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)

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

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INTRODUCTION

Leave to amend or supplement pleadings should be granted "when justice so requires," as the Department of Labor (DOL) agrees.[1] *See, e.g.*, *Gharb v. Mitsubishi Elec. Corp.*, 148 F. Supp. 3d 44, 53 (D.D.C. 2015) (quoting Fed. R. Civ. P. 15(a)(2)); *see* Opp'n at 11. Accordingly, it is notable what DOL does *not* address in its opposition to Plaintiffs' motion for leave to file an amended and supplemental complaint. Most glaringly, it ignores the events of this litigation—including DOL's five extensions in this case, which were *explicitly* predicated on representations to Plaintiffs and this Court that DOL would "issue a decision affirming the wage rates contained in the 2013 SPWDs." ECF 21-2 at 1; *see also* ECF 21- 3 at 1 (stating that "[t]he plan remains the same"). DOL also ignores that it argued to this Court that this case should be dismissed 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. Indeed, DOL's opposition skips over the entire period between the filing of this action in June 2019 and March 2020. *See* Opp'n at 2, 10. DOL's unexplained and unacknowledged reversal of representations made to Plaintiffs and the Court weigh strongly in favor of granting Plaintiffs' leave to amend *See, e.g.*, *Dynalantic Corp. v. Dep't of Def.*, 115 F.3d 1012, 1015 (D.C. Cir. 1997) (finding "it only fair" to allow amendment of claims "given the government's switch of position").

Also absent from DOL's memorandum is any response to Plaintiffs' argument that this Court need not address mootness of the operative complaint because the Court may grant a Rule 15 motion even *after* dismissal of a complaint as moot. Although Plaintiffs' opening brief devoted three pages to this argument, and the Court directed the parties to address what consequences

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

mootness would have on this motion, DOL does not argue that mootness of the operative complaint would have any effect on the current motion.

What DOL does address in its brief does not justify denial of Plaintiffs' motion. DOL argues only that Plaintiffs' proposed amendments to the complaint are futile because the new complaint would not survive a motion to dismiss. DOL has failed to meet its burden of showing futility as to each of Plaintiffs' three claims, much less all three.

Because Plaintiffs have met the liberal Rule 15 standards, the Court should grant leave to file the proposed pleading and allow Plaintiffs to move forward in their quest to obtain the wages that, seven years ago, DOL and a federal district court said they were owed.

ARGUMENT

I. As Conceded by DOL, Mootness of the Operative Complaint Does Not Require Denial of Plaintiffs' Motion.

In its March 12, 2020 Minute Order, the Court directed the parties to address two questions: whether the operative complaint has been mooted and, if so, what impact mootness has on the instant motion. Plaintiffs memorandum in support of their motion addresses both these questions. First, this Court has authority to grant a motion for leave to amend or supplement regardless of whether the operative complaint is moot, and thus the Court need not address mootness. *See* Pls.' Mem. at 17–20. Plaintiffs cited a range of authority in support of this proposition, including *Diffenderfer v. Central Baptist Church of Miami, Florida, Inc.*, 404 U.S. 412, 415 (1972), *Dynalantic Corp. v. Department of Defense*, 115 F.3d 1012, 1015 (D.C. Cir. 1997), and *Blue Water Baltimore v. Pruitt*, 293 F. Supp. 3d 1, 5–9 (D.D.C. 2017). *See* Pls.' Mem. at 17–20. DOL did not respond to this argument or to the Court's request for briefing on the issue of the impact of mootness on the instant motion. DOL's failure to respond to this argument should be treated as a

concession. *See* ECF 5 at 4–5 (Standing Order, citing *Phrasavang v. Deutsche Bank*, 656 F. Supp. 2d 196, 201 (D.D.C. 2009)).

