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 capacity as Secretary of Labor, and U.S. DEPARTMENT OF LABOR, Defendants.	)	Civil Action No. 19-1853 (CKK)

PLAINTIFFS' MOTION FOR LEAVE TO FILE AN AMENDED AND SUPPLEMENTAL COMPLAINT

Pursuant to Federal Rules of Civil Procedure 15(a)(2) and 15(d) and this Court's March 12, 2020 Minute Order, Plaintiffs Joel Davila Calixto, Hector Hernandez Gomez, Leonardo Aviles Romero, Hilario Olvera Gutierrez, and Jorge Palafox Juarez move for leave to file the attached amended and supplemental complaint on the ground that justice so requires, as amendment and supplementation will not be futile and will not cause undue delay, surprise, or prejudice. Defendants have indicated that they oppose this motion.

In support of this motion, Plaintiffs submit the attached memorandum of law, a proposed First Amended and Supplemental Complaint, and a proposed order.

Dated: March 26, 2020

Respectfully submitted,

/s/ *Adam R. Pulver*

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO FILE AN AMENDED AND SUPPLEMENTAL COMPLAINT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

FEDERAL STATUTES AND REGULATIONS

ADMINISTRATIVE MATERIALS

OTHER

INTRODUCTION

For more than six years, the Department of Labor (DOL) took the position that Plaintiffs, low-income migrant workers, were owed additional wages for work they performed in 2013 as a matter of law. As the agency explained in issuing a 2013 rule, Plaintiffs were "being underpaid in violation of the [Immigration and Nationality Act]" and DOL therefore would require Plaintiffs' employers to pay them higher wages "[t]o come into compliance with [a Pennsylvania district] court's order and to ensure that [the Departments of Homeland Security and Labor] fulfill the statutory mandate to protect the domestic labor market," and to avoid "continued harm to U.S. workers, foreign workers and the domestic labor market." 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 stated that it would issue notifications to employers who had been previously granted temporary labor certifications, requiring them to pay higher wage rates for any work performed from April 24, 2013 onward. *Id.* at 24,055.

In 2013, DOL issued such notifications, referred to as "supplemental prevailing wage determinations," or SPWDs, to Plaintiffs' employers, but it did not complete the actions necessary for the SPWDs to take effect. For more than six years, DOL repeatedly stated that it would do so and repeatedly reaffirmed its position that the SPWDs, and the wages they set, were lawful and appropriate. DOL even did so in this litigation, which was brought nine months ago to challenge "DOL's failure to give effect to the revised wage determinations." ECF 1 (Compl.) at ¶ 1. In September 2019, DOL moved to dismiss Plaintiffs' complaint, arguing, among other reasons, that it "agrees with Plaintiffs' position on SPWD wages," and thus that there was no Article III case or controversy. ECF 13-1 at 13–14. And as recently as December 30, 2019, DOL, through its counsel,

advised Plaintiffs' counsel that "the [Office of Foreign Labor Certification] Administrator will issue a decision affirming the wage rates contained in the 2013 SPWDs." ECF 21, Ex. 1. In reliance on these representations, Plaintiffs consented to DOL's fifth extension request in this litigation.[1]

At some point in early 2020, however, the Secretary of Labor changed his mind and abandoned the position that DOL had maintained for nearly seven years. On March 9, 2020, the Secretary issued a notice stating that the 2013 SPWDs should (and would) *not* be affirmed. *See* Secretary of Labor, Notice of Withdrawal, Mar. 9, 2020 (Secretary's March 9 Notice), available at https://www.foreignlaborcert.doleta.gov/pdf/DOL-Notice-of-Withdrawal_Declaratory-Order_03.09.2020.pdf.[2] In reversing the agency's position, the Secretary cited, among other things, the length of time that had passed—including the eight months during which this case had been pending, *id.* at 1, and the supposed unfairness to employers that would result from having to abide by a position that the agency had consistently taken for nearly seven years, *id.* at 17–19. The Notice also stated the surprising position that it "would not have been reasonable" for workers like Plaintiffs to have relied on DOL's repeated representations that it would require their employers to pay them the wages set forth in the 2013 SPWDs. *Id.* at 18. DOL has stated that it has sent letters to each of Plaintiffs' employers vacating the 2013 SPWDs, in accordance with the Secretary's March 9 Notice. *See* ECF 22. In this case, DOL has submitted only one such (unsigned) letter. ECF 24-4.

