results included piece rate wages
6 for cherry, apple and pear harvest that also included an hourly guarantee. *See* U.S.
7 Dep't of Labor, Agricultural Online Wage Library, [https://www.foreignlaborcert.](https://www.foreignlaborcert.doleta.gov/reader-archive.cfm?abbr=WA)
8 [doleta.gov/reader-archive.cfm?abbr=WA](https://www.foreignlaborcert.doleta.gov/reader-archive.cfm?abbr=WA) (May 25, 2017 findings).

9
10 61. Virtually all hourly guarantees reported for fruit harvest activities
11 were pegged to either the 2016 Washington Minimum Wage of \$9.47 per hour or
12 the 2016 AEWR of \$12.69. *See id.*; [ECF No. 7](#) ¶ 11 (historical AEWR rates).

13
14 62. Wages for farmworkers were not obviously impacted during the 2017
15 harvests because both piece rates and guaranteed hourly rates were included and
16 agricultural employers were required to offer the higher piece rate wages.

17
18 63. In 2018, after ESD released initial results from the 2017 wage survey,
19 finding, as usual, that higher piece-rate pay was the prevailing practice in apple
20 harvest, the industry objected, in part, on the grounds that ESD could not use data
21 if it did not represent 15 percent of all workers in a given activity, and ESD
22 reversed its initial findings. *See* [ECF No. 6-10](#) at 270.

23
24 64. After learning of ESD's reversal, Dan Fazio, in a newsletter to all
25 WAFLA members, crowed about the role industry lobbyists played in eliminating

1 higher piece rate wages for farmworkers stating, “[I]n case you didn't hear . . .
2 [ESD] removed all piece rates for apples for growers that utilize the H-2A program
3 effective June 19[, 2018]. This is a huge win and saved the apple industry
4 millions. Really glad we could help.” *Id.*, [ECF No. 6-12](#) at 278.

5
6 65. Realizing its mistake, ESD reversed course yet again, and attempted
7 to restore higher prevailing piece-rate wages for the 2018 apple harvest advocating
8 to USDOL that the arbitrary imposition of thresholds from Handbook 385 fails to
9 consider valid statistical findings and in this case **“lead to a large decrease in the
10 required wage for workers in the Washington apple harvest”** which is **“in
11 direct conflict with the fundamental goal of the H-2A temporary agricultural
12 program to ensure domestic workers are not adversely effected by the use of
13 foreign labor.”** *Id.*, [ECF No. 6-11](#) at 273 (emphasis added).

14
15 66. ESD specifically advocated that USDOL use the worker survey to
16 verify employer responses, as required by Handbook 385. *Id.*

17 67. ESD observed that Red Delicious harvesting was paid at
18 approximately \$22.15 per hour, when converted from a piece rate, as opposed to
19 the AEWR then in effect of \$14.12 per hour. *Id.* at 274.

20
21 68. ESD further urged USDOL to consider the worker survey in
22 conjunction with employer responses where sample size thresholds were “slightly
23

below” the 15 percent sample size threshold,⁷ to prevent no findings of prevailing wages for a number of apple varieties in harvesting. *Id.* at 274-75. The thresholds ranged from 10.74 percent of the worker population to 13.39 percent. *Id.*

69. Ultimately, USDOL refused to publish any apple harvest wage data from 2017. This decision prevented the wholesale elimination of piece rate wages for farmworkers in the 2018 apple harvest but resulted in the use of 2016 piece rate determinations for apple harvest which deprived workers of any increase in wages from 2017. *Id.*, [ECF No. 6-10](#) at 271.

C. The 2019 Wage Survey Eliminates Many Prevailing Piece-Rates for Harvest Activities Replacing them with the Minimum Wage

70. The 2019 Washington prevailing wage survey continued the use of the “hourly wage guarantee” concept, which has resulted in the total elimination of higher paying piece-rates for almost all cherry, pear and apple harvest activities and replaced them with the Washington State minimum wage. *See id.*, [ECF No. 6-](#)

⁷ USDOL has a policy of requiring that wage survey samples collected from employers meet or exceed a certain percentage of workers employed in the crop activity even though Handbook 385 provides the sample size as a “general guide” rather than a mandate. *See supra* ¶ 63; [ECF No. 6-2](#) at 219 (sample size of 15 percent of workers for crop activities with 3000 or more workers).

1 [13](#) at 287-88. USDOL’s arbitrary failure to use the worker survey to verify the data
2 supplied by employers and the arbitrary imposition of a threshold sample size also
3 contributed to the elimination of higher piece-rate wages in the same harvests.

4 71. USDOL interjected the “hourly wage guarantee” concept into the
5 prevailing wage finding methodology, even though it is not defined or required by
6 the regulations or other written guidance and contravenes the statutory mandate to
7 protect U.S. farmworkers wages from adverse effects. *See infra* ¶¶ 88-93 & 104-
8 108.

9 72. By treating piece-rates with an “hourly wage guarantee” as different
10 rates of payment from piece-rates without a guarantee, many piece-rate wages were
11 totally excluded from consideration, even though the data shows the vast majority
12 of growers reporting a wage guarantee identified a “wage guarantee” rate that was
13 the equivalent to or lower than statutorily required minimums. There is no basis to
14 distinguish a piece rate without an hourly guarantee, that is subject to statutorily
15 required minimums, from a piece rate with an hourly wage guarantee at or below
16 those same minimum-wage standards.⁸

17 ⁸ Farmworkers and their advocates have also called into question whether wage
18 guarantees, other than statutorily required minimums, are actually used in
19 Washington State; they certainly are not a common or regular practice. *See* [ECF](#)

73. Farmworker advocates raised grave concerns with the prevailing wage findings with both ESD and USDOL resulting in a delay in USDOL publishing the results. *See* [ECF Nos. 6-3](#), [6-4](#), [6-5](#), & [6-6](#). That delay will not cure the irreparable harm to Washington’s farmworkers who will be deprived of any wage increase for 2021 and discouraged from seeking jobs at farms that employ H-2A workers, as described below.

