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. MARTIN J. WALSH, in his official capacity as capacity as Secretary of Labor, and U.S. DEPARTMENT OF LABOR, Defendants.	)	Civil Action No. 19-1853 (CKK)

PLAINTIFFS' RENEWED MOTION FOR SUMMARY JUDGMENT

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

In support of this motion, Plaintiffs submit the accompanying (1) memorandum of law and (2) a proposed order.

Dated: July 23, 2021

Respectfully submitted,

/s/ *Adam R. Pulver*

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' RENEWED MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

From 2013 through 2020, the Department of Labor (DOL) consistently maintained that Supplemental Prevailing Wage Determinations (SPWDs) that it issued in 2013 to certain employers participating in the H-2B temporary guestworker program were not only lawful but mandated by regulation and court order. To the extent that DOL's Board of Alien Labor Certification Appeals (BALCA) stated otherwise, DOL repeatedly asserted that BALCA was wrong on the merits, that it lacked authority to deem the SPWDs unlawful or otherwise determine matters of law and policy, and that it did not speak for DOL. Based on these assertions, DOL successfully obtained dismissal of two lawsuits brought by H-2B workers who sought to compel DOL to do what it repeatedly said that it would do: allow the 2013 SPWDs to take effect and, thus, require the workers' employers to pay them wages owed.

DOL continued to take that position in this very litigation, brought by five H-2B workers who DOL maintained for seven years were entitled to backpay at wages specified in 2013 SPWDs. DOL previously moved to dismiss this action on the grounds that it *agreed* with Plaintiffs that they "are legally entitled to receive SPWD wages for their work in 2013," ECF 13-1 at 19, and later sought several extensions of its obligations in this case based on the explicit representation that the agency would be "issu[ing] a decision affirming the wage rates contained in the 2013 SPWDs," ECF 21-2.

Last year, DOL did a complete about-face. In March 2020, it issued a notice withdrawing a March 2014 notice that had proposed a declaratory order affirming the validity of the SPWDs. DOL, Withdrawal of Notice of Intent to Issue a Declaratory Order, 85 Fed. Reg. 14,706 (Mar. 13, 2020) (2020 Notice) (AR04722). The 2020 Notice contained several radical shifts as to both policy and legal interpretations. First, without addressing prior contrary positions, DOL claimed that a

declaratory order was not appropriate, and it suggested, for the first time in the many years of discussion of the 2013 SPWDs, that the Secretary of Labor lacked authority to adopt legal or policy positions that differed from those adopted by BALCA's administrative law judges—who, at the relevant time, were not even constitutionally appointed inferior officers, but simply agency employees. In so doing, DOL did not address its own prior contrary reasoning. Second, DOL used the notice to affirmatively adopt BALCA's position that the SPWDs were invalid, claiming that it represented a "better view of the law" and citing "prudential and programmatic" reasons. Again, DOL ignored much of its own prior justifications for the contrary view and based its new position on a regulatory interpretation that a federal district court had already rejected as "clearly erroneous." The agency also irrationally stated that DOL's own delay in giving effect to the 2013 SPWDs made those SPWDs unlawful and dismissed the reliance interests of workers like Plaintiffs on the grounds that it "would not have been reasonable" for them 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 then sent letters to each of Plaintiffs' employers vacating the 2013 SPWDs, based on the 2020 Notice.

The actions that DOL took in March 2020 are arbitrary, capricious, and contrary to law, and should be set aside pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 706(2). The agency's 2020 about-face, taking the position that a declaratory order was not an appropriate mechanism for resolving the tension between the Secretary's long-stated view of the law and that of subordinate agency employees, was an unexplained reversal of position, ignored constitutional concerns raised by this new position, and was internally inconsistent. DOL's adoption of the view that the Plaintiffs' employers need *not* pay Plaintiffs the wages that DOL had long said they were owed was itself arbitrary and capricious, as it was based on an unreasoned reversal of position and

a clearly erroneous legal interpretation and failed to adequately consider all relevant factors. The letters that DOL sent to Plaintiffs' employers were explicitly based on the 2020 Notice, and thus were arbitrary, capricious, and contrary to law as well.

Accordingly, the Court should vacate both the 2020 Notice and the letters issued to Plaintiffs' employers pursuant to that notice.

BACKGROUND

I. Events Preceding This Litigation

A. The 2008 Rule and Related Litigation

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

DOL set the present controversy into motion in December 2008 when it promulgated a rule containing revised methodologies for calculating H-2B prevailing wages. *See* DOL, Final Rule, Labor Certification Process and Enforcement for Temporary Employment in Occupations Other than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes, 73 Fed. Reg. 78,020 (Dec. 19, 2008) (2008 Rule). In the relevant parts of the 2008 Rule,

DOL changed the way the prevailing wage rate was calculated, using "skill levels" in calculating the prevailing wages and relying solely on data from DOL's Occupational Employment Survey. *See* 20 C.F.R. § 655.10 (2008). H-2B workers challenged these aspects of the 2008 Rule, and a district court agreed that both changes were unlawful under the INA. *See Comite de Apoyo a los Trabajadores Agricolas v. Solis*, Civ. No. 09-240, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010) (*CATA I*).[1] 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. The *CATA* plaintiffs then asked the district court to order DOL to issue, during the period of remand, "conditional" certifications, which would explicitly require employers to agree "to pay a prevailing wage set by the new methodology as soon as that methodology becomes effective." *Comite de Apoyo a Los Trabajadores Agricolas v. Solis*, Civ. No. 09-240, 2010 WL 4823236, at *1 (E.D. Pa. Nov. 24, 2010) (*CATA II*). The district court denied that request, finding that equity did not warrant the relief requested. At the same time, the court rejected as "plainly erroneous" DOL's argument that its regulations prohibited it from increasing a prevailing wage after an initial determination. *Id.* at *2.

In 2011, DOL issued a new rule, in which it agreed that the 2008 Rule "artificially lowers [the required] wage to a point that it no longer represents a market-based wage." DOL, Final Rule, Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, 76 Fed. Reg. 3452, 3463 (Jan. 19, 2011). Three years later, however, for a variety of reasons not germane to this action, DOL was still utilizing the invalid 2008 Rule. The *CATA* court therefore vacated the

[1] Plaintiffs note that various actions and judicial decisions have used differing short-hand abbreviations to refer to four different decisions of the Eastern District of Pennsylvania. This brief refers to the four decisions as *CATA I*, *CATA II*, *CATA III*, and *CATA IV*, in the order in which they were issued.

rule and enjoined its continued use. *Comite de Apoyo a los Trabajadores Agricolas v. Solis*, 933 F. Supp. 2d 700, 707 (E.D. Pa. 2013) (*CATA III*). In so doing, the court noted DOL's acknowledgment that the 2008 prevailing wage methodology 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 held that wage certifications issued pursuant to the 2008 Rule "exceed[ed] the DOL's delegated authority," *id.* at 711.

