UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MIGUEL GARCIA, ALBERTO OLVERA GOMEZ, JOSE BOTELLA AVILA, GERALD PRINCILUS, and FARM LABOR ORGANIZING COMMITTEE, Plaintiffs, v. R. ALEXANDER ACOSTA, in his official capacity as Secretary of Labor, and U.S. DEPARTMENT OF LABOR, Defendants.	)	Civil Action No. 18-1968(RDM)

PLAINTIFFS' MEMORANDUM IN OPPOSITION
TO DEFENDANTS' MOTION TO DISMISS OR TRANSFER
OR, IN THE ALTERNATIVE, TO STAY ALL PROCEEDINGS

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INTRODUCTION

Plaintiffs, four individual agricultural workers based in Texas, Florida, and Arizona, and a labor organization headquartered in Ohio that represents nearly 8,000 agricultural workers in the Eastern United States, filed this action against the Secretary of Labor and the Department of Labor (collectively, DOL). The case challenges both a nationwide policy and practice by which DOL certifies jobs offering wages at rates lower than mandated by existing law as part of the "H-2A" temporary foreign worker visa program and five specific certifications for jobs in Montana, Nevada, Nebraska, North Dakota, and South Carolina. Plaintiffs allege that DOL is refusing to consider whether the wages offered are at least as high as the prevailing wage, as it is required by regulation to do, unless a state agency has conducted a survey and made a formal finding as to the prevailing wage. DOL has adopted this policy and practice even though it is not contained in the regulations, and even though other sources of prevailing wage data are available. As a result of this practice, which plaintiffs allege to be both substantively and procedurally unlawful, wages for both U.S.-based agricultural workers and H-2A workers are artificially depressed.

DOL's motion asks this Court not to reach the merits of the case. None of its arguments are supported by the relevant case law or the record.

First, combining theories of mootness and ripeness, DOL asserts that its policy is immune from judicial review because any as-applied challenge would be mooted before the case could be resolved and because any facial challenge is too "general" to be ripe. But plaintiffs have alleged specific, current, ongoing harms as a result of DOL's actions. To the extent any of their claims are moot or would become moot due to the passage of time, the "capable of repetition while evading review" exception to mootness plainly applies. As to ripeness, DOL's consideration of a possible

amendment of the underlying regulations does not render a challenge to the current policy, which is final and in effect, unripe.

Second, DOL requests transfer of this case to Illinois based on an assertion that "all of the events relevant to Plaintiffs' Complaint … were adjudicated in Chicago, Illinois." Defs.' Mem. of Supp. Points and Authorities (Defs.' Mem.) (ECF 9-1) at 2. This bare statement, unsupported by evidence, is insufficient to overcome the presumption in favor of plaintiffs' chosen forum. Contrary to DOL's argument, this case, involving plaintiffs located around the country suing a federal official and agency located in the District of Columbia and challenging a nationwide policy both on its face and as applied to jobs located throughout the country, is not an Illinois "local matter." *See id.* at 17. The administration of the H-2A program is a national concern, and the relevant factors all weigh in favor of maintaining this action in this Court.

Finally, DOL requests a stay of the case pending a rulemaking that has not even begun. The equities do not support a stay. Even if DOL were to promulgate a new rule in the future—which may or may not happen—plaintiffs are being harmed by depressed wages now. Any rule that may issue in several years will not retroactively legitimize DOL's unlawful actions or the harms they have caused in the meantime. This Court should not allow DOL to act unlawfully now because the law may change in the future.

The motion should be denied in its entirety.

FACTS

To address temporary labor shortages, Congress created a non-immigrant visa program that allows employers to hire foreign workers to perform agricultural labor when there are not enough qualified and available U.S. workers to fill open jobs. This program is referred to as the H-2A program, taking its name from one of the relevant provisions of the Immigration and Nationality

Act (INA), 8 U.S.C. § 1101(a)(15)(H)(ii)(a). Under the INA, DOL is tasked with ensuring that the program does not "adversely affect the wages and working conditions" of U.S. workers. 8 U.S.C. § 1188.