1. 2019 Survey Results Undermine Piece-Rate Wages

74. In June 2020, ESD released the results from the 2019 wage survey (“2019 Wage Survey Results”). *See* [ECF No. 6-13](#).

75. Despite having found that higher piece rates, not fixed hourly wages, were the prevailing wage in Washington’s cherry harvest in all prior wage surveys since 2006, the flawed 2019 wage survey results indicated that nearly all cherry harvesting activity for specific varieties changed from a piece rate wage structure to an hourly wage rate of \$12.00 per hour.⁹ *Id.* at 3-4 & 8-9.

[No. 3](#) at 132 n.2 & 133; [ECF No. 4](#) ¶ 7; [ECF No. 5](#) ¶ 14; *see also supra* ¶ 39 (the *only* hourly wage guarantees identified by the agricultural industry in 2015 were statutorily required minimums).

⁹ The Washington State minimum wage in 2019 was \$12.00 per hour.

1 76. Based on the flawed 2019 results, the prevailing wage rate for the
2 harvest of Dark Red, Lapin, Skeena and Yellow cherries were all drastically
3 lowered from a piece rate wage where workers could earn over \$20 an hour, to an
4 hourly wage rate of \$12.00 per hour. *Id.*

5
6 77. These results stand in dramatic contrast to the decades-old practice of
7 paying the piece-rate for harvesting cherries through which farmworkers earn well
8 in excess of the minimum wage. *See supra* ¶¶ 34-36 & ¶¶ 42-48.

9 78. In addition, the flawed 2019 prevailing wage data for two varieties of
10 apples, Braeburn and Gala, and for the harvesting of Bosc pears were also similarly
11 lowered from a piece rate wage structure to an hourly wage rate of \$12.00 per
12 hour. [ECF No. 6-13](#) at 287-88.

13
14 79. On July 14, 2020, ESD submitted the flawed 2019 wage survey data
15 to USDOL. *Id.*, [ECF No. 6-6](#) at 248.

16 80. In addition, one commodity-activity saw a decrease in the piece rate
17 itself; blueberry harvesting was reduced from \$.75 per pound from \$.50 per pound.
18 *Id.*, [ECF No. 6-13](#) at 283 & 287.¹⁰

19
20
21
22 ¹⁰ In *Zirkle Fruit Co. v. United States Dep't of Labor*, 442 F. Supp. 3d 1366, 1383
23 (E.D. Wash. 2020), this Court upheld the \$0.75 piece rate from the 2018 wage

1 81. The Form ETA-232 and the Handbook 385 require SWAs to explain
2 increases or decreases in prevailing rates from the previous year. *See* [ECF No. 7-9](#)
3 at 156; [ECF No. 6-2](#) at 128 (I-143); *see also* *Zirkle Fruit Co.*, 442 F. Supp. 3d at
4 1378-79 (analyzing whether the failure to explain an increase or decrease was
5 arbitrary and capricious, and finding no such violation where the change was from
6 an hourly rate to piece rate, and not a change from one piece rate to another).

8 82. The Form ETA-232 submitted for blueberry harvest wages fails to
9 include any explanation of the decrease in blueberry harvest wages from \$0.75 per
10 pound to \$0.50 per pound. [ECF No. 7-9](#) at 151-166.¹¹

12 survey and ordered Zirkle to remit the wages that had been withheld from
13 farmworkers.

14 Notably, Zirkle—purportedly the state's largest blueberry grower—
15 declined to participate in the voluntary survey, foregoing the
16 opportunity to dramatically increase the dataset on which ESD's
17 findings were made and—if Zirkle in fact pays less than \$0.75/lb. to
domestic laborers—potentially reduce the PWR.

18 *Id.* n.10.

19 ¹¹ Every Form ETA-232 submitted for the 2019 Washington prevailing wage
20 survey has a cover page referring to Braeburn apple harvesting. This appears to be
21 an error as the attached pages reference distinct activities, like the pages referenced
22 here pertaining to blueberries. [ECF No. 7-9](#).

1 83. In addition, the data shows that at least three grower respondents who
2 participate in the H-2A program (reflected by reporting an hourly guarantee the
3 equivalent of the AEWR in 2019 of \$15.03) reported a piece rate below \$0.75 per
4 pound, which was the required prevailing wage that year, as upheld in the *Zirkle*
5 *Fruit* case, including rates of \$0.50 and \$0.60 per pound. *Id.* at 149. The prevailing
6 wage ultimately identified by ESD for the blueberry harvest was the rate reported
7 by an employer who reported paying piece-rate wages *less than* the rate required
8 by law. *See id.* (line highlighted in green).

10 84. The 2019 survey, which led to the dramatic drop in harvest wages,
11 yielded contrasting results for *non-harvest* wages, which have historically been
12 paid at an hourly rate. For every non-harvest activity for which there is a
13 comparator in the 2018 Agricultural Wage Survey, wages *increased* except for one
14 that stayed the same (pear thinning). *Compare id.* at 8-9 with [ECF No. 6-14](#) at 6-7.

16 85. Moreover, in the 2019 survey results, *every* non-harvesting
17 commodity-activity with an hourly rate, again except for thinning pears, has an
18 hourly rate that *exceeds* \$12.00 per hour, while *every* harvesting activity that
19 changed from a piece rate to an hourly rate is set at the minimum wage of \$12.00
20 per hour despite the well-established understanding that wages for harvesting
21 activities exceed other activities like pruning and thinning. [ECF No. 6-13](#) at 287-
22 88; [ECF No. 5](#) ¶ 15; *see supra* ¶¶ 32-48.

86. In addition, in the 2019 survey results, prevailing piece-rate wages for apple and pear harvesting generally, and for specific varieties including, Fuji, Honeycrisp, Red Delicious and Bartlett pears were eliminated because USDOL refuses to accept wage results that fail to meet the 15 percent sample size threshold. *See* [ECF No. 6-13](#) at 296-298; [ECF No. 6-11](#) at 2-3.

