

1 BRIAN M. BOYNTON
 Acting Assistant Attorney General
 2 BRAD P. ROSENBERG
 BRIGHAM J. BOWEN
 3 Assistant Branch Directors
 CAROL FEDERIGHI
 4 Senior Trial Counsel
 ALEXANDRA R. SASLAW
 5 LAUREL H. LUM
 Trial Attorneys
 6 United States Department of Justice
 Civil Division, Federal Programs Branch
 7 P.O. Box 883
 Washington, DC 20044
 8 Phone: (202) 514-4520
 alexandra.r.saslaw@usdoj.gov

9 *Attorneys for Defendants*

10
 11 UNITED STATES DISTRICT COURT
 12 NORTHERN DISTRICT OF CALIFORNIA

13 CHAMBER OF COMMERCE OF THE
 14 UNITED STATES OF AMERICA, *et al.*,

15 Plaintiffs,

16 v.

17 UNITED STATES DEPARTMENT OF
 HOMELAND SECURITY, *et al.*,

18 Defendants.

Civil Action No.4:20-cv-07331-JSW

**DEFENDANTS' MOTION FOR
 VOLUNTARY REMAND;
 MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT
 THEREOF**

Date: July 16, 2021
 Time: 9:00am
 Courtroom: 5
 Judge: Hon. Jeffrey S. White

21
 22
 23
 24
 25
 26
 27
 28

1 **NOTICE OF MOTION AND MOTION**

2 **PLEASE TAKE NOTICE** that on July 16, 2021 at 9:00am, or as soon thereafter as the
3 matter may be heard, in Courtroom 5 of the above-entitled Court, located at 1301 Clay Street,
4 Oakland, California, or by video teleconference, Defendants United States Department of Labor
5 (“DOL”) and Martin J. Walsh, in his official capacity as Secretary of Labor (collectively, “DOL
6 Defendants” or “Defendants”), by and through undersigned counsel, will move for remand of
7 DOL’s final rule on prevailing wage levels to the agency for further consideration, for the reasons
8 more fully set forth in the accompanying Memorandum of Points and Authorities.

9 Dated: June 9, 2021

Respectfully submitted,

10 BRIAN M. BOYNTON
11 Acting Assistant Attorney General
12 Civil Division

13 BRAD P. ROSENBERG
14 BRIGHAM J. BOWEN
15 Assistant Directors, Federal Programs Branch

16 s/Alexandra R. Saslaw
17 CAROL FEDERIGHI
18 Senior Trial Counsel
19 ALEXANDRA R. SASLAW
20 LAUREL H. LUM
21 Trial Attorneys
22 United States Department of Justice
23 Civil Division, Federal Programs Branch
24 P.O. Box 883
25 Washington, DC 20044
26 Phone: (202) 514-4520
27 alexandra.r.saslaw@usdoj.gov

28 *Attorneys for Defendants*

INTRODUCTION

1
2 Defendants United States Department of Labor (“DOL”) and Martin J. Walsh, in his official
3 capacity as Secretary of Labor (collectively, “DOL Defendants”), respectfully move this Court for a
4 remand of DOL’s final rule on prevailing wage levels to the agency for further consideration.
5 Remand is appropriate because commenters and litigants have raised a number of serious substantive
6 and procedural concerns about the rule, and the agency has determined that these concerns warrant
7 careful reconsideration of the rule.

8 Plaintiffs have indicated that they support a voluntary remand with vacatur, and the DOL
9 Defendants do not oppose vacatur in this case because the Final Rule’s effective date has already
10 been postponed until November 14, 2022, to allow the agency time to consider these concerns, and
11 thus vacatur is unlikely to cause significant disruption to the regulatory scheme.

BACKGROUND

12
13 On October 8, 2020, DOL issued an interim final rule (“IFR”) that amended regulations
14 governing the prevailing wages for employment opportunities that U.S. employers seek to fill with
15 foreign workers on a permanent or temporary basis through certain employment-based immigrant
16 visas or through H-1B, H-1B1, or E-3 nonimmigrant visas. *Strengthening Wage Protections for the*
17 *Temporary and Permanent Employment of Certain Aliens in the United States*, 85 Fed. Reg. 63,872 (Oct. 8,
18 2020) (“IFR”). The IFR was published without advance notice and comment, but the agency
19 provided for a post-promulgation comment period through November 9, 2020. *Id.* at 63,898-63,902.
20 The IFR immediately went into effect. *Id.* at 63,872.

