

1 MCDERMOTT WILL & EMERY LLP
Paul W. Hughes (*Pro Hac Vice*)
2 phughes@mwe.com
Sarah P. Hogarth (*Pro Hac Vice to be filed*)
3 500 North Capitol Street NW
4 Washington, DC 20001
(202) 756-8000

5 William G. Gaede, III (136184)
wgaede@mwe.com
6 415 Mission Street, Suite 5600
7 San Francisco, CA 94105
(650) 815-7400

8 Attorneys for Plaintiffs

9 [Additional Counsel Listed on Signature Page]

10 **IN THE UNITED STATES DISTRICT COURT**
11 **IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA**

12 CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA;
13 NATIONAL ASSOCIATION OF
MANUFACTURERS; BAY AREA
14 COUNCIL; NATIONAL RETAIL
FEDERATION; AMERICAN
15 ASSOCIATION OF INTERNATIONAL
HEALTHCARE RECRUITMENT;
16 PRESIDENTS' ALLIANCE ON HIGHER
EDUCATION AND IMMIGRATION;
17 CALIFORNIA INSTITUTE OF
TECHNOLOGY; CORNELL UNIVERSITY;
18 THE BOARD OF TRUSTEES OF THE
LELAND STANFORD JUNIOR
19 UNIVERSITY; UNIVERSITY OF
SOUTHERN CALIFORNIA; UNIVERSITY
20 OF ROCHESTER; UNIVERSITY OF UTAH;
and ARUP LABORATORIES,

21 Plaintiffs,

22 v.

23 UNITED STATES DEPARTMENT
OF HOMELAND SECURITY;
24 UNITED STATES DEPARTMENT
OF LABOR; CHAD F. WOLF,
25 in his official capacity as Acting Secretary of
Homeland Security; and EUGENE SCALIA,
26 in his official capacity as Secretary of Labor,

27 Defendants.
28

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

**REPLY IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION TO
STAY AGENCY ACTION OR FOR
PARTIAL SUMMARY JUDGMENT;
AND OPPOSITION TO DEFEND-
ANTS' MOTION FOR PARTIAL
SUMMARY JUDGMENT**

Date: November 23, 2020
Time: 10:00 a.m.
Judge: Hon. Jeffrey S. White
Ctrm.: 5

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Table of Authorities ii

Introduction 1

Argument 2

 A. The only remaining issue is whether good cause existed, which the Court
 addresses de novo. 2

 B. Pandemic-related unemployment does not provide good cause here. 4

 C. DOL’s alternative theory of good cause fails as well. 9

Conclusion 14

TABLE OF AUTHORITIES

Cases

1

2 *Air Transp. Ass’n of Am. v. Dep’t of Transp.*,

3 900 F.2d 369 (D.C. Cir. 1990)4, 6

4 *Alacaraz v. Block*,

5 746 F.2d 593 (9th Cir. 1984).....7

6 *Allina Health Servs. v. Sebelius*,

7 746 F.3d 1102 (D.C. Cir. 2014)14

8 *Arrington v. Daniels*,

9 516 F.3d 1106 (9th Cir. 2008).....11

10 *Bauer v. DeVos*,

11 325 F. Supp. 3d 74 (D.D.C. 2018)3

12 *Buschmann v. Schweiker*,

13 676 F.2d 352 (9th Cir. 1982).....7

14 *California v. Azar*,

15 911 F.3d 558 (9th Cir. 2018).....7, 12, 13, 14

16 *California v. Bernhardt*,

17 2020 WL 4001480 (N.D. Cal. July 15, 2020).....14

18 *Capital Area Immigrants’ Rights Coal. v. Trump*,

19 2020 WL 3542481 (D.D.C. June 30, 2020)9, 13, 14

20 *E. Bay Sanctuary Covenant v. Trump*,

21 932 F.3d 742 (9th Cir. 2018).....3, 12, 14

22 *E. Bay Sanctuary Covenant v. Trump*,

23 950 F.3d 1242 (9th Cir. 2020).....12, 14

24 *Heartland Regional Med. Ctr. v. Sebelius*,

25 566 F.3d 193 (D.C. Cir. 2009)14

26 *Karuk Tribe of Cal. v. U.S. Forest Serv.*,

27 2005 WL 8177401 (N.D. Cal. July 1, 2005).....14

28 *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm*,

463 U.S. 29 (1983).....6, 11

Nat’l Ass’n of Farmworkers Orgs. v. Marshall,

628 F.2d 604 (D.C. Cir. 1980)5, 6

Nat’l Ass’n of Mfrs. v. DHS,

2020 WL 5847503 (N.D. Cal. Oct. 1, 2020).....1, 7, 8

Nat’l Educ. Ass’n v. DeVos,

379 F. Supp. 3d 1001 (N.D. Cal. 2019)4, 9

Nat’l Venture Capital Ass’n v. Duke,

291 F. Supp. 3d 5 (D.D.C. 2017)5, 6

Paulsen v. Daniels,

413 F.3d 999 (9th Cir. 2005).....7

In re Polycom, Inc.,

78 F. Supp. 3d 1006 (N.D. Cal. 2015)3, 4

1 **Cases—continued**

2 *Reno-Sparks Indian Colony v. EPA*,

3 336 F.3d 899 (9th Cir. 2003).....3

4 *Sorenson Commc’ns Inc. v. FCC*,

5 755 F.3d 702 (D.C. Cir. 2014)3, 7, 9, 13

6 *Stichting Pensioenfonds ABP v. Countrywide Fin. Corp.*,

7 802 F. Supp. 2d 1125 (C.D. Cal. 2011)3

8 *Tenn. Gas Pipeline Co. v. FERC*,

9 969 F.2d 1141 (D.C. Cir. 1992)13, 14

10 *United States v. Valverde*,

11 628 F.3d 1159 (9th Cir. 2010).....7

12 *United States v. Wahchumwah*,

13 710 F.3d 862 (9th Cir. 2013).....14

14 *Wash. All. of Tech. Workers v. DHS*,

15 156 F. Supp. 3d 123 (D.D.C. 2015)14

16 **Statutes, Rules, and Regulations**

17 8 C.F.R. § 214.2(h)(6)(iv)(A)8

18 20 C.F.R. § 655.50(b)8

19 5 U.S.C.