87. The responses for apple and pear harvesting and each of the varieties referenced in the preceding paragraph **exceeded** the response rate that ESD obtained in the 2017 wage survey which ESD argued should be sufficient, along with the worker survey, to set prevailing wages as set forth in the table below. *See supra* ¶ 66.

Variety	2017 % of Workers Represented	2019 % of Workers Represented
Fuji	11.23	13.83
Honeycrisp	12.16	13.05
Red Delicious	13.27	14.52
Apple Harvesting		14.64
Pears Harvesting		13.39
Bartlett		13.27

88. The 2019 worker survey confirmed that the most prevailing wage rate by far is the piece rate, including for the three specific varieties, Fuji, Honeycrisp and Red Delicious. [ECF No. 6-32](#) at 3-4.

1 89. ESD stated that USDOL “does not ‘use’ worker survey results” and
2 therefore ESD submitted ETA 232 forms, which are used to set the prevailing
3 wage rates, “based solely on employer responses.” *Id.* at 3.

4 **2. The Arbitrary Use of the Hourly Wage Guarantee Results in**
5 **the Elimination of Higher Piece-Rate Pay**

6 90. The regulations applicable to the use of the H-2A program and the
7 Wagner-Peyser regulations do not include or define the terms “hourly wage
8 guarantee” or “earnings guarantee.”

9 91. The ETA Handbook No. 385 does not define the terms “hourly wage
10 guarantee” or “earnings guarantee.” *See* [ECF No. 6-2](#) at 105 (I-113).

11 92. Similarly, the Handbook sections covering Standards for Preparation
12 of Agricultural Wage Surveys and Collection of Wage Information, which
13 describes how the SWA makes prevailing wage rate findings do not include these
14 terms or concepts. *Id.* at 105-111 (I-113-I119). Specifically, the sections relating to
15 the 40 percent rule, the 51 percent rule, and more than one unit of payment, do not
16 include any reference to an “hourly wage guarantee” or “earnings guarantee.” *Id.* at
17 108-109. These handbook provisions do not require SWAs to consider an hourly
18 wage guarantee in making prevailing wage rate findings. *Id.*

19 93. The only reference in the ETA Handbook No. 385 related to an
20 “earnings guarantee” is found in the section which provides instructions to the
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22
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1 SWA for the completion of the Domestic Agricultural In-Season Wage Report,
2 ETA 232. *See id.* at 124-28 (I-135-143).

3 94. That section states: “Rates with earnings guarantee represent a
4 different method of payment from piece rates without earning guarantees and
5 should be listed separately.” *Id.* at 126 (I-141).

6
7 95. The term “earnings guarantee” is not defined in this section and not
8 included in the special instructions. *Id.* at 124.

9 96. The reference is understood to be a term of art referring to historical
10 protections afforded Puerto Rican farmworkers under Public Law 87 which
11 entitled them to a *higher* hourly wage than other domestic farmworkers. *See* [ECF](#)
12 [No. 6-3](#) at 134 & 170-225.

13
14 97. USDOL Employment Training Administration (ETA) is responsible
15 for reviewing SWA wage rate findings. *Id.* at 110.

16 98. Once the prevailing wage results are finalized, USDOL-ETA
17 publishes the wage results on its Agricultural Online Wage Library (AOWL). *See*
18 <https://www.foreignlaborcert.doleta.gov/aowl.cfm>.

19
20 99. The USDOL-ETA has not published any prevailing wage rates for
21 Washingtonn State since July 23, 2019. *Id.*

1 100. In July 2019, USDOL issued a notice of proposed rulemaking
2 (NPRM) containing numerous changes to its regulations governing the H-2A
3 program. 84 Fed. Reg. 36168 (Jul. 26, 2019).

4 101. In the NPRM, USDOL proposed to modernize the methodology used
5 to establish the prevailing wage rate. 84 Fed. Reg. 36168, 36171 & 36184. The
6 proposed changes were significant and included changes to the Handbook No. 385
7 and the Form ETA-232 used by SWAs to report prevailing wage survey results.
8 *See* 84 Fed. Reg. 36168, 36184-88.

9 102. The NPRM did not address or reference an “hourly wage guarantee”
10 or the “earnings guarantee” in the sections dealing with proposed changes to the
11 prevailing wage rate methodology.
12

13 103. USDOL received over 83,000 public comments in response to the
14 July 26, 2019 NPRM. 85 Fed. Reg. 70445. On November 5, 2020, USDOL
15 published a final rule on the methodology by which it determines the AEWR (the
16 minimum hourly wage for H-2A jobs) with an effective date of December 21,
17 2020. The final rule was later withdrawn by the Biden administration.
18

19 104. The November 5, 2020, final rule purported to freeze AEWRs at the
20 2020 level for two-years. *Id.* at 70467. USDOL estimated the impact of this change
21 would result in an average annual transfer from workers to employers of more than
22 \$167 million, or \$1.68 **billion** over the next decade. *Id.* at 70447. USDOL further
23

1 acknowledged that in recent years, farmworker wages have increased significantly
2 faster than inflation or wage increases in the overall U.S. economy. *Id.* at 70452.¹²

3 105. Each year USDOL issues Training and Employment Guidance Letters
4 (TEGL) which provide guidance to SWAs to conduct agricultural prevailing wage
5 surveys. *See* Training and Employment Guidance Letter No. 14-19 (Apr. 13, 2020)
6 available at https://wdr.doleta.gov/directives/attach/TEGL/TEGL_14-19.pdf.

8 106. USDOL did not provide any guidance in the 2019 or 2020 TEGLs,
9 governing the Washington State prevailing wage survey conducted in 2019
10 through 2020 regarding the “hourly wage guarantee” or “earnings guarantee.”