21 On October 19, 2020, Plaintiffs filed their complaint in this action challenging the IFR.
22 Compl., ECF No. 1. The parties stipulated to proceed directly to summary judgment on the question
23 of whether Defendants had good cause to dispense with the notice-and-comment requirements
24 provided for under the Administrative Procedure Act (“APA”). *See* Order Granting Stip., ECF No.
25 51. On December 1, 2020, this Court set aside the IFR after finding that the agency did not have
26 good cause to bypass the APA’s notice-and-comment provisions. *See* Order, ECF No. 73. Following
27 this Court’s order, DOL immediately took steps to revert to the prevailing wage levels in effect before
28

1 the IFR. *See* December 3, 2020, OFLC Announces Updates to Implementation of the Wage
2 Protections Interim Final Rule; Compliance with District Court Orders, *available at*
3 <https://www.dol.gov/agencies/eta/foreign-labor/news>.

4 On January 14, 2021, DOL published a final rule adopting, with changes, the IFR.
5 *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United*
6 *States*, 86 Fed. Reg. 3608 (Jan. 14, 2021) (“Final Rule”). The Final Rule provides for different wage
7 levels than the IFR. *Compare, e.g., id.* at 3673 (computing the Level I Wage as “the 35th percentile of
8 the OES wage distribution”) *with* 85 Fed. Reg. at 63,897 (computing the Level I Wage as “the mean
9 of the fifth decile of the wage distribution,” or “[r]oughly speaking,” the 45th percentile of the
10 relevant wage distribution). The Final Rule also incorporates a “phased approach” so that the new
11 prevailing wage levels set by the rule will phase in over the course of one and a half or three and a
12 half years (depending on the category of workers). 86 Fed. Reg. at 3642. Finally, although the Final
13 Rule had an effective date of March 15, 2021, *id.* at 3608, no adjustments to wage levels were set to
14 begin until July 1, 2021, *id.* at 3642.

15 On January 20, 2021, the Assistant to the President and Chief of Staff issued a memorandum
16 entitled “Regulatory Freeze Pending Review,” which directed agencies to consider postponing the
17 effective date for regulations that had not yet taken effect “for the purpose of reviewing any questions
18 of fact, law, and policy the rules may raise.” In accordance with that Presidential directive, DOL
19 sought comments on a proposed sixty-day delay of the Final Rule’s effective date to “allow agency
20 officials the opportunity to review any questions of fact, law, or policy the rule may raise.”
21 *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United*
22 *States: Proposed Delay of Effective Date*, 86 Fed. Reg. 7656 (Feb. 1, 2021). DOL received a number of
23 comments supporting the proposed delay, including a number of comments raising “substantive
24 concerns” about the Final Rule itself. *Strengthening Wage Protections for the Temporary and Permanent*
25 *Employment of Certain Immigrants and Non-Immigrants in the United States; Delay of Effective Date*, 86 Fed.
26 Reg. 13,995, 13,995-96 (Mar. 12, 2021). On March 12, 2021, DOL published a final rule delaying the
27 effective date of the Final Rule to May 14, 2021. *Id.* at 13,995.

28

1 Accordingly, DOL Defendants respectfully request voluntary remand to allow the agency the
2 opportunity to fully assess these issues and determine what further action is appropriate.

3 **I. Remand Is Appropriate to Permit DOL to Consider Concerns Raised by Commenters
4 and Litigants Regarding the Final Rule.**

5 “Voluntary remand is consistent with the principle that “[a]dministrative agencies have an
6 inherent authority to reconsider their own decisions, since the power to decide in the first instance
7 carries with it the power to reconsider.” *Nat. Res. Def. Council, Inc. v. U.S. Dep’t of the Interior*, 275 F.
8 Supp. 2d 1136, 1141 (C.D. Cal. 2002) (quoting *Trujillo v. Gen. Elec. Co.*, 621 F.2d 1084, 1086 (10th Cir.
9 1980)). In this Circuit, “courts [generally] only refuse voluntarily requested remand when the agency’s
10 request is frivolous or made in bad faith.” *Cal. Cmty. Against Toxics v. U.S. E.P.A.*, 688 F.3d 989, 992
11 (9th Cir. 2012) (citing *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001)).