20 § 705.....4

21 § 706.....4

22 8 U.S.C. § 1101(a)(15)(H)(ii)(b).....8

23 Fed. R. Civ. P. 65(a)(2)2

24 *Fiduciary Duties Regarding Proxy Voting and Shareholder Rights*,

25 85 Fed. Reg. 55,219 (Sept. 4, 2020)10

26 *Financial Factors in Selecting Plan Investments*,

27 85 Fed. Reg. 39,113 (June 30, 2020)11

28 *Grandfathered Group Health Plans and Grandfathered Group Health Insurance Coverage*,

85 Fed. Reg. 42,782 (July 15, 2020)10

Strengthening the H-1B Nonimmigrant Visa Classification Program,

85 Fed. Reg. 63,918 (Oct. 8, 2020).....1, 5

Strengthening Wage Protections for the Temporary and Permanent Employment of
Certain Aliens in the United States,

85 Fed. Reg. 63,872 (Oct. 8, 2020).....1, 2, 5, 6

Other Authorities

Chamber of Commerce of the United States of America,

Charting Federal Costs and Benefits (2014)2

Speculative, *Oxford English Dictionary*12

Speculative, *Oxford Lexico*12

U.S. Dep’t of Labor, Bureau of Labor Statistics, *The Employment Situation – October 2020*
 (Nov. 6, 2020)5

INTRODUCTION

1
2 This case presents the Court with the government's effort to use the COVID-19 pandemic
3 as the veneer for anti-employer immigration policies that the Department of Homeland Security
4 (DHS) and Department of Labor (DOL) have long favored but have been unable to enact over the
5 last four years. Facing the end of 2020, DHS and DOL promulgated final rules that would funda-
6 mentally reshape the H-1B, EB-2, and EB-3 visa programs, restricting the occupations that would
7 qualify and pricing out many of the 580,000 H-1B employees¹ currently in the country through
8 massive increases in prevailing wage rates.² The agencies have implemented these Rules without
9 the prior notice and comment mandated by the Administrative Procedure Act (APA), claiming
10 instead that unemployment stemming from COVID-19 justifies invocation of the narrow and dis-
11 favored good-cause exception to notice-and-comment rulemaking.

12 But good cause is not satisfied here, for multiple independent reasons. First, the unem-
13 ployment caused by COVID-19 has hardly affected the specific, high-skilled, and technologically
14 sophisticated labor markets in which H-1B employees overwhelmingly operate—just as this
15 Court recently concluded. *See Nat'l Ass'n of Mfrs. v. DHS*, 2020 WL 5847503, at *13 (N.D. Cal.
16 Oct. 1, 2020) (*NAM*) (White, J.). Second, courts routinely reject claims of good cause when an
17 agency delays promulgating a rule in the face of an emergency and then claims that that very
18 emergency leaves no time for notice and comment—just as the agencies have done here. Finally,
19 DOL's alternative good-cause justification—that advance announcement of an increase in wage
20 levels would lead to evasive behavior by employers—fails both because the government *did* an-
21 nounce its intention to promulgate the DOL's rule in advance, and because Ninth Circuit prece-
22 dent requires such claims to be supported by the record, not just the agency's conjecture about
23 incentives. Despite its best efforts, the government cannot escape any of these conclusions. There
24 is no good cause for disregarding the APA's notice and comment obligations, and both Rules

25
26 ¹ Thousands of these individuals are prospective green card recipients who intend to reside in
the United States permanently.

27 ² *Strengthening the H-1B Nonimmigrant Visa Classification Program*, 85 Fed. Reg. 63,918
28 (Oct. 8, 2020) (DHS Rule); *Strengthening Wage Protections for the Temporary and Permanent
Employment of Certain Aliens in the United States*, 85 Fed. Reg. 63,872 (Oct. 8, 2020) (DOL
Rule).

1 should therefore be set aside.

2 To hold otherwise would be to invalidate the APA's general requirement of notice-and-
3 cause rulemaking. The opportunity for the regulated public to participate in administrative rule-
4 making is via comments submitted to the agency. That is, notice-and-comment rulemaking fosters
5 essential democratic values, including the ability to have a say in policies that have the force and
6 effect of law. Under the government's view, a temporary unemployment spike would justify
7 abandoning these fundamental protections. If that were so, the government would have a virtual
8 blank check to engage in wide-ranging economic regulations whenever it contends that market
9 conditions deviate from the norm. That has never been—and it should not be—the law.

