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)

PLAINITFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' RENEWED MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In January 2020, in the guise of a single "Notice of Withdrawal," the Secretary of Labor took two actions. First, he reversed the Department of Labor (DOL)'s longstanding legal position—one advanced in this very litigation—as to the lawfulness of Supplemental Prevailing Wage Determinations (SPWDs) issued in 2013, and thus the obligations of employers to pay back wages to workers like Plaintiffs. The Secretary's reversal bound the Secretary's subordinates and compelled them to vacate the 2013 SPWDs—including those issued to Plaintiffs' employers. Second, as a result of DOL's new position on the law and "prudential considerations," the Secretary withdrew a proposed declaratory order that would have affirmed DOL's long-held position and bound his subordinates to give final effect to the 2013 SPWDs.

The January 2020 Notice and the letters sent to each of Plaintiffs' former employers implementing that notice and vacating the SPWDs that required those employers to pay Plaintiffs and other workers additional wages (the March 2020 Letters) were arbitrary, capricious, and contrary to law. As explained in Plaintiffs' motion for summary judgment, DOL's legal interpretations are unreasonable, it failed to consider relevant factors, and it relies on unexplained and unacknowledged departures from positions previously advanced both in rulemaking and in litigation. In seeking relief, Plaintiffs thus do not ask "this Court to substitute its own policy judgment" for that of the agency, Defs.' Mem. (ECF 49-1) 15, but rather invoke the Court's traditional role under the Administrative Procedure Act (APA), ensuring that challenged agency action was the result of reasoned decisionmaking.

DOL's memorandum in opposition is notable for what it does *not* say. While Plaintiffs argue that the January 2020 Notice was based on an unreasonable legal interpretation as to the lawfulness of the 2013 SPWDs, DOL does not address that interpretation at all. DOL likewise does not address Plaintiffs' arguments about the January 2020 Notice's discussion of reliance

interests. There, the Secretary audaciously asserted that workers like Plaintiffs could not have reasonably relied on the position that DOL espoused for seven years (including in proceedings where it argued this position barred workers from obtaining judicial relief), and that employers had reasonably relied on DOL *not* doing exactly what it kept telling courts and the public it *would* do. DOL's failure to defend either the legal interpretation contained in the January 2020 Notice or its consideration of reliance interests—that is, the Secretary's contemporaneous justification for his actions—constitutes forfeiture. Thus the Court need not go no further to vacate the January 2020 Notice and the March 2020 Letters, which DOL concedes were premised solely on that Notice.

Although DOL's failure to defend on these points makes the Court's consideration of DOL's other errors unnecessary, DOL's responses to Plaintiffs' other arguments also miss the mark. DOL misconstrues Plaintiffs' arguments about the Secretary's decision not to issue the proposed declaratory order, focusing on the facts that the issuance of a declaratory order is discretionary and that DOL had never before issued a declaratory order like the one proposed. Plaintiffs do not dispute those two facts. But an agency cannot wield its discretion arbitrarily and capriciously. And DOL's refusal to address the reasons why the agency had concluded in 2014 that a declaratory order *was* appropriate in this situation was arbitrary and capricious, as were the strained justifications for withdrawal that the agency did provide.

DOL's argument that Plaintiffs lack standing to challenge the March 2020 Letters, which relies on selective quotations from inapposite cases, is meritless. The unpaid wages Plaintiffs have identified—for actual work that *they* performed—constitute "specific economic injuries," DOL's curious assertion to the contrary notwithstanding. Defs.' Mem. 17. No case stands for the proposition that Plaintiffs must prove that their employers would comply with DOL wage orders

in order to establish standing, and the fact that Plaintiffs were not a party to their employers' appeals of the SPWDs does not mean they have no more than a "generally available grievance about government." Defs.' Mem. 22–23. Plaintiffs are adversely affected by DOL's abrupt about-face releasing their former employers of their obligation to pay them for the work they performed. They thus have standing to challenge the agency's action under both Article III and the APA.