12 “[An] agency may request a remand (without confessing error) in order to reconsider its
13 previous position.” *SKF USA*, 254 F.3d at 1029. An agency “might argue, for example, that it
14 wishe[s] to consider further the governing statute, or the procedures that were followed” or “simply
15 state that it ha[s] doubts about the correctness of its decision or that decision’s relationship to the
16 agency’s other policies.” *Id.*; see also *Neighbors Against Bison Slaughter v. Nat’l Park Serv.*, No. CV 19-
17 128-BLG-SPW, 2021 WL 717094, at *2 (D. Mon. Feb. 5, 2021), *appeal filed*, No. 21-35144 (9th Cir.
18 Feb. 23, 2021). “[I]f the agency’s concern is substantial and legitimate, a remand is usually
19 appropriate.” *SKF USA*, 254 F.3d at 1029; see also *United States v. Gonzales & Gonzales Bonds & Ins.*
20 *Agency, Inc.*, No. C-09-4029 EMC, 2011 WL 3607790, at *3-4 (N.D. Cal. Aug. 16, 2011).

21 In this case, DOL has already publicly acknowledged a number of “substantial and legitimate”
22 concerns raised by commenters and litigants. *SKF USA*, 254 F.3d at 1029. For example, when DOL
23 proposed delaying the effective date of the rule, a number of commenters raised concerns that the
24 Department “did not provide the public with proper notice and a meaningful opportunity to
25 comment, and failed to disclose relevant data and analysis to permit informed comments from the
26 public.” 86 Fed. Reg. at 26,167; see also 86 Fed. Reg. at 15,155. Other commenters urged the
27 Department to “consider making more of the underlying data used to compute the wage levels in the
28 Final Rule available for public review.” 86 Fed. Reg. at 26,167. Additionally, commenters raised

1 substantive concerns with the Final Rule, “including that key provisions in the rule are at odds with
2 the INA, the prevailing wage levels were set in an irrational manner and based on ‘cherry-picked’
3 studies,” and “that sources of authority cited in the rule . . . have since been revoked or rescinded.”
4 86 Fed. Reg. at 26,167. Similar concerns have been raised by Plaintiffs in this case, *see, e.g.*, Am.
5 Compl. ¶¶ 101-04, 108, and other litigation involving the Final Rule, *see, e.g.*, First Am. Compl. ¶ 89,
6 *Stellar IT v. Walsh*, No. 20-cv-3175 (D.D.C. Feb. 26, 2021); First Am. Compl. ¶ 147, *Purdue Univ. v.*
7 *Walsh*, No. 20-cv-3006 (D.D.C. Feb. 19, 2021). As DOL publicly acknowledged in its May 13, 2021
8 delay rule, “the procedural and substantive concerns” raised by commenters and litigants call “into
9 question the appropriateness of the wage rates established in the Final Rule, including the transition
10 rates.” 86 Fed. Reg. at 26,168.

11 In accordance with its recognition of the validity of these concerns outlined above, DOL has
12 already taken the steps described above to delay the effective date of the Final Rule to allow the
13 agency time to consider these concerns. DOL has also published an RFI soliciting public input on
14 sources of data or methodologies to inform any future proposals related to prevailing wages of
15 PERM, H-1B, H-1B1, and E-3 job opportunities. Accordingly, voluntary remand is appropriate to
16 permit the agency to fully consider these issues and how best to address them in future rulemaking.

17 Furthermore, remand will conserve judicial resources. *See ASSE Int’l, Inc. v. Kerry*, 182 F.
18 Supp. 3d 1059, 1063 (C.D. Cal. 2016) (“Voluntary remand also fosters judicial economy by giving the
19 relevant agency the opportunity to reconsider and rectify an erroneous decision without further
20 expenditure of judicial resources.”). If DOL determines that the commenters and litigants’ concerns
21 are warranted, the agency may propose a new rule that differs significantly from the current Final
22 Rule. Even if DOL ultimately determines that its original approach was justified and proposes a new
23 rule that is substantially similar to the Final Rule, it will be doing so on a more developed and
24 considered record that will assist courts in assessing any future challenges to such a rule. Absent a
25 voluntary remand, DOL will be required to defend the Final Rule in Court at the same time that it is
26 internally evaluating the propriety of that Rule. And if the Court ultimately concludes that the Final
27 Rule is arbitrary and capricious, the appropriate outcome will be to vacate and remand—the same

28

1 outcome sought by this motion.