10 The magnitude of these regulations should not escape the Court's attention. As we earlier
11 explained (Mot., Dkt. 31, at 12), by DOL's own calculation, its regulation will alone cost em-
12 ployers \$198.29 billion over the next 10 years, with an annualized cost of \$23.25 billion. DOL
13 Rule, 85 Fed. Reg. at 63,908. In 2014, plaintiff U.S. Chamber catalogued the most expensive reg-
14 ulations then promulgated. At that time, the costliest regulation in history was an automotive
15 standard, which had an annualized cost of \$11.37 billion. *See* Chamber of Commerce of the Unit-
16 ed States of America, *Charting Federal Costs and Benefits*, at 10, tbl.1 (2014), perma.cc/W4ZU-
17 4JW9. As of 2014, only three regulations ever eclipsed an annualized cost of \$10 billion. The
18 DOL regulation is more than *twice* as expensive. Meanwhile, as we demonstrated (Mot. 11-12),
19 the DHS regulation puts at risk roughly 200,000 existing jobs. These two Rules would have stag-
20 gering impact on the economy—taken together, they may well be the regulations with the greatest
21 financial impact *ever*. Yet Defendants promulgated them absent notice-and-comment rulemaking
22 anyway.

23 ARGUMENT

24 A. The only remaining issue is whether good cause existed, which the Court 25 addresses *de novo*.

26 Now that the government has stipulated to consolidation under Rule 65(a)(2), the only
27 remaining issue is whether there was, in fact, good cause for the agencies to dispense with notice
28 and comment in promulgating the challenged Rules. Significantly, the government does not con-

1 test that plaintiffs have standing; that the absence of notice and comment is prejudicial; or that the
2 equitable factors for injunctive relief are satisfied. *See generally* Gov’t Opp., Dkt. 55. Any objec-
3 tion to those issues (save Article III standing) is therefore waived. *See, e.g., In re Polycom, Inc.*,
4 78 F. Supp. 3d 1006, 1014 n.6 (N.D. Cal. 2015) (“[I]n most circumstances, failure to respond in
5 an opposition brief to an argument put forward in an opening brief constitutes waiver or aban-
6 donment in regard to the uncontested issue.”) (quoting *Stichting Pensioenfonds ABP v. Country-*
7 *wide Fin. Corp.*, 802 F. Supp. 2d 1125, 1132 (C.D. Cal. 2011)).

8 As for the merits of the good-cause exception, the government agrees that the standard of
9 review is de novo. *See* Gov’t Opp. 7 (“[C]onsistent with the APA, the Court should review the
10 ‘agency’s legal conclusion of good cause [] de novo.’”) (quoting *Bauer v. DeVos*, 325 F. Supp. 3d
11 74, 97 (D.D.C. 2018)). Yet it goes on to suggest, repeatedly, that it must prevail because “the
12 agencies’ determinations that good cause existed to forgo notice and comment *were reasonable*.”
13 *Id.* at 1-2 (emphasis added); *see also, e.g., id.* at 10 (“DOL and DHS each reasonably found that
14 there was good cause.”), 12 (“[B]oth agencies reasonably concluded that advance notice and
15 comment would be impracticable.”).

16 But that is not de novo review. Whether good cause exists is a “legal conclusion” that has
17 a right and wrong answer, not a matter of agency discretion that a court will sustain so long as the
18 agency acted reasonably. *Sorenson Commc’ns Inc. v. FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014).
19 Indeed, the D.C. Circuit explicitly rejected *any* “measure of deference” for good-cause determina-
20 tions—which is exactly what a reasonableness standard would entail. *Id.*; *see Reno-Sparks Indian*
21 *Colony v. EPA*, 336 F.3d 899, 909 n.11 (9th Cir. 2003) (“[T]he agency’s decision not to follow
22 the APA’s notice and comment provisions . . . is not entitled to deference because complying with
23 the notice and comment procedures when required by the APA is not a matter of agency choice.”)
24 (quotation marks omitted); *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 777 n.16 (9th
25 Cir. 2018) (*E. Bay I*) (rejecting government’s argument that “courts cannot ‘second-guess’ the
26 reason for invoking the good cause exception as long as the reason is ‘rational.’”).

27 The single question for the Court, therefore, is whether the government has demonstrated
28 that good cause *actually* existed, not whether the agency’s *assertion* that it existed is reasonable.

1 *See also, e.g., Nat'l Educ. Ass'n v. DeVos*, 379 F. Supp. 3d 1001, 1021 (N.D. Cal. 2019) (“The
2 burden is on the agency to demonstrate that it has good cause.”). As discussed below, the gov-
3 ernment falls far short of this showing.

4 One final point: Because the government has agreed to consolidation of a hearing on the
5 merits (which means that our motion for summary judgment is now operative), the Court should
6 “set aside” both Rules. 5 U.S.C. § 706; *see also* Mot. 1, 25 (invoking APA § 705, which provides
7 for relief pending judicial review). That is consistent with the scope of relief Plaintiffs requested
8 (*see* Mot. 25), and the government does not dispute the scope of that relief.³

9 **B. Pandemic-related unemployment does not provide good cause here.**

10 The government’s good-cause justification based on pandemic-related unemployment
11 fails for two independent reasons, either of which is sufficient on its own to reject the govern-
12 ment’s claims. First, the government may not fail to act for months in the face of an apparent
13 emergency, and then turn around and claim that the emergency must be addressed so quickly as to
14 justify an extraordinary departure from the agency’s legal obligations under the APA. Mot. 6-8.
15 Second, COVID-related unemployment simply does not constitute good cause to rush *these* Rules
16 into effect without notice and comment, particularly given that the affected population is largely
17 employed in jobs for which unemployment continues to remain remarkably low. *Id.* at 9-15.

18 1. To begin with, even assuming COVID-related unemployment *did* constitute an emer-
19 gency relevant to the Rules here (*but see* pages 7-9, *infra*), the government “is foreclosed from
20 relying on the good cause exception by its own delay in promulgating” the Rules. *Air Transp.*
21 *Ass’n of Am. v. Dep’t of Transp.*, 900 F.2d 369, 379 (D.C. Cir. 1990), *vacated on other grounds*,
22 498 U.S. 1077 (1991). That is, because the agencies “could have realized [their] objective short of
23 disregarding [their] obligations under the APA” by conducting notice and comment in the more
24 than six months after the unemployment effects of COVID-19 became apparent, they may not
25 claim that an exigency requires them to jettison the APA’s procedures now. *Id.*; *see* Mot. 6-8 (col-
26 lecting cases).