B. The 2013 Rule and the SPWDs to Plaintiffs' Employers

One month after the *CATA III* court vacated the 2008 Rule, DOL and the Department of Homeland Security (DHS) 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* DOL & DHS, Interim Final Rule, Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program, Part 2, 78 Fed. Reg. 24,046 (Apr. 24, 2013) (2013 Rule) (AR37–51). The 2013 Rule stated that, under the court order invalidating the 2008 Rule and based on DOL's own factual findings, "the U.S. workers and H-2B workers currently employed under approved certifications, based on the invalid wage rates under the 2008 rule, are being underpaid in violation of the INA." *Id*. at 24,056 (AR46).

> 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. DOL explained that the new methodology would be effective immediately with respect to new or pending applications for labor certifications, and that "[u]pon individual notification to the employer of a new prevailing wage, the new wage methodology will also apply to all previously granted H-2B temporary labor certifications for any work performed on or after the effective date

of this interim rule." *Id*. at 24,055 (AR45).

DOL's Office of Foreign Labor Certification (OFLC), an office within DOL's Employment and Training Administration (ETA), sent such "individual notifications," which it referred to as Supplemental Prevailing Wage Determinations, to employers that had previously obtained certifications for ongoing H-2B employment. The SPWDs issued to each of Plaintiffs' 2013 employers covered work that Plaintiffs performed on or after the date of those SPWDs. The notifications informed those employers that the prevailing wage had increased, identified the increased wage, and explained that compensation at the higher wage rate was required, pointing to provisions in the H-2B application where employers agreed to pay any newly established wage. *See* AR70 (describing process); *see also, e.g.*, AR4484–88 (example of SPWD); AR4527–30 (same); AR4704–06 (same).

Plaintiffs Joel Davila Calixto and Hector Hernandez Gomez worked under the H-2B program as landscapers for St. Louis Select Landscaping and Lawn Care in St. Louis and St. Charles Counties, Missouri, in the spring and summer of 2013. ECF 16-6 ¶ 4. For their work, they were paid $10.25 per hour. *Id.* On July 3, 2013, OFLC issued an SPWD to St. Louis Select, which specified a prevailing wage for landscape laborers in St. Louis and St. Charles Counties in Missouri of $12.15 per hour. AR4704–05.

Plaintiffs Leonardo Aviles Romero and Hilario Olvera Gutierrez worked under the H-2B Program as landscapers for Outside Unlimited LLC in Baltimore, Frederick, and Carroll Counties in Maryland, and in parts of Pennsylvania and Virginia, in the spring, summer, and fall of 2013. ECF 16-7 ¶¶ 3–4; ECF 16-8 ¶¶ 3–4. Aviles Romero was paid at a rate of $11 per hour for his work, and Olvera Gutierrez was paid at a rate of $9.54 per hour. ECF 16-7 ¶ 4; ECF 16-8 ¶ 4. OFLC issued two SPWDs to Outside Unlimited which covered work Aviles Romero and Olvera Gutierrez

performed. First, on July 9, 2013, OFLC issued an SPWD specifying prevailing wage rates for work for landscape laborers in Pennsylvania; for the areas where Aviles Romero and Olvera Gutierrez worked, the rate was $14.04 per hour. AR4600–01. Second, on July 16, 2013, OFLC issued an SPWD specifying prevailing wage rates for landscape laborers in Maryland and the District of Columbia; for the areas where Aviles Romero and Olvera Gutierrez worked, the rates were $12.41 per hour in Baltimore and Carroll Counties and $12.51 per hour in Frederick County. AR4527–28.

Jorge Palafox Juarez worked under the H-2B program for JLQ Concessions performing food preparation in traveling fairs throughout California in the summer of 2013. ECF 16-9 ¶ 4. For his work, he was paid a flat rate of $40 per day during fair preparation days and $85 per day during fair operations. *Id.* On June 27, 2013, OFLC issued an SPWD to JLQ Concessions that covered multiple locations where Palafox Juarez worked, specifying a prevailing wage of $10.08 per hour in Monterey County, $10.10 per hour in Sonoma County, $10.21 per hour in Los Angeles County, $10.62 per hour in Alameda County, and $11.62 per hour in San Mateo County. AR4484–87.

C. Administrative Reviews of the SPWDs and *Island Holdings*

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. First, an employer could submit a request to the OFLC National Processing Center (NPC), which was required to:

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

> the skill level, the NPC [had to] inform the employer, in writing, of the reasons for its decision.

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

Second, the employer could file a further appeal within OFLC—what DOL and the employers referred to as "Center Director Review." An employer could submit a request for review to the NPC Director, who would designate a certifying officer (CO) to review the prevailing wage determination. 20 C.F.R. § 655.11(a)–(c) (2009). The relevant regulations provided: "The CO shall review the PWD solely on the basis upon which the PWD was made and after review may: (1) Affirm the PWD issued by the NPC; or (2) Modify the PWD." 20 C.F.R. § 655.11(d) (2009).

If the employer was dissatisfied with the CO's determination, it could seek further review from DOL's Board of Alien Labor Certification Appeals (BALCA). 20 C.F.R. § 655.11(e) (2009). BALCA is an adjudicatory body made up of administrative law judges appointed by the Chief Administrative Law Judge and to which the Secretary has delegated limited authority. *See* DOL, Final Rule, Labor Certification Process for the Permanent Employment of Aliens in the United States; Establishment of Board of Alien Labor Certification Appeals, 52 Fed. Reg. 11,217 (Apr. 8, 1987) (BALCA Rule).

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[2] For the Court's convenience, Plaintiffs previously filed the historical versions of 20 C.F.R. §§ 655.10 and 655.11 as ECF 16-3. 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 that the pre-April 22, 2012, version of the regulations remained in effect.

DOL took the position that the wage rate contained in an SPWD "does not go into effect during the time the determination is under review." ECF 16-3 (Aug. 28, 2013, Declaration of OFLC Administrator William L. Carlson, *CATA v. DOL* (E.D. Pa. Civ. No. 09-00240-LDD)) at ¶ 12. If the SPWD were upheld on administrative appeal, though, the appealing employer would be "required to pay the wage rate in the SPWD for all work performed on and after the date of the SPWD." *Id.* ¶¶ 11–12.

Employers took advantage of the redetermination process en masse, challenging the legality of the SPWDs. *See id.* ¶ 8 (noting 1400 requests for redetermination as of Aug. 23, 2013). Each of Plaintiffs' employers submitted one or more requests for redetermination pursuant to § 655.10(g) on the ground that DOL lacked authority to issue the SPWDs, and DOL denied each request.[3] 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 *In re Island Holdings*. AR52. In that case, BALCA stated that DOL lacked the authority to issue the SPWDs to employers who had obtained labor certifications pursuant to the since-vacated 2008 Rule, and it remanded the SPWDs issued to that employer with instructions that they be vacated. AR52, 66.

[3] *See* AR4700–03 (July 3, 2013 Request for Redetermination by St. Louis Select); AR4697–98 (Aug. 9, 2013 Denial); AR4640–43 (Aug. 9, 2013 Request for Redetermination by Outside Unlimited); AR4637–38 (Aug. 23, 2013 Denial); AR4558–60 (Aug. 12, 2013 Request for Redetermination by Outside Unlimited); AR4555–56 (Aug. 30, 2013 Denial); AR4478–80 (June 27, 2013 Request for Redetermination by JLQ Concessions); AR4476–77 (Aug. 20, 2013 Denial). In rejecting these requests for redetermination, OFLC affirmed the agency's authority to issue the SPWDs. *See, e.g.*, AR70 (discussing review of one SPWD); AR4697–98 (example of denial of request for redetermination); *see also* Dkt. 13-1 at 10–11 (Defs.' Mem. in Supp. of Motion to Dismiss at 5–6) (noting that OFLC denied most initial requests for review and that employers then filed requests for a second review).