ARGUMENT

I. The January 2020 Notice was arbitrary, capricious, and contrary to law.

Through the January 2020 Notice, DOL accomplished two distinct actions.[1] First, via the Notice, the Secretary affirmatively adopted a new position as to the lawfulness of the 2013 SPWDs, which was binding on all of the Secretary's subordinates. *See* DOL, Notice of withdrawal, 85 Fed. Reg. 14706, 14709–10 (Mar. 13, 2020). Second, based on that new legal position and "prudential considerations," DOL terminated the pending declaratory order proceedings. *Id.* at 14708–08, 14711. As explained in Plaintiffs' opening memorandum, DOL failed to comply with the reasoned decisionmaking requirements of the APA as to both aspects of the Notice.

A. DOL's adoption of a new position as to the lawfulness of the 2013 SPWDs was arbitrary, capricious, and contrary to law.

Like any other agency action, an agency action reversing a previously held position is subject to the requirements of reasoned decisionmaking. *See Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 57 (1983) ("[A]n agency changing its course must supply a reasoned analysis."). Where "the new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account," an agency must provide a "more detailed justification

[1] DOL does not dispute that the January 2020 Notice is reviewable agency action under the APA. *Cf.* Pls.' Mem. (ECF 44) 16–18 (explaining why January 2020 notice is reviewable).

than what would suffice for a new policy created on a blank slate." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *see Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 136 S. Ct. 2117, 2126 (2016). The January 2020 Notice did not meet this standard.

In the January 2020 Notice, DOL explained that it was jettisoning its prior position and adopting the position that the 2013 SPWDs were unlawful because (1) the BALCA decision in *Island Holdings* "reflects the better view of the law," and (2) "prudential and programmatic considerations" weighed in favor of changing position. 85 Fed. Reg. at 14706; *see also* 85 Fed. Reg. at 14709–11. In their opening memorandum, Plaintiffs explained in detail why both of these explanations were arbitrary and capricious. *See* Pls.' Mem. (ECF 44) 24–34.

DOL has largely failed to respond to Plaintiffs' arguments, doing little more than asserting that "the Notice of Withdrawal explained its decision and engaged in reasoned decisionmaking." Defs.' Mem. at 14–15. Misconstruing *Fox*, DOL suggests that a court must rubber-stamp any agency reversal so long as the agency acknowledged that it was changing position and provided *some* reason for its change. Defs.' Mem. 13. This argument "misunderstands the lesson of *Fox Television*." *Physicians for Social Responsibility v. Wheeler*, 956 F.3d 634, 646 (D.C. Cir. 2020). As the D.C. Circuit has explained, while *Fox* makes clear that an agency is not required to show that a new interpretation is better than a prior one, a court conducting judicial review must still ensure "that the agency's action 'was the product of reasoned decisionmaking.'" *Id.* (quoting *State Farm*, 463 U.S. at 52). Accordingly, courts in this Circuit regularly evaluate the sufficiency of an agency's "explanations for [its] changed position," and vacate actions where the agency has failed to consider a relevant factor or inadequately explained its decision. *See, e.g.*, *Air Alliance Houston v. EPA*, 906 F.3d 1049, 1066–69 (D.C. Cir. 2018) (finding agency did not engage in reasoned decisionmaking in adopting changed position); *Physicians for Soc. Resp.*, 956 F.3d at 644–47

(finding agency action arbitrary and capricious where agency "failed to rationally address its previous conclusion"); *Ala. Educ. Ass'n v. Chao*, 455 F.3d 386, 396–97 (D.C. Cir. 2006) (finding DOL's explanation for adopting new legal position inadequate); *see also Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 136 S. Ct. 2117, 2126 (2016) ("[A] reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."). The Court should do the same here, for the reasons explained in Plaintiffs' opening memorandum, as to which DOL has not meaningfully responded.

