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,

Plaintiffs,

v.

EUGENE SCALIA, in his official capacity as United States Secretary of Labor, and U.S. DEPARTMENT OF LABOR,

Defendants.

Civil Action No. 19-1853 (CKK)

FIRST AMENDED AND SUPPLEMENTAL COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF

1. Plaintiffs are five individuals who worked pursuant to H-2B nonimmigrant visas in 2013. Pursuant to a court order and a federal regulation, the Office of Foreign Labor Certification (OFLC) of the Department of Labor (DOL) determined that each of plaintiffs' employers were legally obligated to pay them a higher wage rate for that 2013 work. DOL issued determinations to that effect, known as "supplemental prevailing wage determinations" or "SPWDs." Plaintiffs' employers sought administrative review of the SPWDs, which, according to DOL, had the effect of staying any obligations to pay higher wages.

2. For six years, DOL stayed its processing of those administrative reviews. In the meantime, the Secretary of Labor issued a Notice of Intent affirming that the SPWDs, and the wages contained in them, were not only lawful, but legally required. The Secretary stated that he would issue a declaratory order to terminate the administrative appeals and require payment of the higher wages. Nonetheless, for five years after the issuance of the Notice of Intent, six years after

the administrative appeals were stayed, and almost seven years after plaintiffs performed the work for which they were underpaid, DOL took no action.

3. After waiting nearly six years during which the revised wage determinations remained in administrative limbo, plaintiffs brought this action in June 2019 under the Administrative Procedure Act (APA), challenging DOL's failure to give effect to the SPWDs as an unlawful withholding of legally mandated action, and as action that was arbitrary, capricious, and contrary to law.

4. Over the next nine months, DOL delayed this litigation—obtaining five extensions—at the same time reaffirming that it agreed with plaintiffs that their employers were legally obligated to pay the wages specified in the SPWDs. Indeed, DOL moved to dismiss the entire action on the ground that there was no case or controversy because the parties were in agreement on this issue. And in December 2019, to induce plaintiffs not to oppose a further extension of time for defendants to file a reply in support of their motion to dismiss and opposition to plaintiffs' motion for summary judgment, defendants' counsel explicitly stated that DOL would, in a manner of weeks, "issue a decision affirming the wage rates contained in the 2013 SPWDs."

5. On February 19, 2020, in seeking an extension of time so the agency could "resolve" the matter by March 9, 2020, defendants' counsel stated in an email: "The plan remains the same."

6. The plan did not remain the same. Without retracting any of defendants' contrary representations, on March 9, 2020, the Secretary of Labor issued a "Notice of Withdrawal," reversing the agency's long-standing position as to plaintiffs' employers' obligations to pay them higher wages for their 2013 work and the lawfulness of the SPWDs, and announcing the withdrawal of the Notice of Intent. The Secretary's explanation relied heavily on the agency's own

unreasonable delay and a desire to avoid processing the individual employer appeals. In so doing, the Secretary failed to meaningfully consider the interest of workers, including their interest in earning the legally mandated wage and the reliance interest of workers like plaintiffs who had relied on defendants' explicit representations for years. Instead, the Secretary claimed that for workers to rely on what the agency and its lawyers had said for years in public statements and court documents would have not been "reasonable."

7. The same day, the agency issued decisions on plaintiffs' employers' appeals, informing the employers that they would not be required to pay plaintiffs at the wage rates contained in the 2013 SPWDs, relying on the Secretary's Notice.

8. Defendants' failure to issue final wage determinations requiring plaintiffs' employers to pay them at the rates contained in the 2013 SPWDs constitutes agency action unlawfully withheld, in violation of the APA. *See* 5 U.S.C. § 706(2)(A). In addition, both the Secretary's March 9, 2020, Withdrawal Notice and the letters to plaintiffs' employers resolving their appeals of the 2013 SPWDs constitute final agency actions that are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. *See* 5 U.S.C. § 706(2)(A). The Court should set aside defendants' unlawful actions and order defendants to finalize plaintiffs' employers' obligations to pay the wage rates contained in the 2013 SPWDs.

