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14 **IN THE UNITED STATES DISTRICT COURT**  
15 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
16 **OAKLAND DIVISION**

17 CHAMBER OF COMMERCE OF THE  
18 UNITED STATES OF AMERICA; BAY  
19 AREA COUNCIL; NATIONAL RETAIL  
20 FEDERATION; AMERICAN  
21 ASSOCIATION OF INTERNATIONAL  
22 HEALTHCARE RECRUITMENT;  
23 PRESIDENTS' ALLIANCE ON HIGHER  
24 EDUCATION AND IMMIGRATION;  
25 CALIFORNIA INSTITUTE OF  
26 TECHNOLOGY; CORNELL UNIVERSITY;  
27 THE BOARD OF TRUSTEES OF THE  
28 LELAND STANFORD JUNIOR  
UNIVERSITY; UNIVERSITY OF  
SOUTHERN CALIFORNIA; UNIVERSITY  
OF ROCHESTER; UNIVERSITY OF UTAH;  
and ARUP LABORATORIES,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF  
HOMELAND SECURITY; UNITED  
STATES DEPARTMENT OF LABOR;  
ALEJANDRO MAYORKAS, in his official  
capacity as Acting Secretary of Homeland  
Security; and AL STEWART, in his official  
capacity as Secretary of Labor,

Defendants.

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

**RESPONSE TO DOL'S MOTION  
FOR VOLUNTARY REMAND**

MCDERMOTT WILL & EMERY LLP  
ATTORNEYS AT LAW  
MENLO PARK

**RESPONSE TO DOL’S MOTION FOR VOLUNTARY REMAND**

Plaintiffs respectfully file this response to note their consent to the Department of Labor’s (DOL) motion for voluntary remand, subject to the condition that the Court vacate the DOL Rule.

1. It is well within this Court’s discretion to vacate agency action on the government’s motion for voluntary remand. *See ASSE Int’l, Inc. v. Kerry*, 182 F. Supp. 3d 1059, 1064 (C.D. Cal. 2016) (noting that “[c]ourts faced with a motion for voluntary remand employ ‘the same equitable analysis’ courts use to decide whether to vacate agency action after a ‘rul[ing] on the merits,’” and ordering voluntary remand with vacatur) (quoting *Nat. Res. Def. Council, Inc. v. U.S. Dep’t of Interior*, 275 F. Supp. 2d 1136, 1143 (C.D. Cal. 2002)); *N. Coast Rivers All. v. U.S. Dep’t of Interior*, 2016 WL 8673038, at \*6 (E.D. Cal. Dec. 16, 2016) (“[V]acation of an agency action without an express determination on the merits [pursuant to a voluntary remand] is well within the bounds of traditional equity jurisdiction.”) (quoting *Ctr. for Native Ecosystems v. Salazar*, 795 F. Supp. 2d 1236, 1241-1242 (D. Colo. 2011)).

“To decide whether to vacate an agency action on remand under this analysis, courts ‘look at two factors: (1) the seriousness of an agency’s errors and (2) the disruptive consequences that would result from vacatur.’” *ASSE Int’l*, 182 F. Supp. 3d at 1064 (quoting *Klamath-Siskiyou Wildlands Ctr. v. NOAA Nat’l Marine Fisheries Serv.*, 109 F. Supp. 3d 1238, 1242 (N.D. Cal. 2015)); *see also id.* (explaining that vacatur along with voluntary remand is appropriate unless “vacatur would cause serious and irreparable harms that significantly outweigh the magnitude of the agency’s error.”).

2. Those factors counsel strongly in favor of vacatur here. Our First Amended Complaint documents the numerous fatal failings of the DOL Rule, any one of which would be independently sufficient to set it aside. *See generally* Dkt. 79, ¶¶ 85-113. Among other things, the DOL Rule: arbitrarily and capriciously requires employers to pay entry-level H-1B employees as if they had master’s degrees, even though a bachelor’s degree or equivalent is the minimum qualification for H-1B classification (*id.* ¶¶ 86-90); irrationally sets the minimum salary for “entry-level” employees in an occupation as the 35th percentile of wages received in that occupation, meaning that “entry-

1 level” H-1B employees must in fact be paid more than 35% of workers (*id.* ¶¶ 91-95); bases a key  
 2 aspect of its reasoning on a district court case that had been explicitly overruled by the Ninth Circuit  
 3 by the time the Rule was issued (*id.* ¶¶ 93-95); and fails to meaningfully respond to comments that  
 4 demonstrated, with empirical data, that the DOL Rule’s wage levels are actually a complete mis-  
 5 match with the “prevailing wage” they are nominally supposed to approximate (*id.* ¶¶ 96-102).  
 6 These are extremely “serious[] . . . errors,” and amply justify vacatur here. *ASSE Int’l*, 182 F. Supp.  
 7 3d at 1064 (quoting *Klamath-Siskiyou Wildlands Ctr.*, 109 F. Supp. 3d at 1242).

8 On the other side of the ledger, no “disruptive consequences . . . would result from vacatur”  
 9 of the DOL Rule while the agency reconsiders it. *ASSE Int’l*, 182 F. Supp. 3d at 1064 (quoting  
 10 *Klamath-Siskiyou Wildlands Ctr.*, 109 F. Supp. 3d at 1242). The Rule is currently not set to take  
 11 effect until November 14, 2022—over 17 months from today. *See Strengthening Wage Protections*  
 12 *for the Temporary and Permanent Employment of Certain Immigrants and Non-immigrants in the*  
 13 *United States: Delay of Effective and Transition Dates*, 86 Fed. Reg. 26,179, 26,179 (May 13,  
 14 2021) (delaying effective date). There are thus no reliance interests that would be disrupted by  
 15 vacating the Rule—particularly when DOL has explicitly delayed its effectiveness in order to con-  
 16 duct a “comprehensive review of the Final Rule and consider[] alternate paths.” *Id.* at 26,165; *see*  
 17 *also id.* (explaining that “the appropriateness of the wage rates established in the Final Rule” has  
 18 been “called into question”). Given those statements, any reliance on the wage rates that the DOL  
 19 Rule would establish over a year in the future would be deeply unreasonable. Vacatur of the DOL  
 20 Rule thus would not “cause serious and irremediable harms that significantly outweigh the magni-  
 21 tude of the agency’s error” (*ASSE Int’l*, 182 F. Supp. 3d at 1064 (quoting *Klamath-Siskiyou*  
 22 *Wildlands Ctr.*, 109 F. Supp. 3d at 1242)), and vacatur is therefore the appropriate procedural path  
 23 here.

## 24 CONCLUSION

25 The Court should grant DOL’s motion for voluntary remand with vacatur.  
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Respectfully submitted,

**MCDERMOTT WILL & EMERY LLP**

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By: /s/ Paul W. Hughes

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