11 107. Pursuant to the applicable TEGLs, ESD submitted annual plans to
12 USDOL-ETA regarding the manner in which it intended to conduct the 2019
13 agricultural prevailing wage survey. *See* [ECF No. 6-1](#).

15 108. The annual plans require states to agree that they will carry out all
16 activities, including conducting the prevailing wage survey, to support USDOL’s
17 review and processing of H-2A job orders and applications consistent with the
18 statutory and regulatory mandate that the employment of H-2A foreign workers not
19

20 ¹² The AEWR freeze was enjoined. *See UFW v. USDOL*, Case No. 1:20-CV-
21 01690-DAD-JLT, 2020 WL 7646406, at *1 (E.D. Cal. Dec. 23, 2020) (plaintiffs’
22 motion for preliminary injunction granted).
23

1 adversely affect the wages and working conditions of similarly employed domestic
2 workers. *See id.* at 13, 20-21, 24, 60, 73, & 91.

3 109. The annual plans also require states to contractually agree to submit
4 all prevailing wage survey findings in accordance with instructions contained in
5 the TEGL. *See id.* at 24, 26, 86, & 88.

6 110. There are no instructions in the annual plans submitted by ESD in
7 connection with the 2019 wage survey or in the TEGL related to the “hourly wage
8 guarantee” or the “earnings guarantee.” *See* [ECF No. 6-1](#).

9 111. The arbitrariness of injecting the hourly wage guarantee concept into
10 the prevailing wage determinations is well illustrated in the 2019 ETA-232 data for
11 yellow cherry harvesting. *See* [ECF No. 7](#) ¶ 21, [ECF No. 7-8](#).

12 112. By segregating employer responses based on whether the employer
13 reported an hourly wage guarantee, piece rate responses were eliminated, and the
14 prevailing wage was determined to be \$12 per hour - **\$18 less than what Plaintiff**
15 **Torres normally earns on piece-rate wages during the cherry harvest.** *Id.*, [ECF](#)
16 [No. 7-8](#) at 127.

17 113. Had the employer responses reporting a piece rate—with or without
18 an hourly wage guarantee—been treated as the same, the piece rate would have
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1 been overwhelmingly¹³ the most common method of payment and therefore the
2 prevailing wage would have been a piece-rate wage. *See id.* ¶ 22. Had the
3 prevailing wage been set based on that piece-rate data, some yellow cherry
4 harvesting wages would have increased by \$0.05 per pound. *Id.* ¶ 24; [ECF No. 6-](#)
5 [14](#) at 309 (2018 wage survey set harvesting of low-density yellow cherries at \$0.25
6 per pound).

8 114. The arbitrariness of treating these responses differently is further
9 underscored by the fact that, in the data set provided for yellow cherry harvesting,
10 96% of the employers indicating they had an hourly guarantee reported that rate
11 was at or *below* statutorily required minimums. [ECF No. 7](#) ¶ 23. Similarly, in the
12 ETA-232 data provided for red cherry harvest (no variety specified), 96% of the
13 employers indicating they had an hourly guarantee reported that rate was at or
14 below statutorily required minimums. *Id.* ¶ 20.

17
18 ¹³ Nearly 80% of the employers participating in the survey for yellow cherry
19 harvest wages reported paying piece-rate wages. [ECF No. 7](#) ¶ 22. The prevailing
20 nature of piece-rate pay for harvest activities was further reinforced by the recently
21 released 2019 Worker Survey results, in which workers overwhelming reported
22 piece-rate wages. [ECF No. 6-32](#) at 682.

1 115. There is no basis to distinguish between a piece-rate wage with an
2 hourly guarantee that provides no more than statutorily required minimum wages,
3 the state minimum wage and the AEW (for H-2A employers) from those without
4 an hourly wage guarantee because every grower must comply with statutory
5 minimum wages.
6

7 116. Moreover, because USDOL and ESD fail to define “hourly wage
8 guarantee” or “earnings guarantee,” employers were not informed whether
9 statutory minimums were in fact “hourly wage guarantees” or whether only hourly
10 guarantees that *exceed* these minimums constituted an hourly wage guarantee. *See*
11 [ECF No. 6-3](#) at 132; [ECF No. 6-4](#) at 231-32.
12

13 117. Because “hourly wage guarantees” are not in common usage in the
14 cherry harvest in Washington State, had employers been clearly instructed that
15 only those guarantees that exceeded statutory minimums should have been
16 reported, it is likely that very few would have reported an “hourly wage
17 guarantee.” *See supra* n. 8.
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1 118. On December 10, 2020, ESD informed stakeholders that it intends to
2 continue to include the hourly guarantee concept in the survey methodology for the
3 2020 wage survey and that process is now underway. *See* [ECF No. 6-33](#) at 690.¹⁴

4
5 **3. The Arbitrary Failure to Use Worker Surveys, Imposition of a**
6 **Threshold Sample Size, and Overestimation of Worker**
7 **Populations Also Result in the Elimination of Higher Piece-**
8 **Rate Pay**

9 119. The wage finding process in Handbook 385 mandates that employer
10 wage data “**must** be verified through worker interviews.” [ECF No. 6-2](#) at 221 [I-
11 116] (emphasis added).

12 120. ESD commenced conducting worker wage surveys consistent with
13 this mandate in 2016. [ECF No. 6-32](#) at 793; *see supra* ¶¶ 53-55.

14 121. USDOL provides funding to ESD to conduct the worker survey. *See*
15 [ECF No. 6-1](#) at 62-65 & 91-93 (ESD contracts with the University of Washington
16 to conduct the employer and worker surveys at a total estimated cost of
17

18 ¹⁴ The 2020 survey instrument perplexingly adds a question for employers
19 reporting an hourly guarantee that is less than the state minimum wage. *Id.* The
20 only way an hourly guarantee makes sense is if it provides a wage rate that exceeds
21 statutorily required minimums. *See id.*, [ECF No. 6-5](#) at 231; *see also supra* ¶¶ 57 &
22 94.
23

1 approximately \$400,000); [ECF No. 6-31](#) at 5 (expected total cost of 2020 surveys
2 \$698,437) & 7 (ESD must spend not more than 20% of federal grant funding on
3 the surveys and field checks).