JURISDICTION AND VENUE

9. This Court has jurisdiction under 28 U.S.C. § 1331.

10. Venue is proper under 28 U.S.C. § 1391(e) and 5 U.S.C. § 703.

PARTIES

11. Plaintiff Joel Davila Calixto is a Mexican national who regularly works in the United States in seasonal employment as part of the H-2B program. In 2013, he worked for a

company known as St. Louis Select Landscaping and Lawn Care as a driver and landscaper, pursuant to an H-2B visa, at various worksites in Missouri and Illinois, including St. Charles and St. Louis Counties in Missouri. He was paid $10.25 per hour, regardless of location.

12. Plaintiff Hector Hernandez Gomez is a Mexican national who regularly works in the United States in seasonal employment as part of the H-2B program. In 2013, he worked for St. Louis Select Landscaping and Lawn Care as a landscaper, pursuant to an H-2B visa, in and around St. Louis County in Missouri. He was paid approximately $10-11 per hour.

13. Plaintiff Leonardo Aviles Romero is a Mexican national who has frequently worked in the United States in seasonal employment as part of the H-2B program. In 2013, he worked for a company known as Outside Unlimited doing landscaping work, pursuant to an H-2B visa, at various worksites in Baltimore, Frederick, and Carroll Counties in Maryland, as well as in parts of Pennsylvania. He was paid approximately $11 per hour.

14. Plaintiff Hilario Olvera Gutierrez is a Mexican national who has frequently worked in the United States in seasonal employment as part of the H-2B program. In 2013, he worked for Outside Unlimited performing landscaping work, pursuant to an H-2B visa, at various worksites in Virginia, Maryland, and Pennsylvania. He was paid $9.54 per hour.

15. Plaintiff Jorge Palafox Juarez is a Mexican national who worked in the United States in seasonal employment as part of the H-2B program in 2013. Pursuant to an H-2B visa, he worked for JLQ Concessions performing food preparation tasks in traveling fairs throughout California, including in San Mateo, Alameda, Sonoma, Los Angeles, and Monterey counties. He was paid a flat rate of $40 per day during fair preparation days and $85 per day during fair operations. He frequently worked more than eight hours per day.

16. Defendant Eugene Scalia is the Secretary of Labor and charged with the supervision and management of all decisions and actions within DOL. Plaintiffs sue Secretary Scalia in his official capacity.

17. Defendant DOL is an agency of the United States within the meaning of the Administrative Procedure Act (APA). DOL is responsible for issuing labor certifications in connection with employer petitions for authorization to employ H-2B workers, 8 C.F.R. §§ 214.2(h)(1)(ii)(D), (6)(iii), and enforcing compliance with labor-related conditions of the H-2B program, including the payment of lawfully compliant wages, 8 C.F.R. § 214.2(h)(6)(ix); 29 CFR pt. 503.

FACTS

18. Congress has established a visa program that allows employers to hire foreign workers to perform temporary non-agricultural labor when there are too few available, willing, and qualified U.S. workers to fill open jobs. This program is referred to as the H-2B program, taking its name from one of the relevant provisions of the Immigration and Nationality Act (INA), 8 U.S.C. § 1101(a)(15)(H)(ii)(b).

19. 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 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).

20. By regulation, DOL has adopted various methodologies for calculating the "prevailing wage."

21. In 2010, a federal district court decision held that regulations promulgated in 2008, which prescribed a methodology that would result in a lower prevailing wage, were invalid under the APA. *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 *CATA I* court did not vacate the 2008 rule, but it directed DOL to promulgate new rules concerning the calculation of the prevailing wage rate. *Id.* at *24-28. In a subsequent rulemaking, DOL agreed that the methodology in 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).