[1] In this memorandum, Plaintiffs use "DOL" to refer to all Defendants, unless otherwise noted.

[2] Plaintiffs previously filed the Secretary's March 9 Notice with the Court as ECF 24-1. DOL's website indicates that the notice will be published in the Federal Register at some future date.

Upon learning of the Secretary's March 9 Notice and DOL's rescission of the 2013 SPWDs, Plaintiffs promptly informed DOL and the Court of their intent to move for leave to amend the complaint to address the changed circumstances. ECF 24. In the proposed amended and supplemental complaint, attached hereto as Exhibit 1, Plaintiffs seek to continue to raise claims pursuant to 5 U.S.C. § 706(1) and 5 U.S.C. § 706(2) challenging "DOL's failure to give effect to the revised wage determinations." Plaintiffs will no longer pursue their challenge to DOL's delay in resolving the employers' administrative appeals, but Plaintiffs will continue to challenge DOL's failure to take a legally required action: issuing final, effective SPWDs as required by the 2013 Rule. Plaintiffs also still maintain that DOL's failure to issue final, effective SPWDs containing the wage rates required by the 2013 Rule, court order, and the INA is arbitrary, capricious, and contrary to law. That failure has now crystalized in the form of two separate agency actions: the Secretary's March 9 Notice and the letters that DOL purportedly mailed to each of Plaintiffs' employers.

Plaintiffs easily meet the lenient Rule 15 standard, given their prompt action, the lack of any prejudice to any party resulting from amendment, and the fact that the proposed amended pleading plainly states a claim. In light of DOL's representations to Plaintiffs and this Court in obtaining delay after delay in this case, and the fact that H-2B workers have been pursuing litigation since 2014 to attempt to hold DOL to the representations it made in the 2013 Rule, the interests of justice strongly support Plaintiffs' motion; indeed, to require Plaintiffs to commence a new case, which would entail even more delay, would be unjust.

Although DOL has suggested that the operative complaint is moot, a Rule 15 motion is generally considered prior to making any determination as to the viability of the operative complaint. And to the extent that Plaintiffs no longer seek to pursue the claims as plead in that

complaint, any ruling as to whether Plaintiffs could do so would be an advisory opinion. Moreover, courts may grant Rule 15 motions even *after* dismissing claims without prejudice, and amendment and supplementation of a complaint is appropriate to address jurisdictional defects, including mootness. In any event, Plaintiffs' claim that DOL's failure to finalize the 2013 SPWDs is arbitrary, capricious, and contrary to law is plainly not moot and the alleged failure continues to cause Plaintiffs injury.

BACKGROUND

I. Events Preceding this 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."

In 2010, a federal court determined that a 2008 DOL rule prescribing a new methodology for setting the wage rates for the H-2B program was unlawful because it produced a prevailing wage rate lower than that required by the INA. *Comite de Apoyo a los Trabajadores Agricolas v. Solis* (*CATA I*), Civ. No. 09-240, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010). 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 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).

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* (*CATA III*), 933 F. Supp. 2d 700, 707 (E.D. Pa. 2013). 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, including those issued to Plaintiffs' employers for their 2013 work, "exceed[ed] the DOL's delegated authority." *Id.* at 711.

DOL acceded to the *CATA III* court's order. One month later, DOL and the Department of Homeland Security jointly issued an Interim Final Rule revising the methodology that determines the H-2B prevailing wage *See* 2013 Rule, 78 Fed. Reg. 24,046, 24,056 (AR37, 46). The 2013 Rule stated that workers working under earlier wage certifications, like plaintiffs, were "being underpaid in violation of the INA," and that:

> 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 committed 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). The agency's commitment was consistent with the fact that H-2B employers provide assurances that they will pay workers whatever the prevailing wage is at the time the work is performed.

In accordance with the 2013 Rule, DOL's Office of Foreign Labor Certification (OFLC) sent individual SPWDs to employers that had previously obtained certifications for ongoing H-2B employment, including Plaintiffs' employers. 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 the provisions in the H-2B application where the 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, although only 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);[3] *see also In re Island Holdings LLC*, BALCA Case No. 2013-PWD-00002 (Dec. 3, 2013) AR52, at AR57–58 (discussing regulatory

[3] For the Court's reference, Plaintiffs previously submitted copies of the relevant historical regulations are submitted as ECF 16-2. 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.

process). 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 wage rate contained in an SPWD "does not go into effect during the time the determination is under review." *See* ECF 16-3 (Aug. 28, 2013, Decl. 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* Secretary's March 9 Notice at 10 n.11 (noting over 1400 requests for redetermination). 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* ECF 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 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. AR52, 66.