1. DOL makes no effort to defend its new legal interpretation.

The January 2020 Notice was based on DOL's new position that the 2013 SPWDs were unlawful. *See* 85 Fed. Reg. at 14709–10. Plaintiffs devoted more than six pages of their opening memorandum to explaining why the new legal interpretation is unreasonable. Pls.' Mem. 24–31. They explained, among other things, that DOL ignored the reasons it previously gave for adopting the contrary view, relied on a construction of the regulations that one court had already deemed "clearly erroneous," advanced distinctions unsupported by the regulatory text, and illogically dismissed the relevance of binding contracts between employers and DOL. *Id*.

Nowhere in its response does DOL defend its new interpretation of the law or address the merits of Plaintiffs' arguments. Instead, DOL characterizes Plaintiffs' arguments about DOL's legal interpretation as "disagreement with the policy rather than the process" and cites to the Notice. Defs.' Mem. 14. By failing to address its legal interpretation in its memorandum, DOL "has forfeited any defense" of that interpretation. *Mo. Dep't of Soc. Servs. v. U.S. Dep't of Health & Human Servs.*, No. CV 18-2587 (JEB), 2019 WL 4709685, at *4 (D.D.C. Sept. 26, 2019) (citing *Global Tel*Link v. FCC*, 866 F.3d 397, 408 (D.C. Cir. 2017)). "The Government's nonexistent defense of the actual rationale provided by the agency thus deserves no review by this Court." *Id.*

Since DOL does not dispute that its action was based on the conclusion that the 2013 SPWDs were lawful, and DOL has forfeited any argument that it resolved that legal question correctly—or even reasonably, the Court may vacate the Notice's adoption of the *Island Holdings* decision as the view of DOL without going any further.

2. **"Prudential considerations" do not demonstrate a reasoned basis for DOL's reversal.**

DOL accuses Plaintiffs of giving "short shrift … to the discretionary and prudential considerations that were also explicitly made within the Notice of Withdrawal," citing to Plaintiffs' four-page discussion of these considerations. Defs. Mem. 15 (citing Pls.' Mem. 31–34). The 2013 SPWDs, however, could not be unlawful "prudentially." While the fact that DOL, as a matter of policy preference, no longer wanted to hold employers responsible for paying the wages set forth in the 2013 SPWDs might justify a failure to take enforcement action against those employers, it is not a basis to conclude that the 2013 SPWDs were unlawful. If, as DOL asserted for years, contracts, regulations, and the Immigration and Nationality Act required employers to pay the wages set forth in the 2013 SPWDs, it was not within the Secretary's "discretion" to adopt a contrary legal position.

Moreover, Plaintiffs *did* engage with the "discretionary and prudential considerations" offered by DOL; their opening memorandum explained in detail why each was unreasonable. By contrast, DOL's memorandum ignores one "consideration" explicitly cited in the Notice—its claim that, given the passage of time, workers could not have reasonably relied on the 2013 SPWDs—even though, over that time, DOL repeatedly represented in multiple proceedings, including this one, that it intended to finalize them. *See* Pls.' Mem. 32–33 (discussing 85 Fed. Reg. at 14711). DOL also fails to defend its claim that, despite DOL's repeated statements to the contrary, employers relied on the notion that they would *not* have to pay the wages contained in

the 2013 SPWDs. *Id.* at 33–34 (discussing 85 Fed. Reg. at 14711). DOL has thus forfeited any argument that its discussion of reliance was reasonable. *See Mo. Dep't of Soc. Servs.*, 2019 WL 4709685, at *3–4. This forfeiture is fatal to the Notice's survival. And although DOL refers to its consideration of reliance interests as "prudential," the APA requires reasoned consideration of reliance interests when an agency reverses its policy. *See, e.g.*, *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) (vacating agency reversal that failed to reasonably assess reliance interests); *Nat'l Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1113–15 (D.C. Cir. 2019) (same).

Finally, DOL claims that its "cost-benefit analysis" and limited resources provided a basis for it to jettison its longstanding legal interpretation. Defs.' Mem. 15. That argument is not responsive to those advanced in Plaintiffs' opening brief, including the arguments that the failure of DOL to consider that employees could utilize private rights of action to compel employers to pay wages set out in final SPWDs, and that the amount of money at issue could be life-changing for low-wage workers. *See* Pls.' Mem. 31–32.