"To protect domestic jobs, the Department of Labor has promulgated regulations that set minimum wages and working conditions for H-2A workers and their domestic counterparts." *Hispanic Affairs Project v. Acosta*, 901 F.3d 378, 383 (D.C. Cir. 2018); *see also* Compl. (ECF 1) ¶ 2. These regulations, particularly those related to the wages to be paid to H-2A workers, have been subject to frequent changes over the years. *See, e.g.*, *N.C. Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 771 (4th Cir. 2012) (Wilkinson, J., concurring) (noting the "political back-and-forth" in H-2A regulations over time). Most recently substantively amended in 2016, the H-2A regulations establish a detailed process by which DOL's Office of Foreign Labor Certification (OFLC) grants H-2A employers "temporary employment certifications" after reviewing the proposed jobs for compliance with various requirements. 20 C.F.R. Part 655, Subpart B. Currently, 20 C.F.R. § 655.120, the "Offered Wage Rate" provision, mandates that employers of H-2A workers must offer both U.S. workers and foreign workers the highest of four wages: (1) the Adverse Effect Wage Rate (AEWR), as calculated by DOL pursuant to 20 C.F.R. § 655.1300; (2) "the prevailing hourly wage or piece rate"; (3) "the agreed-upon collective bargaining wage;" or (4) "the Federal or State minimum wage." 20 C.F.R. § 655.120(a); *see also Hispanic Affairs Project*, 901 F.3d at 383 (summarizing provision). Regulations prohibit OFLC from granting certification where an employer is not in compliance with the Offered Wage Rate provision. 20 C.F.R. § 655.161(a).

The term "prevailing hourly wage or piece rate" is defined as the "wage established pursuant to 20 CFR 653.501(d)(4)." 20 C.F.R. § 655.103. When the Offered Wage Rate provision

was last amended in 2010 and through October 17, 2016, 20 C.F.R. § 653.501(d)(4) referred to "the prevailing wages and working conditions among similarly employed agricultural workers in the area of intended employment or the applicable Federal or State minimum wage, whichever is higher." As of October 17, 2016, that language was moved to 20 C.F.R. § 653.501(c)(2)(i). 20 C.F.R. § 653.501(d)(4) no longer references wages at all.

Plaintiffs' complaint focuses on a DOL policy and practice that conflicts with the Offered Wage Rate provision. Specifically, DOL considers whether an offered wage meets or exceeds the prevailing wage only when a state workforce agency (SWA) has conducted a survey of the relevant job and that survey has produced a "finding" as to the prevailing wage rate. Where a SWA does not conduct a wage survey, or where the SWA conducts a survey but makes "no finding," DOL does not make any attempt to determine whether the wage offered equals or exceeds the prevailing wage, measured by any method, prior to issuing a certification. DOL states on its website that, in these cases, "the employer shall offer and pay the worker(s) the legal state or Federal minimum, the agreed-upon collective bargaining wage rate or the Adverse Effect Wage Rate (AEWR) for that state, whichever is highest." Compl. ¶ 29; *see also* Decl. of Adam R. Pulver (Pulver Decl.), Exs. 1, 2.

Plaintiffs allege that DOL's policy and practice of ignoring the prevailing wage is contrary to the regulation, which allows DOL to grant certifications only where the offered wage meets or exceeds each of the four wages. It is also contrary to the statute, given DOL's acknowledgment that there are many instances where the local prevailing wage *exceeds* the AEWR, and thus a higher wage is needed to address the "potential for the entry of foreign workers to depress the wages and working conditions of domestic agricultural workers." *See* Employment & Training Admin. & Wage & Hour Div., DOL, Final Rule, Temporary Agricultural Employment of H-2A

Aliens in the United States, 75 Fed. Reg. 6884, 6891-92, 6893 (Feb. 12, 2010). Further, because neither the statute nor any regulation defines the prevailing wage as that determined by a SWA survey, DOL's determination that a SWA survey is the *only* relevant source of prevailing wage data, and its refusal to consider any other available data, is arbitrary and capricious. It is particularly so given that, since 1998, with respect to other temporary employment programs, DOL has used data collected by DOL's Bureau of Labor Statistics via the Occupational Employment Survey (OES) to calculate the prevailing wage.[1] *See* Compl. ¶ 26. In addition, DOL's policy and practice of simply ignoring the prevailing wage requirement in the absence of a SWA survey finding is a de facto amendment of the regulations, and thus could not be adopted without undertaking notice-and-comment rulemaking.