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," "postpon[ing] action on the *Island Holdings* decision pending judicial review" per 5 U.S.C. § 705, 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." AR67.

On July 13, 2014, the district court dismissed the challenge to *Island Holdings*, finding that the section 705 stay deprived plaintiffs of standing; that the Secretary, not BALCA, had the sole authority to adopt a policy as to the SPWDs; and that the challenge was not ripe because DOL committed to addressing the issue in upcoming rulemaking. *See Comité de Apoyo A Los Trabajadores Agricolas v. Perez* (*CATA IV*), 46 F. Supp. 3d 550, 560–64 (E.D. Pa. 2014). 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. 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. For five years, no action was taken with respect to that Notice or with respect to the appeals of SPWDs submitted by each of Plaintiffs' employers in August 2013. *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).

II. Procedural History of this Action

In June 2019, Plaintiffs commenced this suit, challenging DOL's failure to give effect to the wage rates set forth in the 2013 SPWDs. The complaint alleged, pursuant to 5 U.S.C. § 706(1), that DOL's failure was both "agency action unreasonably delayed or unlawfully withheld," ECF 1 at ¶¶ 39–44, and, pursuant to 5 U.S.C. § 706(2), that its failure was arbitrary, capricious, and contrary to law, *id.* at ¶¶ 45–48. In their prayer for relief, Plaintiffs requested that the Court set aside the stay of action with respect to the SPWDs, order DOL to resolve the pending appeals of the SPWDs, and order DOL to allow the wage rates contained in the 2013 SPWDs to go into effect. *Id.* at p. 12.

DOL's response to the complaint was due on August 26, 2019. On August 21, 2019, DOL moved for a twenty-five-day extension of time, which Plaintiffs did not oppose, and which the Court granted. *See* ECF 11; Aug. 21, 2019 Minute Order. On September 23, 2019, DOL filed a

second extension request, which Plaintiffs did not oppose and which the Court granted *nunc pro tunc*. *See* ECF 12; Sept. 23, 2019 Minute Order.

On September 26, 2019, DOL filed a motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6), arguing, among other things, that there was "no 'actual controversy' between the parties" because "DOL agrees with Plaintiffs' position on SPWD wages" and agrees that "Plaintiffs are legally entitled to receive SPWD wages for their work." ECF 13-1 at 13–14.

Plaintiffs filed a consolidated opposition and cross-motion for summary judgment on November 4, 2019, ECF 16 & 17.

DOL's opposition to Plaintiffs' cross-motion and reply in support of the motion to dismiss was due on December 9, 2019. On December 2, 2019, DOL sought an extension of that deadline in order to continue "exploration of the possibility of finding an administrative resolution." ECF 18. Plaintiffs did not oppose this extension request, which the Court granted. *See* Dec. 3, 2019 Minute Order. DOL's opposition and reply was thus now due on January 8, 2020. *Id.* On December 30, 2019, DOL's counsel informed Plaintiffs' counsel that

> within the next few weeks, DOL will lift the stay of action in the pending 2013 SPWD employer appeals in this case (as well as the 1,000+ other appeals). Shortly thereafter, **the Administrator will issue a decision affirming the wage rates contained in the 2013 SPWDs**.

ECF 21, Ex. 1 (emphasis added). In reliance on this representation by DOL and its counsel from the Department of Justice, Plaintiffs did not oppose the request for a 47-day extension, which DOL represented was necessary to implement DOL's "finalized … plan." ECF 18 at ¶ 2; *see also* ECF 19. The Court granted the fourth extension request and set a new deadline of February 24, 2020. *See* Jan. 6, 2020 Minute Order.