D. Post-*Island Holdings* Developments

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

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

AR67.

On July 13, 2014, the district court dismissed the challenge to *Island Holdings* on three grounds. *See Comité de Apoyo A Los Trabajadores Agricolas v. Perez*, 46 F. Supp. 3d 550 (E.D. Pa. 2014) (*CATA IV*). First, the court found that the plaintiffs did not have standing to challenge the *Island Holdings* decision because there was no evidence that it would be applied to them given the stay. *Id.* at 560–61. Second, agreeing with arguments made by DOL, the court held that the *Island Holdings* decision was not final agency action as to the wages that any employer other than Island Holdings must pay, because "the Secretary of Labor, and not BALCA, … ultimately makes the policies and rules governing H–2B prevailing wages." *Id.* at 561–62. Finally, the court held that the dispute was not ripe because DOL had indicated that it would address *Island Holdings* in upcoming rulemaking. *Id.* at 562–64.

Two months later, the employer in *Island Holdings* filed a motion with BALCA seeking a declaratory order compelling OFLC to act on the earlier BALCA decision and vacate the SPWDs.

See In re Island Holdings, 2013-PWD-00002 (Nov. 13, 2014) (*Island Holdings II*)). On November 13, 2014, BALCA denied the motion on the ground that it lacked the authority to compel OFLC to act. *Id.*

On December 17, 2014, DOL's Office of the Secretary issued a "Notice of Intent to Issue Declaratory Order and Request for Comment." 79 Fed. Reg. 75,179 (2014 Notice) (AR68). DOL stated it 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*]." *Id.* at 75,182 (AR71). DOL also stated that BALCA lacked authority to issue an authoritative interpretation of a DOL regulation for the agency. Noting that the Secretary has the authority to issue a declaratory order overruling BALCA pursuant to 5 U.S.C. § 554(e) if he "determines that the BALCA's decision rests on a legal error or departs from the Secretary's announced legal interpretation or policy," DOL "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." 79 Fed. Reg. at 75,183 (AR72).

The comment period on the 2014 Notice closed on February 2, 2015. *See* AR74. Thirty-five individuals and organizations submitted comments. AR75–4467. For the next five years, however, DOL took no further action with respect to the proposed declaratory order, and all proceedings with respect to the SPWDs remained stayed. Meanwhile, 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. As it had in *CATA IV*, 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 v. Perez*, Civ. No. JFM-15-3463, 2016 WL 3440581 at *1 (D. Md. June 17, 2016).

II. Proceedings with Respect to Plaintiffs' Initial Complaint

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 "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.

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. 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, 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 extended DOL's time to file to March 9, 2020, while noting that it would be DOL's "final extension for making this filing." Feb. 21, 2020 Minute Order.

III. The March 2020 Notice of Withdrawal

On March 9, 2020, the day DOL's response was due, DOL issued a "Notice of Withdrawal," stating that the Secretary would not issue a declaratory order, that Defendants would

not affirm the wage rates contained in the 2013 SPWDs, and that Plaintiffs' employers would not be required to pay them the wages the agency had consistently maintained, for the past seven years, were mandated by law. 85 Fed. Reg. at 14,709 (AR4725). First, the Notice states there was "no precedent" for using the declaratory order mechanism provided for by 5 U.S.C. § 554(e) "in circumstances like these." *Id.* It does not acknowledge or address the reasoning of the agency in 2014 as to why the mechanism could be appropriately utilized in this scenario. Second, the Notice states that DOL would "[a]ccept the [d]ecision in *Island Holdings*." *Id.* It maintained that the 2013 SPWDs were "inconsistent" with DOL regulations and with the "structure and purpose" of the H-2B program, *id.* at 14,709–10 (AR4725–26), and that they were not mandated by the decision in *CATA III*, *id.* at 14,710 (AR4726).[4] The 2020 Notice also cites "prudential and programmatic concerns" tied to the passage of time—stating that it would be difficult for DOL to enforce wage obligations from 2013, and that any reliance by workers like plaintiffs would not have been reasonable in light of DOL's five-year delay. *Id.* at 14,710–11 (AR4726–27). The Notice does not acknowledge DOL's own responsibility for the delay or its repeated representations to workers and courts over that time period.

On March 9, 2020, pursuant to the 2020 Notice, DOL issued letters to each of Plaintiffs' employers, resolving their requests for review and vacating "the increased wage obligation that the SPWD purported to impose." AR4734–37; AR4743–54; AR4779–82.

IV. The Amended and Supplemental Complaint

Plaintiffs filed a motion for leave to file an amended and supplemental complaint on March 26, 2020. ECF 26. The proposed pleading omitted earlier-pleaded claims based on DOL's delay;

[4] The Notice refers to the third *CATA* decision as "*CATA II*" and fails to acknowledge the actual second *CATA* decision.

it added new claims challenging DOL's failure to issue final, effective SPWDs, and challenging the 2020 Notice and resulting letters as arbitrary, capricious, and contrary to law. *See* ECF 26-1. DOL opposed, arguing, *inter alia*, that the 2020 Notice was not a reviewable final agency action, and that Plaintiffs lacked standing to challenge the letters vacating the SPWDs issued to their employers. *See* ECF 27. On March 24, 2021, the Court granted Plaintiffs' motion, finding that DOL had not demonstrated that the proposed new claims were futile. *See* ECF 35.

Plaintiffs now move for summary judgment on their claims challenging the 2020 Notice and resulting letters as arbitrary, capricious, and contrary to law, pursuant to 5 U.S.C. § 706(2). (Plaintiffs are no longer pursuing the first cause of action in the amended and supplemental complaint.)

LEGAL STANDARD

"Summary judgment is the mechanism for deciding whether as a matter of law the agency action is supported by the administrative record and is otherwise consistent with the APA standard of review." *Friends of Animals v. Pendley*, Civ. No. 19-3506 (CKK), 2021 WL 780818, at *5 (D.D.C. Feb. 28, 2021) (quoting *Southeast Conference v. Vilsack*, 684 F. Supp. 2d 135, 142 (D.D.C. 2010)). Here, Plaintiffs seek summary judgment on their claims brought pursuant to 5 U.S.C. § 706(2)(A), which requires a court to "hold unlawful and set aside agency action … found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." "An agency decision is arbitrary and capricious if it is not reasonably explained." *W. Coal Traffic League v. Surface Transp. Bd.*, 998 F.3d 945, 963 (D.C. Cir. 2021) (citation omitted). "The agency must have 'examined the relevant considerations and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made.'" *Id.* (quoting *Int'l Longshore & Warehouse Union v. NLRB*, 971 F.3d 356, 360 (D.C. Cir. 2020)). And an agency

action is "not in accordance with law" if it is not authorized by, or inconsistent with, a statute or regulation. *See Fisher v. Pension Benefit Guar. Corp.*, 151 F. Supp. 3d 159, 165 (D.D.C. 2016) (citing *Gonzales v. Oregon*, 546 U.S. 243, 255 (2006)).