PROCEDURAL BACKGROUND

Plaintiffs in this action are four U.S. agricultural workers, Miguel Garcia, Alberto Olvera Gomez, Jose Botella Avila, and Gerard Princilus, as well as the Farm Labor Organizing Committee (FLOC), a labor organization that represents H-2A workers and U.S. workers in the eastern half of the United States. Plaintiffs commenced this action on August 23, 2018, bringing five separate claims under the Administrative Procedure Act (APA). The first two claims challenge as arbitrary, capricious, and contrary to law five individual certifications that DOL granted to H-2A employers in the preceding six months, without regard to the prevailing wage. Compl. ¶¶ 51-56 (the wrongful

[11] Contrary to DOL's suggestion, Defs.' Mem. at 4, plaintiffs do not allege that the only way DOL could comply with its regulations is by utilizing the OES prevailing wage. Rather, they allege that DOL is required to do *something* to determine whether an H-2A employer is offering a wage that exceeds the prevailing wage. The fact that DOL, for other visa programs, has determined that the OES prevailing wage represents "the average wage paid to similarly employed workers in a specific occupation in the area of intended employment," Compl. ¶ 26, shows that DOL has options other than reading the prevailing wage requirement out of the regulation and that the harm to plaintiffs is not speculative.

certification claims). For the Court's reference, the aspects of those wrongful certifications relevant to the pending motion are summarized as follows:

Employer/Location	**Date of Certification**	**Dates of Work**
McCabe Agribusiness, Inc., Sheridan County, MT (Compl. ¶ 31)	February 12, 2018	March 17, 2018-November 30, 2018
Peri & Sons Farms, Inc., Lyon County, NV (Compl. ¶ 34)	June 22, 2018	August 1, 2018-October 15, 2018
Daniels Produce, LLC, Platte County, NE (Compl. ¶ 37)	June 4, 2018	July 5, 2018-November 15, 2018
United Agronomy, LLC, Mountrail County, ND (Compl. ¶ 40)	Mar. 9, 2018	April 1, 2018-December 1, 2018
Del Valle Fresh, Inc., Spartanburg, SC (Compl. ¶ 43)	Feb. 26, 2018	April 1, 2018-November 30, 2018

The remaining three claims are facial challenges to DOL's policy and practice of ignoring the prevailing wage on the grounds that it is arbitrary, capricious, and contrary to law, and a *de facto* rule issued without required notice and comment. Compl. ¶¶ 57-65.

ARGUMENT

I. DOL's Motion to Dismiss Should Be Denied.

Defendants move to dismiss all of plaintiffs' claims pursuant to Rule 12(b)(1), arguing that their challenges to each of the five unlawful certifications is or will be moot "by the time of decision," Defs.' Mem. at 1, and that their facial challenges to defendants' policy and practice are unripe. DOL is wrong on each point.

A. Plaintiffs' wrongful certification claims are not now moot and, if they become so, are "capable of repetition while evading review."

DOL does not argue that plaintiffs' wrongful certification claims are moot now (or at the time the action was commenced). Instead, it seeks dismissal on the theory that those claims will be moot by the time of "a favorable decision by this Court," as the last of the job certification orders expires on December 1, 2018. This anticipatory mootness argument fails to justify dismissal because, even if plaintiffs' claims do become moot in the next few months, those claims would

remain justiciable under the well-established exception to mootness where a dispute is capable of repetition while evading review. A dispute qualifies for this exception, "and a case based on that dispute remains live, if (1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again." *Turner v. Rogers*, 564 U.S. 431, 439-40 (2011) (quoting *Weinstein v. Bradford,* 423 U.S. 147, 149 (1975) (marks omitted)). Plaintiffs' challenges to the wrongful certifications meet both of these requirements.