Six weeks later, three business days before DOL's new deadline, DOL's counsel informed Plaintiffs' counsel that DOL had "lifted the stays on the employer appeals in this case and resumed

processing of them," but that "the Center Director needs a little more time to coordinate with the Secretary before issuing a final decision." ECF 21-3. In response, Plaintiffs' counsel stated that "this does not appear to align with my understanding of what your representation as to the agency's plans were, which our consent to the past two months of extensions were based upon." *Id.* at 1. In response, DOL's counsel stated: "The plan remains the same." *Id.* DOL did not indicate to either Plaintiffs' counsel, or the Court in its subsequent extension motion, ECF 20, that the plan to "issue a decision affirming the wage rates contained in the 2013 SPWDs" had changed, and it did not retract the representation made to the Court in the motion to dismiss that it agreed with Plaintiffs that Plaintiffs were owed the wages specified in the 2013 SPWDs. In light of the length of time that had passed since the commencement of the case, and concerns about DOL's representations, Plaintiffs opposed DOL's extension request. The Court granted the extension, while noting that it would be DOL's "final extension for making this filing." Feb. 21, 2020 Minute Order.

III. Defendants' March 2020 Actions

On March 9, 2020, DOL filed a "Notice of Final Administrative Action," indicating that it had "issued letters to notify [Plaintiffs' four employers] of the resolution of their appeals." ECF 22-1 at ¶ 6. DOL did not include copies of those letters or otherwise indicate how it had resolved the appeals, asserting that it wanted to "ensure that the employers are first to receive notice of the outcome of their administrative appeals." ECF 22 at ¶ 3 n.1. Nonetheless, DOL maintained that the unspecified agency action "resolves all of the issues raised in Plaintiffs' complaint and cross-motion for summary judgment, without the need for judicial intervention," or "renders moot Plaintiffs' claim for relief." ECF 22 at 2. DOL did not, however, withdraw the motion to dismiss, and did not seek to revise the statement that "no actual controversy exists between Plaintiffs and

DOL regarding whether Plaintiffs are legally entitled to receive SPWD wages for their work in 2013 and whether those wages are due and payable." ECF 13-1 at 19.

Plaintiffs filed a response addressing the vagueness of DOL's notice. ECF 23. The Court then, via e-mail, asked DOL whether there was a reason why it had "not informed Plaintiffs of the final action" other than "ensur[ing] that the employers are the first to receive notice." ECF 24-4. In its response, DOL did not answer the Court's question, *id.*, but instead submitted an unsigned copy of one of the four letters purportedly sent to Plaintiffs' employers. *Id.*, attaching ECF 24-5. That letter indicated that, contrary to DOL's previous representations, DOL was not affirming the wage rates contained in the 2013 SPWDs but instead was vacating the increased wage obligations imposed by the SPWDs. *See* ECF 24-5 at 2.

The unsigned letter provided via email to the Court also referenced (but did not include) the Secretary's March 9 Notice, bringing that Notice to Plaintiffs' attention for the first time. Plaintiffs' counsel then located that notice on DOL's website, which indicated that "for legal, programmatic, and prudential reasons," including the lengthy delay challenged in this action and exacerbated by DOL's five extensions in this case, and a desire not to use department resources to resolve the pending appeals on the merits, DOL would *not* be affirming the wage rates contained in the 2013 SPWDs. Instead, DOL had decided that Plaintiffs' employers would not be required to pay the wages the agency had long maintained were mandated by law. *See* Secretary's March 9 Notice at 16–19.

LEGAL STANDARD

Plaintiffs bring this motion pursuant to both Rule 15(a) to the extent they seek to amend their complaint with respect to matters that occurred prior to the filing of the original pleading, and Rule 15(d) to the extent they seek to supplement the complaint with allegations relating to matters

that occurred after filing. *See Hall v. CIA*, 437 F.3d 94, 100 (D.C. Cir. 2006) (explaining the difference between Rule 15(a) and Rule 15(d)). "Motions to amend under Rule 15(a) and motions to supplement under Rule 15(d) are subject to the same standard." *Wildearth Guardians v. Kempthorne*, 592 F. Supp. 3d 18, 23 (D.D.C. 2008) (citing *Armstrong v. Bush*, 807 F. Supp. 816, 818–19 (D.D.C. 1992), and *Glatt v. Chicago Park Dist.*, 86 F.3d 190, 194 (7th Cir. 1996)); *see also Thorp v. District of Columbia*, 325 F.R.D. 510, 513 (D.D.C. 2018); *Xingru Lin v. District of Columbia*, 319 F.R.D. 1, 1 (D.D.C. 2016). "Under either, the decision 'is within the discretion of the district court, but leave should be freely given unless there is a good reason, such as futility, to the contrary.'" *Xingru Lin*, 319 F.R.D. at 1 (quoting *Wildearth Guardians*, 592 F. Supp. 2d at 23 (internal quotation marks omitted)). In exercising its discretion, courts consider five factors often referred to as the *Foman* factors: "(1) undue delay; (2) prejudice to the opposing party; (3) futility of the amendment; (4) bad faith; and (5) whether the plaintiff has previously amended the complaint." *Howell v. Gray*, 843 F. Supp. 2d 49, 54 (D.D.C. 2012) (citing *Atchinson v. District of Columbia*, 73 F.3d 418 (D.C. Cir. 1996) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962))). "Because amendments are to be liberally granted, the non-movant bears the burden of showing why an amendment should not be allowed." *Abdullah v. Washington*, 530 F. Supp. 2d 112, 115 (D.D.C. 2008).