B. DOL's decision to withdraw the proposed declaratory order for other reasons was arbitrary and capricious.

DOL devotes the majority of its memorandum to defending its decision not to issue the proposed declaratory order—which is distinct from the affirmative action that it *did* take in the January 2020 Notice. As DOL concedes that the Secretary based the decision to withdraw the proposed declaratory order on the new view as to the lawfulness of the SPWDs, Defs.' Mem. 20, the withdrawal was arbitrary and capricious for the reasons discussed above. The other reasons given in the two paragraphs of the January 2020 Notice also reflect arbitrary and capricious decisionmaking.

DOL's arguments largely misconstrue Plaintiffs' claims. DOL makes much of the fact that the Secretary was not legally required to issue the proposed declaratory order. Defs.' Mem. 16;

see id. at 19. Plaintiffs agree. But Plaintiffs have not brought a claim seeking to compel the issuance of such an order pursuant to 5 U.S.C. § 706(1); rather, they claim that the Secretary's decision not to issue the order was arbitrary, capricious, and contrary to law, and should be vacated pursuant to 5 U.S.C. § 706(2). *See* Amended Compl. ¶¶ 47, 62–65; Pls.' Mem. 19–24. And while DOL is correct that the issuance of a declaratory order is discretionary, "an agency's exercise of discretion must be both reasonable and reasonably explained." *Multicultural Media, Telecom & Internet Council v. FCC*, 873 F.3d 932, 937 (D.C. Cir. 2017).

In their opening memorandum, Plaintiffs noted that the January 2020 Notice was unclear about whether the Secretary had concluded that he was *prohibited* from using a declaratory order as he had proposed in 2014, or whether, as a matter of discretion, he was choosing not to do so. Pls.' Mem. 22–33. DOL asserts that this point is "belied by the Notice of Withdrawal itself," but still does not clearly state whether DOL believes that the Secretary had authority to issue the declaratory order he proposed. Defs.' Mem. 20. And, again, the language of "the Notice of Withdrawal itself" is hardly clear, stating "Existing DOL regulations, unlike the regulations of some agencies, do not contemplate such orders or provide procedures for their issuance. Indeed, DOL's regulations provide no mechanism at all for a Department official to review BALCA decisions regarding H-2B prevailing wage determinations." 85 Fed. Reg. at 14708–09. The Secretary's statement that there was no "appropriate procedural mechanism" by which he could adopt a view of the lawfulness of the 2013 SPWDs, 85 Fed. Reg. at 14709, suggests the Secretary thought—erroneously—that he lacked the authority to do so—not merely that he was *choosing* not to do so.

Further, even if the Notice were clear that the Secretary was exercising his discretion, the six sentences in the January 2020 Notice did not adequately explain the Secretary's reversal of

position from the January 2014 Notice of Intent, which stated that a declaratory order *was* an appropriate procedural mechanism to be used in these circumstances. *See* DOL, Notice of intent to issue declaratory order; request for comment, 79 Fed. Reg. 75179, 75183–84 (Dec. 17, 2014). While DOL asserts that the decision not to issue a declaratory order was not a "true 'reversal'" because the 2014 Notice was merely a proposal, Defs.' Mem. 18, the principle that agencies must acknowledge and explain when they depart from previously stated positions is not tied to the question of whether the agency's prior position had the force of law. Rather, it "is simply a species of the more general requirement—present in all APA cases—that an agency provide a reasoned explanation for its action." *Physicians for Soc. Resp.*, 956 F.3d at 646 (cleaned up). Although the Secretary was not required to proceed with issuing a declaratory order, his decision not to do so could not be based on arbitrary and capricious reasoning—and courts regularly review final agency action that departs from a proposal on such grounds. *See, e.g.*, *Int'l Union, United Mine Workers of Am. v. U.S. Dep't of Labor*, 358 F.3d 40, 43–45 (D.C. Cir. 2004) (finding DOL failed to provide an adequate explanation for withdrawing proposed rule).