27
28 ³ Any argument now regarding the scope of appropriate relief is waived. *See In re Polycom, Inc.*, 78 F. Supp. 3d at 1014 n.6.

1 The government does not contest the rule established by these cases: that good cause
2 should be “rejected” if the agency “could have initiated the notice-and-comment process” but in-
3 stead “delays implementing its decision.” *Nat’l Venture Capital Ass’n v. Duke*, 291 F. Supp. 3d 5,
4 16 (D.D.C. 2017); *accord, e.g., Nat’l Ass’n of Farmworkers Orgs. v. Marshall*, 628 F.2d 604, 622
5 (D.C. Cir. 1980) (“[W]e cannot sustain the suspension of notice and comment” where “[t]he De-
6 partment waited nearly seven months” and “found it quite possible to consult with . . . interested
7 parties” during that time).

8 Instead, the government argues that its failure to act for seven months should be excused
9 because COVID-19 unemployment is “complex and ongoing” and “constantly changing.” Gov’t
10 Opp. 12-13. But the government has not identified *how* pandemic-related unemployment has
11 “constantly chang[ed]” over the agencies’ seven months of inaction such that it now “requires
12 swift agency action” (*id.* at 13) that was not apparent months ago. For example, the government
13 points to no worsening of economic conditions that has made the emergency more acute—to the
14 contrary, as we demonstrated (Mot. 12-13), overall unemployment has in fact “constantly” *less-*
15 *ened* every month since April.⁴ Nor does it explain how it is “complex” or “constantly changing”
16 in the particular job categories where H-1B visa recipients are employed. The government fails to
17 offer any *facts* that justify their substantial delay. Again, the agencies could have, but did not, un-
18 dertake notice and comment during their period of delay.

19 The government also highlights DOL’s conclusion that October 2020 was a “critical mo-
20 ment” at which those who lost their jobs early in the pandemic would cross into “more detri-
21 mental ‘long-term unemployment’” (Gov’t Opp. 12)—but that deadline, based on a simple 27-
22 week countdown from the mass layoffs (*see* DOL Rule, 85 Fed. Reg. at 63,900), was entirely
23 predictable as soon as unemployment spiked in April. In other words, once the April unemploy-
24 ment numbers revealed the “unprecedented ‘economic cataclysm’” caused by the coronavirus
25 (DHS Rule, 85 Fed. Reg. at 63,938), it would have been obvious to the agency that, 27 weeks lat-
26 er, long-term unemployment would begin—because long-term unemployment is defined as un-

27 _____
28 ⁴ The newest statistics show a continuation of the same pattern: The overall unemployment rate
for October was down again, to 6.9%. *See* U.S. Dep’t of Labor, Bureau of Labor Statistics, *The
Employment Situation – October 2020*, at 1 (Nov. 6, 2020), perma.cc/9WUQ-YGLV.

1 employment of 27 weeks or more (DOL Rule, 85 Fed. Reg. at 63,900). Once again, the agencies
2 “could have initiated the notice-and-comment process” during those 27 weeks, but chose not to.
3 *Nat’l Venture Capital Ass’n*, 291 F. Supp. 3d at 16. Just as the “impending harvest” did not sup-
4 ply good cause when the agency “waited nearly seven months” in *National Association of Farm-*
5 *workers Organizations*, for example, the wholly foreseeable onset of long-term unemployment
6 cannot supply good cause here in light of the agencies’ delay. 628 F.2d at 622; *see also, e.g., Air*
7 *Transp. Ass’n*, 900 F.2d at 395 (“[I]nsofar as the [agency’s] own failure to act materially contrib-
8 uted to its perceived deadline pressure, the agency cannot now invoke the need for expeditious
9 action as ‘good cause’ to avoid the obligations of section 553(b).”).⁵

10 Furthermore, Defendants’ reference to an “ongoing crisis” cannot provide “good cause”
11 given that they attended to many issues quite unrelated to COVID-19 during the past 8 months.
12 Defendants have issued many different regulations and proposed regulations over this timeframe
13 that have no bearing on COVID-19. Mot. 10 n.8. Although it may be that, in the face of an emer-
14 gency, an agency can undertake a variety of emergency-related actions in sequence, an agency
15 cannot invoke good cause to justify departure from notice-and-comment rulemaking where, as
16 here, the agency prioritizes actions unrelated to the emergency. *Air Transp. Ass’n*, 900 F.2d at
17 379 (rejecting good cause where agency delayed promulgating rules “largely [as] a product of the
18 agency’s decision to attend to other obligations”). Defendants could have focused their resources
19 on these Rules back in March, April or May; their decision not to do so forecloses their invoca-
20 tion of the “good cause” exception now.

21 In short, the government may not dispense with notice and comment in circumstances
22 where, as here, it “could have realized [its] objective short of disregarding its obligations under
23 the APA” by initiating notice and comment at a much earlier date. *Air Transp. Ass’n*, 900 F.2d at
24 379. Against this backdrop, the Court should reject the government’s effort to invoke the “nar-

25 ⁵ This “long-term unemployment” justification is also absent from the DHS Rule, and therefore
26 could not justify that Rule even if it were persuasive. *See, e.g., Nat’l Venture Capital Ass’n*, 291
27 F. Supp. 3d at 15-16 (“The Court . . . must examine closely the agency’s explanation [for invoking
28 the good-cause exception] *as outlined in the rule.*”) (quotation marks omitted; emphasis added); *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm*, 463 U.S. 29, 50 (1983) (“It is well-
established that an agency’s action must be upheld, if at all, on the basis articulated by the agency
itself.”).