As to the first requirement, the longest of the five challenged certifications was for a period of eight months and was issued just more than a month before the work to be performed was to begin, *see* Compl. ¶ 31; the shortest was for a period of ten weeks and was issued six weeks in advance of the work to be performed, *see* Compl. ¶ 34. *See also* chart, *supra* at 6. Such short durations are not only typical, but compelled by DOL regulations, which limit H-2A certifications to employment that is either seasonal, defined as "tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle," or "temporary"—defined as lasting "no longer than 1 year" "except in extraordinary circumstances." 20 C.F.R. § 655.103(d).[2] Even if plaintiffs had sought judicial review of each of the wrongful certifications "on the day it issued, [they] could not have obtained review by the district court, [the Court of Appeals] and the Supreme Court before" the certification "expired." *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296, 323 (D.C. Cir. 2014). Thus, their claims meet the first

[2] This aspect of the challenged actions distinguishes this case from *People for the Ethical Treatment of Animals, Inc. v. U.S. Fish & Wildlife Serv.*, 59 F. Supp. 3d 91 (D.D.C. 2014), cited by defendants. *See* Defs.' Mem. at 12. There, the court found the capable of repetition exception inapplicable because permits like the one challenged and expired there were *not* typically of a short duration, but rather typically extended for more than three years. 59 F. Supp. 3d at 97.

requirement of the capable of repetition while evading review exception. *See Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 322 (D.C. Cir. 2009) ("[A]gency actions of less than two years' duration cannot be 'fully litigated' prior to cessation or expiration, so long as the short duration is typical of the challenged action.").

The wrongful certification claims also meet the second requirement of the "evading review" exception, as there is evidence to support a "reasonable expectation" that plaintiffs will in the future be harmed by the same unlawful action—DOL's failure to consider the prevailing wage. For purposes of this requirement, the relevant inquiry is not "whether the precise historical facts that spawned the plaintiff's claims are likely to recur[,]" but "whether the legal wrong complained of by the plaintiff is reasonably likely to recur." *Id.* at 324. "In estimating the likelihood of an event's occurring in the future, a natural starting point is how often it has occurred in the past." *Clarke v. United States*, 915 F.2d 699, 704 (D.C. Cir. 1990) (en banc), *quoted in United Bhd. of Carpenters & Joiners of Am., AFL-CIO v. Operative Plasterers' & Cement Masons' Int'l Ass'n of U.S. & Canada, AFL-CIO*, 721 F.3d 678, 688 (D.C. Cir. 2013).

Information published by DOL shows that, for the past several years, few states have conducted wage surveys resulting in prevailing wage findings. Thirty-five states and territories have not conducted a wage survey resulting in a finding of a prevailing wage for a single crop activity in the past four years. *See* Schell Decl. ¶ 4. This group includes four of the top ten states in terms of certified H-2A positions in fiscal year 2018. *See* OFLC, DOL, H-2A Temporary Agricultural Labor Certification Program – Selected Statistics, FY 2018, available at https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2018/H-2A_Selected_Statistics_FY2018_Q4.pdf and as Pulver Decl., Ex. 4. Five other states have produced fewer than five prevailing wage findings from 2015 through the present, including one of the top ten H-2A states

in FY 2018. *See id.*; Schell Decl. ¶ 5. This data suggests that certification of wages without considering the prevailing wage has been ubiquitous over the past four years. Indeed, in 35 states and territories, DOL has disregarded the prevailing wage as to every single H-2A labor certification application. This data supports a "reasonable expectation" that DOL will continue to apply its unlawful practice in the future.

Further, plaintiffs have a reasonable expectation that they will harmed by DOL's wrongful certifications in the future. Each of the individual plaintiffs has been performing seasonal agricultural work for many years and continues to do so—including in states and with respect to crop activities as to which there is no SWA prevailing wage rate finding. *See* Garcia Decl. ¶¶ 3-4; Gomez Decl. ¶¶ 2-4; Botello Avila Decl. ¶¶ 2-4; Princilus Decl. ¶¶ 2-4. Their individual work histories and continued desire to work make it likely that they will be harmed again. As to organizational plaintiff FLOC, the majority of its members are farmworkers in Ohio, North Carolina, and South Carolina. *See* Velasquez Decl. ¶ 5. Ohio and South Carolina did not have a single wage finding for 2018. *See* Pulver Decl., Exs. 2 & 3. In North Carolina, only a single wage finding was made for 2018. *See id.*, Ex. 1. At any given time, approximately 2,000 FLOC members are working in North Carolina. *See* Velasquez Decl. ¶ 6. Jobs in North Carolina accounted for 9% of positions certified under the H-2A program in Fiscal Year 2018—representing more than 21,000 jobs. *See* Pulver Decl., Ex. 4. It is thus more than reasonably likely that at least one FLOC member will be impacted by DOL's wrongful certifications in the future.

