**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | | |
|---|---|---|
| JOEL DAVILA CALIXTO, HECTOR HERNANDEZ GOMEZ, LEONARDO AVILES ROMERO, HILARIO OLVERA GUTIERREZ, and JORGE PALAFOX JUAREZ,<br><br>Plaintiffs,<br><br>v.<br><br>EUGENE SCALIA, in his official capacity as capacity as Secretary of Labor, and U.S. DEPARTMENT OF LABOR,<br><br>Defendants. | ) | Civil Action No. 19-1853 (CKK) |

**PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Pursuant to Federal Rule of Civil Procedure 56, Plaintiffs Joel Davila Calixto, Hector Hernandez Gomez, Leonardo Aviles Romero, Hilario Olvera Gutierrez, and Jorge Palafox Juarez hereby move for summary judgment on the ground that there is no genuine issue of disputed material fact and that they are entitled to judgment as a matter of law.

In support of this motion, Plaintiffs submit the accompanying (1) memorandum of law, (2) Declaration of Adam R. Pulver and accompanying exhibits, (3) Declarations of Rachel Micah-Jones, Joel Davila Calixto, Leonardo Aviles Romero, Hilario Olvera Gutierrez, and Jorge Palafox Juarez, (4) Supplemental Declarations of Hilario Olvera Gutierrez and Jorge Palafox Juarez, and (5) a proposed order.

Dated: November 4, 2019

Respectfully submitted,

/s/ *Adam R. Pulver*

Adam R. Pulver
D.C. Bar No. 1020475
Michael T. Kirkpatrick
D.C. Bar No. 486293
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
apulver@citizen.org

*Counsel for Plaintiffs*

Benjamin R. Botts*
CA Bar No. 274542
CENTRO DE LOS DERECHOS DEL MIGRANTE, INC.
10 E. North Avenue, #9
Baltimore, Maryland 21202
(855) 234-9699
* *Practice Pursuant to LCvR 83.2(g)*

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | | |
|---|---|---|
| JOEL DAVILA CALIXTO, HECTOR HERNANDEZ GOMEZ, LEONARDO AVILES ROMERO, HILARIO OLVERA GUTIERREZ, and JORGE PALAFOX JUAREZ,<br><br>Plaintiffs,<br><br>v.<br><br>EUGENE SCALIA, in his official capacity as capacity as Secretary of Labor, and U.S. DEPARTMENT OF LABOR,<br><br>Defendants. | ) | Civil Action No. 19-1853 (CKK) |

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

Benjamin R. Botts*
CA Bar No. 274542
CENTRO DE LOS DERECHOS DEL MIGRANTE, INC.
10 E. North Avenue, #9
Baltimore, Maryland 21202
(855) 234-9699
* *Practice Pursuant to LCvR 83.2(g)*

Adam R. Pulver
D.C. Bar No. 1020475
Michael T. Kirkpatrick
D.C. Bar No. 486293
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
apulver@citizen.org

*Counsel for Plaintiffs*

## TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii

INTRODUCTION ..... 1

I. The 2008 Rule and Related Litigation ..... 3

II. The 2013 Rule, SPWDs, and the Administrative Appeal Process ..... 4

III. Post-*Island Holdings* Developments ..... 8

IV. SPWDs Issued to Plaintiffs' Employers and Pending Appeals ..... 10

LEGAL STANDARDS ..... 12

ARGUMENT ..... 13

I. Defendants have unlawfully withheld and unreasonably delayed completion of the administrative reviews. ..... 13

A. Defendants' delay is unreasonable, and the Court should compel DOL to act. ..... 13

1. There is no reasonable basis for continued delay. ..... 14

2. The delay causes significant harm to Plaintiffs. ..... 16

3. There is no claim of competing priority. ..... 19

B. Defendants misunderstand Plaintiffs' claim, which challenges DOL's failure to task discrete, non-discretionary action. ..... 20

II. DOL's indefinite stay is arbitrary, capricious, and contrary to law. ..... 23

A. The indefinite stay is arbitrary and capricious. ..... 24

B. Plaintiffs' second cause of action states a claim for relief. ..... 25

CONCLUSION ..... 26

## TABLE OF AUTHORITIES

**CASES** **PAGE(S)**

*Afghan & Iraqi Allies Under Serious Threat Because of Their Faithful Service to the U.S. v. Pompeo*,
No. 18-CV-01388 (TSC), 2019 WL 4575565 (D.D.C. Sept. 20, 2019) ..... 16, 19

*Air Alliance Houston v. U.S. Chemical & Safety Hazard Investigation Board*,
365 F. Supp. 3d 118 (D.D.C. 2019) ..... 22

*Air Line Pilots Association, International v. Civil Aeronautics Board*,
750 F.2d 81 (D.C. Cir. 1984) ..... 16, 17

*American Hospital Association v. Burwell*,
812 F.3d 183 (D.C. Cir. 2016) ..... 13, 20

*In re American Rivers & Idaho Rivers United*,
372 F.3d 413 (D.C. Cir. 2004) ..... 14, 23

*Ashcroft v. Iqbal*,
556 U.S. 662 (2009). ..... 12

*Association of Civilian Technicians, Montana Air Chapter No. 29 v. FLRA*,
22 F.3d 1150 (D.C. Cir. 1994) ..... 22

*Bauer v. DeVos*,
325 F. Supp. 3d 74 (D.D.C. 2018) ..... 23

*Bayou Lawn & Landscape Services v. Secretary of Labor*,
713 F.3d 1080 (11th Cir. 2013) ..... 6

*Calixto v. U.S. Department of the Army*,
No. CV 18-1551 (ESH), 2019 WL 2139755 (D.D.C. May 16, 2019) ..... 20

*Canales v. A.H.R.E., Inc.*,
254 F.R.D. 1 (D.D.C. 2008) ..... 19

*Center for Science in the Public Interest v. FDA,*
74 F. Supp. 3d 295 (D.D.C. 2014) ..... 14

*Clean Air Council v. Pruitt*,
862 F.3d 1 (D.C. Cir. 2017) ..... 23

*Cobell v. Norton*,
240 F.3d 1081 (D.C. Cir. 2001). ..... 22

*Connecticut v. U.S. Department of the Interior,*
363 F. Supp. 3d 45 (D.D.C. 2019) ..... 21

*Comité de Apoyo A Los Trabajadores Agricolas v. Perez*,
46 F. Supp. 3d 550 (E.D. Pa. 2014) ..... 8, 9

*Comite de Apoyo a los Trabajadores Agricolas v. Solis*,
933 F. Supp. 2d 700 (E.D. Pa. 2013) ..... 4

*Comite de Apoyo a los Trabajadores Agricolas v. Solis*,
Civ. No. 09-240, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010) ..... 4

*Cook v. FDA*,
733 F.3d 1 (D.C. Cir. 2013) ..... 22

*In re Core Communications, Inc.*,
531 F.3d 849 (D.C. Cir. 2008) ..... 14

*Electronic Privacy Information Center v. IRS*,
910 F.3d 1232 (D.C. Cir. 2018) ..... 21

*Encino Motorcars, LLC v. Navarro*,
136 S. Ct. 2117 (2016). ..... 25

*Geneme v. Holder*,
935 F. Supp. 2d 184 (D.D.C. 2013) ..... 14

*Gonzales-Aviles v. Perez*,
Civ. No. JFM-15-3463, 2016 WL 3440581 (D. Md. June 17, 2016) ..... 20

*Gulf Coast Maritime Supply, Inc. v. United States*,
867 F.3d 123 (D.C. Cir. 2017) ..... 12

*Hamandi v. Chertoff*,
550 F. Supp. 2d 46 (D.D.C. 2008) ..... 23

*Hyatt v. U.S. Patent & Trademark Office*,
110 F. Supp. 3d 644 (E.D. Va. 2015) ..... 21, 23