ARGUMENT

Both the 2020 Notice and the March 2020 letters DOL issued to each of Plaintiffs' former employers pursuant to that Notice are unlawful and should be set aside.

I. The 2020 Notice should be set aside.

A. The notice is reviewable final agency action.

The Secretary's 2020 Notice was the mechanism by which DOL terminated the declaratory order proceedings commenced in 2004 and by which it adopted a substantive rule as to the validity of the 2013 SPWDs. Because the 2020 Notice "marks the consummation of the agency's decisionmaking process and is not of a merely tentative or interlocutory nature" and "is an action by which rights or obligations have been determined, or from which legal consequences will flow," it is a final agency action reviewable under the APA. *Soundboard Ass'n v. FTC*, 888 F.3d 1261, 1267 (D.C. Cir. 2018) (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)).

As the D.C. Circuit has long held, "an agency decision to terminate its rulemaking proceedings usually is ripe for review as final agency action," particularly where that decision selects among alternative courses of action. *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 710 F.2d 842, 846 (D.C. Cir. 1983); s*ee 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); *Env't Integrity Project v. McCarthy*, 139 F. Supp. 3d 25, 38–39 (D.D.C. 2015). Likewise, the "decision not to initiate a declaratory order proceeding" is a final agency action. *Intercity Transp. Co. v. United States*, 737 F.2d 103, 106 (D.C. Cir. 1984). Thus here, DOL's decision to withdraw a proposed declaratory order is a

reviewable final agency action: The decision "is not subject to alteration." *Id*. Indeed, its purpose was "to provide certainty and finality." 85 Fed. Reg. at 14,706. And by eliminating an avenue by which Plaintiffs and other workers could obtain wages owed, the decision not to adopt an order that would allow the SPWDs that DOL had defended as legal for seven years to take effect had legal consequences.

Moreover, DOL utilized the Notice as the means to adopt a new, substantive policy—and was thus itself a rule. The 2020 Notice is plainly "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4). Importantly, that DOL has not denominated its action as "a 'rule' is not determinative of whether it did, in fact, issue a rule within the meaning of the [APA]." *Ctr. for Auto Safety*, 710 F.2d at 846. "It is the substance of what the agency has purported to do and has done which is decisive." *Id.* (quoting *Columbia Broadcasting Sys., Inc. v. United States*, 316 U.S. 407, 416 (1942)); *see also Cent. Tex. Tel. Co-op., Inc. v. FCC*, 402 F.3d 205, 211 (D.C. Cir. 2005) (finding agency "order" constituted a rule under the APA).

Prior to March 2020, according to DOL, BALCA's *Island Holdings* decision represented no more than "a resolution of that individual case"; it did "not represent the legal position of the Secretary of Labor" and was not binding on anyone with respect to any other employer. *CATA IV*, 46 F. Supp. 3d at 555 (quoting DOL brief); *see also* ECF 13-1 at 12–14 (Nov. 2019 DOL memorandum in this action stating that there was no actual controversy between DOL and Plaintiffs as to the validity of the SPWDs); *Moodie v. Kiawah Island Inn Co.*, 124 F. Supp. 3d 711, 724 (D.S.C. 2015) (stating "[t]he BALCA decision [in *Island Holdings*] does not bind the Secretary of Labor"). Based on the position that BALCA's decision in *Island Holdings* was not a final agency action with respect to any employer but Island Holdings, and that only the Secretary

could take such broadly binding action, DOL successfully obtained the dismissal of two separate actions brought by H-2B workers. *See Gonzalez-Avilez*, 2016 WL 3440581, at *1; *CATA IV*, 46 F. Supp. 3d at 562.

The 2020 Notice, by contrast, is exactly what DOL said would constitute final agency action. Through that Notice, the Secretary announced a rule governing H-2B prevailing wage determinations, adopting *Island Holdings* as the policy of the Department of Labor and requiring it to be applied to all other cases. Thus, for the first time, the DOL officials reviewing Plaintiffs' employers' individual requests for review were bound to grant those requests. A "notice" that alters the decisional rule to be applied by agency decisionmakers in adjudicating appeals is a rule and, thus, a final agency action. *See, e.g., RCM Techs., Inc. v. U.S. Dep't of Homeland Sec.*, 614 F. Supp. 2d 39, 46 (D.D.C. 2009) (noting that when officials are not "free to exercise their discretion" pursuant to the policy, the policy is binding and determines certain "rights and obligations").

B. The 2020 Notice is arbitrary, capricious, and contrary to law.

The APA requires agency action to be "the product of reasoned decisionmaking." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). An agency fails to meet this standard, and acts arbitrarily and capriciously, when it "relie[s] on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* Where an agency is reversing a prior position, reasoned decisionmaking requires that "it display awareness that it *is* changing position" and "show there are good reasons for the new policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). In explaining its

changed position, an agency must also be cognizant that longstanding policies may have "engendered serious reliance interests that must be taken into account." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016); *see also 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). Moreover, an agency action is arbitrary and capricious where it is based on an unreasonable interpretation of law. *See, e.g., Zhang v. U.S. Citizenship & Immigration Servs.*, 344 F. Supp. 3d 32, 56 (D.D.C. 2018); *HealthAlliance Hosps., Inc. v. Azar*, 346 F. Supp. 3d 43, 60 (D.D.C. 2018); *cf. Gen. Instrument Corp. v. FCC*, 213 F.3d 724, 732 (D.C. Cir. 2000) ("Whether a statute is unreasonably interpreted is close analytically to the issue whether an agency's actions under a statute are unreasonable.").

Neither the reasons that DOL gave for declining to issue a declaratory order, nor the reasons for adopting the legal view set out in *Island Holdings*, were reasonable.

1. DOL's reversal as to whether to issue a declaratory order was arbitrary and capricious.

The 2020 Notice's explanation as to why the Secretary would not issue a declaratory order represented an unreasoned reversal from longstanding DOL positions as to BALCA's limited authority and failed to consider obvious constitutional concerns presented by that reversal. In the 2014 notice, DOL stated that, pursuant to 5 U.S.C. § 554(e), the Secretary was "considering issuing on his own motion a declaratory order to clarify his authority to set law and policy in the H-2B labor certification program, and to resolve the controversy arising from the BALCA's legally erroneous decision." 79 Fed. Reg. at 75,183 (AR72). As authority to issue such a declaratory order and adopt a rule that departed from that in *Island Holdings*, DOL invoked the "basic principle of administrative law that the agency makes law and policy, not subordinate ALJs." *Id. (citing Ho v.*