2 **II. DOL Defendants Do Not Oppose Vacatur of the Final Rule.**

3 “Courts faced with a motion for voluntary remand employ ‘the same equitable analysis’ courts
4 use to decide whether to vacate agency action after a ‘rul[ing] on the merits.’” *ASSE Int’l*, 182 F.
5 Supp. 3d at 1064 (quoting *Nat. Res. Def. Council*, 275 F. Supp. 2d at 1143); *see also N. Coast Rivers All.*
6 *v. U.S. Dep’t of the Interior*, No. CV 16-307-LJO-MJS, 2016 WL 11372492, at *3 (E.D. Cal. Sept. 23,
7 2016). In both circumstances, courts “remand without vacatur only in ‘limited circumstances.’”
8 *Pollinator Stewardship Council v. U.S. E.P.A.*, 806 F.3d 520, 532 (9th Cir. 2015). Specifically, “[w]hether
9 agency action should be vacated depends on how serious the agency’s errors are ‘and the disruptive
10 consequences of an interim change that may itself be changed.’” *Cal. Cmty. Against Toxics*, 688 F.3d
11 at 992 (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm’n*, 988 F.2d 146, 150-51 (D.C. Cir.
12 1993)). “Put differently, ‘courts may decline to vacate agency decisions when vacatur would cause
13 serious and irreparable harms that significantly outweigh the magnitude of the agency’s error.’”
14 *Klamath-Siskiyou Wildlands Ctr. v. Nat’l Oceanic & Atmos. Admin.*, 109 F. Supp. 3d 1238, 1242 (N.D.
15 Cal. 2015).

16 In this case, DOL is seeking remand to carefully consider concerns raised by commenters
17 and litigants. Until the agency conducts further review, it cannot say for certain the extent to which
18 the Final Rule may need to be revised, but the concerns raised to this point suggest that there may
19 need to be significant changes to the rulemaking going forward. *See* 86 Fed. Reg. at 26,167, 26,173
20 (discussing “serious concerns with the substance of the Final Rule and the process through which it
21 was promulgated” that “call into question fundamental aspects of the rulemaking”). This possibility
22 of significant revisions must be balanced against the consequences of vacatur, which in this case
23 would have few practical consequences because DOL has already delayed the effective date of the
24 Final Rule until November 2022. Thus, this is not a case where vacatur will unduly delay an important
25 government action, *see, e.g., Cal. Cmty. Against Toxics*, 688 F.3d at 993-94, or cause disruption or
26 confusion, *see, e.g., Neighbors Against Bison Slaughter*, 2021 WL 717094, at *3-4. Rather, this is a case
27 where remand with or without vacatur will maintain the status quo for over a year, during which time
28

1 the agency can consider the various concerns raised by commenters and litigants and determine an
2 appropriate path forward. In light of the possibility of serious error and the delay already in effect,
3 DOL Defendants do not oppose vacatur in this case.

4 **CONCLUSION**

5 For the foregoing reasons, DOL Defendants respectfully request that the Court grant its
6 motion for voluntary remand.

7 Dated: June 9, 2021

Respectfully submitted,

8 BRIAN M. BOYNTON
9 Acting Assistant Attorney General
10 Civil Division

11 BRAD P. ROSENBERG
12 BRIGHAM J. BOWEN
13 Assistant Directors, Federal Programs Branch

14 s/Alexandra R. Saslaw
15 CAROL FEDERIGHI
16 Senior Trial Counsel
17 ALEXANDRA R. SASLAW
18 LAUREL H. LUM
19 Trial Attorneys
20 United States Department of Justice
21 Civil Division, Federal Programs Branch
22 P.O. Box 883
23 Washington, DC 20044
24 Phone: (202) 514-4520
25 alexandra.r.saslaw@usdoj.gov

26 *Attorneys for Defendants*
27
28