*In re International Chemical Workers Union*,
958 F.2d 1144 (D.C. Cir. 1992) ..... 14

*Jerome Stevens Pharmaceuticals, Inc. v. FDA*,
402 F.3d 1249 (D.C. Cir. 2005) ..... 12

*Liberty Fund, Inc. v. Chao*,
394 F. Supp. 2d 105 (D.D.C. 2005) ..... 22

*Liu v. Novak*,
509 F. Supp. 2d 1 (D.D.C. 2007) ..... 23

*Lujan v. Defenders of Wildlife*,
504 U.S. 555 (1992) ..... 12

*Martin v. O'Rourke*,
891 F.3d 1338 (Fed. Cir. 2018) ..... 15

*MCI Telecommunications Corp. v. FCC*,
627 F.2d 322 (D.C. Cir. 1980) ..... 19

*Meina Xie v. Kerry*,
780 F.3d 405 (D.C. Cir. 2015) ..... 20, 21

*Murphy v. Smith*,
138 S. Ct. 784 (2018) ..... 21

*Muwekma Tribe v. Babbitt*,
133 F.Supp. 2d 30 (D.D.C. 2000) ..... 14, 16, 17

*Nader v. FCC*,
520 F.2d 182 (D.C. Cir. 1975) ..... 19

*National Women's Law Center. v. Office of Management & Budget*,
358 F. Supp. 3d 66 (D.D.C. 2019) ..... 23

*Nine Iraqi Allies Under Serious Threat Because of Their Faithful Service to the U.S. v. Kerry*,
168 F. Supp. 3d 268 (D.D.C. 2016) ..... 21, 23

*Norton v. Southern Utah Wilderness Alliance*,
542 U.S. 55 (2004) ..... 20, 21

*NRDC v. U.S. Department of Energy*,
362 F. Supp. 3d 126 (S.D.N.Y. 2019) ..... 23

*Open America v. Watergate Special Prosecution Force*,
547 F.2d 605 (D.C. Cir. 1976) ..... 19

*Owens v. Republic of Sudan*,
174 F. Supp. 3d 242 (D.D.C. 2016) ..... 18

*Perry Capital LLC v. Mnuchin*,
864 F.3d 591 (D.C. Cir. 2017) ..... 20

*Ralls Corp v. Committee on Foreign Investment in the U.S.*,
758 F.3d 296 (D.C. Cir. 2014) ..... 12

*Reliable Automatic Sprinkler Co. v. CPSC*,
324 F.3d 726 (D.C. Cir. 2003) ..... 20

*SAI v. Department of Homeland Security*,
149 F. Supp. 3d 99 (D.D.C. 2015) ..... 19, 21

*Skalka v. Kelly*,
246 F. Supp. 3d 147 (D.D.C. 2017) ..... 22

*Telecommunications Research & Action Center v. FCC* (TRAC),
750 F.2d 70 (D.C. Cir. 1984) ..... 13, 14

*Trudeau v. FTC*,
456 F.3d 178 (D.C. Cir. 2006) ..... 20

*In re United Mine Workers of America International Union*,
190 F.3d 545 (D.C. Cir. 1999) ..... 16

*U.S. Women's Chamber of Commerce v. U.S. Small Business Administration*,
No. 1:04-CV-01889, 2005 WL 3244182 (D.D.C. Nov. 30, 2005) ..... 22

**FEDERAL STATUTES AND REGULATIONS**

5 U.S.C. § 555(b) ..... 23
5 U.S.C. § 706(1) ..... 2, 12
5 U.S.C. § 706(2) ..... 2, 12
8 U.S.C. § 1101(a)(15)(H)(ii)(b) ..... 3

20 C.F.R. § 655.10 (2008) ..... 3
20 C.F.R. § 655.10(g) (2009) ..... 6, 11
20 C.F.R. § 655.11 (2009) ..... 6, 21
29 C.F.R. § 503.1 ..... 3
29 C.F.R. § 503.16(a) ..... 3

**ADMINISTRATIVE MATERIALS**

DOL, Final Rule, Wage Methodology for the Temporary Non-Agricultural Employment
H-2B Program, 80 Fed. Reg. 24,146 (Apr. 29, 2015) ..... 15

DOL, Notice of Intent to Issue Declaratory Order and Request for Comment, 79 Fed. Reg. 75,179 (Dec. 17, 2014) ..... 9, 24

DOL, Notification of Status of the 2011 H-2B Wage Rule, 79 Fed. Reg. 14,450 (Mar. 14, 2014) ..... 15

DOL & DHS, Interim Final Rule, Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, Part 2, 78 Fed. Reg. 24,046 (Apr. 24, 2013) ..... 1, 4, 5, 16, 24

DOL, Final Rule, Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, 76 Fed. Reg. 3452 (Jan. 19, 2011) ..... 4

DOL, Final Rule, Labor Certification Process and Enforcement for Temporary Employment in Occupations Other than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes, 73 Fed. Reg. 78,020 (Dec. 19, 2008) ..... 3

*In re Island Holdings LLC*, BALCA Case No. 2013-PWD-00002 (Nov. 13, 2014) ..... 9

*In re Island Holdings LLC*, BALCA Case No. 2013-PWD-00002 (Dec. 3, 2013) ..... 6, 7

## INTRODUCTION

In 2013, pursuant to notice-and-comment rulemaking and court orders, the Department of Labor (DOL) issued "Supplemental Prevailing Wage Determinations" (SPWDs) that required employers to pay higher wages to Plaintiffs, five foreign nationals working under the H-2B temporary guestworker program. The SPWDs reflected DOL's assessment that Plaintiffs were "being underpaid in violation of the [Immigration and Nationality Act]" and that an immediate wage adjustment was needed to comply with earlier judicial decisions. DOL & DHS, Interim Final Rule, Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, Part 2, 78 Fed. Reg. 24,046, 24,056 (Apr. 24, 2013) (2013 Rule) (AR46). DOL also determined that the SPWDs were needed to ensure that the agency fulfilled its "statutory mandate" and to avoid "continued harm to U.S. workers, foreign workers and the domestic labor market." *Id.*

In response, Plaintiffs' employers sought administrative review of the SPWDs, an action that stayed the employers' obligation to pay the higher wages. Now, more than six years later, DOL has still not resolved those administrative reviews, and Plaintiffs have not been paid the higher wages to which DOL determined they were entitled.

There is no valid reason for this exceedingly lengthy delay. At first, DOL stayed the reviews pending the resolution of related litigation—but that litigation terminated more than five years ago. And although in 2014 the Secretary of Labor indicated that he would issue a declaratory order addressing the arguments raised by Plaintiffs' employers, the comment period on that proceeding ended in February 2015 and no order has issued. Indeed, the administrative record in this case reveals that no action has been taken with respect to the pending administrative reviews

since February 2015. These undisputed facts show that DOL has engaged in an unreasonable delay in violation of section 706(1) of the Administrative Procedure Act (APA), 5 U.S.C. § 706(1).

Plaintiffs thus seek to compel the agency to take discrete action required by DOL's regulations: resolution of the pending SPWD administrative reviews sought by Plaintiffs' employers. Completion of the review process will result in either the SPWDs taking effect, which will require that Plaintiffs be paid back wages at the higher rate, or setting aside of the SPWDs, which would allow Plaintiffs to challenge the agency's determination on the merits. The factors that the Court considers in assessing claims of unreasonable delay support the issuance of an order compelling DOL to resolve these long-pending proceedings. Most notably, there is no reasonable explanation for DOL's inaction. For more than half a decade, Plaintiffs have each been deprived of thousands of dollars in wages that DOL agrees they should have been paid. Given that DOL supports Plaintiffs' position on the legal issue at the heart of the pending administrative reviews, the amount of resources needed to complete those reviews would be minimal, and Defendant the Secretary of Labor has the authority to remove any barriers to the SPWDs taking effect. The Court should thus compel DOL to act on the pending SPWD reviews within 30 days.