4 122. The University of Washington costs to conduct the worker survey
5 were estimated at \$144,981 for 2019 and \$136,309 for 2020. [ECF No. 6-31](#) at 5.
6

7 123. The vast majority of workers surveyed in the 2019 worker survey
8 reported being paid by the piece rate, consistent with decades of practice
9 recognized by the industry and farmworkers alike. [ECF No. 6-32](#) at 3-4; *see supra*
10 ¶¶ 32-37 & 42-48.

11 124. Despite the mandate to verify wage data supplied by employers
12 through a worker survey, USDOL advised ESD that “USDOL does not ‘use’
13 worker survey results” resulting in ESD submitting prevailing wage findings based
14 “solely on employer responses.” *Id.* at 3.
15

16 125. USDOL’s failure to use the worker surveys allowed employers
17 reporting hourly wages as the prevailing practice to go unchallenged and
18 unverified.
19

20 126. USDOL moreover requires prevailing wage survey responses
21 collected from employers to meet sample thresholds that meet or exceed a certain
22 percentage of workers employed in the crop activity. *See supra* ¶¶ 61-67.
23

1 127. Handbook 385 provides the sample response size as a “general guide”
2 not a mandate. [ECF No. 6-2](#) at 4 [I-114].

3 128. ESD previously asserted that USDOL’s insistence on these thresholds
4 was arbitrary and, would result in a large decrease in workers’ apple harvest
5 wages, in direct conflict with the fundamental goal of the H-2A program to ensure
6 domestic workers are not adversely affected by the use of foreign labor. [ECF No.](#)
7 [6-11](#) at 2.

8 129. ESD advocated that USDOL accept survey results slightly below the
9 15 percent threshold, in combination with worker survey results, to set prevailing
10 piece-rate wages. *Id.* at 3.

11 130. The 2019 Worker survey eliminates piece-rate wages for apple and
12 pear harvesting generally, and for specific varieties including, Fuji, Honeycrisp,
13 Red Delicious and Bartlett pears based on failing to meet USDOL’s 15 percent
14 sample size threshold. [ECF No. 6-13](#) at 18-19.

15 131. The responses for apple and pear harvesting and each of the varieties
16 referenced in the preceding paragraph **exceeded** the response rate that ESD
17 previously argued should be sufficient, in conjunction with the corroborating
18 worker survey, to set prevailing wages. *See supra* ¶¶ 66 & 85.
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1 132. For apple harvesting generally and Red Delicious harvesting the
2 survey sample collected was barely under the 15 percent threshold at 14.64 and
3 14.52 percent, respectively.

4 133. USDOL's insistence on accepting only employer wage data reaching
5 certain response thresholds, when such thresholds are included in Handbook 385 as
6 a suggested guideline, results in the disregard of statistically relevant data and
7 rewards employers' failure to participate in the wage survey process such that the
8 lack of sufficient data results in the elimination of higher piece-rate wages.

9 134. Available data indicate that ESD overestimated the size of worker
10 populations for commodity-activities in the calculations resulting from the 2019
11 survey.

12 135. These overestimates, in tandem with the response thresholds imposed
13 by USDOL, cause the agencies to fail to certify prevailing wages for many
14 commodity-activities.

15 136. The number of prevailing wages certified for Washington agriculture
16 in 2019 fell sharply as compared with 2018.

17 137. USDOL has a policy or practice of approving clearance orders that
18 fail to promise the prevailing wage for a general category of activity where there is
19 no prevailing wage certified for a sub-activity in that category, resulting in workers
20 being deprived of higher required wages. USDOL has approved and published at
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22
23

1 least two clearance orders for 2021 that evince this practice—both for BT Loftus
2 Ranch, <https://seasonaljobs.dol.gov/job-order/H-300-20352-967105>;
3 <https://seasonaljobs.dol.gov/job-order/H-300-20324-920106>—which offer work in
4 the Yakima area. This practice limits local workers’ opportunities for jobs by
5 depressing the wages offered.
6

7 **D. USDOL Approval and Publication of H-2A Clearance Orders**
8 **Promising to Pay the AEW for Activities That Have a Prevailing**
9 **Piece Rate Drives Down Farmworker Wages**

10 138. USDOL has a policy or practice of approving and publishing H-2A
11 clearance orders that promise to pay the AEW even when there is a published
12 prevailing piece rate, evinced by its history of approving such clearance orders and
13 its communications on the subject.

14 139. For the 2021 harvest season, USDOL has approved and published H-
15 2A clearance orders that promise only to pay the AEW for activities that have a
16 published prevailing piece rate.

17 140. These clearance orders include those for AgriLabor,
18 <https://seasonaljobs.dol.gov/job-order/H-300-21155-368103>; Chiawana Orchards,
19 <https://seasonaljobs.dol.gov/job-order/H-300-21159-380049>; High Valley
20 Orchards, <https://seasonaljobs.dol.gov/job-order/H-300-20342-939950>; and MMP
21 Orchards, <https://seasonaljobs.dol.gov/job-order/H-300-21076-151954>, all of
22 which offer work in the general Yakima area.
23

141. Clearance orders that promise only the AEW for activities paid by the piece as a prevailing practice limits local workers' opportunities for jobs by depressing the wages offered.

E. The USDOL-Sanctioned Hourly Guarantee Concept and Additional Arbitrary Actions Irreparably Harm Washington Farmworkers.

142. As in past controversies related to the prevailing wage rate findings, following concerns being raised by advocates, a stalemate has now resulted, with no corrections made to the 2019 wage survey (thus no current prevailing wages published) and employers defaulting to using wages from the 2018 Wage Survey in their H-2A Clearance Orders (effectively H-2A contracts) for 2021. *See supra* ¶¶ 61-67.