As with any other agency action, the Secretary's decision not to proceed with a declaratory order was arbitrary and capricious if he "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." *State Farm*, 463 U.S. at 43. The decision should also be set aside if the Secretary failed to "respond to 'significant points' and consider 'all relevant factors' raised in public comments." *Transp. Trades Dep't, AFL-CIO v. Nat'l Mediation Bd.*, No. 1:19-CV-03107 (CJN), 2021 WL 1209301, at *5 (D.D.C. Mar. 31, 2021) (quoting *Carlson v. Postal Reg. Comm'n*, 938 F.3d 337, 344 (D.C. Cir. 2019)). The six sentences the Secretary provided to justify why he was departing from his

2014 view were insufficient.

As explained in Plaintiffs' opening memorandum, the Secretary failed to acknowledge that he was reversing his position both as to the propriety of a declaratory order in these circumstances and as to the ability of BALCA to decide decisions of law and policy that bound the Secretary. He did not address the reasons that he and DOL had given in 2014 and in litigation for the contrary views, nor did he address any of the comments submitted explaining why the proposed declaratory order was an appropriate invocation of 5 U.S.C. § 554(e). He also failed to acknowledge and address the obvious constitutional concerns that resulted from his new view, and his interpretation of existing law was incorrect. *See* Pls.' Mem. 19–22.

DOL's rebuttal is non-responsive. First, it argues that the Secretary decided to "engage in the more standard form of rulemaking to address the issue of Secretarial review of BALCA decisions in future cases." Defs.' Mem. 19. Although DOL is correct that rulemaking can often be used interchangeably with adjudications, *id.* at 20, the rulemakings that DOL commenced in 2020 are not a substitute for the Declaratory Order: They will not provide the Secretary any additional tools to review BALCA's *Island Holdings* decision. Additionally, that the Secretary decided to conduct rulemaking does not change the fact that the January 2020 Notice took the position that, under *existing* law, BALCA interpretations of law and policy *were* binding on the Secretary. *See* 85 Fed. Reg. at 14708–09. While the Secretary decided that such an outcome was not desirable and would seek to change the existing regulations so that future BALCA interpretations were reviewable, the Notice nonetheless reversed DOL's consistent position over the prior six years. *See* Pls. Mem. 19–20 (citing DOL positions in both 2014 notice and in litigation). Thus, the Secretary was required to acknowledge and explain that reversal. *See Fox*, 556 U.S. at 515. He did not.

DOL's rulemaking plans also say nothing about the legal soundness of the Secretary's view that there was no "appropriate procedural mechanism" by which he could set aside law and policy decisions made by the agency employees that, at the time, made up BALCA. 85 Fed. Reg. at 14709. DOL does not defend its position in its memorandum, nor dispute that its position—that the Secretary had no way of overruling agency employees—raises obvious constitutional concerns. *See* Pls.' Mem. 28 (discussing *Lucia v. SEC*, 138 S. Ct. 2044, 2050 (2018)). DOL is correct that there is "no constitutional cause of action" in this case, Defs.' Mem. 20, but there is a claim challenging the Secretary's action as arbitrary and capricious. And as explained in Plaintiffs' opening memorandum, the failure to consider an obvious constitutional concern renders an action arbitrary and capricious. *See* Pls.' Mem. 22 (citing *Fox*, 556 U.S. at 553; *Nat'l Urban League v. Ross*, 489 F. Supp. 3d 939, 981–90 (N.D. Cal. 2020)). While DOL suggests that the Appointments Clause issue is irrelevant because the January 2020 Notice was issued by the Secretary himself, Defs.' Mem. at 20, the entire thrust of the January 2020 Notice was that the Secretary did *not* consider himself free to make any decision that departed from the views of the "lesser functionaries in the Government's workforce" that constituted BALCA. *Lucia*, 137 S. Ct. at 2050. According to the Supreme Court, that view was wrong under the Constitution.