Plaintiffs also are entitled to relief pursuant to APA section 706(2), because DOL's stay of the administrative review proceedings are "final agency actions" reviewable under the APA. In advancing this claim, Plaintiffs do not, as Defendants suggest in their motion to dismiss, argue that the Secretary of Labor is required to issue a declaratory order in Plaintiffs' favor. Rather, Plaintiffs challenge the stay of proceedings as arbitrary, capricious, and contrary to law. Moreover, although Plaintiffs agree with the Secretary's legal position in a 2013 "Notice of Intent" that the SPWDs are valid, that agreement does not mean there is no "actual controversy" in this case: Plaintiffs and DOL disagree as to whether the proceedings should be, and lawfully may be, stayed. Because the

stay has no reasonable basis, and in light of DOL's previous statements as to both the legal basis for the SPWDs and the need for those higher wages to comply with the Immigration and Nationality Act, the stay is unlawful.

## BACKGROUND

### I. The 2008 Rule and Related Litigation

Congress has established a visa program that allows employers to hire foreign workers to perform temporary non-agricultural labor when available, willing, and qualified U.S. workers are too few to fill open jobs. This program is referred to as the H-2B program, taking its name from a relevant provision of the Immigration and Nationality Act (INA), 8 U.S.C. § 1101(a)(15)(H)(ii)(b). To hire H-2B workers, an employer must obtain a temporary labor certification from the Secretary of Labor. *See* 29 C.F.R. § 503.1(a). As part of the application process for such a certification, the employer must agree that, at all times, it will pay to both H-2B workers and any workers in corresponding employment a wage that "equals or exceeds the highest of the prevailing wage or Federal minimum wage, State minimum wage, or local minimum wage." 29 C.F.R. § 503.16(a)(1). By regulation, DOL has adopted various methodologies for calculating the "prevailing wage."

DOL set the present controversy into motion in December 2008 when it promulgated a rule containing revised methodologies for calculating H-2B prevailing wages. *See* DOL, Final Rule, Labor Certification Process and Enforcement for Temporary Employment in Occupations Other than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes, 73 Fed. Reg. 78,020 (Dec. 19, 2008) (2008 Rule). In the relevant parts of the 2008 Rule, DOL changed the way the prevailing wage rate was calculated, using "skill levels" in calculating the prevailing wages and relying solely on data from DOL's Occupational Employment Survey. *See* 20 C.F.R. § 655.10 (2008). H-2B workers challenged these aspects of the 2008 Rule, and a

district court agreed that both changes violated the APA. *See Comite de Apoyo a los Trabajadores Agricolas v. Solis*, Civ. No. 09-240, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010) (*CATA I*). The district court did not vacate the 2008 rule, but instead directed DOL to promulgate within 120 days new rules concerning the calculation of the prevailing wage rate. *Id.* at *24–28. In a subsequent rulemaking, DOL agreed that the 2008 Rule "artificially lowers [the required] wage to a point that it no longer represents a market-based wage." DOL, Final Rule, Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, 76 Fed. Reg. 3452, 3463 (Jan. 19, 2011).

Three years later, however, for a variety of reasons not germane to this action, DOL was still utilizing the invalid 2008 Rule. The same district court therefore vacated the rule and enjoined its continued use. *Comite de Apoyo a los Trabajadores Agricolas v. Solis*, 933 F. Supp. 2d 700, 707 (E.D. Pa. 2013) (*CATA III*). The court noted DOL's acknowledgment that the prevailing wage methodology utilized for those certifications artificially lowered wages for H-2B workers and thus had a depressive effect on the wages of U.S. workers. *Id*. at 711–12, 713. And it held that wage certifications issued pursuant to the 2008 Rule "exceed[ed] the DOL's delegated authority." *Id.* at 711.

## II. The 2013 Rule, SPWDs, and the Administrative Appeal Process

One month after the *CATA III* court vacated the 2008 Rule, DOL and the Department of Homeland Security jointly issued an Interim Final Rule revising the methodology that determines the H-2B prevailing wage in a manner that would increase the prevailing wage. *See* 2013 Rule, 78 Fed. Reg. 24,046 (AR37–51). The 2013 Rule stated that, under the court order invalidating the 2008 Rule and based on DOL's own factual findings,

> the U.S. workers and H-2B workers currently employed under approved certifications, based on the invalid wage rates under the 2008 rule, are being underpaid in violation of

> the INA. To come into compliance with the court's order and to ensure that DHS and DOL fulfill the statutory mandate to protect the domestic labor market, DHS and DOL must immediately set new and legally valid prevailing wage rate standards to allow for an immediate adjustment of the wage rates for these currently employed workers. Further delay in setting a legally valid prevailing wage regime will cause continued harm to U.S. workers, foreign workers, and the domestic labor market.

*Id*. at 24,056 (AR46). DOL explained that the new methodology would be effective immediately with respect to new or pending applications for labor certifications, and that "[u]pon individual notification to the employer of a new prevailing wage, the new wage methodology will also apply to all previously granted H-2B temporary labor certifications for any work performed on or after the effective date of this interim rule." *Id*. at 24,055 (AR45).

In accordance with the 2013 Rule, DOL's Office of Foreign Labor Certification (OFLC) sent individual "supplemental prevailing wage determinations" (SPWDs) to employers who had previously obtained certifications for ongoing H-2B employment. The notifications informed those employers that the prevailing wage had increased, identified the increased wage, and explained that compensation at the higher wage rate was required, pointing to provisions in the H-2B application where employers agreed to pay any newly-established wage. *See* AR70 (describing process); *see also, e.g.*, AR4484–88 (example of SPWD); AR4527–30 (same); AR4704–06 (same). OFLC issued the last of these SPWDs on August 12, 2013. AR70. Each SPWD indicated that the employer could "seek a redetermination" of the SPWD pursuant to the regulations then in effect and codified at 20 C.F.R. § 655.10(g). *See, e.g.*, AR4487, 4529, 4705–06.

At that time, the regulations contained a multi-step process by which employers could seek review of prevailing wage determinations. The first two steps of review were within DOL's OFLC. First, an employer could submit a request to DOL's National Processing Center (NPC), which was required to:

> consider one supplemental submission relating to the employer's survey, the skill level assigned to the job opportunity, or any other legitimate basis for the employer to request such a review. If the NPC [did] not accept the employer's survey after considering the supplemental information, or affirms its determination concerning the skill level, the NPC [had to] inform the employer, in writing, of the reasons for its decision.

20 C.F.R. § 655.10(g)(2) (2009).[1] *See also In re Island Holdings LLC*, BALCA Case No. 2013-PWD-00002 (Dec. 3, 2013) AR52, at AR57–58 (discussing regulatory process). Once the NPC made such a written determination, the employer could either "apply for a new wage determination, appeal under § 655.11, or acquiesce to the initial PWD." 20 C.F.R. § 655.10(g)(3) (2009).

Second, under section 655.11, the employer could file a further appeal within OFLC, referred to by DOL and the employers as "Center Director Review." An employer could submit a request for review to the NPC Director, who would designate a certifying officer (CO) to review the prevailing wage determination. 20 C.F.R. § 655.11(a)–(c) (2009). The relevant regulations provided:

> The CO shall review the PWD solely on the basis upon which the PWD was made and after review may:
>
> (1) Affirm the PWD issued by the NPC; or
> (2) Modify the PWD.