Donovan, 569 F.3d 677, 682 (7th Cir. 2009); *Croplife v. EPA*, 329 F.3d 876, 882 (D.C. Cir. 2003); *Iran Air v. Kugelman*, 996 F.2d 1253, 1260 (D.C. Cir. 1993); *Nash v. Bowen*, 869 F.2d 675, 680 (2d Cir. 1989); Admin. Conf. of the U.S., Recommendation 92-7, 57 Fed. Reg. 61,759, 61,763 (Dec. 29, 1992)). The 2014 Notice also noted that BALCA—which was created by rule, not statute, and exercises only that authority delegated to it by the Secretary—had not been delegated the authority to speak on behalf of the Secretary on legal issues, such as the lawfulness of the SPWDs. *See id.* at 75,179 (AR68) (citing BALCA Rule, 52 Fed. Reg. at 11,217). Rather, DOL explained, "the BALCA ALJs' authority is limited to non-lawmaking functions, including determining issues of fact and applying undisputed law to the facts of an employer's particular case." *Id.* at 75,183 (AR72). These positions were consistent with those taken by DOL in the *CATA* and *Gonzalez-Aviles* litigation. *See CATA IV*, 46 F. Supp. 3d at 555 (noting DOL positions that "*Island Holdings* does not represent the legal or policy position of Defendant the Secretary of Labor," that "BALCA's rulings in *Island Holdings* are [not] valid and should [not] be applied by the DOL in future adjudications," and that the Secretary "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"); *see also Gonzalez-Aviles*, 2016 WL 3440581, at *1.

The 2020 Notice did not address either DOL's 2014 arguments as to the propriety of a declaratory order or the related arguments made by commenters in response to the 2014 Notice. *See, e.g.*, Comment of Comité de Apoyo a Los Trabajadores (CATA), et al., AR229, AR236–39 (explaining why BALCA lacked authority); AR247–48 (explaining why use of 5 U.S.C. § 554(e) would be appropriate). Rather, the Notice simply stated that because DOL's existing regulations did not provide a "mechanism at all for a Department official to review BALCA decisions regarding H-2B prevailing wage determinations" and because there "appears to be no precedent,

at any federal agency, for using a Section 554(e) order in circumstances like these," the Secretary would not issue a declaratory order. 85 Fed. Reg. at 14,708–09 (AR4723–24). This brief rationale did not comply with the requirements of reasoned decisionmaking.

First, the 2020 Notice suggests that, absent a specific regulatory provision stating otherwise, BALCA interpretations of law and policy *are* binding on the Secretary of Labor. This position is a complete reversal from DOL's prior positions. *See* 2014 Notice, 79 Fed. Reg. at 75,183 (AR72); *CATA IV*, 46 F. Supp. 3d at 555. Because DOL failed to acknowledge that it was adopting a position directly contrary to its prior position, its decision was arbitrary and capricious. *See Fox*, 556 U.S. at 515.

Second, the explanation in the 2020 Notice conflated the Secretary's ability to review BALCA decisions as an appellate adjudicator in cases where BALCA acts within its delegated authority with the Secretary's ability to assert authority that he did not delegate to BALCA. Although there may be a need for procedures for the former, the Secretary in 2014 was clear that he was proposing to do the latter and to exercise authority that only the Secretary, and not BALCA, had: the power "to make law or policy for the agency." 79 Fed. Reg. at 75,183 (AR72). The Secretary of Labor is vested with this authority by statute, *see, e.g.*, 29 U.S.C. § 551, and, as explained in 2014, he did not delegate that authority to BALCA. 79 Fed. Reg. at 75,183 (AR72). And, as BALCA has conceded, it has no authority to compel employees of OFLC, who report to the Secretary, to act. *Island Holdings II*, ECF 16-4. Rather, the Secretary maintained his authority to issue an order to OFLC employees to disregard BALCA's opinion, particularly as to a question that BALCA did not have jurisdiction to decide.

Third, DOL's new position raises an obvious constitutional concern that the 2020 Notice did not address. The Secretary of Labor has no role in designating the members of BALCA. Rather,

the Chief Administrative Law Judge has sole authority to designate the members of BALCA from among the administrative law judges (ALJs) assigned to the Department of Labor. 20 C.F.R. § 656.3. At the time of the *Island Holdings* decision, the Secretary had no role in appointing such ALJs at all. *See* Stephen R. Henley, Mem., Ratification of Appointment of U.S. Dep't of Labor Admin. L. Judges (Dec. 20, 2017).[5] Accordingly, the members of BALCA could only constitutionally perform the roles "of lesser functionaries in the Government's workforce"—that is, that of ordinary agency employees. *Lucia v. SEC*, 138 S. Ct. 2044, 2050 (2018). BALCA thus could not make decisions of law and policy that bind the Secretary of Labor. The failure to consider this obvious constitutional issue renders the 2020 Notice arbitrary and capricious. *See, e.g.*, *Fox*, 556 U.S. at 553 (finding that an agency acted arbitrarily and capriciously by failing to consider constitutional implication of changed interpretation); *Nat'l Urban League v. Ross*, 489 F. Supp. 3d 939 (D.D.C. 2020) (stating that the failure to consider and address constitutional obligations was arbitrary and capricious); *cf. Chamber of Commerce of U.S. v. FEC*, 69 F.3d 600, 605 (D.C. Cir. 1995) (declining to give *Chevron* deference to an agency interpretation that would raise unaddressed constitutional concerns).

Finally, the 2020 Notice is unclear whether the Secretary had concluded that, contrary to the view stated in 2014, he lacked *authority* to issue a declaratory order pursuant to 5 U.S.C. § 554(e), or that the lack of "precedent" simply counseled against doing so. *Cf. SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (holding that the basis for an agency's action "must be set forth with such clarity as to be understandable"). If the former, neither the text of section 554(e) nor interpretive case law supports such a conclusion, and DOL provided no reasoned explanation for

[5] https://www.dol.gov/sites/dolgov/files/OALJ/PUBLIC/FOIA/Frequently_Requested_Records/ALJ_Appointments/Memorandum_on_Ratification_of_Appointment_of_USDOL_ALJs_(Dec_20_2017).pdf.

departing from the position announced in 2014 that the Secretary has the authority to issue a declaratory order when he "determines that the BALCA's decision rests on a legal error or departs from the Secretary's announced legal interpretation or policy." 79 Fed. Reg. at 75,183 (AR72). As the D.C. Circuit has explained, "[a]n administrative agency … may issue a declaratory order in mere anticipation of a controversy or simply to resolve an uncertainty." *Pfizer Inc. v. Shalala*, 182 F.3d 975, 980 (D.C. Cir. 1999). *Cf.* 2020 Notice, 85 Fed. Reg. at 14,706 (AR4722) (using notice "to provide certainty"). That is what the Secretary proposed doing in 2014, when BALCA took a view contrary to that the Secretary directed his other subordinates to take. The Secretary was required to at least acknowledge that he previously thought a declaratory order was appropriately utilized in such a scenario and provide a reason for that reversal. *See Fox*, 556 U.S. at 515.