ARGUMENT

In the proposed amended and supplemental complaint ("the proposed complaint"), Plaintiffs delete allegations related to DOL's failure to resolve the employer appeals of the SPWDs and the now-lifted stay, add allegations relating to relevant events occurring prior to the commencement of this action, and add allegations related to DOL's representations throughout this litigation and their March 9, 2020 actions. They also seek to alter their claims for relief to

challenge specifically both the Secretary's March 9 Notice and the March 9 letters to Plaintiffs' employers as arbitrary, capricious, and contrary to law. Because Plaintiffs meet the liberal Rule 15 standard and concerns about mootness of their original complaint are irrelevant, the Court should grant Plaintiffs leave to file the proposed complaint.

I. The Proposed Complaint Meets the Rule 15 Standard.

All five *Foman* factors weigh in favor of allowing Plaintiffs to file the proposed complaint.

First, there can be no serious suggestion that Plaintiffs have engaged in undue delay. Plaintiffs informed DOL and the Court of their intent to file this motion within one day of learning of the additional actions taken by DOL and DOL's reversal of the position that it had consistently maintained throughout this litigation. Moreover, although first filed nine months ago, this case is at an early stage: DOL has not answered the complaint, and the motion to dismiss is no longer pending. New briefing is necessarily required in light of what the Court has acknowledged are "drastically changed circumstances," *id.*, including DOL's abandonment of its position as to the lawfulness of the 2013 SPWDs.

Second, DOL will not be prejudiced by the alterations to the complaint. DOL cannot claim surprise that Plaintiffs would seek to challenge the agency's March 9, 2020 actions, because H-2B workers have been challenging DOL's failure to honor the commitments made in the 2013 Rule regarding SPWDs for nearly six years. *See, e.g.*, *Gonzalez-Avilez v. Perez*, Civ. No. JFM-15-3463, 2016 WL 3440581 (D. Md. June 17, 2016) (dismissing 2015 challenge to *Island Holdings* decision); *CATA IV*, 46 F. Supp. 3d 550 (dismissing 2014 challenge to same). If any party could claim unfair surprise here, it would be Plaintiffs. *Cf. Dynalantic Corp. v. Dep't of Def.*, 115 F.3d 1012, 1015 (D.C. Cir. 1997) (finding no prejudice in allowing plaintiff to amend claim on appeal,

finding "it only fair, given the government's switch of position after appellant had filed its opening brief").

The fact that Plaintiffs now seek to challenge agency actions that had not yet been taken at the time of the initial complaint does not demonstrate any prejudice to DOL. As explained in *Powell v. IRS*, 263 F. Supp. 3d 5, 7 (D.D.C. 2017), there is no rule against using Rule 15(d) to "add an entirely new cause of action related only to post-litigation events." To the contrary, "Rule 15(d) 'plainly permits supplemental amendments to cover events happening after suit,'" including "'allegations of recent incidents and, of course, presentation of such legal contentions as may be indicated' by those events." *Id.* (quoting *Griffin v. Cty. Sch. Bd.*, 377 U.S. 218, 227 (1964) and *Gomez v. Wilson*, 477 F.2d 411, 417 (D.C. Cir. 1973)) (cleaned up); *see also The Fund for Animals v. Hall*, 246 F.R.D. 53 (D.D.C. 2007) (granting motion for leave to supplement complaint to challenge three additional rules).