20 C.F.R. § 655.11(d) (2009). If the employer was dissatisfied with the CO's determination, it could seek further review from DOL's Board of Alien Labor Certification Appeals (BALCA), an adjudicatory body. 20 C.F.R. § 655.11(e) (2012). BALCA reports to the Secretary of Labor, and

[1] For the Court's reference, the historical regulations are submitted as exhibit 1 to the concurrently-filed declaration of Adam R. Pulver. At the time of the relevant events, an injunction, issued on grounds unrelated to this action, was in effect against DOL's 2012 H-2B rule. *See Bayou Lawn & Landscape Servs. v. Secretary of Labor*, 713 F.3d 1080 (11th Cir. 2013). Because of the injunction, it appears that both the employers and DOL presumed the pre-April 22, 2012, version of the regulations applied.

"does not have authority to speak for the agency on questions of law and policy"; its "authority is limited to non-lawmaking functions, including determining issues of fact and applying undisputed law to the facts of an employer's particular case." DOL, Notice of Intent to Issue Declaratory Order and Request for Comment, 79 Fed. Reg. 75,179, 75,183 (Dec. 17, 2014) (AR72) (2014 Notice).

DOL has taken the position that the wage rate contained in an SPWD "does not go into effect during the time the determination is under review." *See* Pulver Decl., Ex. 2 (Aug. 28, 2013, Declaration of OFLC Administrator William L. Carlson, *CATA v. DOL* (E.D. Pa. Civ. No. 09-00240-LDD) at ¶ 12). If the SPWD is upheld on administrative appeal, though, the appealing employer is "required to pay the wage rate in the SPWD for all work performed on and after the date of the SPWD." *Id.* ¶¶ 11–12.

Employers took advantage of the redetermination process en masse, challenging the legality of the SPWDs. *See id.* ¶ 8 (noting 1400 requests for redetermination as of Aug. 23, 2013). To the extent OFLC resolved the requests for review, it rejected them, affirming the agency's authority to issue the SPWDs. *See, e.g.*, AR70 (discussing review of one SPWD); AR4697–98 (example of denial of request for redetermination); *see also* Dkt. 13-1 at 10–11 (Defs. Mem. at 5–6) (noting that OFLC denied most initial requests for review and that employers then filed requests for a second review). At least one employer sought review from BALCA, and on December 3, 2013, BALCA issued a decision with respect to its appeals in the case of *In re Island Holdings*. AR52. In that case, BALCA found that DOL lacked the authority to issue the SPWDs to employers

who had obtained labor certifications pursuant to the since-vacated 2008 Rule, and it remanded the SPWDs issued to that employer with instructions that they be vacated. AR52, 66.

## III. Post-*Island Holdings* Developments

Eight days after BALCA's decision in *Island Holdings*, H-2B workers returned to the Pennsylvania district court to challenge that decision. *See Comité de Apoyo A Los Trabajadores Agricolas v. Perez*, Civ. No. 2:13-cv-7213 (E.D. Pa.) (filed Dec. 11, 2013). Nine days after that, OFLC made a one-paragraph "announcement":

> After a full review of the *Island Holdings* decision and the district court complaint, the Department has decided to postpone action on the *Island Holdings* decision pending judicial review, as permitted by the Administrative Procedure Act, 5 U.S.C. § 705. This action is in the interest of justice, given the confusion and substantial disruption that would be created if the Department implemented the decision and it was subsequently overturned by the district court. Accordingly, all OFLC actions related to the resolution of appeals in the supplemental prevailing wage decisions will be stayed, pending the resolution of the district court action. Please continue to check back on this site for additional information.

AR67. This stay was not published in the Federal Register, and DOL has never indicated that it has been lifted.

On July 13, 2014, the district court dismissed the challenge to *Island Holdings* on three alternate grounds. *See Comité de Apoyo A Los Trabajadores Agricolas v. Perez*, 46 F. Supp. 3d 550 (E.D. Pa. 2014) (*CATA IV*). First, the court found that the plaintiffs did not have standing to challenge the *Island Holdings* decision because there was no evidence that it would be applied to them given the stay in place. *Id.* at 560–61. Second, the court found the *Island Holdings* decision was not final agency action as to the wages any employer other than Island Holdings must pay, because "[i]t is … the Secretary of Labor, and not BALCA, that ultimately makes the policies and rules governing H–2B prevailing wages." *Id.* at 561–62. Finally, the court found the dispute was

not ripe because DOL had indicated that it would address *Island Holdings* in upcoming rulemaking. *Id.* at 562–64.

Two months later, the employer in *Island Holdings* filed a motion with BALCA seeking a declaratory order compelling OFLC to act on the earlier BALCA decision and vacate the SPWDs. *See* Pulver Decl., Ex. 3 (*In re Island Holdings*, 2013-PWD-00002 (Nov. 13, 2014)). On November 13, 2014, BALCA denied the motion on the ground that it lacked the authority to issue the requested order. *Id.*

On December 17, 2014, the Secretary of Labor issued a "Notice of intent to issue declaratory order and request for comment." 2014 Notice, 79 Fed. Reg. 75,179 (AR68). The Secretary stated that he disagreed with BALCA's decision in *Island Holdings*, that BALCA "erroneously rejected the Secretary of Labor's own plain interpretation of the relevant regulatory provisions," and that BALCA's conclusions as to DOL's authority were "in direct opposition to the district court's orders in [*CATA I*]." *Id.* at 75,182 (AR71). The Secretary also stated that BALCA lacked authority to issue an authoritative interpretation of a DOL regulation for the agency. Noting that the Secretary has the authority to issue a declaratory order overruling BALCA if he "determines that the BALCA's decision rests on a legal error or departs from the Secretary's announced legal interpretation or policy," the Secretary "propose[d] issuing a declaratory order to overrule the BALCA's decision and legal conclusions in *Island Holdings*, and to reaffirm the Secretary's interpretation of the regulations." *Id.* at 75,183 (AR72).

The comment period on the 2014 Notice closed on February 2, 2015. *See* AR74. Thirty-five individuals and organizations submitted comments. AR75–4467. In the nearly five years since, the Secretary has taken no further action with respect to the proposed declaratory order.

## IV. SPWDs Issued to Plaintiffs' Employers and Pending Appeals

OFLC issued SPWDs to each of Plaintiffs' 2013 employers that covered work the Plaintiffs performed on or after the date of those SPWDs.

Plaintiffs Joel Davila Calixto and Hector Hernandez Gomez worked under the H-2B program as landscapers for St. Louis Select Landscaping and Lawn Care in St. Louis and St. Charles Counties, Missouri in the spring and summer of 2013. Dkt. 1 at 2, 3 (Compl. ¶¶ 4, 5); Davila Calixto Decl. ¶ 4. For their work, they were paid $10.25 per hour. On July 3, 2013, OFLC issued an SPWD to St. Louis Select, which specified a prevailing wage for landscape laborers in St. Louis and St. Charles Counties in Missouri of $12.15 per hour. AR4704–05.

Plaintiffs Leonardo Aviles Romero and Hilario Olvera Gutierrez worked under the H-2B Program as landscapers for Outside Unlimited LLC in Baltimore, Frederick, and Carroll Counties in Maryland, and in parts of Pennsylvania and Virginia, in the spring, summer, and fall of 2013. Dkt. 1 at 3 (Compl. ¶¶ 6, 7); Aviles Romero Decl. ¶¶ 3–4; Olvera Gutierrez Decl. ¶¶ 3–4. Aviles Romero was paid at a rate of $11 per hour for his work, and Olvera Gutierrez was paid at a rate of $9.54 per hour. Aviles Romero Decl. ¶ 4; Olvera Gutierrez Decl. ¶ 4. OFLC issued two SPWDs to Outside Unlimited which covered work Aviles Romero and Olvera Gutierrez performed. First, on July 9, 2013, OFLC issued an SPWD specifying prevailing wage rates for work for landscape laborers in Pennsylvania; for the areas where Aviles Romero and Olvera Gutierrez worked, the rate was $14.04 per hour. AR4600–01. Second, on July 16, 2013, OFLC issued an SPWD specifying prevailing wage rates for landscape laborers in Maryland and the District of Columbia; for the areas where Aviles Romero and Olvera Gutierrez worked, the rates were $12.41 per hour in Baltimore and Carroll Counties and $12.51 per hour in Frederick County. AR4527–28.