1 rowly construed and only reluctantly countenanced” exception to the requirement of notice-and-
2 comment rulemaking. *California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018).

3 2. Separately, the government does not even attempt to respond to our demonstration that
4 H-1B workers overwhelmingly work in high-skilled “computer occupations,” and that the latest
5 statistics available when the Rules were issued showed unemployment in these occupations was
6 up only half a percentage point from the pre-pandemic rates. *See* Mot. 13-15; Hughes Decl. Exs.
7 12, 17, 19; *see also* Mot. 14 (statistics showing over 655,000 active job vacancy postings in
8 common computer occupations over the 30 days ending October 2, indicating high demand for
9 such positions). A half-percentage-point rise cannot possibly be sufficient to “overcome [the]
10 high bar” required for the good-cause exception, which the Ninth Circuit instructs “is to be ‘nar-
11 rowly construed and only reluctantly countenanced.’” *Azar*, 911 F.3d at 575 (quoting *Alacaraz v.*
12 *Block*, 746 F.2d 593, 612 (9th Cir. 1984), and *United States v. Valverde*, 628 F.3d 1159, 1164-65
13 (9th Cir. 2010)); *accord, e.g., Sorenson*, 755 F.3d at 706. To hold otherwise would allow the good
14 cause exception to “swallow the rule,” an outcome that the Ninth Circuit has repeatedly decried.
15 *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982); *see also, e.g., Azar*, 911 F.3d at 575
16 (“[I]t is antithetical to the structure and purpose of the APA for an agency to implement a rule
17 first, and then seek comment later.”) (quoting *Paulsen v. Daniels*, 413 F.3d 999, 1005 (9th Cir.
18 2005)).

19 The government’s only rejoinder is an effort to distinguish this Court’s recent decision in
20 *NAM*, in which the Court found another work-based visa restriction unlawful based on the same
21 “mismatch” between COVID-related unemployment and the positions generally filled by H-1B
22 employees. *NAM*, 2020 WL 5847503, at *13; *see* Gov’t Opp. 15-16.

23 First, it is simply not true that “[t]he legal issues in dispute were . . . entirely different.”
24 Gov’t Opp. 15. The relevant legal issue in *NAM* was whether a “find[ing]” in Presidential Proc-
25 lamation 10052—that the entry of H-1B employees into the United States during pandemic-
26 related unemployment “would be detrimental to the interest of the United States”—was adequate-
27 ly “supported” by the facts. *NAM*, 2020 WL 5847503, at *11-13.⁶ Here, the issue is whether the

28 _____
⁶ To be sure, the Court *also* “enjoined the Proclamation because it believed that the Proclama-
REPLY ISO MOTION FOR PI AND PARTIAL
SUMMARY JUDGMENT (4:20-CV-7331-JSW)

1 agencies have adequately demonstrated that providing notice and comment—thereby delaying the
2 Rules’ new restrictions on the H-1B program—is “impracticable” due to the need to “protect[]”
3 “the economic interests of U.S. workers” during the “widespread unemployment” caused by
4 COVID-19. Gov’t Opp. 9-10. The Court’s conclusion in *NAM* that “[t]he statistics regarding pan-
5 demic-related unemployment actually indicate that unemployment is concentrated in service oc-
6 cupations and that large number of job vacancies remain in the area most affected by the ban,
7 computer operations which require high-skilled workers” (*NAM*, 2020 WL 5847503, at *13) is
8 thus entirely applicable here.

9 Second, the government suggests that “the *NAM* decision rested on the Court’s view that
10 foreign workers were ‘already prevented, by statute, from competing with jobs for United States
11 citizens,’” while the agencies have found otherwise with respect to H-1B workers. Gov’t Opp. 15
12 (quoting *NAM*, 2020 WL 5847503, at *13). That is an obfuscation. As the Court is well aware,
13 the Proclamation at issue in *NAM* barred multiple work-based visa categories; the language high-
14 lighted by the government pertained to H-2B workers, who are indeed prevented from competing
15 with United States citizens. *See NAM*, 2020 WL 5847503, at *10 (“The pre-existing law already
16 guarantees that issuance of an H-2B visa will not disadvantage American native-born workers.”)
17 (citing 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6)(iv)(A); 20 C.F.R. § 655.50(b)).
18 The Proclamation also covered H-1B workers, and this Court’s conclusion about *H-1B* workers,
19 by contrast, was the one just noted: that the Proclamation’s “finding” that pandemic-related un-
20 employment justifies excluding H-1B workers “does not comport with actual facts” given that a
21 “large number of job vacancies remain in the area most affected by the ban, computer operations
22 which require high-skilled workers.” *NAM*, 2020 WL 5847503, at *13. The same “actual facts”
23 that undermined the Proclamation in *NAM*—namely, that COVID-related unemployment has
24 largely spared the specific high-skilled labor markets that the H-1B program primarily serves—
25 similarly doom the government’s good-cause assertions here.

26
27 tion exceeded the President’s authority and improperly interfered with the existing statutory
28 scheme” (Gov’t Opp. 15)—but that was a separate claim. The Court ruled for the plaintiffs *both*
on that theory, *and* on their claim that the ban on H-1B workers was unsupported by the evidence
on pandemic-related unemployment. *See NAM*, 2020 WL 5847503, at *11, 13.