Moreover, DOL cannot assert prejudice because Plaintiffs could commence a separate action based on the proposed complaint. Requiring Plaintiffs to do so would simply result in the delay and duplication that Rule 15(d) exists to avoid by "promot[ing] the economic and speedy disposition of the entire controversy between the parties." 6A Wright & Miller, Federal Practice & Procedure § 1504, at 186–87 (2d ed. 1990), *quoted in Hall*, 437 F.3d at 101; *see also Powell*, 263 F. Supp. 3d at 7 (allowing supplemental complaint as "far preferable to requiring [plaintiffs] to open yet another case"); *Fund for Animals*, 246 F.R.D. at 54 (noting goals of "judicial economy and convenience"). Given the overlap between the original complaint and the proposed complaint, both in terms of the facts and the core allegation that DOL's failure to issue final, effective SPWDs setting forth the wage rates required by the 2013 Rule was arbitrary and capricious and contrary to both the 2013 Rule and the INA, "[t]here is a sufficient degree of connection between

Plaintiff[s'] original pleading and these newly alleged events that granting Plaintiff[s'] Motion is appropriate at this stage in the case." *Xingru Lin*, 219 F.R.D. at 2–3.

Third, the proposed alterations to the complaint would not be futile. Futility is measured under the same standard as would be applied under a motion to dismiss. *See In re Interbank Funding Corp. Sec. Litg.*, 629 F.3d 213, 218 (D.C. Cir. 2010). To state a claim under 5 U.S.C. § 706(1), a plaintiff must allege "that an agency failed to take a discrete agency action that it is required to take." *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004). The proposed complaint does just that, alleging that, under the 2013 Rule and the INA, Defendants were required to issue final, enforceable supplemental prevailing wage determinations to each of their employers, requiring those employers to pay higher wage rates, and that they have not done so. *See* Ex. 1 at ¶¶ 8, 57–61 (proposed complaint). The proposed complaint also adequately alleges claims of agency action that is arbitrary, capricious, and contrary to law, pursuant to 5 U.S.C. § 706(2). *See* Ex. 1 at ¶¶ 8, 62–69. As alleged in the proposed complaint, the Secretary's March 9 Notice that reversed DOL's longstanding position as to the propriety of the 2013 SPWDs was not adequately reasoned, particularly to the extent 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 (including Plaintiffs), ignored the possibility of private enforcement, and did not adequately consider important factors, including the impact of its action on H-2B workers. *See id.* at ¶¶ 49–53; *cf. Nat'l Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1112–13 (D.C. Cir. 2019) (finding agency's "fundamental policy reversal" arbitrary and capricious based on failure to adequately consider reliance interests or important aspects of the problem). The letters that DOL issued to Plaintiffs' employers were arbitrary and capricious to the extent that they were

explicitly premised on the arbitrary and capricious Secretary's March 9 Notice. *See* Ex. 1 at ¶¶ 54, 69.

Plaintiffs have also adequately alleged that the Secretary's March 9 Notice and the letters that DOL represents that it sent to employers were contrary to law, given that, 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 violated DOL's obligations under the INA, 933 F. Supp. 2d at 711–13, and that DOL's own 2013 Rule required it to issue final, enforceable SPWDs, *see* 78 Fed. Reg. at 24,056. *See* Ex. 1 at ¶¶ 53, 64, 67. The letters were also unlawful given that DOL regulations did not allow for employers to obtain review on the grounds that they disagreed with the agency's authority to issue SPWDs. *See id.* at ¶ 68.

Fourth, Plaintiffs' motion and their conduct throughout this entire litigation has been in good faith, taking DOL and its counsel at their word, and being direct about Plaintiffs' intentions.

Fifth, this motion is Plaintiffs' first request for leave to either amend or supplement their complaint.

II. The Court Should Grant the Motion Without Regard to Potential Mootness of the Operative Complaint.

In their response to Plaintiffs' Notice of Additional Administrative Action, DOL stated that it would oppose this motion on the ground that the operative complaint is moot. ECF 25 at 3. The Court subsequently directed the parties to address whether or not the operative complaint is indeed moot and what effect mootness would have on this motion. *See* March 12, 2020 Minute Order. Because, as explained below, the mootness of the operative complaint would not preclude the Court from granting the relief sought, the Court need not reach the question of whether the operative complaint is moot. If the Court does reach that question, it should hold that, although some aspects of the claims stated in the original complaint are moot, the action as a whole is not.