Jorge Palafox Juarez worked under the H-2B program for JLQ Concessions performing food preparation in traveling fairs throughout California in the summer of 2013. Dkt. 1 at 3 (Compl. ¶ 8); Palafox Juarez Decl. ¶ 4. For his work, he was paid a flat rate of $40 per day during fair preparation days and $85 per day during fair operations. *Id.* On June 27, 2013, OFLC issued an SPWD to JLQ Concessions that covered multiple locations where Palafox Juarez worked, specifying a prevailing wage of $10.08 per hour in Monterey County, $10.10 per hour in Sonoma County, $10.21 per hour in Los Angeles County, $10.62 per hour in Alameda County, and $11.62 per hour in San Mateo County. AR4484–87.

Each of Plaintiffs' employers submitted one or more requests for redetermination pursuant to § 655.10(g) on the ground that DOL lacked authority to issue the SPWDs, and DOL denied each request. *See* AR4700–03 (July 3, 2013 Request for Redetermination by St. Louis Select); AR4697–98 (Aug. 9, 2013 Denial); AR4640–43 (Aug. 9, 2013 Request for Redetermination by Outside Unlimited); AR4637–38 (Aug. 23, 2013 Denial); AR4558–60 (Aug. 12, 2013 Request for Redetermination by Outside Unlimited); AR4555–56 (Aug. 30, 2013 Denial); AR4478–80 (June 27, 2013 Request for Redetermination by JLQ Concessions); AR4476–77 (Aug. 20, 2013 Denial). In August 2013, each of Plaintiffs' employers then filed a request for Center Director Review, which remains pending. *See* AR4468–71 (Aug. 26, 2013 Request for Center Director Review by JLQ Concessions); AR4500–07 (Aug. 30, 2013 Request for Center Director Review by Outside Unlimited); AR4590–93 (Aug. 26, 2013 Request for Center Director Review by Outside Unlimited); AR4669–73 (Aug. 16, 2013 Request for Center Director Review by St. Louis Select Landscaping & Lawn Care).

None of the Plaintiffs have been paid the wages required by the SPWDs for work done in 2013, and each would seek payment of back wages owed should administrative review be

completed and the SPWDs upheld. Dkt. 1 at 10 (Compl. ¶ 37); Aviles Romero Decl. ¶¶ 5–6; Olvera Gutierrez Decl. ¶¶ 5–6; Palafox Juarez Decl. ¶¶ 5–6.

**LEGAL STANDARDS**

Defendants move to dismiss Plaintiffs' claims pursuant to both Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6). In reviewing a motion to dismiss under either rule, the Court takes as true all well-pled factual allegations within Plaintiffs' complaint, and "grant[s] Plaintiffs the benefit of all inferences that can be derived from the facts alleged." *Ralls Corp v. Cmte. on Foreign Inv. in U.S.*, 758 F.3d 296, 315 (D.C. Cir. 2014); *see also Gulf Coast Mar. Supply, Inc. v. United States*, 867 F.3d 123, 128 (D.C. Cir. 2017). "Moreover, the court 'may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction.'" *Id.* (quoting *Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005)). A Rule 12(b)(1) motion should be denied where a plaintiff establishes jurisdiction by a preponderance of the evidence. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). A Rule 12(b)(6) motion should be denied where the pleadings "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

As to Plaintiffs' motion for summary judgment, Plaintiffs seek relief under both 5 U.S.C. § 706(1) and § 706(2)(A). The former provides that a court "shall compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). The latter provides that a court shall "hold unlawful and set aside agency action … found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Id*. § 706(2).

## ARGUMENT

### I. Defendants have unlawfully withheld and unreasonably delayed completion of the administrative reviews.

Plaintiffs' first cause of action is brought pursuant to 5 U.S.C. § 706(1), because "Defendants' delay in resolving the administrative reviews that have been pending since 2014 is unreasonable." Dkt. 1 at 11 (Compl. ¶ 43).[2] Defendants' mischaracterize the claim as one "that DOL unreasonably delayed issuing a Declaratory Order." Dkt. 13-1 at 16 (Defs. Mem. at 11). In fact, the complaint challenges Defendants' failure to resolve specific administrative reviews relating to the wages Plaintiffs are owed for work they performed. That failure to act, in turn, prevents the obligation to pay the rates contained in the 2013 SPWDs from going into effect. Because Defendants' delay is unreasonable, DOL should be compelled to act.

#### A. Defendants' delay is unreasonable, and the Court should compel DOL to act.

Although the regulations required DOL to either affirm or modify the SPWDs upon receipt of Plaintiffs' employers' requests for reviews, six years later, it has not. Indeed, DOL has taken no action relevant to these reviews for more than four years.

In determining whether a delay is unreasonable, courts in this circuit are guided by the "hexagonal contours of a standard" first identified in the D.C. Circuit's decision in *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) (*TRAC*). *Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016). The six factors are:

> (1) the time agencies take to make decisions must be governed by a rule of reason; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on

[2] Since Defendants have produced the administrative record, it has become clear that Plaintiffs' employers' reviews have actually been pending since 2013.

> agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

*TRAC*, 750 F.2d at 80. These six factors yield three "basic inquiries":

> First, is there any rhyme or reason—congressionally prescribed or otherwise—for [the agency]'s delay (factors one and two)? Second, what are the consequences of delay if the Court does not compel the [agency] to act (factors three and five)? Finally, how might forcing the agency to act thwart its ability to address other priorities (factor four)?

*Ctr. for Sci. in the Pub. Interest v. FDA,* 74 F. Supp. 3d 295, 300 (D.D.C. 2014). The answers to each of the three questions here weigh in favor of relief.

**1. There is no reasonable basis for continued delay.**

The first *TRAC* factor is the "most important," *In re Core Commc'ns, Inc.*, 521 F.3d 849, 855 (D.C. Cir. 2008), and calls for this Court to "consider the agency's justification for the pace of its decision," *Muwekma Tribe v. Babbitt*, 133 F. Supp. 2d 30, 36 (D.D.C. 2000) (citation omitted).[3] Here, DOL has no reasonable justification for its six-year delay.

Although "[t]here is 'no *per se* rule as to how long is too long' to wait for agency action, a reasonable time for agency action is typically counted in weeks or months, not years." *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004) (quoting *In re Int'l Chem. Workers Union,* 958 F.2d 1144, 1149 (D.C. Cir. 1992)). Thus, in *American Rivers*, the court found that a "six-year-plus delay" was "nothing less than egregious." *Id.* The same is true for the six-year-plus delay at issue here.

[3] Here, Plaintiffs do not dispute that, under the second factor, there is no statutory or regulatorily deadline at issue, and thus "the APA's general reasonableness standard applies." *Geneme v. Holder*, 935 F. Supp. 2d 184, 193 (D.D.C. 2013).