These facts distinguish this case from *G.H. Daniels III & Assocs., Inc. v. Perez*, 626 F. App'x 205 (10th Cir. 2015), relied on heavily by DOL. *See* Defs.' Mem. at 11-12. There, the court noted that the reasons why the employers' H-2B visa applications had been denied due to unique facts. 626 F. App'x at 215. Because "[t]here [wa]s no indication that these circumstances will arise

again, let alone that DOL w[ould[] take similar actions on future applications," the exception to mootness did not apply. *Id.* Plaintiffs here have shown just the opposite. Together, the ubiquity of circumstances in which DOL has and will continue to issue certifications without considering the prevailing wage, and plaintiffs' continued work in seasonal agricultural employment throughout the country, meet the "reasonable expectation" requirement. Thus, because they are not yet moot, and because, if they become so, they will be capable of repetition yet evading review, plaintiffs' wrongful certification claims should not be dismissed.

B. Plaintiffs' policy claims are ripe.

The third, fourth, and fifth causes of action in plaintiffs' complaint are based on the allegation that DOL has established a policy or practice of "granting temporary employment certifications without regard to the prevailing wage when state workforce agencies have not conducted wage surveys to ascertain the prevailing wage, or have issued 'no finding' as to the prevailing wage rate." Compl. ¶¶ 60, 61, 62-65. DOL argues *potential* agency action in the future converts plaintiffs' claims into a "generalized challenge" that is "prudentially unripe." Defs.' Mot. at 12-15. As a preliminary matter, it is unclear whether the "prudential ripeness doctrine" remains good law, given the Supreme Court's repeated "reaffirmation of the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 134 S. Ct. 2334, 2347 (2014). But even if cases remain where courts should, in their discretion, decline to exercise their jurisdiction, this case is not one.

"In assessing the prudential ripeness of a case, [courts] focus on two aspects: the 'fitness of the issues for judicial decision' and the extent to which withholding a decision will cause 'hardship to the parties.'" *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 387 (D.C. Cir. 2012); *accord Cal. Ass'n of Private Postsecondary Schs. v. DeVos*, Civ. No. 17-999 (RDM), --- F. Supp. 3d ---,

2018 WL 5017749, at *14 (D.D.C. Oct. 16, 2018). Well-established case law makes clear that hypothetical future rulemaking is not a factor in the inquiry. *See, e.g.*, *Am. Petroleum Inst. v. U.S. EPA*, 906 F.2d 729, 739-40 (D.C. Cir. 1990). Here, the legal challenge to a policy that DOL is currently deploying is fit for this Court's review, and withholding a decision will cause plaintiffs hardship, as the DOL policy continues to harm and will continue to harm plaintiffs over the next several years, regardless of whether DOL eventually revises its regulation.

1. Facial challenges to DOL's policy are fit for judicial decision.

"The fitness of an issue for judicial decision depends on whether it is 'purely legal, whether consideration of the issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final.'" *Atl. States Legal Found. v. EPA*, 325 F.3d 281, 284 (D.C. Cir. 2003); *accord Am. Fed'n of Gov't Employees, AFL-CIO v. Trump*, 318 F. Supp. 3d 370, 409 (D.D.C. 2018). Plaintiffs' policy challenges easily meet this standard.

To begin with, defendants do not argue that plaintiffs' challenges are not "purely legal." Whether current law allows DOL to ignore the prevailing wage in the absence of a SWA survey finding, and whether such a policy is required to be issued via notice and comment rulemaking, are purely legal questions. And the D.C. Circuit has "often observed that a purely legal claim in the context of a facial challenge … is presumptively reviewable." *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 417 F.3d 1272, 1282 (D.C. Cir. 2005) (citations omitted).