Although DOL argues that the Court "should dismiss Plaintiffs' operative complaint" as moot, Opp'n at 15, that argument does not resolve the instant motion. As explained in Plaintiffs' opening memorandum, a dismissal for mootness is one without prejudice, and courts maintain the authority to grant "a Rule 15 motion, even after dismissal under Rule 12(b)(1), if the proposed pleading would cure the jurisdictional defect." *Blue Water Baltimore*, 293 F. Supp. 3d at 7, *quoted in* Pls.' Mem. at 19. This point is illustrated by two recent cases. In *Phoenix Herpetological Society, Inc. v. U.S. Fish & Wildlife Serv.*, No. 19-cv-00788 (APM), 2020 WL 2044000, at *4–*5 (D.D.C. Apr. 28, 2020), the court granted a motion to dismiss the operative complaint challenging an agency's failure to rule on pending applications as moot when the agency acted on those applications. In so doing, the court "afford[ed] leave to Plaintiff to amend its complaint." *Id.* at *6. And in *Aktowaiti v. Cissna*, No. 18 Civ. 508 (ER), 2020 WL 2036703 (S.D.N.Y. Apr. 28, 2020), a district court granted a motion to dismiss on mootness grounds in the same order that it granted a motion for leave to file an amended and supplemental complaint.[2] The facts in *Aktowaiti* are indistinguishable in all relevant aspects to those here: The plaintiffs brought an unreasonable delay claim based on a failure to adjudicate pending applications, the agency subsequently adjudicated those applications, and, rather than litigate the unreasonable delay claim, the plaintiffs sought to amend their claims to "challenge the nine petition denials as arbitrary and capricious under the APA." *Id.* at *4. Despite granting the defendants' unopposed motion to dismiss the operative

[2] Here, unlike in *Phoenix Herpetological Society* or *Altowaiti*, there is no motion to dismiss on mootness grounds currently pending.

complaint as moot, the Court found that leave to amend and supplement was appropriate under Rule 15. *Id.* at *4–*5.

Because DOL has conceded the issue and, in any event, Plaintiffs' position that mootness of the operative complaint does not affect the Court's ability to grant the instant Rule 15 motion is correct, the Court need not decide whether the operative complaint is moot. If the Court were inclined to do so, though, DOL's argument as to mootness is incorrect. As explained in Plaintiffs' opening brief, the operative complaint explicitly argued that DOL was "legally required to … impose on employers an obligation to pay workers the revised prevailing wage," ECF 1 at ¶ 40, and requested the Court order DOL to do just that. *See* Pls' Br. at 21. DOL does not dispute that the operative complaint contains these allegations or that DOL has *not* imposed on employers an obligation to pay workers the revised prevailing wage. Rather, DOL argues that Plaintiffs have not "cite[d] any authority that would compel DOL to take a specific administrative action." Opp'n at 14. This argument has nothing to do with mootness; it is the same merits argument that DOL made in its earlier motion to dismiss. See ECF 13-1 at 10–12. But "[i]n considering possible mootness [courts] assume that the plaintiffs would be successful on the merits." *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 955 (D.C. Cir. 2016); *see also Ramirez v. U.S. Immigration & Customs Enforcement*, 310 F. Supp. 3d 7 (D.D.C. 2018) ("Both the Supreme Court and the D.C. Circuit have cautioned that 'prospects of success' on a claim 'are not pertinent to the mootness inquiry.'" (quoting *Schnitzler v. United States*, 761 F.3d 33, 39 n.8 (D.C. Cir. 2014), and *Chafin v. Chafin*, 568 U.S. 165, 174 (2013)). The only question is whether Plaintiffs have "obtained all the relief they sought" in the operative complaint. *Conservation Force, Inc. v. Jewell*, 733 F.3d 1200, 1204 (D.C. Cir. 2013) (citing *Monzillo v. Biller*, 735 F.2d 1456, 1459 (D.C. Cir. 1984)). They have not, and the action is not moot.

II. The Amended and Supplemental Complaint is Not Futile.

Plaintiffs' opening memorandum explains that all five of the factors set out in *Foman v. Davis*, 371 U.S. 178, 182 (1962) weigh in favor of allowing them to file the proposed complaint. *See* Pls.' Mem. at 14–17. DOL does not address four of the five factors; it argues that the Court should deny Plaintiffs' motion solely on the basis that the "proposed amended complaint is futile and cannot survive a motion to dismiss." Opp'n at 15. The party opposing amendment on futility grounds bears the burden of showing why each claim would necessarily fail. *See, e.g.*, *Clayton v. District of Columbia.*, 999 F. Supp. 2d 178, 184 (D.D.C. 2013); *Boone v. Mountainmade Found.,* No. CV 08-1065 (RMU), 2011 WL 13244153, at *2 (D.D.C. Apr. 7, 2011); *Mead v. City First Bank of DC, N.A.*, 256 F.R.D. 6, 7 (D.D.C. 2009). None of DOL's arguments as to the three claims in the proposed amended and supplemental complaint meet this burden.