A. Whether the operative complaint is moot should not alter the Court's Rule 15 analysis.

To begin with, courts regularly consider motions for leave to amend prior to considering motions to dismiss, recognizing that a grant of the former could moot or narrow the latter. *See, e.g.*, *United States ex rel. Scott v. Pacific Architects & Eng'rs (PAE), Inc.*, 327 F.R.D. 17 (D.D.C. 2018) (addressing motion for leave to amend prior to motion to dismiss); *Council on Am.-Islamic Relations Action Network, Inc. v. Gaubatz*, 793 F. Supp. 2d 311 (D.D.C. 2011) (same); *FTC v. Cantkier*, Civ. No. 09-894 (CKK), 2010 WL 11433170 (D.D.C Mar. 13, 2010) (same). The D.C. Circuit has adopted this approach as to motions to dismiss on mootness grounds. In *Dynalantic*, the court explicitly declined to reach the question of whether plaintiffs' initial claims were moot, and instead granted the plaintiffs leave to amend their complaint to raise a challenge to a broader government action than the one they had initially challenged. 115 F.3d at 1015.

As in *Dynalantic*, the Court should exercise its discretion to grant leave to amend and supplement here, without reaching the question of whether the operative claim is moot. In *Dynalantic*, the court noted that it was "only fair" to allow amendment "given the government's switch of position after appellant had filed its opening brief." *Id.* Similarly here, the arguable mootness and amended claims have arisen only as a result of the government's repeated delays and its sudden switch of position. Given that, in light of DOL's new actions, Plaintiffs no longer seek to pursue the claims as pleaded in their initial complaint, there is no reason for the Court to decide whether they could do so.

Furthermore, the holding in *Dynalantic*, which suggests that courts need not assure themselves of jurisdiction to hear the operative complaint before addressing a motion for leave to amend, is consistent with other case law holding that courts have the authority to grant a motion for leave to amend, even if the operative complaint *is* moot. For example, in *Diffenderfer v. Central*

Baptist Church of Miami, Florida, Inc., 404 U.S. 412 (1972), the Supreme Court held that actions taken after the case reached the Court rendered the case was moot. *Id.* at 414–15. Nonetheless, "rather than remanding the case to the District Court for dismissal as is our usual practice when a case has become moot pending a decision by this Court," the Court "remand[ed] the case to the District Court with leave to the appellants to amend their pleadings," noting the possibility that the taxpayers might do so "to attack the newly enacted legislation." *Id.* at 415.

Likewise, in *Blue Water Baltimore v. Pruitt*, 293 F. Supp. 3d 1 (D.D.C. 2017), the plaintiffs initially had challenged EPA's approval of Maryland's 2012 surface water quality report. *Id.* at 2. When EPA issued an approval of Maryland's superseding 2014 surface water quality report, the court dismissed the original complaint, with prejudice, on mootness grounds. *Id.* at 3. The plaintiffs then concurrently filed motions to alter or amend the judgment under Rule 59, and for leave to amend the complaint pursuant to Rule 15. *Id.* at 3. Pursuant to Rule 59, they requested that the court amend its judgment to be a dismissal without prejudice, because the dismissal was based on lack of subject-matter jurisdiction. The court agreed that its dismissal with prejudice had been error and granted the Rule 59 motion. *Id.* at 4–5. As to the Rule 15 motion, the court granted plaintiffs leave to file an amended complaint challenging the superseding EPA approval. *Id.* at 5–9. In so doing, the court explicitly rejected the government's argument that the court lacked jurisdiction to do so given the mootness of the original claims. The court relied both on 28 U.S.C. § 1563, which provides that "[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts," and on the fact that "both the Circuit and other members of this Court have approved a district court's consideration of a Rule 15 motion, even after dismissal under Rule 12(b)(1), if the proposed pleading would cure the jurisdictional defect." 293 F. Supp. 3d at 7 (citing *Attias v. Carefirst, Inc.*, 865 F.3d 620, 624 (D.C. Cir. 2017); *Gov't of Guam v. Am. President Lines*,

28 F.3d 142, 149, 151 (D.C. Cir. 1994); *Vogel v. Go Daddy Grp., Inc.*, 266 F. Supp. 3d 234, 238 (D.D.C. 2017); *Am. Civil Constr., LLC v. Fort Myer Constr. Corp.*, 246 F. Supp. 3d 309, 315 (D.D.C. 2017); *Johnson v. Panetta*, 953 F. Supp. 2d 244, 247 (D.D.C. 2013)).