DOL's argument appears to be based on a version of the two other criteria: a concrete setting and sufficient finality. It argues that DOL may soon initiate a rulemaking process that may change the regulations that govern the H-2A program in several years. The D.C. Circuit "ha[s] already debunked this theory" that such circumstances render a case non-ripe, "explain[ing] that 'the fact that a law may be altered in the future has nothing to do with whether it is subject to

judicial review at the moment.'" *Id*. at 1282 (quoting *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022 (D.C. Cir. 2000)). "[A]n agency *always* retains the power to revise a final rule through additional rulemaking. If the possibility of unforeseen amendments were sufficient to render an otherwise fit challenge unripe, review could be deferred indefinitely." *Am. Petroleum Inst. v. U.S. E.P.A.*, 906 F.2d at 739.

In *Comite de Apoyo a Los Trabajadores Agricolas v. Perez*, 774 F.3d 173 (3d Cir. 2014) ("*CATA*"), the Third Circuit rejected a similar argument made by DOL in a case challenging wage calculations under the H-2B visa program. There, DOL had indicated that it "intend[ed] to publish a notice of proposed rulemaking." *Id.* at 181. Reversing the district court, the Third Circuit explained that it could not "be certain if the new rule will be promulgated, or, if promulgated, become effective, because, among other possible impediments, its implementation depends on the availability of congressional funding and Congress might withhold the funding as it has in the past with earlier DOL rules." *Id*. Because DOL was deploying the challenged rule "on an ongoing basis in the administration of the H-2B program," the challenge was ripe, despite the potential for future rulemaking. *Id*. at 184.

This case is no different. DOL's statements go no further than stating that "DOL is considering possible amendment of different areas of the existing H-2A regulations." Thompson Decl. (ECF 9-2) ¶ 11. Even if DOL officials would *like* to amend the H-2A regulations to make what they have done here legal, such a change requires notice and comment rulemaking—and an open mind. *See, e.g.*, *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095 (D.C. Cir. 2009); *see also Am. Hosp. Ass'n v. Dep't of Health & Hum. Servs.*, No. CV 18-2112 (JDB), 2018 WL 5777397, at *2 (D.D.C. Nov. 2, 2018) (declining to stay action pending rulemaking and noting agency cannot guarantee a future rule change due to need to give meaningful consideration to comments). Given

that no notice of proposed rulemaking has even issued, not to mention the strong likelihood of litigation over any final rule that may be issued, no relevant regulatory change is likely to go into effect for several years—if at all.[3]

DOL also relies heavily on *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158 (1967), to argue that plaintiffs' policy claims constitute unreviewable "generalized challenges." But the distinctions between this case and *Toilet Goods* highlight the inapplicability of the prudential ripeness doctrine here. *Toilet Goods* concerned a pre-enforcement challenge to a regulation that allowed the FDA commissioner to, in his discretion, order inspection of certain facilities and data in "certain circumstances." *Id.* at 163. The Supreme Court found a facial challenge to the regulation unripe, as it would require "an understanding of what types of enforcement problems are encountered by the FDA, the need for various sorts of supervision in order to effectuate the goals of the Act, and the safeguards devised to protect legitimate trade secrets." *Id.* at 164. It explained that "judicial appraisal of these factors is likely to stand on a much surer footing in the context of a specific application of this regulation than could be the case in the framework of the generalized challenge made here." *Id.*

No such concerns are present here. With respect to DOL's policy, there is "little or nothing more that the agency could do in a particular adjudication that would likely inform the court's decision on the question whether the enforcement scheme is currently being, or is capable of being, administered in accordance with the [law]." *Action for Children's Television v. FCC*, 59 F.3d 1249,

[3] It is more than possible that any actual rulemaking will have no bearing on this lawsuit, even once completed. For example, on November 8, 2018, DOL indicated it would be proposing a rule requiring employers seeking temporary labor certifications to post job advertisements online. *See* DOL, News Release, "U.S. Department of Labor Proposes Protecting American Workers by Requiring Advertising Jobs Online for Temporary Labor Certifications," Nov. 8, 2018, https://www.dol.gov/newsroom/releases/osec/osec20181108. Such a revision to H-2A program requirements would have no bearing on the outcome of this case.