A. Plaintiffs may bring a claim based on failure to issue final SPWDs.

The first claim in the proposed amended and supplemental complaint is based on DOL's failure to take a lawfully required action: ordering Plaintiffs' 2013 employers to pay them the wages specified in the 2013 Rule. *See* ECF 26-1 at ¶¶ 57–61. DOL argues this claim fails on both jurisdictional and merits grounds; both arguments are incorrect.

DOL begins by arguing Plaintiffs' injuries are not redressable because "DOL has already taken administrative action to resolve the employers' appeals of the 2013 SPWD." Opp'n at 16. But Plaintiffs no longer seek to compel the resolution of their employers' appeals, nor do they, as DOL incorrectly suggests, request "a finding that DOL took too long to resolve the employers' appeals." *Id.* Plaintiffs' first claim is based on DOL's failure to take a *different* administrative action: ordering Plaintiffs' employers to pay them the wages DOL has previously stated were required by statute and regulation. This Court could order DOL to issue final determinations to

Plaintiffs' employers requiring them to pay the wages specified; such an order would redress Plaintiffs' injuries. Although Plaintiffs' ultimate injury, reduced wages, "flows not directly from the challenged agency action, but rather from independent actions of third parties, (i.e., their employers), in such cases, the D.C. Circuit has "required only a showing that 'the agency action is at least a substantial factor motivating the third parties' actions.'" *Tozzi v. U.S. Dep't of Health & Human Servs.*, 271 F.3d 301, 308 (D.C. Cir. 2001). DOL's failure to require Plaintiffs' employers to pay them the 2013 SPWD wages is "at least a substantial factor" motivating Plaintiffs' employers' actions. As the D.C. Circuit has repeatedly held, a plaintiff meets the redressabilty requirement where an agency's action or inaction "permitted the activity that allegedly injured her, when that activity would allegedly have been illegal otherwise." *Animal Legal Def. Fund, Inc v. Glickman*, 154 F.3d 426, 440 (D.C. Cir. 1998) (*en banc*) (citing *La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 366–67 (D.C. Cir. 1998)); *see also Competitive Enterprise Inst. V. Nat'l Hwy. Traffic Safety Admin.*, 901 F.2d 107, 113 (D.C. Cir. 1990) (in challenge to agency's reduction of fuel economy standard, finding plaintiffs met redressability requirement even though ultimate harm would not be redressed unless auto manufacturers complied with earlier standard); *Int'l Ladies Garment Workers Union v. Donovan*, 722 F.2d 795, 811 (D.C. Cir. 1983) (finding workers' had standing to sue where relief sought would make the injurious conduct of third-party employers unlawful). If DOL issued final SPWDs to Plaintiffs' employers, those employers would have a legal obligation to pay them. The fact that the employers may refuse to comply with that obligation does not make Plaintiffs' injuries nonredressable. That "third parties [could] prevent redress of [plaintiffs'] injuries" by taking the "extraordinary measure[]" of "violating the law" does not show a lack of redressability. *Int'l Ladies Garment Workers' Union*, 722 F.2d at 811; *cf. NRDC v. U.S. EPA*, 437 F. Supp. 2d 1137, 1153 (C.D. Cal. 2006), *aff'd*, 542

F.3d 1235 (9th Cir. 2008) ("[L]lack of compliance with lawful regulations is not the kind of third party behavior that the Court has found to render redressability overly speculative.").

DOL's merits attack fares no better. DOL concedes that Plaintiffs have alleged that the agency failed to take a discrete action: issue final SPWDs requiring Plaintiffs' employers to pay Plaintiffs the wages therein. Opp'n at 18. DOL argues, though, that nothing required DOL to do that. But for seven years, including in this action, DOL argued the opposite. In its 2013 Rule, DOL stated that "[t]o come into compliance with the [*CATA*] 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." 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). It did *not* purport to be invoking its discretion. Given that DOL itself said that the statute and a court order required it to take the action plaintiffs seek to compel here, it is hard to see how it is "implausible" to argue that the statute and court order required DOL to take such action. *See* Opp'n at 18 (arguing claim fails to meet plausibility standard). DOL's implausibility argument is particularly incredible given that DOL stated *in this litigation* that "it agrees with Plaintiffs' position on SPWD wages." ECF 13-1 at 13–14.