Neither the record nor DOL's memorandum in support of its motion to dismiss offer any justification for the continued delay. Furthermore, the record and history of the matter show that no reasonable justification could exist. DOL's initial justification for staying the administrative reviews was the pendency of the *CATA IV* litigation. That justification may have been reasonable at the time, but the *CATA IV* litigation concluded more than five years ago. And while it may have been reasonable to delay resolution based on DOL's 2014 suggestion it might address the issue in an upcoming rulemaking, DOL, Notification of Status of the 2011 H-2B Wage Rule, 79 Fed. Reg. 14,450 (Mar. 14, 2014), DOL finalized that rulemaking, in April 2015, without addressing the *Island Holdings* decision or SPWDs. *See* DOL, Final Rule, Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, 80 Fed. Reg. 24,146 (Apr. 29, 2015). Finally, while delaying resolution of pending SPWDs so that the Secretary could resolve the underlying issues via a declaratory order may have been reasonable initially, the Secretary indicated that he would do so nearly five years ago. The comment period closed more than four and a half years ago, and only 35 comments were submitted. It is unreasonable for DOL to delay completion of its legally-mandated duty to resolve administrative reviews for six years because the Secretary *may* take another action—an action the agency repeatedly, including in this case, states it has no obligation to undertake. *See, e.g.*, Dkt. 13-1 at 16 (Defs. Mem. at 11).

Even now, DOL explicitly states that it "agrees with Plaintiffs' position on SPWD wages." Dkt. 13-1 at 13 (Defs. Mem. at 13). Resolution of the long-pending review should therefore not be complex. *See Martin v. O'Rourke*, 891 F.3d 1338, 1345–46 (Fed. Cir. 2018) ("It is reasonable that more complex and substantive agency actions take longer than purely ministerial ones."). Regardless of its ultimate determination, however, DOL has offered no reason why it cannot complete review of the SPWDs.

**2. The delay causes significant harm to Plaintiffs.**

The third and fifth *TRAC* factors consider the consequences of delay and are frequently analyzed together. *See, e.g., Afghan & Iraqi Allies Under Serious Threat Because of Their Faithful Serv. to the U.S. v. Pompeo*, No. 18-CV-01388 (TSC), 2019 WL 4575565, at *8 (D.D.C. Sept. 20, 2019); *Muwekma Tribe*, 133 F. Supp. 2d at 39; *see also In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545, 552 n.6 (D.C. Cir. 1999) (noting overlap).

Here, the delay is causing concrete harm to Plaintiffs. As DOL explicitly acknowledged, allowing Plaintiffs' employers to pay the wage rates provided for by the 2008 Rule, as opposed to those in the SPWDs, means that Plaintiffs were "underpaid in violation of the INA." 2013 Rule, 78 Fed. Reg. at 24,056 (AR46). The issuance of the SPWDs was thus necessary to "[t]o come into compliance with the court's order and to ensure that DHS and DOL fulfill the statutory mandate to protect the domestic labor market." *Id.* But because the wages specified in the SPWDs "do [] not go into effect during the time the determination is under review," Plaintiffs' employers will only be "required to pay the wage rate in the SPWD for all work performed on and after the date of the SPWD" *after* administrative review is completed. Pulver Decl., Ex. 2 (Carlson Decl.) at ¶¶ 11–12. Thus, Plaintiffs will not be paid wages they are owed so long as DOL refuses to act on the pending reviews.[4] By allowing the SPWDs to remain in limbo for years, DOL is inflicting the very harm to foreign workers that it acknowledged in the 2013 Rule the SPWDs were necessary to avoid. 2013 Rule, 78 Fed. Reg. at 24,056 (AR46).

This harm is financial in nature, but also affects Plaintiffs' health and welfare. In this regard, *Air Line Pilots Association, Int'l v. Civil Aeronautics Board*, 750 F.2d 81, 86 (D.C. Cir.

[4] Should Plaintiffs' employers not pay them voluntarily once DOL acts, each Plaintiff has indicated he is prepared to take legal action under relevant state law. *See* Dkt. 1 at 10 (Compl. ¶ 37); Aviles Romero Decl. ¶ 6; Olvera Gutierrez Decl. ¶ 6; Palafox Juarez Decl. ¶ 6.

1984), decided as a companion case to *TRAC*, is instructive. There, the court of appeals found unreasonable a "five year delay in adjudicating claims for a form of unemployment assistance payments," citing *TRAC*'s concern for delays that impact "human health and welfare." *Id.*; *see also Muwekma Tribe*, 133 F. Supp. 2d at 39 (finding third and fifth *TRAC* factors weigh in favor of relief given the "nexus between human welfare and 'economic' considerations").

For the low-wage migrant-worker plaintiffs in this case, the additional wages, plus interest, that they have been owed for more than six years similarly impacts their health and welfare. The precise amount of back wages owed varies for each Plaintiff, based on the hours worked and the locations where they worked. The minimum hourly wage difference for Plaintiffs is $1.41 per hour, for work performed by Plaintiff Aviles Romero in Maryland for which he was paid $11, Aviles Romero Decl. ¶ 4, and the SPWD specified a wage of $12.41, AR4527–28. The maximum hourly wage difference is $4.50 per hour, for work performed by Plaintiff Olvera Gutierrez in Pennsylvania, for which he was paid $9.54 per hour, and the SPWD specified a wage of $14.04 per hour, AR4600–01. In the materials filed with DOL, Aviles Romero and Olvera Gutierrez's employer, Outside Unlimited, indicated that they would work 40 hours per week. *See* AR4566, 4604. Aviles Romero worked for Outside Unlimited for approximately 18 weeks after the SPWD was issued, Aviles Romero Decl. ¶ 4, and thus would be entitled to at least $1,015.20 plus interest, and likely more given that some of his work was performed in areas with higher wage differentials. Olvera Gutierrez also worked for Outside Unlimited for approximately 18 weeks after the SPWD was issued, Olvera Gutierrez Decl. ¶ 4, and thus would be entitled to up to $3,240.00 plus interest, depending on how much of his work was performed in Pennsylvania versus areas with lower wage differentials.

This is a significant amount of money for Plaintiffs. Most H-2B workers from Mexico live in poverty, and have limited employment opportunities in their home communities. *See* Micah-Jones Decl. ¶ 3. The daily minimum pay for workers in low-wage industries like construction is currently approximately $6 per day. *Id.* Annual salaries for low-wage workers in Mexico, like Plaintiffs, are typically around $2,000. *Id.*; *see also* Supp. Palafox Juarez Decl. ¶ 1 (noting wages in home community rarely exceeds $4,000 annually). Workers leave their homes and families to come to and work in the United States under the H-2B program precisely because of the availability of higher wages, which "can have a profound impact on the wellbeing of their families, including enabling them to access educational opportunities, healthcare, and other basic needs." Micah-Jones Decl. ¶ 4.

"Given their economic status, the H-2B workers who stand to receive payment of the supplemental prevailing wages at issue in this case could see tangible benefits to their lives." Micah-Jones Decl. ¶ 5. Plaintiff Olvera Gutierrez currently makes only $300 per month. Supp. Olvera Gutierrez Decl. ¶ 2. The amount he would be owed under the SPWDs would cover his "housing and food costs for at least a year without worrying that [he] will fall behind on [his] expenses or lose [his] housing." *Id.* at ¶ 3. *See also* Supp. Palafox Juarez Decl. ¶ 2 (noting $1,000 would cover housing and food expenses for several months).

Not only does a delay impact Plaintiffs' finances, health, and welfare during the pendency of delay, it also makes it more difficult for Plaintiffs ultimately to recover the wages owed. The continuing delay increases the risk that records and other evidence will be unavailable and the risk of insolvency of employers. *See, e.g.*, *Owens v. Republic of Sudan*, 174 F. Supp. 3d 242, 257–58 (D.D.C. 2016) (noting delay of litigation "would surely make it harder for [plaintiffs] to prove their case going forward" based on "a serious likelihood of lost witnesses, memories, and

documentary evidence"); *Canales v. A.H.R.E., Inc.* 254 F.R.D. 1, 10–11 (D.D.C. 2008) (noting delay of action would risk insolvency of plaintiffs' former employer). The concrete harm to Plaintiffs caused by DOL's delay weighs strongly in favor of relief.