Moreover, the fact that agencies have not previously used declaratory orders in analogous circumstances hardly demonstrates that the statute does not provide the authority to do so. As the Administrative Conference of the United States (ACUS) has noted, "agencies have demonstrated a persistent reluctance to use" the declaratory order provision of the APA. ACUS. Recommendation 2015-3 (Dec. 4, 2015), *printed in* Notice, Adoption of Recommendations, ACUS, 80 Fed. Reg. 78,161, 78,163 (Dec. 16, 2015); *see also* Jeffrey S. Lubbers & Blake D. Morant, *A Reexamination of Federal Agency Use of Declaratory Orders*, 56 Admin. L. Rev. 1097, 1100 (2004) (noting that "the relative disuse of declaratory orders is curious"). Nonetheless, ACUS has expressed its view that agencies can, and should, issue declaratory orders to provide an agency's view of a governing statute or its own regulations, and to make binding decisional law that can be applied with uniformity across individual adjudications. 80 Fed. Reg. at 78,161; *see also* Burnele V. Powell, *Administratively Declaring Order: Some Practical Applications of the Administrative Procedure Act's Declaratory Order Process*, 64 N.C. L. Rev. 277, 290–92 (1986)

(arguing that the Secretary of Interior should have issued declaratory order where agency adjudicatory body and federal court had reached conflicting views of scope of agency authority).

Fundamentally, DOL's suggestion that it was inappropriate to use the declaratory order process to set DOL policy on the propriety of the 2013 SPWDs was in significant tension with the remainder of the 2020 Notice—where the Secretary set policy for DOL as to the propriety of the 2013 SPWDs. Although denominated a "Notice of Withdrawal," the 2020 Notice in function served the same goals of certainty and finality in resolving the dispute between BALCA and the other Secretarial subordinates as a declaratory order would have done. Stating in section III of the Notice that the Secretary lacks authority to decide whether OFLC employees should follow the legal position contained in a BALCA decision, and then stating in section IV of the Notice that OFLC employees should follow the legal position contained in that BALCA decision was arbitrary and capricious. *See, e.g.*, *ANR Storage Co. v. FERC*, 904 F.3d 1020, 1024 (D.C. Cir. 2018) (noting that, to survive review under APA, an agency's "reasoning cannot be internally inconsistent").

2. The decision to adopt *Island Holdings* was unreasonable.

Not only was the Secretary's reasoning as to why a declaratory order was inappropriate arbitrary and capricious, his reasoning for adopting BALCA's *Island Holdings* view that the 2013 SPWDs were unlawful as the official policy of DOL was arbitrary and capricious as well.

a. The decision was based on an unreasonable legal interpretation.

First, the Secretary stated that it was appropriate to adopt the holding of *Island Holdings* because BALCA's opinion "sets forth the better view of law as to the 2013 SPWDs." 85 Fed. Reg. at 14,709. This statement represents an inadequately explained departure from DOL's prior position as expressed both in the 2013 Interim Final Rule and in the 2014 Notice, and does not "reflect fair and considered judgment." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2018). Accordingly,

it is owed no deference. *See id.*, 139 S. Ct. at 2417; *Skidmore v. Swift & Co.*, 323 U.S. 134, 149 (1944) (weight to be given administrative interpretation "depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control"); *see also Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994) ("[A] n agency's interpretation of a statute or regulation that conflicts with a prior interpretation is entitled to considerably less deference than a consistently held agency view." (quotation omitted)).

In the preamble to the 2013 Rule, DOL stated: "Upon 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." 78 Fed. Reg. at 24,055 (AR45). DOL explained that the orders in *CATA I* through *III* and "the statutory mandate to protect the domestic labor market" required the agency to "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." *Id.* at 24056 (AR46). Additionally, it noted that "the employer's obligation to pay the wage under the interim rule is reflected in Appendix B.1 to the ETA Form 9142, H-2B Application for Temporary Employment Certification, in which employers have certified as a condition of employment under the H-2B program that they will offer and pay 'the most recent prevailing wage … issued by the Department to the employer for the time period the work is performed.'" *Id.* at 24,055 (AR45) (citing DOL, Notice, Application of the Prevailing Wage Methodology in the H-2B Program, 76 Fed. Reg. 21,036, 21,036 (Apr. 14, 2011)).

In the 2014 Notice, DOL expanded on this rationale in detail. Addressing the *CATA* litigation, the agency noted that the district court's decision in *CATA II* held "that nothing in the

existing H-2B regulations precluded DOL from issuing certifications conditioned on a promise to pay a new prevailing wage as soon as one became effective." 79 Fed. Reg. at 75,812 (citing *CATA II*, 2010 WL 4823236, at *2–3).[6] It further noted that the district court in *CATA III* held that "prevailing wage determinations issued based upon the four-tiered wage rates in [the 2008] rule"—for example, the initial determinations issued to each of Plaintiffs' employers—"resulted in adverse effect on U.S. workers' wages,' and that the labor certifications based on such prevailing wages 'exceed the bounds of DOL's delegated authority.'" 79 Fed. Reg. at 75,182 (AR71) (quoting *CATA III*, 933 F. Supp. 2d at 711–12). Together, DOL stated, "these rulings make it clear that the CATA court expected that once DOL issued a valid regulatory method for determining the prevailing wage, the agency would also issue supplemental prevailing wage determinations to employers with current labor certifications to correct the unlawful wage issued with those extant certifications." *Id.*

Second, DOL reiterated that ETA Form 9142, Appendix B.1—which, as of 2011, required employers to attest that they would pay a wage that equaled or exceed the most recent "prevailing wage 'that is *or will be issued* by the Department' during the course of the certified employment"—provided alternate authority for the 2013 SPWDs. 79 Fed. Reg. at 75,182–83 (AR71–72) (emphasis added) (citing 76 Fed. Reg. at 21,036 (Apr. 14, 2011)).

In the 2020 Notice, however, DOL stated that the 2013 SPWDs were "inconsistent" with DOL regulations. In so doing, DOL conceded that nothing in the regulatory text specifically governed the issuance of SPWDs. 85 Fed. Reg. at 14,709 (AR4725). Nonetheless, it pointed to regulatory language providing that a wage determination "shall apply and shall be paid … at a

[6] The 2014 Notice erroneously labeled both the August 2010 and November 2010 decisions as "*CATA I*").

minimum, for the duration of employment" and that obliged employers to pay U.S. workers wages no lower than specified in the wage determination "during the entire period of the approved H-2B labor certification." 85 Fed. Reg. at 14,706 (AR4722) (citing and quoting 20 C.F.R. §§ 655.10(d), 655.20(f), and 6555.2(e) (2009)). According to DOL's new position, "[a]n employer could not agree to, or comply with, this obligation if DOL could raise PWDs during the certified employment." *Id.*

In this regard, DOL ignored the fact—discussed in the 2014 Notice—that the *CATA II* court had explicitly *rejected* such a view of these regulations as "clearly erroneous," 2010 WL 4823236, at *1. Addressing the same "shall apply and shall be paid" language, the court had stated:

> The DOL contends that this provision precludes the DOL from requiring employers to pay a higher wage because it mandates that an employer "shall" pay the PWD "for the duration of employment." The DOL appears to argue that the provision sets both a floor and a ceiling on the wage to be paid "for the duration of employment." But this construction glosses over the phrase "at a minimum," which manifestly sets a floor and not a ceiling…*Thus an employer must pay a valid wage for the duration of employment, but it does not follow that an employer must continue paying that wage after it has been deemed to be the product of an invalid regulation.*

Id. While the agency was not bound to follow a district court's interpretation of its regulations, it was required to at least address it, particularly because the court's interpretation was the explicit basis for a prior position. *See* 2014 Notice, 79 Fed. Reg. at 75,182 at AR71. The failure to address *CATA II* alone is a basis for vacatur and remand.