In its opposition, DOL does not explain why these prior statements were wrong, or what suddenly makes Plaintiffs' view that the INA required DOL to act "implausible." It ignores its own statement earlier in this litigation and attempts to dismiss its 2013 statutory interpretation only on the ground that it was contained in a preamble. *See* Opp'n at 18. But the fact that DOL expressed an interpretation of a statute in a preamble, and in filings in this litigation, as opposed to in the text

of the Code of Federal Regulations does not make it wrong, much less implausible. To the contrary, courts regularly look to agency statutory interpretations contained in preamble language and frequently give deference to those interpretations. *See, e.g.*, *Am. Fed'n of Gov't Employees, AFL-CIO v. Gates*, 486 F.3d 1316, 1326 (D.C. Cir. 2007); *Nat'l Auto. Dealers Ass'n v. FTC*, 864 F. Supp. 2d 65, 77 (D.D.C. 2012); *Groncki v. AT & T Mobility LLC*, 640 F. Supp. 2d 50, 53 (D.D.C. 2009). Given that DOL bears the burden to show that the proposed claim is futile, if DOL believes that the position it consistently took for seven years was wrong, it was required to explain why. Because it did not, the Court should allow Plaintiffs to proceed with their first proposed cause of action.

B. The Secretary's March 9 notice is reviewable final agency action and Plaintiffs have adequately alleged it is arbitrary, capricious, and contrary to law.

Plaintiffs' second proposed cause of action argues that the notice issued by the Secretary of Labor on March 9, 2020, ECF 24-1, is arbitrary, capricious, and contrary to law. *See* ECF 26-1 ¶¶ 62–65. Arguing that this Notice is not reviewable final agency action, DOL advances a grab-bag of arguments, all of which are either contrary to the facts, the law, and/or the agency's own positions over the past seven years.

First, DOL argues that the "decision not to undergo a declaratory order adjudication" is *de facto* unreviewable, because the failure to act means "the status quo remains unaltered." Opp'n at 27. Even putting aside the Secretary's Order does not simply maintain the status quo, DOL's argument is inconsistent with longstanding D.C. Circuit precedent. For decades, the D.C. Circuit has held that "an agency decision to terminate its rulemaking proceedings usually is ripe for review as final agency action." *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 710 F.2d 842, 846 (D.C. Cir. 1983); *see also Int'l Union, United Mine Workers of Am. v. U.S. Dep't of Labor*, 358 F.3d 40, 43–44 (D.C. Cir. 2004) (reviewing agency's termination of rulemaking proceedings

under APA as final agency action); *Montana v. Clark*, 749 F.2d 740, 744 (D.C. Cir. 1984) (noting that "an agency decision not to amend long-standing rules after a notice and comment period is reviewable agency action"). The fact that the agency action challenged here is the withdrawal of a proposed declaratory order, after notice and comment, does not distinguish this case from this line of precedent.

Second, the Secretary's March 9 notice did *not* maintain the status quo. While labeled a "Notice of Withdrawal," the March 9 notice did more than withdraw the proposed declaratory order. The Notice set forth a new rule, adopting the *Island Holdings* decision as DOL's position for the very first time. *See* DOL, Notice of Withdrawal (March 9, 2020) (ECF 24-1) at 12–19 ("accepting" BALCA's decision in *Island Holdings*); *cf. Truckers United for Safety v. Fed. Hwy. Admin.*, 139 F.3d 934, 939 (D.C. Cir. 1998) (in determining whether a rule is interpretive or legislative, "the label an agency places on a rule is not dispositive."). For years, DOL argued that the preamble to the 2013 Rule, *not Island Holdings*, represented the agency's position as to the requirement to issue, and lawfulness of, the SPWDs. In *CATA IV*, for example, DOL argued "that *Island Holdings* does not represent the legal or policy position of Defendant the Secretary of Labor as reflected in the preamble to the 2013 IFR," and that "the Secretary of Labor is authorized to make policy and law for the DOL, and that BALCA—which is composed of Administrative Law Judges who are subordinate agency employees—is not so empowered." *Comité de Apoyo A Los Trabajadores Agricolas v. Perez*, 46 F. Supp. 3d 550, 555 (E.D. Pa. 2014) (citing DOL briefs).

"Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)); *see also Temple Univ. Hosp., Inc. v. NLRB*, 929 F.3d 729,

733–34 (D.C. Cir. 2019) (discussing judicial estoppel standard). That is exactly what DOL is attempting to do here. In *Gonzalez-Aviles v. Perez*, Civ. No. JFM-15-3463, 2016 WL 3440581 (D. Md. Jun. 17, 2016), DOL successfully argued that workers could not challenge the *Island Holdings* decision, since "[t]he BALCA decision does not represent a 'final decision' of the Department of Labor." *Id.* at *1; *Cf. CATA IV*, 46 F. Supp. 3d at 562 (holding that *Island Holdings* itself was *not* a final agency action, since "the Secretary of Labor, and not BALCA, that ultimately makes the policies and rules governing H–2B prevailing wages"). Having won on that point in *Gonzalez-Aviles*, DOL cannot now take the clearly inconsistent position that the *Island Holdings* decision was self-executing and final all along, and that the Secretary's adoption of it has no legal effect.

Moreover, DOL's argument that "nothing that occurred after the *Island Holdings* decision altered the rights of the plaintiff [*sic*]," Opp'n at 20, is simply wrong. As DOL argued in *CATA IV*, "[t]he BALCA's *Island Holdings* decision represents a resolution of that individual case which is not subject to further administrative review." DOL Resp. to Mot. for Summ. J. at 12, *quoted at* 46 F. Supp. 3d at 555. *Island Holdings* had no legal effect on anyone but the parties to that case. But when the Secretary, in his March 9 Notice, adopted *Island Holdings* as a rule for the agency, that act had legal consequences for Plaintiffs: The DOL officials who reviewed Plaintiffs' employers' appeals were bound by the Secretary's March 9 Notice and lacked discretion in ruling on the employers' appeals. Indeed, when DOL granted Plaintiffs' employers individual requests for review and vacated the SPWDs, it explicitly stated it was doing so "[p]ursuant to the Withdrawal Notice." *See* ECF 24-5 at 2.

Finally, DOL half-heartedly argues that "Plaintiffs have not identified any alleged deficiencies in DOL's reasoning that would be sufficient to state a plausible claim" under what they assert is a "deferential standard." Opp'n at 20. First, since the March 9 Notice affirmatively

adopted a new rule for DOL, the ordinary standards of review under the APA apply; the fact that the agency called the document by which it acted a "notice of withdrawal" is irrelevant. Second, as noted above, DOL has the burden of showing the proposed claim is futile. Yet it does not attempt to address *any* of the specific "alleged deficiencies" identified in the proposed complaint, which details why the March 9 Notice was arbitrary, capricious, and contrary to law. *See* ECF 26-1 at ¶¶ 46–52. DOL can address the "alleged deficiencies" in the rule the Secretary issued on March 9 in summary judgment briefing; its blanket one-sentence assertion that they would not be sufficient to state a claim does not meet DOL's burden in opposing a motion for leave to amend or supplement as futile.

C. The injuries caused by DOL's March 9 letters are redressable.

In their third proposed cause of action, Plaintiffs challenge as arbitrary, capricious, and contrary to law the letters issued to each of their employers, which explicitly apply the Secretary's March 9 Notice to vacate the 2013 SPWDs. *See* ECF 26-1 at ¶¶ 66–69. DOL's only argument as to this claim is that Plaintiffs lack standing because they cannot show that their employers will comply with a DOL order to pay them for wages they are owed. As discussed above, it is not speculative for plaintiffs to assume that their employers would comply with a DOL order requiring them to pay back wages.

The one case on which DOL relies, *NAACP, Jefferson Cty. Branch v. U.S. Sugar Corp.*, 84 F.3d 1432 (D.C. Cir. 1996), is distinguishable. In that case, the plaintiffs requested that the court "force the Department to condition any future foreign-worker certifications on the sugar cane growers' payment of back pay for past violations." *Id*. at 1438. The court of appeals found that this remedy would not redress plaintiffs' injuries because plaintiffs could not show that their past employers would seek to hire foreign workers in the future. The relief Plaintiffs seek here would

not require any such contingent future action. Each of Plaintiffs' employers was *already* ordered to grant them back pay, and Plaintiffs' seek to set aside the agency actions that vacated those orders. As the OFLC Administrator explained in a declaration filed in the *CATA* case, DOL stayed those orders pending appeal but also informed each of Plaintiffs' employers that, if their administrative appeals were unsuccessful, they would be "required to pay the wage rate in the SPWD for all work performed on and after the date of the SWPD [*sic*] in the event the SPWD is upheld." ECF 16-3 at ¶ 11. Thus, the challenged letters made legal—withholding of back wages—that which would have otherwise been illegal. Vacatur of those letters would thus redress Plaintiffs' injuries. *See ALDF*, 154 F.3d at 440.

CONCLUSION

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

Dated: May 11, 2020

Respectfully submitted,

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