**3. There is no claim of competing priority.**

Finally, in assessing the fourth TRAC factor, "courts examine whether the defendants' specific, proffered activities will be de-prioritized, in error, if the plaintiff is successful." *Afghan & Iraqi Allies*, 2019 WL 4575565, at *9. Here, given that the delay is a result of DOL's decision not to resolve the pending SPWD reviews, "there is no basis to conclude that [DOL's failure to complete those reviews] is the product of 'higher or competing priorities.'" *SAI v. Dep't of Homeland Sec.*, 149 F. Supp. 3d 99, 121 (D.D.C. 2015). "This is thus not a case in which a plaintiff is seeking to upend a 'first-in, first-out' procedure by attempting to 'automatically go to the head of the line at the agency.'" *Id.* (quoting *Open Am. v. Watergate Special Prosecution Force*, 547 F.2d 605, 614–15 (D.C. Cir. 1976)).

Moreover, the resources required to complete the reviews at issue are exceedingly minor: The reviews solely address a legal question that DOL has answered as to other SPWD reviews—an answer with which it states in this litigation it continues to agree. *See* Dkt. 13-1 at 18 (Defs. Mem. at 13). Accordingly, this factor too weighs in favor of relief.

* * *

"There comes a point when relegating issues to proceedings that go on without conclusion in any kind of reasonable time frame is tantamount to refusing to address the issues at all—and the result is a denial of justice." *See MCI Telecommc'ns Corp. v. FCC,* 627 F.2d 322, 344 (D.C. Cir. 1980) (quoting *Nader v. FCC,* 520 F.2d 182, 206 (D.C. Cir. 1975)). Given that low-wage workers

have been deprived of wages owed to them for six years, that point has been reached. The Court should order Defendants to complete the pending administrative reviews within 30 days.

**B. Defendants misunderstand Plaintiffs' claim, which challenges DOL's failure to take discrete, non-discretionary action.**

Defendants rely on two cases, *Norton v. Southern Utah Wilderness Alliance* (*SUWA*), 542 U.S. 55 (2004), and *Gonzales-Aviles v. Perez*, Civ. No. JFM-15-3463, 2016 WL 3440581 (D. Md. June 17, 2016), to argue that Plaintiffs have failed to allege two required elements of the § 706(1) claim: (1) a "discrete agency action" that is (2) required by law. *See* Dkt. 13-1 at 16 (Defs. Mem. at 11). As the above discussion demonstrates, Plaintiffs have alleged both elements, and Defendants' argument is based on a mistaken characterization of the claim.[5]

First, completion of the pending SPWD reviews is discrete agency action, unlike the "broad programmatic attacks" disapproved of in *SUWA*. *SUWA*, 542 U.S. at 64; *see Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 191–92 (D.C. Cir. 2016) (distinguishing impermissible programmatic attacks from challenges to discrete agency actions); *Meina Xie v. Kerry*, 780 F.3d 405, 407–08

[5] Although Defendants make this argument in the alternative under Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6), Dkt.13-1 at 17 (Defs. Mem. at 12), an argument that a plaintiff has failed to allege the "element[s] of the claim" is better construed as a challenge to the merits pursuant to Rule 12(b)(6). As a court in this district recently explained in determining that an argument that a plaintiff impermissibly sought to make a "broad programmatic attack" was appropriately brought under Rule 12(b)(6), not 12(b)(1), D.C. Circuit case law makes it clear that the "discrete agency action" requirement contained in *SUWA* is not jurisdictional. *Calixto v. U.S. Dep't of the Army*, No. CV 18-1551 (ESH), 2019 WL 2139755, at *3 (D.D.C. May 16, 2019) (citing *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 620–21 (D.C. Cir. 2017); *Trudeau v. FTC*, 456 F.3d 178, 184 (D.C. Cir. 2006); *Reliable Automatic Sprinkler Co. v. CPSC*, 324 F.3d 726, 731 (D.C. Cir. 2003)). That case involved a claim brought under 5 U.S.C. § 706(2), but the court's reasoning applies equally in cases raising challenges to § 706(1) claims. As the court explained, "[*SUWA*]'s discrete agency action requirement is derived from the Supreme Court's interpretation of 5 U.S.C. § 551(13), in which the APA defines 'agency action.' The D.C. Circuit has rejected the idea that an 'agency action' within the meaning of § 551(13) is required in order to invoke § 702's waiver of sovereign immunity." *Id.* at 3 n.3 (citing *Trudeau*, 456 F.3d at 187)). In any event, since Plaintiffs *have* alleged a failure to take a discrete agency action, the motion should be denied under either rule.

(D.C. Cir. 2015) (cautioning against "overstat[ing] the rule articulated in [*SUWA*]"). In *Meina Xie*, reversing the lower court's dismissal of a section 706(1) claim, the D.C. Circuit explained that the processing of certain immigrant visas was a discrete agency action, and thus that an agency's delay in doing so was challengeable under section 706(1). 780 F.3d at 408. Agency delays in processing other types of applications have similarly been the subject of successful 706(1) claims. *See, e.g.*, *Nine Iraqi Allies Under Serious Threat Because of Their Faithful Service to the U.S. v. Kerry*, 168 F. Supp. 3d 268, 293 (D.D.C. 2016); *Hyatt v. U.S. Patent & Trademark Office*, 110 F. Supp. 3d 644, 652 (E.D. Va. 2015). Likewise, in *Connecticut v. U.S. Department of the Interior*, 363 F. Supp.3d 45 (D.D.C. 2019), the plaintiffs had submitted proposed amendments to a memorandum of understanding to the Secretary of Interior for his review. *Id.* at 59. "The Secretary reviewed the proposed amendments and declined to approve or deny them." *Id.* Citing *SUWA*, the court concluded that the agency's failure to grant an approval or denial constituted "reviewable 'discrete' inaction." *Id.* As in each of these cases, DOL's refusal to complete the administrative review and either affirm or modify the SPWDs is reviewable.

Second, DOL is legally required by its regulations to complete the reviews. As *SUWA* states, the legal requirement to act that forms the basis of an unreasonable delay claim can derive from a regulation. 542 U.S. at 64; *see also Elec. Privacy Info. Ctr. v. IRS*, 910 F.3d 1232, 1244 (D.C. Cir. 2018) (noting, in § 706(1) context, that "an agency can create a non-discretionary duty by binding itself through a regulation carrying the force of law"); *SAI v. Dep't of Homeland Sec.*, 149 F. Supp. 3d at 119 (finding regulation created mandatory duty giving rise to § 706(1) claim). Each of the pending requests for review at issue was submitted by Plaintiffs' employers pursuant to the then-applicable regulation, 20 C.F.R. § 655.11 (2009). That regulation stated that a certifying officer at DOL's OFLC "*shall* review the PWD" and either affirm it or modify it. 20 C.F.R. §

655.11(d) (2009) (emphasis added). "[T]he word 'shall' usually creates a mandate, not a liberty[.]" *Murphy v. Smith*, 138 S. Ct. 784, 787 (2018); *see also Cook v. FDA*, 733 F.3d 1, 7 (D.C. Cir. 2013). Its inclusion "generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive." *Ass'n of Civilian Technicians, Montana Air Chapter No. 29 v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994). Here, however, DOL has neither affirmed nor modified the prevailing wage decisions.