1 This case is different from *NAM* in one important respect: the degree of deference due the
2 government. In *NAM*, all agreed that significant deference was due to the President’s exercise of
3 Section 212(f) authority. Even so, the Court found that, notwithstanding this broad authority,
4 Presidential Proclamation 10052 transgressed the essential limitations on executive action. This
5 case is far different because there is *no* deference due the Defendants. *See* pages 2-3, *supra*. In
6 this setting, it is substantially harder to countenance Defendants’ efforts at tying their extraordi-
7 nary efforts to avoid longstanding administrative procedures to COVID-19.

8 Moreover, even if it *could* distinguish *NAM*, that would not get the government any-
9 where—because the government utterly fails to respond to our factual demonstration in *this* case
10 that unemployment in the occupational categories commonly filled by H-1B workers remains
11 low. *Compare* Mot. 13-15 (citing extensive statistical analyses proving this point), *with* Gov’t
12 Opp. 15-16 (not contesting this factual demonstration whatsoever). Even putting the persuasive
13 effect of *NAM* to one side, therefore, the government has completely failed to demonstrate that
14 unemployment in the occupations actually affected by these Rules is “so dire as to warrant dis-
15 pensing with notice and comment procedures.” *Capital Area Immigrants’ Rights Coal. v. Trump*,
16 2020 WL 3542481, at *13 (D.D.C. June 30, 2020) (*CAIR Coal.*); *see also, e.g., Sorenson*, 755
17 F.3d at 707 (good cause requires “record support proving the emergency”); *Nat’l Educ. Ass’n*,
18 379 F. Supp. 3d at 1021 (“The burden is on the agency to demonstrate that it has good cause.”).

19 **C. DOL’s alternative theory of good cause fails as well.**

20 DOL’s alternative theory of good cause—that the agency’s plans to raise the wage levels
21 for H-1B, EB-2, and EB-3 workers could not be announced in advance because employers might
22 rush to lock in the existing rates during the comment period—also fails, again for two independ-
23 ent reasons. *See* Mot. 15-18.

24 1. First, even if this theory were theoretically viable, it is unavailable here because the
25 government had already publicly announced its intention to raise the wage levels three months
26 before the DOL Rule was issued. That is, the government cannot seriously maintain that the need
27 for secrecy justifies dispensing with notice and comment when the supposed “secret” was an-
28 nounced at a White House press briefing months earlier. *See* Mot. 15.

1 The government has little to say in response. It first ventures that “there is a significant
2 difference . . . between a non-DOL official announcing the administration’s *hope* that DOL will
3 make certain changes to its rules by an unspecified date and the agency itself proposing” a rule.
4 Gov’t Opp. 20 (emphasis added). This argument both insults the intelligence of anyone who reads
5 it and mistakes the facts. The announcement in question was not merely of the administration’s
6 “hope” about DOL’s future behavior. Rather, it was that “[t]he President” had explicitly “*in-*
7 *structed*” DOL “to change the prevailing wage calculation,” and that in response to this direct or-
8 der from the chief executive, “the Department of Labor is going to fix all that, with the idea of
9 setting the prevailing wage floor at the 50th percentile.” Hughes Decl. Ex. 4 (emphasis added);
10 *see* Mot. 15. And the President himself followed up with his own announcement in August that,
11 “[a]s we speak, we’re finalizing [H-1B] regulations” aimed at ensuring H-1B visas are restricted
12 to “highly paid talent.” Hughes Decl. Ex. 8, at 2. A declaration by the President of the United
13 States that “regulations” are being “finaliz[ed]” “[a]s we speak” is hardly the kind of aspirational
14 statement that, as the government would have it, employers might disregard. Rather, there was no
15 secret, specifically because the White House—months before DOL issued its Rule—announced
16 what DOL was going to do. Given this history, DOL cannot now maintain that a supposed need
17 for secrecy justified the failure to allow the public to participate in its massively costly regulation.

18 In addition, DOL is quite simply wrong to suggest that a notice of proposed rulemaking
19 would typically include “a specific effective date.” Gov’t Opp. 20. Rather, such notices announce
20 a date by which comments must be submitted. The agency then receives those comments, reviews
21 them, makes changes to the regulation as appropriate in response to the comments, and then it
22 works with the Office of Information and Regulatory Affairs (OIRA) to finalize the regulation.
23 This is a highly variable process, and agencies rarely, if ever, know at the outset how long it will
24 take.⁷ Thus, the issuance of a notice of proposed rulemaking by DOL would not have introduced

25
26 ⁷ For example, the Department of Labor’s own recent notices of proposed rulemaking do not
27 include a date on which the rule, if ultimately finalized, will become effective. The most recent
28 proposed rule is entitled *Fiduciary Duties Regarding Proxy Voting and Shareholder Rights*, 85
Fed. Reg. 55,219 (Sept. 4, 2020). In the section titled “Effective date,” it states that “[t]he section
shall be effective [30 days after date of publication of final rule].” *Id.* at 55,243. The brackets are
in the original, underscoring that the ultimate effective date is wholly unknown at the time that
the proposed rule is published. *See also Grandfathered Group Health Plans and Grandfathered*

1 more concrete facts regarding timing than did the information provided by the White House here.

2 The government’s only other contention on this point is that, “[g]iven the narrow
3 timeframe in which employers may submit LCAs, it would not make sense for employers wishing
4 to lock in the old wage rate to rush to submit LCAs absent an effective date.” Gov’t Opp. 20. This
5 argument fails on several levels. First, a *proposed* rule need not provide an effective date, either.
6 Thus, DOL’s fundamental contention—that issuing a notice of proposed rulemaking and permit-
7 ting comments in the normal course would have provided the public advance notice of the “effec-
8 tive date”—is simply erroneous.