DOL's 2020 interpretation of its regulations was also illogical because it concluded that, while the Secretary could not adjust a prevailing wage determination after it was issued based on a change in the wage the law required to be paid, he *could* do so in other instances, "such as to correct an inadvertent error in a PWD." 85 Fed. Reg. at 14,709 n.13 (AR4725). But nothing in the text of the regulations that the Secretary relied on would allow such a distinction. If the regulations

mean that once a prevailing wage determination is issued, the wage therein remains the prevailing wage "for the duration of employment," that must be the case whether the Secretary seeks to correct an error of law, such as that reflected in Plaintiffs' employers' PWDs, or an "inadvertent error." If DOL regulations prohibit increasing the wages set in a PWD, there is no exception for inadvertent errors.

To the extent that the 2020 Notice addressed some of the reasons the agency had given in support of its prior position, the discussion was inadequate. The Notice simply stated that the *CATA III* decision (erroneously referred to as *CATA II*) "did not require issuance of the 2013 SPWDs," 85 Fed. Reg. at 14,710 (AR4726)—ignoring that the agency's previous position was explicitly based on both *CATA II* and *CATA III*, 79 Fed. Reg. at 75,182 (AR71). DOL also stated that "neither the IFR's preamble nor the Form 9142 attestation could have served as authority to issue the 2013 SPWDs." 85 Fed. Reg. at 14,710 (AR4726). As to the former, it stated that "a preamble cannot impose legal obligations that contradict the regulatory text." *Id.* (citation omitted). This precept is irrelevant because, as discussed above, there is no contradiction with the regulatory text. In any event, preamble language *can*, in some circumstances, bind an agency and/or regulated parties. *See NRDC v. EPA*, 559 F.3d 561, 564 (D.C. Cir. 2009) (noting that preamble statements may constitute binding, final agency action). And it is often considered as evidence of an agency's interpretation of a regulation. *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). Dismissing as irrelevant the 2013 Rule's preamble language thus does not reflect reasoned judgment.

DOL's rejection of the relevance of employers' explicit contractual agreement, via Form 9142, to pay the rates specified in supplemental prevailing wage determinations was also thinly reasoned. First, the agency stated, without citation, that the "regulations do not support" its prior view of this contract. 85 Fed. Reg. at 14,709 (AR4725). This conclusory assertion is hardly a sufficient basis for reversing a prior position—nor is it correct. *See Encino Motorcars*, 136 S. Ct. at 2127. Form 9142 creates a contractual obligation between employers and DOL. *See Frederick Cnty. Fruit Growers v. Dole*, 968 F.2d 1265, 1269 (D.C. Cir. 1992) (holding that the promise to pay particular piece rates contained in each employer's certification application is enforceable). Nothing in DOL regulations says otherwise. Second, the 2020 Notice states that enforcing employers' agreement to pay rates that might increase in the future would be "inconsistent with principles requiring proper notice to regulated parties of their legal obligations." 85 Fed. Reg. at 14,709 (AR4725). But given that participation in the H-2B program is entirely voluntary, and that employers had "proper notice" through Form 9142, which they signed, this assertion is illogical. Third, the 2020 Notice states that "the weight to be given to the" language in Form 9142, which was approved by the Office of Management and Budget and utilized by DOL consistently since 2011, was "diminished," because that language change was adopted at the same time as a 2011 rule changing the H-2B wage methodology, "which was barred from taking effect" due to an appropriations rider. *Id.* For one, the appropriations rider did not repeal the 2011 rule; it prohibited DOL from spending money to enforce it.[7] And Congress did *not* prohibit DOL from using the revised Form 9142 adopted via a different Federal Register publication; DOL, in fact, did use and

[7] As the Third Circuit explained in litigation related to other aspects of the 2013 Rule, that DOL could not spend money to enforce the other 2011 rule does not mean that DOL was allowed to reverse the positions expressed in that rule without reasoned explanations. *See Comité De Apoyo A Los Trabajadores Agricolas v. Perez*, 774 F.3d 173, 188 (3d Cir. 2014).

continues to use the language added to that form in 2011. There is thus no basis to suggest the contractual obligations willingly entered into by employers signing revised Form 9142 are not properly enforceable.

DOL's final reason for reversing its position as to the lawfulness of the 2013 SPWDs was that the SPWDs "[w]ere [i]nconsistent [w]ith the H-2B Labor Certification Program's [s]tructure and [p]rimary [p]urposes." 85 Fed. Reg. at 14,709 (AR4725). The 2020 Notice contends that, because DOL never required employers "to conduct additional recruitment of U.S. workers at the SPWD rate," the 2013 SPWDs would lead "employers to pay foreign H-2B workers a higher wage than they offered to U.S. workers in recruitment." *Id.* DOL did not explain how that outcome rendered the SPWDs unlawful. And while DOL acknowledged that the prevailing wage requirement serves to protect against wage depression both for the jobs in which certifications are issued and for "similarly employed workers," it reasoned that "these SPWDs cannot serve this purpose" as a result of DOL's seven-year delay. *Id.* The Secretary thus concluded that "*now* affirming the 2013 SPWDs" "would result in ordering back wages predominantly to H-2B workers" and not provide a benefit to "U.S workers whose wages may have been depressed in 2013." *Id.* at 14,709–10 (AR4725–26) (emphasis added). Putting aside whether this point would be a valid *policy* reason to act a certain way with respect to the 2013 SPWDs, it is certainly not a *legal* reason to conclude that the SPWDs were invalid *when they were issued*. In adopting BALCA's reasoning from *Island Holdings*, however, the agency adopted a legal position about the validity of SPWDs when issued. The fact that DOL delayed giving effect to the SPWDs for seven years, while making representations in this litigation and otherwise that it was going to do so, cannot have made the SPWDs unlawful when they were issued.

In short, because the 2020 Notice was based on an unreasonable interpretation of law, it was arbitrary and capricious, and should be set aside.

b. The Secretary's "prudential and programmatic" justifications were arbitrary and capricious.

Because the reasons given for jettisoning the prior interpretation that the SPWDs were *required* by law were arbitrary and capricious, the Court need not consider the agency's "prudential and programmatic" reasons for reversing its position as to the validity of the SPWDs. Nonetheless, these reasons were also arbitrary and capricious.

First, the 2020 Notice states 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 14,708–11 (AR4726). Both sides of this equation were unreasonable. The mere fact that a large number of regulated entities have challenged an agency's view of the law is not a valid independent basis for changing that view—particularly where, as here, doing so is to the detriment of third parties. Under this view, any time DOL adopted a regulation regarding prevailing wages that employers did not like, the employers could simply *en masse* seek review by BALCA—regardless of the merits of any such review requests—and DOL would be forced to cave. That is plainly not a reasonable view of law.