In short, regardless of whether a plaintiff's challenge to an action is mooted by superseding action, a court may grant a Rule 15 motion to allow claims to challenge that superseding action. Accordingly, regardless of the effect of DOL's new actions on the operative complaint, the Court retains authority to grant Plaintiffs' motion for leave to amend.

B. Plaintiffs' action is not moot.

Finally, Plaintiffs' action is not moot. Mootness is a function of "Article III's requirement that federal courts 'only adjudicate actual, ongoing controversies.'" *Porzecanski v. Azar*, 943 F.3d 472, 478–79 (D.C. Cir. 2019) (quoting *Honig v. Doe*, 484 U.S. 305, 317 (1988)). A case is moot where a controversy is no longer live, because "intervening events make it impossible 'to grant any effectual relief,' or if 'a party has already obtained all the relief that it has sought.'" *Id.* (cleaned up) (quoting *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992), and *Conservation Force, Inc. v. Jewell*, 733 F.3d 1200, 1204 (D.C. Cir. 2013)). "The burden of establishing mootness rests on the party raising the issue, and it is a heavy burden." *In re Navy Chaplaincy*, 850 F. Supp. 2d 86, 107 (D.D.C. 2012) (citing *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979); *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953); *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 458 (D.C. Cir. 1998)); *see also Citizens for Responsibility & Ethics in Wash. v. Wheeler*, 352 F. Supp. 3d 1, 7 (D.D.C. 2019).

Here, Plaintiffs do not dispute that *some* of the relief that they sought in the operative complaint has come to pass: those requesting the Court vacate the agency's stay of their employers' appeals and resolve the administrative appeals. *See, e.g.*, ECF 1 at ¶¶ 43 and 46, p. 12 ¶¶ B & D.

But it is well-established that "the fact that one aspect of a lawsuit becomes moot does not automatically deprive a court of jurisdiction over remaining, live aspects of the case." *Foretich v. United States*, 351 F.3d 1198, 1210 (D.C. Cir. 2003) (citing *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 121–22 (1974)); *see also Ramer v. Saxbe*, 522 F.2d 695, 704 (D.C. Cir. 1975) ("A case is not moot so long as any single claim for relief remains viable, whether that claim was the primary or secondary relief originally sought."). And even looking only at the operative complaint, it is clear that a live controversy between the parties remains and that the Court could grant effective relief to remedy the violations alleged. *Cf. Ctr. for Food Safety v. Salazar*, 900 F. Supp. 2d 1, 5–6 (D.D.C. 2012) (noting that, "for purposes of a mootness analysis, 'any effective relief whatever' is expansively defined" and that "the availability of measure to mitigate the ongoing effects of unlawful agency action are sufficient to save a case from mootness").

In the first cause of action in the operative complaint, Plaintiffs stated that DOL was "legally required to … impose on employers an obligation to pay workers the revised prevailing wage," ECF 1 at ¶ 40, and that DOL's failure to do so "wrongfully deprived [them] of the lawful wages they are owed for services they provided," *id.* ¶ 44. DOL's actions have not mooted these claims; DOL continues to withhold the same lawfully required action and, as a result, Plaintiffs continue to be deprived of the wages they are owed. Although the mechanism by which DOL is withholding this lawfully required action has changed, the dispute among the parties continues to exist, and Plaintiffs continue to suffer harm. In their second cause of action, Plaintiffs asserted that "DOL's failure to give effect to the wage rates set forth in the 2013 SPWDs is arbitrary, capricious, and contrary to DOL's 2013 Rule and the INA." *Id.* ¶ 48. Because DOL continues to fail to give effect to the wage rates set forth in the 2013 SPWDs, this claim likewise is not moot.

In the motion to dismiss Plaintiffs' complaint, DOL argued that "no actual controversy exist[ed]" between the parties because DOL agreed with Plaintiffs on the lawfulness of the 2013 SPWDs and Plaintiffs' entitlement to the wages set forth in those SPWDs. ECF 13-1 at 13–14. DOL's reversal of position thus brings the continuing case or controversy into even sharper focus. Because the Court can grant Plaintiffs effective relief—by ordering DOL to reinstate the 2013 SPWDs issued as to their employers—the action is not moot.

CONCLUSION

For the above-stated reasons, the Court should grant Plaintiffs' motion for leave to file an amended and supplemental complaint.

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Respectfully submitted,

/s/ *Adam R. Pulver*

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