9 Second, it is hard to see what the government means by this: Such an open-ended an-
10 nouncement would seem to incentivize businesses to submit LCAs under the old rate as soon as
11 possible—that is, immediately once the start date for employment is less than six months away.
12 Finally, this argument attributes to DOL a supposedly “reasonable predictive judgment” (Gov’t
13 Opp. 20)—that the announcement of a fixed effective date incentivizes businesses differently than
14 an announcement of changes on an imminent but unspecified timeline—which appears nowhere
15 in the DOL Rule, and therefore cannot justify the agency’s action. *See, e.g., Motor Vehicle Mfrs.*
16 *Ass’n*, 463 U.S. at 50 (“It is well-established that an agency’s action must be upheld, if at all, on
17 the basis articulated by the agency itself.”); *Arrington v. Daniels*, 516 F.3d 1106, 1113 (9th Cir.
18 2008) (“*Post hoc* explanations of agency action by appellate counsel cannot substitute for the
19 agency’s own articulation of the basis for its decision.”).

20 In sum, the White House’s explicit announcement of the coming rule change guts DOL’s
21 contention that it had good cause to dispense with notice-and-comment rulemaking out of a puta-
22 tive need for secrecy.

23 2. DOL’s theory of a mad rush to submit LCAs under the old wage levels further fails

24 *Group Health Insurance Coverage*, 85 Fed. Reg. 42,782, 42,788 (July 15, 2020) (“The amend-
25 ments to the 2015 final rules that are included in these proposed rules would apply to grandfa-
26 thered group health plans and grandfathered group health insurance coverage beginning 30 days
27 after the publication of any final rules.”); *Financial Factors in Selecting Plan Investments*, 85
28 Fed. Reg. 39,113, 39,128 (June 30, 2020) (“(g) Effective date. This section shall be effective on
[60 days after date of publication of final rule.]”). Plaintiffs include institutional litigants who
routinely address agency rulemaking, and they confidently affirm that most proposed rules do not
include an effective date for the *final* rule. To issue a proposed rule in this context, DOL certainly
did not have to identify a “specific effective date.” Gov’t Opp. 20.

1 under clear Ninth Circuit precedent because the contention is unsupported by the record. Mot. 16-
2 18. The government’s attempts to explain away that precedent fail to persuade.

3 The Ninth Circuit’s twin decisions in the *East Bay* cases establish a simple rule: When the
4 government claims good cause based on its prediction that regulated entities would evade the new
5 rules during any comment period, the government must base that prediction on actual “evidence”
6 and not merely its view of the relevant “incentive[s].” *E. Bay I*, 932 F.3d at 777; *see also E. Bay*
7 *Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1278 (9th Cir. 2020) (*E. Bay II*) (rejecting good
8 cause because “[t]he government’s reasoning continues to be largely speculative; no evidence has
9 been offered to suggest that any of its predictions are rationally likely to be true.”) (citation omit-
10 ted); *Azar*, 911 F.3d at 577 (“[S]peculation unsupported by the administrative record . . . is not
11 sufficient to constitute good cause.”); Mot. 16-17. And the DOL Rule fails that simple test, be-
12 cause it proffers no evidence in support of its predictions about employer behavior. Mot. 17.

13 In response, the government does not contend that the DOL Rule marshals any evidence;
14 rather, it argues that the agency need not have done so. *See Gov’t Opp.* 16-20. The government’s
15 reading of the *East Bay* cases stretches the Ninth Circuit’s reasoning past its breaking point, how-
16 ever. The government asserts that those cases “stand for the proposition” merely “that an agen-
17 cy’s predictive judgment must be reasoned rather than purely speculative,” and that “DOL’s
18 judgment satisfies this requirement.” *Id.* at 19. But that is an incoherent dichotomy: By definition,
19 what makes a conclusion “speculative” is not a lack of reasoning, but a lack of grounding in con-
20 crete facts. *See, e.g., Speculative, Oxford English Dictionary* (“characterized by[] speculation or
21 theory in contrast to practical or positive knowledge”), perma.cc/65MC-679U; *Speculative, Ox-*
22 *ford Lexico* (“based on conjecture rather than knowledge”), perma.cc/BN4J-2KS6. Indeed, the
23 Ninth Circuit in *East Bay* explicitly *acknowledged* the abstract logic behind the government’s
24 predictions. *E. Bay I*, 932 F.3d at 777 (“We recognize that, theoretically, an announcement of a
25 proposed rule ‘creates an incentive’ for those affected to act ‘prior to a final administrative deter-
26 mination.’”). In the final analysis, what rendered the government’s predictions impermissibly
27 “speculative”—and therefore insufficient to support good cause—was precisely the fact that, even
28 *admitting* their abstract logic, “no evidence has been offered” in support of those predictions. *E.*

1 *Bay II*, 950 F.3d at 1278 (emphasis added).

2 Nor is this rule—that predictions of rule-evading behavior must be backed up with evi-
3 dence in order to constitute good cause—unique to the Ninth Circuit. *Cf.* Gov’t Opp. 19. To the
4 contrary, the very same rule prevails in the D.C. Circuit. As one district court explained in reject-
5 ing precisely the sort of good-cause claim the DOL Rule presses here:

6 Common sense dictates that the announcement of a proposed rule may, at least to
7 some extent and in some circumstances, encourage those affected by it to act before
8 it is finalized. *But this rationale cannot satisfy the D.C. Circuit’s standard in this*
9 *case unless it is adequately supported by evidence in the administrative record sug-*
gesting that this dynamic might have led to the consequences predicted by the De-
partments—consequences so dire as to warrant dispensing with notice and comment
procedures. See Sorenson, 755 F.3d at 707.