Finally, DOL fails to address the inherent inconsistency between the Secretary's use of the January 2020 "Notice" terminating a declaratory order proceeding to affirmatively adopt a new legal position to resolve a dispute with BALCA, on the one hand, and his conclusion that declaratory order proceedings are not the appropriate mechanisms for adopting legal positions to resolve disputes with BALCA, on the other. *See* Pls.' Mem. 24. DOL's response that "Plaintiffs do not even contest the fact that DOL has never issued such a declaratory order in over a century" is a *non sequitur*. Plaintiffs are also unaware of any situation where a DOL notice withdrew a

proposed order or rule and formally adopted a legal position contrary to one that the agency had made consistently for seven years—yet the novelty of DOL's action is not a basis for ruling against DOL.

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

Defendants concede that the validity of the March 2020 Letters turns on the validity of the Secretary's adoption of a new legal position in the January 2020 Notice. *See* Defs.' Mem. 23. The Court should thus vacate those letters since the January 2020 Notice was arbitrary and capricious.

DOL's only additional argument is that Plaintiffs lack standing to challenge agency action that released their employers of a legal obligation to pay them back wages. First, DOL suggests that Plaintiffs have not established an injury in fact. Defs.' Mem. 21. But the record contains uncontroverted evidence that Plaintiffs were not paid the wages specified in the 2013 SPWDs. DOL's suggestion that Plaintiffs' assertions of injury are based on no more than "conclusory allegations of an affidavit" is mindboggling. Defs.' Mem. 22 (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990)). Each Plaintiff has submitted an affidavit specifying the precise wage rate he was paid and that he has not received any increased wages. *See, e.g.*, ECF 16-6 (Davila Calixto Decl.) ¶¶ 4–5; ECF 16-7 (Aviles Romero Decl.) ¶¶ 4–5; ECF 16-8 (Olvera Gutierrez Decl.) ¶¶ 4–5; ECF 16-9 (Palafox Juarez Decl.) ¶¶ 4–5. The SPWDs—contained in the administrative record produced by DOL and cited in Plaintiffs' opening memorandum—identify the precise wage rate that each Plaintiff should have been paid, which is higher than the wages each Plaintiff has sworn they were paid. AR4704–05; AR4600–01; AR4527–28; AR4484–87 (cited in Pls.' Mem. 6–7). This evidence establishes "specific economic injuries." Defs. Mem. 21.

To the extent that Defendants suggest that Plaintiffs have to prove that their former employers would comply with the 2013 SPWDs if DOL allows them to take final effect, DOL is

wrong.[2] To establish standing, "a party seeking judicial relief need not show to a certainty that a favorable decision will redress its injury," but rather only a substantial likelihood of redress. *Teton Historic Aviation Fdn. v. U.S. Dep't of Defense*, 785 F.3d 719, 726 (D.C. Cir. 2015) (cleaned up). This requirement is met "where a challenged government action permitted the third party conduct that allegedly caused a plaintiff injury, when that conduct would have otherwise been illegal." *Animal Legal Def. Fund v. Glickman*, 154 F.3d 426, 437 (D.C. Cir. 1998); *see also LaRoque v. Holder*, 650 F.3d 777, 790 (D.C. Cir. 2011); *Marouf v. Azar*, 391 F. Supp. 3d 23, 34–35 (D.D.C. 2019). That is exactly what has happened here: Plaintiffs' employers' failure to pay the wages specified in the 2013 SPWDs would have been illegal absent DOL's vacatur of those SPWDs. The suggestion that the employers would comply with final wage determinations issued by DOL "does not rest on mere speculation about the decisions of third parties; it relies instead on the predictable effect of Government action on the decisions of third parties." *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2566 (2019).