1258 (D.C. Cir. 1995). Plaintiffs have alleged that the challenged policy has been applied hundreds of times and have identified five specific instances of its application. Compl. ¶¶ 30, 31, 34, 37, 40, 43. The policy, which is explicitly listed throughout DOL's Agricultural Online Wage Library, *see, e.g.*, Pulver Decl. Exs. 1-2, is "fully formed" and "leave[s] no discretion" to individual bureaucrats. *See AFGE*, 318 F. Supp. 3d at 410; *see also TRT Telecommc'ns Corp. v. FCC*, 876 F.2d 134, 140 (D.C. Cir. 1989) (noting the centrality of the discretionary aspect of the rule challenged in *Toilet Goods*). "The legality *vel non* of the [challenged policy] will not change from case to case or become clearer in a concrete setting." *Nat'l Ass'n of Home Builders*, 440 F.3d at 464. And "[t]his finality is not undermined even though the present rules may not remain DOL's last position with regard to [H-2A] program rules." *CATA*, 774 F.3d at 183. No "further administrative action is needed to clarify the agency's position" as to how DOL is processing labor certification applications under *current* law. *See Action Alliance of Senior Citizens of Greater Phila. v. Heckler*, 789 F.2d 931, 940 (D.C. Cir. 1986). Thus, defendants have not rebutted the presumption of ripeness of this legal challenge.

2. Plaintiffs would be harmed by delayed review.

Because plaintiffs' facial challenges are "clearly fit for review, there is no need to consider 'the hardship to the parties of withholding court consideration,' because there would be no advantage to be had from delaying review." *Action for Children's Television*, 59 F.3d at 1258 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)); *accord Nat'l Ass'n of Home Builders*, 440 F.3d at 465. Nonetheless, the harm that delayed review would cause to the plaintiffs further demonstrates that this case is prudentially ripe.

In *CATA*, the Third Circuit found that, because DOL was applying the challenged policy in issuing labor certifications even while it was considering regulatory change, the plaintiffs—U.S.

workers—were being "force[d] to accept depressed wages or face being replaced by foreign H-2B workers." 774 F.3d at 184. Here, each of the individual plaintiffs and the U.S. worker members of FLOC are experiencing that same harm. They have alleged that application of the policy results in depressed wages—not just for workers applying to the specific jobs, but all workers "in the affected industries and regions." Compl. ¶ 3. The H-2A worker members of FLOC are also harmed as they are offered and paid lower wages than they are entitled to. Thus, contrary to the scenario in *Toilet Goods*, this *is* a case "where the impact of the administrative action could be said to be felt immediately by [plaintiffs] in conducting their day-to-day affairs." 387 U.S. at 164.[4]

II. DOL's Transfer Request Should Be Denied.[5]

DOL requests that the Court transfer this case to the Northern District of Illinois pursuant to 28 U.S.C. § 1404(a). Section 1404(a) allows district courts to transfer cases based on an "individualized, case-by-case consideration of convenience and fairness." *Reiffin v. Microsoft Corp.*, 104 F. Supp. 2d 48, 50 (D.D.C. 2000). When venue is proper in a jurisdiction, as DOL appears to concede here, "transfer elsewhere under Section 1404(a) must ... be justified by particular circumstances that render [this] forum inappropriate by reference to the considerations specified in that statute. Absent such circumstances, transfer in derogation of properly laid venue

[4] This harm is particularly sufficient to overcome any ripeness concern if the Court were to agree with DOL that the wrongful certification claims should be dismissed based on "anticipatory mootness." The teaching of *Toilet Goods* is that some cases are best resolved on an as-applied basis. But, as explained above, DOL argues that as-applied challenges would generally not be justiciable due to the short duration of each certification. *Toilet Goods* and the prudential ripeness doctrine do not exist to prevent courts from *ever* reaching the merits of plaintiffs' claims while defendants continue to engage in the challenged action.

[5] Although DOL represented that its counsel conferred with plaintiffs' counsel pursuant to Local Civil Rule 7(m), Defs.' Mot. (ECF 9), DOL's counsel did not mention a motion to transfer in that conference, and plaintiffs' counsel did not learn of DOL's desire to transfer this case to Illinois until the filing of this motion. The Court may deny DOL's motion to transfer on this ground alone. *See, e.g.*, *Ellipso, Inc. v. Mann*, 460 F. Supp. 2d 99, 101 (D.D.C. 2006).

is unwarranted." *Starnes v. McGuire,* 512 F.2d 918, 925-26 (D.C. Cir. 1974) (en banc). "The main purpose of section 1404(a) is to afford defendants protection where maintenance of the action in the plaintiff's choice of forum will make litigation oppressively expensive, inconvenient, difficult or harassing to defend." *Starnes*, 512 F.2d at 927. This case plainly does not present such concerns.