143. Many of the Clearance Orders filed for 2021 to date have language that reserves the employers' right to lower wages based on rates published on the AOWL and many include apple, pear and cherry harvest wages that would be reduced when prevailing wages based on the 2019 Wage Survey are published on the AOWL. *See* [ECF Nos. 6-15, 6-17, 6-19, & 6-20](#).

144. National data sources document a trend of farmworker wage increases averaging approximately 5% per year in Washington State and nationally, with the Pacific Region (Oregon and Washington) slightly higher at an average of 6% per year. [ECF No. 7](#) at ¶¶ 5-7, 9-10, & 13; [ECF No. 6-21](#) (agricultural labor economist

1 documents trend of farmworker wage increases that exceed the Employment Cost
2 Index (ECI)).

3 145. This Court recognized the national trend of increases in farmworker
4 wages in another prevailing wage challenge. *Evans Fruit Co., Inc. v. United States*
5 *Dep't of Labor*, 1:19-CV-03202-SMJ, 2019 WL 7820432, at *5 (E.D. Wash. Oct.
6 11, 2019) (citing statistical data from the U.S. Department of Agriculture).

7 146. ESD's prevailing wage surveys also show a general increase in piece
8 rate wages over time. [ECF No. 7](#) ¶ 12.

9 147. Similarly, the Adverse Effect Wage Rate (AEWR) set by the USDOL
10 has historically increased on average over 5% per year, with a 2020 increase of
11 5.3%. [ECF No. 7](#) ¶ 11; *see supra* ¶ 102 & *infra* ¶ 143 (background related to
12 USDOL freezing the AEWR for two years and related issues).

13 148. The flaws in the survey methodology, which have resulted in no
14 prevailing wage findings for 2019 and have left employers using 2018 wage survey
15 information while reserving the right to decrease wages in the future, discourages
16 Washington farmworkers like Plaintiff Torres from applying for those jobs and
17 depresses the labor market. [ECF No. 4](#) ¶ 14; [ECF No. 5](#) ¶ 16.

18 149. Moreover, if the 2019 Wage Survey Results are not corrected and are
19 published as submitted by ESD on the AOWL, certain piece-rate wages will be
20 eliminated. *See supra* at ¶¶ 68 & 73-76.

1 150. The elimination of piece rates in the cherry harvest and reduction to
2 the Washington State minimum wage would result in an approximate 30%
3 reduction in hourly wages based on both industry and worker provided data. *See*
4 [ECF No. 7](#) ¶¶ 14 & 16; [ECF No. 6-3](#) at 142 (UFW reports the same approximate
5 piece-rate earnings as those analyzed in [ECF No. 7](#) ¶ 14).

7 151. If paid at the Washington State minimum wage instead of a prevailing
8 piece rate, **Plaintiff Torres would lose over \$3,400 (17%) of his annual**
9 **earnings.** *See* [ECF No. 4](#) ¶ 8; [ECF No. 7](#) ¶ 15.

10 152. Moreover, if the 2019 Wage Survey Results that eliminate piece rates
11 are left to stand, employers will be even more likely to seek H-2A workers at new,
12 much lower harvest wage rates. This will result in even more workers being paid
13 below true prevailing-wage rates and will drive down the wages paid to all
14 farmworkers, contrary to USDOL's statutory and regulatory framework. *See Zirkle*
15 *Fruit Co. v. United States Dep't of Labor*, 1:19-CV-03180-SMJ, 2019 WL
16 7819653, at *2 (E.D. Wash. Nov. 7, 2019) (recognizing that lower prevailing wage
17 rates would depress the wages of Washington workers as the basis for permitting
18 ESD intervention in employer challenges to prevailing wage surveys); *supra* ¶¶ 34-
19 36 & 42-48.

22 153. Because most farmworkers live at or below the poverty line, a
23 reduction in wages, even of 5%, can mean the difference between keeping a family

1 housed or becoming homeless, feeding a family or going hungry, and risking
 2 illness or paying for medicine, harm that cannot be undone through the payment of
 3 back wages. *See* [ECF No. 5](#) ¶¶ 7, 16-17; [ECF No. 4](#) ¶¶ 2 & 14-15; [ECF No. 6-30](#) at
 4 562; *see also* *United Farm Workers v. Perdue*, No. 1:20-cv-01452-DAD-JLT,
 5 2020 WL 6318432, at *14 (E.D. Cal. Oct. 28, 2020) (finding failure to conduct
 6 wage survey that was likely to result in 5 percent wage cut for farmworkers
 7 constituted irreparable harm in the form of economic hardship).

9 VI. CAUSES OF ACTION

10 FIRST CLAIM FOR RELIEF

11 (Administrative Procedure Act – Without Observance of Procedure
 12 Required by Law – 5 U.S.C. § 706(2)(D))

13 154. The APA provides that courts must “hold unlawful and set aside
 14 agency action” that is “without observance of procedure required by law.”
 15 5 U.S.C. § 706(2)(D).

16 155. The APA requires agencies to publish notice of all proposed
 17 rulemaking in a manner that “give[s] interested persons an opportunity to
 18 participate in the rule making through submission of written data, views, or
 19 arguments” 5 U.S.C. § 553(c).

20 156. USDOL never published notice of the change in its prevailing wage
 21 methodology, which interjects the guaranteed wage concept into the wage finding
 22 process, including in its July 26, 2019 NPRM, thereby denying Plaintiffs and other
 23

1 affected parties an opportunity to present comment and evidence, in violation of
2 5 U.S.C. § 706(2)(D).

3 157. USDOL's prevailing wage methodology change was not an
4 "interpretative rule[], general statement[] of policy, or rule[] of agency
5 organization, procedure, or practice." 5 U.S.C. § 553(b). To the contrary, it was a
6 substantive rule change that fundamentally altered Plaintiffs' rights and employers'
7 obligations under federal law.
8

9 158. Defendants' violations cause ongoing harm to Plaintiffs.