22. When years later DOL was continuing to use the invalid 2008 rule, a district court vacated that rule and held that all labor certifications issued under that rule violated the APA. *See Comite de Apoyo a los Trabajadores Agricolas v. Solis*, 933 F. Supp. 2d 700, 707-09, 711, 714-15 (E.D. Pa. 2013) (*CATA III*). This decision applied to the labor certifications initially issued to each of plaintiffs' employers for their 2013 work.

23. The following month, 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* Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, Part 2, 78 Fed. Reg. 24,046 (Apr. 24, 2013) (2013 Rule).

24. In the 2013 Rule, the agencies explained that the new methodology would be effective immediately with respect to new or pending applications for labor certifications. The 2013 Rule further stated 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.

25. 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.

26. In accordance with the 2013 Rule, OFLC then sent individual notifications to employers who had previously obtained certifications for ongoing H-2B employment (the 2013 SPWDs). The notifications informed those employers that the prevailing wage had increased and identified the increased wage. They explained that compensation at the higher wage rate was required, pointing to provisions in the H-2B application where the employers agreed to pay the prevailing wage in effect at the time of work, not simply at the time of the temporary labor certifications. OFLC issued the last of these SPWDs on August 12, 2013.

27. OFLC issued an SPWD to St. Louis Select Landscaping and Lawn Care, Joel Davila Calixto and Hector Hernandez Gomez's 2013 employer, on July 3, 2013. It specified a prevailing wage for landscape laborers in St. Louis and St. Charles Counties in Missouri of $12.15 per hour. This rate exceeds the rate St. Louis Select Landscaping and Lawn Care paid Davila Calixto and Hernandez Gomez for such work on and after April 24, 2013.

28. OFLC issued two SPWDs to Outside Unlimited, Leonardo Aviles Romero's and Hilario Olvera Gutierrez's 2013 employer. 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. 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. These rates exceed the rate that Outside Unlimited paid Aviles Romero and Olvera Gutierrez for such work on and after April 24, 2013.

29. On June 27, 2013, OFLC issued an SPWD to JLQ Concessions, Jorge Palafox Juarez's 2013 employer. OFLC specified a prevailing wage for amusement and recreation attendants 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. These rates exceed the rate that JLQ Concessions paid Palafox Juarez for such work on and after April 24, 2013.

30. The SPWDs stated that employers could seek a "redetermination" of the SPWD pursuant to the regulations then in effect and codified at 20 C.F.R. § 655.10(g).

31. The regulations in effect at the time contained a multi-step process by which employers could seek review of the SPWDs for certain reasons. 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). 20 C.F.R. § 655.10(g)(2) (2009). If dissatisfied with the result of that review, pursuant to 20 C.F.R. § 655.10(g)(3) and 655.11 (2009), the employer could file a further appeal within OFLC, referred to by DOL and the employers as "Center Director Review." The Center Director could then either affirm or modify the prevailing wage determination. 20 C.F.R. § 655.11(a)–(c) (2009). If the employer remained dissatisfied, 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). DOL has taken the position that the Secretary has the authority to reverse any decision by BALCA. *See, e.g.*, *Gonzalez-Avilez v. Perez*, Civ. No. JFM-15-3463, 2016 WL 3440581 (D. Md. June 17, 2016).

32. More than one thousand employers filed requests for "redeterminations" challenging the legality of the SPWDs. Many of the requests argued that OFLC lacked any authority to recalculate the prevailing wage after it issued an initial certification and, thus, that the SPWDs were improper.

33. Each of plaintiffs' employers identified above sought administrative review of the SPWDs issued to them.

34. None of plaintiffs' employers identified above has paid plaintiffs back wages to account for the difference between the SPWD wage rate and the wage they actually paid in 2013.

35. DOL has taken the position that the rate contained in an SPWD "does not go into effect during the time the determination is under review." *See* Aug. 28, 2013 Declaration of OFLC Administrator William L. Carlson, *CATA v. DOL* (E.D. Pa. Civ. No. 09-00240-LDD). 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.*

36. To the extent that OFLC resolved the requests for review, it rejected them and affirmed the agency's authority to issue the SPWDs and the requirement to pay the wages set forth therein.