Moreover, DOL's conclusion that it would be difficult to enforce any finalized SPWDs, and thus any effort to finalize those SPWDs would not be worthwhile, failed to consider all relevant factors. First, the delay was DOL's fault. But more obviously, as DOL is well aware, if DOL had finalized the SPWDs, individual workers—such as Plaintiffs—could have commenced private enforcement actions. *See, e.g.*, *Cuellar-Aguilar v. Deggeller Attractions, Inc.*, 812 F.3d 614, 619–20 (8th Cir. 2015) (collecting cases and holding that H-2B workers may bring state law

claims against employers for failure to pay prevailing wage); *Zamalloa v. Thompson Landscape Servs., Inc.*, No. 4:17-cv-00519-ALM-KPJ, 2018 WL 3032677, at *3–6 (E.D. Tex. May 3, 2018), report and recommendation adopted, 2018 WL 2928083 (E.D. Tex. June 12, 2018) (denying motion to dismiss state law contract claims based on failure to pay H-2B prevailing wage); *Cordova v. R & A Oysters, Inc.*, 169 F. Supp. 3d 1288, 1291–94 (S.D. Ala. 2016) (same). Plaintiffs have stated they would pursue such actions. *See* ECF 16-6 ¶ 6; ECF 16-7 ¶ 6; ECF 16-8 ¶ 6; ECF 16-9 ¶ 6. While DOL may consider the amounts of money at issue not worth pursuing, for each Plaintiff, the amount would be quite significant. For example, Plaintiff Hilario Olvera Gutierrez survives on approximately $300 per month; a backpay award as small as $3,000 would allow him to pay housing and food costs for at least a year. ECF 16-10 at ¶¶ 2–3. Jorge Palafox Juarez has explained that $1,000 USD would ensure that he could pay his housing and food expenses for several months. ECF 16-11 ¶ 2; *see also* ECF 16-5 ¶¶ 3–5 (explaining economic realities facing Mexican H-2B workers).

Second, DOL's discussion of the reliance interests of "the H-2B workers and U.S. workers recruited in connection with the appealing employers' H–2B applications" and their employers, 85 Fed. Reg. at 14,711 (AR4727), was not sufficiently rational to comply with the obligation to consider serious reliance interests based on a former policy or interpretation when reversing that interpretation. *Encino Motorcars*, 136 S. Ct. at 2126. DOL disregarded any reliance interests of the workers because they "understood their work would be temporary, and they accepted and performed the work at the offered wage." 85 Fed. Reg. at 14,711 (AR4727). In enacting the H-2B program, though, Congress made clear that even temporary workers should be paid a prevailing wage. DOL cannot so cavalierly disregard its responsibility to prevent the H-2B program from "adversely affect[ing] wages and working conditions of similarly employed United States

workers." 8 U.S.C. § 1182(a)(5)(A)(i)(II); 8 C.F.R. § 214.2 (h)(6)(iv)(A). In addition, DOL went on to say that "it would not have been reasonable" for workers to rely on the SPWDs because "[f]ive years have passed" since the 2014 Notice was issued and "DOL never issued a final declaratory order overturning *Island Holdings*." 85 Fed. Reg. at 14,711 (AR4727). Workers like Plaintiffs, however, were relying not solely on the 2013 SPWDs and the 2014 Notice, but also on the position taken by DOL consistently from 2013 up to March 2020. And workers had not simply sat and waited since 2014; they brought at least three lawsuits to seek to compel DOL to act in accordance with its stated legal position. In each case, DOL affirmatively represented that the 2013 SPWDs were valid and that it would take steps to finalize those SPWDs, and it attempted to use that position as a shield to prevent workers from obtaining judicial relief. That attempt was successful in 2014 in *CATA IV* and in 2016 in *Gonzales-Aviles*. Most recently, DOL made that attempt in *this* case in September 2019, where it sought to dismiss this action on the ground that it "agrees with Plaintiffs' position on SPWD wages and opened a declaratory order proceeding to that effect." ECF 13-1 at 13. Given this September 2019 representation to the Court, as well as DOL's counsel's December 2019 representation that, in a matter of weeks, "the [OFLC] Administrator will issue a decision affirming the wage rates contained in the 2013 SPWDs," ECF 21-2, any suggestion that it would not have been reasonable for workers to rely on DOL's position because nothing had happened since 2014 is arbitrary and capricious.

After dismissing the reliance interests of the workers whom DOL had consistently said over the course of seven years were owed wages, DOL pointed to "reliance" interests of employers, concluding that it would be unfair for them to have paid wages higher than those in the initial prevailing wage determinations. 85 Fed. Reg. at 14,711 (AR4727). The agency did not suggest that employers had relied on DOL's consistently stated, public position of the validity of the

SPWDs. Rather, it suggested that employers had relied upon the initial 2013 prevailing wage determinations. *Id.* It pointed to nothing, however, that employers could have reasonably relied on at the time those prevailing wage determinations were issued for the proposition that DOL would not increase the wages set out in those prevailing wage determinations. To the contrary, the agency concedes that the Form 9142 agreements put those employers on notice "that it was *possible* DOL would issue SPWDs." *Id.* (emphasis in original). And two years before the employers signed those Form 9142 agreements, the *CATA* court had held that nothing barred DOL from issuing a supplemental prevailing wage determination where the initial prevailing wage determination "has been deemed to be the product of an invalid regulation." 2010 WL 4823236, at *1. DOL never took a contrary position in the time between issuance of that court decision and the issuance of the 2013 SPWDs. If employers were aware that it was possible that they would be required to pay workers like plaintiffs an increased wage, they could not rely on the proposition they would not be required to do so. Accordingly, the Secretary's reliance-based rationale was arbitrary and capricious.

II. The March 2020 Letters sent to Plaintiffs' employers should be vacated.

Each of the March 2020 Letters sent to Plaintiffs' employers, relieving them of their obligation to pay Plaintiffs the wages specified in the SPWDs, was also arbitrary and capricious and contrary to law. They too should be set aside.

The only reason given in each of the March 2020 letters was the Secretary's 2020 Notice and his adoption of BALCA's *Island Holdings* decision. *See* AR4735, AR4737, AR4744, AR4746, AR4748, AR4750, AR4752, AR4754, AR4780, AR4782. Because the 2020 Notice was itself arbitrary, capricious, and contrary to law, as discussed above, the March 2020 Letters were also arbitrary, capricious, and contrary to law. *Cf. D.A.M. v. Barr*, 486 F. Supp. 3d 404, 416 (D.D.C.

2020) ("[W[hen a court with jurisdiction finds that the plaintiffs before it were harmed by an agency decision issued under an illegal rule, the court should vacate that wrongful decision as a remedy."); *see also L.M.-M v. Cuccinelli*, 442 F. Supp. 3d 1, 36 (D.D.C. 2020) (vacating removal orders issued under directive deemed unlawful); *Koi Nation of N. Cal. v. U.S. Dep't of Interior*, 361 F. Supp. 3d 14, 59 (D.D.C. 2019) (vacating decision applying arbitrary and capricious regulation as arbitrary and capricious).

CONCLUSION

For the above-stated reasons, the Court should grant Plaintiffs' motion for summary judgment, vacate the 2020 Notice and March 2020 Letters issued to each of Plaintiffs' employers, and remand to DOL to timely take further action with respect to the 2013 SPWDs.

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Respectfully submitted,
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