DOL's speculation that Plaintiffs' employers might flout final prevailing wage determinations, in violation of binding regulations and contractual obligations, does not defeat Plaintiffs' standing. If the possibility that a regulated entity would have violated the law defeated standing, no plaintiff could ever challenge a deregulatory action. But that has never been the law. Moreover, if Plaintiffs' employers chose to ignore final SPWDs, Plaintiffs could—and would—sue those employers to compel them to comply with their legal obligations. *See* Davila Calixto Decl. ¶ 6; Aviles Romero Decl. ¶ 6; Olvera Gutierrez Decl. ¶ 6; Palafox Juarez Decl. ¶ 6; *see also*

[2] DOL argues this means Plaintiffs have not suffered an injury-in-fact, Defs.' Mem. 21–22, it would more properly be construed as a challenge, albeit a flawed one, to causation or redressability. DOL does not appear to dispute that Plaintiffs have not been paid the wages they claim they are entitled to (and DOL agreed they were entitled to for seven years), only that DOL is not responsible for that or cannot provide them relief.

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 to compel employers to pay DOL-certified prevailing wage). Such a path to relief exceeds the "merely speculative" bar, *Bennett v. Donovan*, 703 F.3d 582, 589–90 (D.C. Cir. 2013), particularly because Plaintiffs have retained counsel and persisted in seeking to recover these wages for eight years.

Also without merit is DOL's suggestion that, because Plaintiffs were not a party to the adjudicatory proceedings between DOL and their employers over the wages that Plaintiffs were to be paid, Plaintiffs have only a "generally available grievance about government." Defs.' Mem. 22–23 (citing *Lujan*, 504 U.S. at 573–74). Article III does not require a plaintiff to have been a party to the adjudication that caused them injury; it requires only a concrete injury traceable to the challenged action. Likewise, the APA allows any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action," to obtain judicial review. 5 U.S.C. § 702.[3] Nothing in *Humane Society of the United States v. Perdue*, 935 F.3d 598 (D.C. Cir. 2019), on which Defendants rely, suggests otherwise. In that case, the D.C. Circuit held that the plaintiff's declaration failed to show "how his pork business [was] harmed." *Id.* at 604. Here, however, the record makes clear how Plaintiffs were harmed and how that harm was more than injury to the general public.

Finally, DOL makes scattered references to the need for "third-party practice" related to Plaintiffs' employers. *See, e.g.*, Def.'s Mem. 21. But the employers' interests do not preclude the

[3] This case is not one where plaintiffs seek to challenge an agency adjudication based on injury suffered solely from its precedential value. *See, e.g.*, *Am. Fam. Life Assur. Co. of Columbus v. FCC*, 129 F.3d 625, 629 (D.C. Cir. 1997) (holding that "the mere precedential effect of an agency's rationale in later adjudications is not an injury sufficient to confer standing on someone seeking judicial review of the agency's ruling" (cleaned up)). Rather, here, Plaintiffs are directly harmed by the challenged adjudications.

Court from vacating the March 2020 Letters as arbitrary and capricious. The employers would be free to seek judicial review of any new action that DOL takes on remand. Moreover, the employers' participation is not required here to provide Plaintiffs the complete relief they seek: the restoration of the legal obligation to pay.[4] Notably, Plaintiffs' employers were explicitly advised of the pendency of this action in January 2020. *See* AR4755–4778. In the ensuing twenty months, they have made no efforts to participate in this action.

CONCLUSION

For the reasons stated above and in Plaintiffs' opening memorandum, the Court should grant Plaintiffs' motion for summary judgment, deny Defendants' cross-motion, vacate the January 2020 Notice and March 2020 Letters issued to each of Plaintiffs' employers, and remand to DOL to take prompt action with respect to the 2013 SPWDs.

Dated: October 18, 2021

Respectfully submitted,
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[4] Plaintiffs have no claim under the APA against their employers. *See, e.g.*, *Mwabira-Simera v. Howard Univ.*, 692 F. Supp. 2d 65 (D.D.C 2010) ("The APA applies only to agencies of the federal government."). And they could not bring a claim against those employers under state law to collect wages owed *because* of the challenged DOL action.