37. At least one employer sought review from BALCA. On December 3, 2013, BALCA issued a decision in the case *In re Island Holdings LLC*, 2013-PWD-00002 (BALCA Dec. 3, 2013). BALCA determined that DOL lacked the authority to issue the SPWDs to employers who had

obtained labor certifications pursuant to the methodology in the 2008 Rule that the *CATA III* court had vacated, and it remanded the SPWDs issued to that employer with instructions that they be vacated.

38. A group of H-2B workers then filed another lawsuit in the Eastern District of Pennsylvania challenging BALCA's *Island Holdings* decision. *See Comite de Apoyo a Los Trabajadores Agricolas v. Perez*, ("*CATA IV*"), Civ. No. 13-7213 (E.D. Pa.).

39. On December 20, 2013, while *CATA IV* was pending, DOL announced on the OFLC webpage that it had "decided to postpone action on the *Island Holdings* decision pending judicial review, as permitted by the Administrative Procedure Act, 5 U.S.C. § 705." *See* DOL, "Island Holdings," https://www.foreignlaborcert.doleta.gov/archives.cfm (Dec. 20, 2013). This announcement applied to the SPWDs at issue in *Island Holdings* itself, as well as any other actions related to the SPWD appeals, "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." *Id.*

40. In the *CATA IV* litigation, DOL took the position that BALCA's decision in *Island* Holdings was not valid and should not "be applied by the DOL in future adjudications," and that the *Island Holdings* decision was contrary to the *CATA III* Court's order. *CATA IV*, 46 F. Supp. 3d 550, 555–56 (E.D. Pa. 2014). DOL thus asked the court to vacate the *Island Holdings* decision. *Id.*

41. Despite the parties' agreement that vacatur of the *Island Holdings* decision would be an appropriate resolution of *CATA IV*, on July 13, 2014, the district court dismissed the action. The court ruled that the section 705 stay deprived plaintiffs of standing; that the Secretary had sole authority to adopt a policy as to the SPWDs and, thus, that BALCA's decision in *Island Holdings*

was not a final agency action; and that the challenge was not ripe because DOL committed to addressing the issue in upcoming rulemaking. 46 F. Supp. 3d at 560–64.

42. After *CATA IV* was dismissed, the Secretary of Labor issued a "Notice of intent to issue declaratory order" and request for comment. 79 Fed. Reg. 75,179 (Dec. 17, 2014) (2014 Notice). In the 2014 Notice, 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. Moreover, the Secretary stated that BALCA lacked authority to issue an authoritative interpretation of a DOL regulation. 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.

43. After an extension, the comment period on the 2014 Notice closed on February 2, 2015. *See* 80 Fed. Reg. 2445 (Jan. 16, 2015). Thirty-five individuals and organizations submitted comments.

44. In 2015, H-2B workers filed a lawsuit against DOL seeking to vacate the *Island Holdings* decision and compel the Secretary to issue the declaratory order referenced in the 2014 Notice. DOL obtained dismissal of that action on the grounds that *Island Holdings* did not represent a final decision, and that DOL intended to reverse that decision. *See Gonzalez-Aviles*, 2016 WL 3440581 at *1.

45. On March 9, 2020, the Secretary of Labor issued a "Notice of Withdrawal" stating that, "for legal, programmatic, and prudential reasons," the Secretary would not issue a declaratory order, defendants would *not* affirm the wage rates contained in the 2013 SPWDs, and plaintiffs' employers would not be required to pay them the wages the agency had long-maintained were mandated by law. Secretary of Labor, Notice of Withdrawal, Mar. 9, 2020 (the Secretary's March 9 Notice), available at https://www.foreignlaborcert.doleta.gov/pdf/DOL-Notice-of-Withdrawal_Declaratory-Order_03.09.2020.pdf.