10 *CAIR Coal.*, 2020 WL 3542481, at *13 (emphasis added). Like the Ninth Circuit in *East Bay*, the
11 court recognized the abstract logic of the government’s incentives-based argument, but held that
12 logic insufficient as a matter of law unless buttressed by record evidence. This is because the D.C.
13 Circuit, like the Ninth Circuit, holds that “record support proving the emergency” is necessary for
14 a successful good-cause showing. *Sorenson*, 755 F.3d at 707; *see also id.* (“[S]omething more
15 than an unsupported assertion is required.”); *accord Azar*, 911 F.3d at 577 (“[S]peculation un-
16 supported by the administrative record . . . is not sufficient to constitute good cause.”).

17 Indeed, even the government’s own cases undermine its position. For its contentions about
18 deference to agency predictive judgments, the government relies heavily on the D.C. Circuit’s
19 decision in *Tennessee Gas Pipeline Co. v. FERC*, 969 F.2d 1141 (D.C. Cir. 1992). *See* Gov’t
20 Mem. 16, 18. But the government neglects to mention that the D.C. Circuit actually *rejected* good
21 cause in that case—notwithstanding “the regulator’s prediction of the regulated’s reaction to [the]
22 proposed rulemaking”—*precisely because* the regulator “provided little factual basis” for that
23 prediction. *Id.* at 1145; *see also id.* at 1145-46 (the “ample practical experience” supporting the
24 agency’s prediction “does not excuse the [agency’s] failure to cite such examples in support of its
25 claim of a good cause exception from the APA’s notice and comment requirements.”). And while
26 the court did note one line of cases in which the now-defunct Temporary Emergency Court of
27 Appeals “allowed use of the good cause exception based on bare predictions of regulatory avoid-
28 ance” (*id.* at 1146; *see* Gov’t Opp. 16), it did so only in the course of cabining those cases to their

1 own “special circumstances,” and denying their broader applicability (*Tenn. Gas Pipeline Co.*,
2 969 F.2d at 1146).⁸

3 In sum, all these cases stand for the same proposition: courts do *not* “defer to an agency’s
4 predictive judgment that a notice and comment period would enable rule evasion” (Gov’t Opp.
5 18), where that “predictive judgment” is based only on the agency’s say-so, and not on record ev-
6 idence. *See E. Bay I*, 932 F.3d at 777; *E. Bay II*, 950 F.3d at 1278; *CAIR Coal*, 2020 WL
7 3542481, at *13; *Tenn. Gas Pipeline Co.*, 969 F.2d at 1145. To the contrary, such an uncorrobo-
8 rated prediction is precisely the sort of “speculation unsupported by the administrative record”
9 that “is not sufficient to constitute good cause.” *Azar*, 911 F.3d at 577. For this independent rea-
10 son, too, the DOL Rule’s alternative good-cause justification must fail.⁹

11 CONCLUSION

12 The Court should grant plaintiffs partial summary judgment and set aside the DHS Rule
13 and the DOL Rule.

14
15 ⁸ Apart from being non-binding (*see* Mot. 17 n.23), these price-control cases are *sui generis*
16 because of the speed at which commodity prices can be changed—and huge transactions funneled
17 through—“to accommodate shifts in regulatory policy.” *Tenn. Gas Pipeline Co.*, 969 F.2d at
18 1145. By contrast, the international hiring and workforce-planning decisions at issue here are
19 much more like the construction projects in *Tennessee Gas*—which “are planned well in advance
and take time to accomplish”—and the “migratory patterns” in *CAIR Coalition*, both of which
cases explicitly rejected the government’s attempted reliance on the *Mobil Oil* line of price-
control cases. *See Tenn. Gas Pipeline Co.*, 969 F.2d at 1146; *CAIR Coal.*, 2020 WL 3542481, at
*14 n.17.

20 ⁹ *Amici* U.S. Tech Workers assert that even if good cause does not exist, the Court should nev-
21 ertheless stay its vacatur of the Rules. Dkt. 66-1, at 10. There is no justification for this approach.
22 Unlike technical failures that can be easily remedied, “deficient notice is a ‘fundamental flaw’
23 that almost always requires vacatur.” *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C.
24 Cir. 2014) (quoting *Heartland Regional Med. Ctr. v. Sebelius*, 566 F.3d 193, 199 (D.C. Cir.
25 2009)); *accord, e.g., CAIR Coal.*, 2020 WL 3542481, at *21-23 (rejecting stay of vacatur where
26 agency improperly relied on good-cause exception); *California v. Bernhardt*, 2020 WL 4001480,
27 at *43 (N.D. Cal. July 15, 2020) (“[C]ircumventing notice-and-comment requirements is not a
28 minor error” that can permit “remand without vacatur.”). And unlike the case cited by *amici*, here
there has been no detrimental reliance on the new Rules that could justify retaining them tempo-
rarily. *Compare Wash. All. of Tech. Workers v. DHS*, 156 F. Supp. 3d 123, 148-49 (D.D.C. 2015)
(staying vacatur only because immediately “vacating the 2008 Rule would force thousands of for-
eign students with work authorizations to scramble to depart the United States.”) (quotation
marks and ellipsis omitted). In any event, the government itself has not requested any such relief,
and “[a]n amicus cannot raise issues not already raised by the parties themselves.” *Karuk Tribe of
Cal. v. U.S. Forest Serv.*, 2005 WL 8177401, at *1 (N.D. Cal. July 1, 2005); *see also, e.g., United
States v. Wahchumwah*, 710 F.3d 862, 868 n.2 (9th Cir. 2013) (“[T]he court will not consider ar-
guments raised only in amicus briefs.”).