10 **SECOND CLAIM FOR RELIEF**

11 (Administrative Procedure Act — Arbitrary and Capricious or Otherwise not
12 in Accordance with the Law — 5 U.S.C § 706(2)(A))

13 159. Under the APA, a court must "set aside agency action" that is
14 "arbitrary, capricious" or "otherwise not in accordance with law." 5 U.S.C.
15 § 706(2)(A).

16 160. Under the INA, in its administration of the H-2A program, the
17 USDOL has a statutory duty to prevent adverse effects to the wages of U.S.
18 workers. USDOL acknowledges that prevailing wage surveys are most useful to
19 protect the wages of U.S. workers where employers commonly pay based on a
20 piece rate and when State agencies know based on past experience that prevailing
21 piece rate wages are higher than the AEWR. *See* 84 Fed. Reg. 36168, 36180 (Jul.
22 26, 2019).
23

1 161. The change in USDOL's the prevailing wage methodology, which
2 interjects the guaranteed wage concept into the wage finding process, violates
3 USDOL's statutory obligation to protect the wages of U.S. farmworkers against
4 adverse effects from the employment of H-2A foreign workers.
5

6 162. USDOL has failed to explain its departure from its longstanding
7 policy which does not provide for the use of the "hourly wage guarantee" in
8 making prevailing wage findings. See [ECF No. 6-2](#) at 108-09 (Handbook No. 385
9 does not include the hourly wage guarantee concept in the prevailing wage rate
10 finding instructions).
11

12 163. USDOL's change in policy and practice is also irrational because it
13 interjects the hourly wage guarantee concept, which is already guaranteed by law
14 (e.g. state minimum wage or the federal AEWR), into the wage finding process
15 without defining what the SWA or employers are being asked to report on or
16 include, and results in higher piece-rate wages being eliminated when piece rates
17 are, in fact, the prevailing wage in the industry.
18

19 164. USDOL's failure to use the worker surveys confirming the
20 predominance of piece-rate pay is arbitrary and capricious and otherwise not in
21 accordance with the law. The Handbook No. 385 provides: "Data supplied by
22 employers **must** be verified through worker interviews." [ECF No. 6-2](#) at 108 (I-
23 116) (emphasis added). It is irrational to go through the process and expense of a

1 worker survey, only to completely disregard the results which contravene the
2 employers' assertions of paying an hourly rate for harvest work.

3 165. USDOL's insistence on requiring a sample size threshold of 15
4 percent is arbitrary and capricious and otherwise not in accordance with the law.
5 The Handbook No. 385 provides that threshold as a "general guide [that] should be
6 observed" *Id.* at 106 (I-114). Because USDOL treats the threshold as
7 mandatory, employers have an incentive not to participate in the survey process
8 and valuable data, corroborated by worker surveys, is not considered, thereby
9 eliminating higher prevailing piece-rate wages and causing USDOL to fail in its
10 duty to prevent adverse effects to the wages of U.S. workers.
11

12 166. The change in the hourly wage guarantee policy and practice, the
13 failure to use worker surveys to verify employer data, the disregard of employer
14 wage data below the 15 percent threshold, the overestimates of worker population
15 for each commodity-activity, the approval of clearance orders that fail to pay the
16 "general" prevailing wage for activities in which there is not a particular piece rate
17 for a sub-activity, and the approval of clearance orders that promise only to pay the
18 AEWR for activities that have a published prevailing piece rate are arbitrary and
19 capricious or otherwise not in accordance with the law because these actions fail to
20 protect the wages of U.S. farmworkers, which is the central purpose of setting
21 prevailing wages. Despite the widely accepted understanding that Washington
22
23

1 farmworkers earn more than minimum wage when working by the piece rate in
2 tree fruit harvest, USDOL's actions result in the elimination of these higher wages.

3 167. USDOL's actions are therefore "arbitrary, capricious" or "otherwise
4 not in accordance with law" and in violation of the APA. 5 U.S.C. § 706(2)(A).
5

6 168. Defendants' violations cause ongoing harm to Plaintiffs.

7 **THIRD CLAIM FOR RELIEF**

8 (Wagner-Peyser Act and Implementing Regulations– Failure to Ensure
9 Wages and Working Conditions are Not Less than the Prevailing Wages and
10 Working Conditions Among Similarly Situated Workers – 29 U.S.C. §49k;
20 C.F.R. §653.501(c)(2)(i) & (b)(1))

11 169. ESD has a duty to ensure that H-2A clearance orders are not placed
12 into the intrastate or interstate clearance systems developed under the Wagner-
13 Peyser Act unless "[t]he wages and working conditions offered are not less than
14 the prevailing wages and working conditions among similarly employed
15 farmworkers in the area of intended employment." 20 C.F.R. §653.501(c)(2)(i) &
16 (b)(1); 29 U.S.C. §49k.
17

18 170. ESD's prevailing wage methodology interjects the guaranteed hourly
19 wage concept into the wage finding process, fragments the category of "piece rate
20 wages," causes piece-rate prevailing wages not to be published, and violates ESD's
21 obligation to ensure that the wages and working conditions offered are not less
22 than those that prevail in the local labor market.
23

1 Wagner-Peyser Act unless “[t]he wages and working conditions offered are not
2 less than the prevailing wages and working conditions among similarly employed
3 farmworkers in the area of intended employment.” 20 C.F.R. §653.501(c)(2)(i) &
4 (b)(1); 29 U.S.C. §49k.

5
6 176. ESD’s prevailing wage methodology interjects the guaranteed hourly
7 wage concept into the wage finding process, fragments the category of “piece rate
8 wages,” causes piece-rate prevailing wages not to be published, and violates ESD’s
9 obligation to ensure that the wages and working conditions offered are not less
10 than those that prevail in the local labor market.