46. The Secretary's March 9 Notice was filled with unexplained inconsistencies and unsupported statements, failed to consider relevant factors, and was contrary to law as expressed in the 2013 Rule, earlier binding court decisions, and the INA.

47. First, the Secretary stated that "the Department" would not issue declaratory orders pursuant to APA section 554(e), because DOL regulations did not specifically provide for such orders, and because there was "no precedent" for using the statute in an analogous situation. Secretary's March 9 Notice at 11. The Secretary claimed that the DOL regulations then in effect did not allow for review of BALCA decisions. *Id.* The Notice did not acknowledge that the agency had repeatedly taken the position, including in litigation, that the Secretary did have the authority to issue such an order under existing regulations, and indeed had obtained dismissal of challenges to *Island Holdings* on that ground. In addition, the Secretary failed to acknowledge that his "Notice of Withdrawal" was, for all intents and purposes, itself a Declaratory Order, adopting a substantive policy decision.

48. Second, the Secretary said DOL would "accept" the decision in *Island Holdings.* In so stating, the Secretary misstated the agency's prior statements, justified his reversal on the agency's own unreasonable delay, irrationally disregarded the reliance interests of workers,

ignored the possibility of private enforcement, and did not consider important factors, including the impact of its action on either H-2B or domestic workers.

49. In the Notice, the Secretary failed meaningfully to address the contrary arguments made by worker advocates and by DOL in the past. He dismissed the relevance of DOL's prior representations as mere "preamble" language—ignoring that the agency had repeatedly reaffirmed its position for seven years. The Secretary also suggested that any interpretation that would require employers to pay H-2B workers back wages would be "inconsistent" with the statute because backpay would not help U.S. workers. *Id.* at 13–14. Such reasoning would allow employers to pay H-2B workers unlawfully low wages, or otherwise violate their statutory obligations to H-2B workers, with impunity.

50. The Secretary did not address the argument that the relevant DOL regulations did not allow employers to seek reviews of the SPWDs on the grounds that they disagreed with the entire premise of the SPWDs, as opposed to a challenge to the calculation of the wage rate.

51. The Secretary also justified his reversal of the agency's prior consistent position on the ground that it would take too long to adjudicate each of the pending employer appeals, and that doing so would not be worth the effort given the passage of time and the agency's own unwillingness to take enforcement action should it affirm the SPWDs and employers fail to comply. *Id.* at 15–19. This explanation failed to acknowledge that an agency cannot properly refuse to adjudicate appeals on the ground that there are too many of them and that the passage of time was the result of DOL's own unreasonable delay. The explanation also did not acknowledge that, if DOL allowed the 2013 SPWDs to take effect as it had said it would, some H-2B employers—as many already have—would voluntarily comply and that, as to those who did not, individual H-2B

workers could pursue remedies under state law. The assumption that employers would fail to comply with a binding determination by DOL was unsupported.

52. Finally, the Secretary briefly discussed the reliance interests disrupted by his reversal of position. He dismissed out-of-hand the notion that any worker would have relied on the SPWDs as "not … reasonable" because the agency had engaged in so many years of delay.

53. As DOL repeatedly stated and the *CATA III* court found, allowing plaintiffs' employers to pay them the wage rate provided in the initial prevailing wage determinations violates DOL's obligations under the INA and the 2013 Rule, which required defendants to issue final, enforceable supplemental prevailing wage determinations to each of plaintiffs' employers, requiring those employers to pay wages higher than those in the original prevailing wage determinations.

54. On information and belief, DOL on March 9, 2020, issued decisions on plaintiffs' employers' appeals and vacated the 2013 SPWDs by modifying them to return to the wage rates in the original prevailing wage determinations—expressly relying on the Secretary's March 9 Notice.