The fact that the regulations do not contain a "specific date by which DOL promise[s] to act," Dkt. 13-1 at 17 (Defs. Mem. at 12), is irrelevant to the reviewability of DOL's inaction under § 706(1). The lack of a statutory or regulatory deadline is a relevant but not dispositive factor in determining whether a delay is unreasonable, and it does not preclude a plaintiff from stating an unreasonable delay claim. *See, e.g.*, *Air All. Houston v. U.S. Chem. & Safety Hazard Investigation Bd.*, 365 F. Supp. 3d 118, 131 (D.D.C. 2019) (noting "although the CSB's enabling act does not require the agency to establish reporting regulations by a date certain, there can be no doubt that the congressional directive to adopt such regulations is a discrete act that the CSB is required to take," and finding unreasonable delay); *Skalka v. Kelly*, 246 F. Supp. 3d 147, 152–53 (D.D.C. 2017) (finding plaintiffs "plead a discrete failure to act" pursuant to *SUWA* and considering lack of deadline as one of the factors going to reasonableness of delay); *Liberty Fund, Inc. v. Chao*, 394 F. Supp. 2d 105, 114 (D.D.C. 2005) (finding court had jurisdiction to consider whether delay was unreasonable despite lack of deadline in statute or DOL regulations); *U.S. Women's Chamber of Commerce v. U.S. Small Business Admin.*, No. 1:04-CV-01889, 2005 WL 3244182, at *17 (D.D.C. Nov. 30, 2005) (finding unreasonable delay despite lack of deadline). "[T]he lack of a timetable does not give government officials carte blanche to ignore their legal obligations." *Cobell v. Norton*, 240 F.3d 1081, 1096 (D.C. Cir. 2001).

The APA itself provides that "within a reasonable time, each agency shall proceed to conclude a matter presented to it." 5 U.S.C. § 555(b); *see also American Rivers*, 372 F.3d at 418 (citing § 555(b) in compelling agency to respond to pending petition). Courts in this district have frequently cited this provision in holding that agencies have a reviewable duty to complete review processes provided for in statutes or regulations within a reasonable time—even if the statutes or regulations do not provide a date by which that process must be completed. *See, e.g.*, *Nine Iraqi Allies*, 168 F. Supp. 3d at 293; *Hamandi v. Chertoff*, 550 F. Supp. 2d 46, 51 (D.D.C. 2008); *Liu v. Novak*, 509 F. Supp. 2d 1, 8 (D.D.C. 2007); *see also Hyatt*, 110 F. Supp. 3d at 652.

In sum, because Plaintiffs allege that Defendants have a legal duty to complete their administrative review of the SPWDs, without which the wage rates from the 2013 SPWDs cannot go into effect, Plaintiffs have stated a claim.

**II. DOL's indefinite stay is arbitrary, capricious, and contrary to law.**

In 2013, DOL stayed "all OFLC actions related to the resolution of appeals in the supplemental prevailing wage decisions." AR67. While the judicial proceedings given as a basis for that stay have terminated, the stay remains in place. Plaintiffs' second cause of action challenges that indefinite stay as arbitrary, capricious, and contrary to law pursuant to 5 U.S.C. § 706(2), and requests that the Court set aside the stay. *See* Dkt. 1 at 11 (Compl. ¶ 46), 12 (¶ D). A stay is a reviewable final agency action, subject to the APA's prohibition on arbitrary and capricious decisionmaking. *See, e.g.*, *Clean Air Council v. Pruitt*, 862 F.3d 1, 10 (D.C. Cir. 2017) (finding stay arbitrary and capricious); *Nat'l Women's Law Ctr. v. Office of Mgmt. & Budget*, 358 F. Supp. 3d 66, 90 (D.D.C. 2019) (same); *Bauer v. DeVos*, 325 F. Supp. 3d 74, 107–08 (D.D.C. 2018); *see also NRDC v. U.S. Dep't of Energy*, 362 F. Supp. 3d 126, 147 (S.D.N.Y. 2019). Because

there is no legitimate basis for the stay, now more than six years old, the stay is unlawful and should be vacated.

**A. The indefinite stay is arbitrary and capricious.**

The only stay reflected in the administrative record is that issued by DOL on December 23, 2013, AR67, which should have been terminated under its own terms after the *CATA IV* decision. The record does not reveal that DOL ever lifted the stay or that DOL has taken any action on the pending reviews since the decision in *CATA IV*. A stay "pending the resolution of the [*CATA IV*] district court action" is, under any measure, arbitrary and capricious when it remains in effect more than five years after the resolution of that district court action. The stay should therefore be vacated.

Were DOL to contend that this stay is no longer in effect and that it has since imposed a new stay *sub silentio*, such a stay would also be arbitrary, capricious, and contrary to law. As discussed above, there is no reasonable justification to delay resolution of the pending reviews. Indeed, DOL has acknowledged that delayed implementation of the wages included in the SPWDs would "cause continued harm to U.S. workers, foreign workers, and the domestic labor market," and that allowing employers to pay lower wages was "in violation of the INA." 2013 Rule, 78 Fed. Reg. at 24,056 (AR46). And DOL has continually reaffirmed its authority to issue the SPWDs and to overrule any contrary decisions by BALCA. *See, e.g.*, 2014 Notice, 79 Fed. Reg. at 75,183. Thus, the *Island Holdings* decision does not serve as a basis for staying all action.

DOL's motion to dismiss suggests that it has not changed its position on this matter. Dkt. 13-1 at 18 (Defs. Mem. at 13). If that is the case, an indefinite stay that perpetuates the harm to foreign workers like Plaintiffs, and perpetuates DOL's violation of the INA, is inherently arbitrary, capricious, and contrary to law. If DOL *has* changed its position, a stay would nonetheless be

unjustified. DOL has failed to acknowledge and explain its change of position. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016). Moreover, a change in position would not justify indefinitely staying review of the SPWDs, as opposing to completing the reviews by setting aside the SPWDs.

Because there is no basis to hold the pending SPWD reviews in abeyance indefinitely, the Court should vacate DOL's stay of those proceedings.

**B. Plaintiffs' second cause of action states a claim for relief.**

As with the first cause of action, Defendants argue that the second cause of action should be dismissed because "DOL is not legally required to take any particular action with regard to the issuance of a Declaratory Order." Dkt. 13-1 at 18 (Defs. Mem. at 13). Whether or not Defendants are correct about any such legal requirement, Plaintiffs' second cause of action is directed not to the failure to issue a Declaratory Order but at an action that DOL *has* taken: the indefinite stay of the administrative reviews of the 2013 SWPDs.

Defendants also argue "there is no 'actual controversy" because DOL "agrees with Plaintiffs' position on SPWD wages and opened a declaratory order proceeding to that effect," *id.*, and thus the Court "lacks jurisdiction to hear Plaintiffs' claim for this form of declaratory relief," *id.* at 14. This argument is erroneous. The fact that DOL has issued a notice taking a legal position on the ultimate question whether the SPWDs are valid is irrelevant. A "notice of intent" has no binding effect, and Plaintiffs do not challenge DOL's position as to the validity of the SPWDs. They challenge DOL's position that administrative review of the SPWDs, and thus their employers' obligation to pay the higher wage rates, is properly indefinitely stayed. On this legal question, there is undisputedly disagreement as to a concrete issue for review.

## CONCLUSION

For the above-stated reasons, the Court should deny Defendants' motion to dismiss, grant Plaintiffs' motion for summary judgment, vacate DOL's stay of the SPWD review proceedings, and compel DOL to resolve the pending SPWD reviews within 30 days.

Dated: November 4, 2019

Respectfully submitted,

/s/ *Adam R. Pulver*

Adam R. Pulver
D.C. Bar No. 1020475
Michael T. Kirkpatrick
D.C. Bar No. 486293
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
apulver@citizen.org

*Counsel for Plaintiffs*

Benjamin R. Botts*
CA Bar No. 274542
Centro de los Derechos del Migrante, Inc.
10 E. North Avenue, #9
Baltimore, Maryland 21202
(855) 234-9699
* *Practice Pursuant to LCvR 83.2(g)*