11
12 177. ESD has failed to explain its departure from its longstanding
13 methodology that did not use the “hourly wage guarantee” in making prevailing
14 wage findings.

15 178. ESD’s wage-finding methodology is irrational because it interjects the
16 hourly wage guarantee concept, which is already guaranteed by law (e.g., state
17 minimum wage or the federal AEWR), into the wage-finding process without
18 defining what employers are being asked to report on or include, and results in
19 higher piece-rate wages being eliminated when piece rates are, in fact, the
20 prevailing wage in the industry.

21
22 179. ESD’s failure to use the worker surveys confirming the predominance
23 of piece-rate pay is arbitrary and capricious and otherwise not in accordance with

1 the law. The Handbook No. 385 provides: “Data supplied by employers **must** be
2 verified through worker interviews.” [ECF No. 6-2](#) at 108 (I-116) (emphasis added).
3 It is irrational to go through the process and expense of a worker survey, only to
4 completely disregard the results which contravene employers’ assertions of paying
5 an hourly rate for harvest work.
6

7 180. ESD’s methodology overestimates the number of workers in
8 commodity-activities, which causes survey results to miss USDOL’s minimum
9 survey response thresholds, resulting in prevailing wages for many commodity-
10 activities failing to be published. The methodology is arbitrary and capricious and
11 violates ESD’s obligation to ensure that the wages and working conditions offered
12 are not less than those that prevail in the local labor market.
13

14 181. Defendants’ violations cause ongoing harm to Plaintiffs.

15 VII. REQUEST FOR RELIEF

16 Plaintiffs ask this Court to grant them the following relief:

17 1. Declare that USDOL Defendants failed to observe the procedure
18 required by law when changing the prevailing wage methodology to interject the
19 hourly wage guarantee concept into the wage-finding process, in violation of
20 5 U.S.C. § 706(2)(D);
21

22 2. In the alternative, declare that the change in prevailing wage
23 methodology which interjects the guaranteed hourly wage concept into the wage-

1 finding process is arbitrary, capricious, an abuse of discretion, or otherwise not in
2 accordance with the law within the meaning of 5 U.S.C. § 706(2)(A), arbitrary and
3 capricious and not in accordance with the law under federal common law, and in
4 violation of 20 C.F.R. §653.501(c)(2)(i) & (b)(1);
5

6 3. Declare that the failure to use the worker survey to verify the data
7 provided by employers is arbitrary, capricious, an abuse of discretion, or otherwise
8 not in accordance with law within the meaning of 5 U.S.C. § 706(2)(A), arbitrary
9 and capricious and not in accordance with the law under federal common law, and
10 in violation of 20 C.F.R. §653.501(c)(2)(i) & (b)(1);
11

12 4. Declare that mandating a 15 percent sample size threshold for harvest
13 activities traditionally paid by the piece rate and corroborated by worker surveys is
14 arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with
15 law within the meaning of 5 U.S.C. § 706(2)(A);
16

17 5. Declare that ESD's methodology overestimates the number of
18 workers in commodity-activities and is arbitrary and capricious and otherwise not
19 in accordance with the law under the federal common law and in violation of 20
20 C.F.R. §653.501(c)(2)(i) & (b)(1);
21

22 6. Declare that USDOL's general policy and practice of approving
23 and/or USDOL's approval of specific clearance orders that fail to pay the
"general" prevailing wage for activities in which there is not a particular piece rate

1 for a sub-activity is arbitrary and capricious or otherwise not in accordance with
2 the law within the meaning of 5 U.S.C. § 706(2)(A);

3 7. Declare that USDOL's general policy and practice of approving
4 and/or USDOL's approval of specific clearance orders that promise only to pay the
5 AEWR for activities that have a published prevailing piece rate is arbitrary and
6 capricious or otherwise not in accordance with the law within the meaning of 5
7 U.S.C. § 706(2)(A);

8 8. Enjoin the Defendants from interjecting the hourly wage guarantee
9 concept into the wage-finding process, prohibiting its use for future prevailing
10 wage surveys;
11

12 9. Enjoin the Defendants and all their officers, employees, and agents,
13 and anyone acting in concert with them, from accepting, certifying and posting in
14 the electronic job registry any H-2A job order, including authorizing access to the
15 interstate clearance system without requiring the employer to include a five percent
16 wage increase for all piece-rate activities pursuant to 20 C.F.R §§ 655.100,
17 655.120, 655.143, 655.144, 655.150 and 655.161, until a prevailing wage survey
18 that complies with federal law is completed in Washington State;
19

20 10. Enjoin the USDOL Defendants from permitting the H-2A system to
21 adversely affect the wages of Washington farmworkers and order Defendants to
22 preserve the status quo and rights of U.S. workers by providing notice to all H-2A
23

1 employers in Washington State, pursuant to 20 C.F.R. § 655.120(b), that each
2 employer must immediately pay all workers employed under H-2A job orders a
3 five percent wage increase for all piece-rate activities and continue to pay that
4 increase until a prevailing wage survey that complies with federal law has been
5 completed in Washington State;
6

7 11. In the alternative, order USDOL Defendants to preserve the status quo
8 and rights of U.S. workers by providing notice to all employers in Washington
9 State using H-2A contracts that have been certified or will be certified for work to
10 be performed in 2021 that piece-rate wages may increase pending the outcome of
11 this litigation;
12

13 12. Enjoin the USDOL Defendants to revise published clearance orders
14 that fail to pay the “general” prevailing wage for activities in which there is not a
15 particular piece rate for a sub-activity and clearance orders that promise only to
16 pay the AEWR for activities that have a published prevailing piece rate and to
17 discontinue their policies and practices of approving such clearance orders;
18

19 13. Award Plaintiffs their reasonable fees, costs and expenses, including
20 attorneys’ fees, pursuant to the Equal Access to Justice Act (EAJA),
21 28 U.S.C. § 2412;
22

23 14. Grant other further relief as just and appropriate.

1 DATED this 8th day of October, 2021.

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