55. As DOL previously stated, had DOL allowed the SPWDs to take effect, plaintiffs' employers would be required to pay workers, including plaintiffs, the wage rate in the SPWD for all work performed on or after the date of the SPWD. If their employers were to refuse to do so, plaintiffs would have taken legal action to compel them to do so.

56. No agency process exists by which plaintiffs can compel DOL to give effect to the SPWDs.

FIRST CAUSE OF ACTION

Unlawful Withholding and Unreasonable Delay – 5 U.S.C. § 706(1)

57. The APA authorizes this Court to compel an agency to act where its failure to do so is unlawfully withheld or unreasonably delayed.

58. As DOL acknowledged in both the 2013 Rule and the 2014 Notice, DOL was legally required to recalculate the prevailing wage for H-2B work performed in 2013 and to impose on employers an obligation to pay workers the revised prevailing wage, in order to comply with "the statutory mandate to protect the domestic labor market," 78 Fed. Reg. at 24,056, and court orders.

59. Defendants were required to issue final supplemental prevailing wage decisions to plaintiffs' employers, reflecting the prevailing wage methodology contained in the 2013 Rule.

60. Defendants' withholding of such action is unlawful.

61. As DOL acknowledged in the 2013 Rule, individuals in plaintiffs' position were "underpaid in violation of the INA." Because DOL has withheld legally required action, plaintiffs remain wrongfully deprived of the lawful wages they are owed for services they provided.

SECOND CAUSE OF ACTION

Agency Action Arbitrary, Capricious, and Contrary to Law – 5 U.S.C. § 706(2)

62. The APA authorizes this Court to hold unlawful and set aside agency action that is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law.

63. The Secretary's March 9 Notice, withdrawing the 2014 Notice of intent and "accepting" BALCA's decision in *Island Holdings* constitutes final agency action.

64. As DOL recognized in both the 2013 Rule and the 2014 Notice, DOL has the authority to issue supplemental wage determinations where appropriate, and was legally required

to do so here to comply with "the statutory mandate to protect the domestic labor market," 78 Fed. Reg. at 24,056, and subsequent court orders.

65. The contrary Secretary's March 9 Notice reflects arbitrary and capricious decisionmaking, and is contrary to both DOL's 2013 Rule and the INA.

THIRD CAUSE OF ACTION

Agency Action Arbitrary, Capricious, and Contrary to Law – 5 U.S.C. § 706(2)

66. Each of the letters defendants purportedly sent to plaintiffs' employers on March 9, 2020, constitutes final agency action.

67. Because defendants were required to issue to plaintiffs' employers final supplemental prevailing wage decisions reflecting the prevailing wage methodology contained in the 2013 Rule, the March 9 letters modifying the 2013 SPWDs were unlawful.

68. Because the operative regulations did not provide plaintiffs' employers with the right to seek administrative review on the grounds that they disagreed with the agency's authority to issue SPWDs, granting the employers' appeals on such grounds was contrary to law.

69. Because the March 9 letters modifying the 2013 SPWDs expressly relied on the arbitrary, capricious, and unlawful Secretary's March 9 Order, they themselves were arbitrary, capricious, and contrary to law.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray that this Court:

(A) Declare that defendants' failure to issue final, effective wage determinations reflecting the prevailing wage methodology set forth in the 2013 Rule is agency action unlawfully withheld and violates the APA;

(B) Declare that the Secretary's March 9 Notice is arbitrary, capricious, and contrary to law;

(C) Declare that the letters sent to plaintiffs' employers on March 9, 2020 were arbitrary, capricious, and contrary to law;

(D) Set aside the Secretary's March 9 Notice and the March 9, 2020 letters to plaintiffs' employers;

(E) Order defendants to issue final, effective determinations to plaintiffs' employers reflecting the wage methodology set forth in the 2013 Rule;

(F) Award plaintiffs their costs and expenses, including reasonable attorney's fees; and

(G) Grant such other relief as this Court deems just and proper.

Dated: March 26, 2020

Respectfully submitted,

/s/ Adam R. Pulver

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