There are two steps to the transfer inquiry: "First, the Court must ask whether the transferee forum is one where the action 'might have been brought' originally. Second, the Court must consider whether private and public interest factors weigh in favor of transfer." *Revis v. Tustin Constr. Servs., LLC*, 322 F. Supp. 3d 58, 61 (D.D.C. 2018) (citations omitted). The burden is on DOL "to establish that transfer under § 1404(a) is proper." *Aracely v. Nielsen*, 319 F. Supp. 3d 110, 127 (D.D.C. 2018). DOL has not come close to meeting its burden at either step.

A. DOL has not established that this case could have been brought in Illinois.

As a preliminary matter, DOL bears the burden of demonstrating that this case might have properly been brought initially in the Northern District of Illinois. *See, e.g.*, *Stewart v. Azar*, 308 F. Supp. 3d 239, 245 (D.D.C. 2018). It has not done so.

Venue in this case is governed by 28 U.S.C. § 1391(e)(1), which provides that actions against officers or employees of the United States in their official capacities, or against federal agencies themselves, may:

> be brought in any judicial district (A) a defendant in the action resides, (B) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (C) the plaintiff resides if no real property is involved in the action.

DOL acknowledges that no plaintiff resides in Illinois. Defs.' Br. at 16-17. And it has not argued or provided evidence that it resides in the Northern District of Illinois. That DOL has an office in Chicago does not make it a resident of the Northern District of Illinois. *See Reuben H. Donnelley Corp. v. FTC*, 580 F.2d 264, 267 (7th Cir. 1978). Thus, the only basis for venue in Illinois would

be that a "substantial part of the events or omissions giving rise to the claim occurred" in Illinois. As to this theory, DOL has offered no evidence, simply noting that the five individual certifications were "adjudicated in Chicago, Illinois." Defs.' Mem. at 2.[6] But statements by counsel in briefs are not evidence. *See, e.g.*, *Moradi v. Islamic Republic of Iran*, 77 F. Supp. 3d 57, 71 n.10 (D.D.C. 2015). The only evidence before the court is a declaration from the Administrator of the OFLC as to the agency's policy plans—executed in Washington, DC. *See* Thompson Decl. at 3. Further, DOL regulations specify that the OFLC Administrator—based in Washington—has been delegated the authority to issue foreign labor certifications. 20 C.F.R. § 655.101. Thus, even if DOL's Chicago office has a role in certifying applications, DOL has not shown that a "substantial part of the events" in this case, including the decision to adopt the challenged national policy, occurred there.

Because DOL has not met its burden of establishing that this case could have been brought in Illinois, the motion to transfer should be denied.

B. Private interest considerations weigh against transfer to Illinois.

Even if this case *could* have been brought in Illinois, that of course, does not mean transfer is warranted, if a balancing of the public and private interest considerations suggest otherwise. Relevant "private interest considerations include: (1) the plaintiff's choice of forum; (2) the defendant's preferred forum; (3) the location where the claim arose; (4) the convenience of the parties; (5) the convenience of the witnesses; and (6) ease of access to sources of proof." *Union*

[6] Defendants, who had 60 days to prepare their response to the Complaint, cannot cure this evidentiary failure on reply. *See, e.g.*, *Lee v. District of Columbia*, 298 F. Supp. 3d 4, 10-11 (D.D.C. 2018) (declining to consider evidence offered for the first time in reply); *Nat'l Parks Conservation Ass'n v. U.S. Forest Serv.*, No. CV 15-01582(APM), 2015 WL 9269401, at *3 (D.D.C. Dec. 8, 2015) (declining to consider declarations submitted for the first time with reply, when they could have "easily" been offered with motion).

Neighbors United, Inc. v. Jewell, No. CV 13-1435 (RJL), 2014 WL 12803803, at *1 (D.D.C. Feb. 11, 2014). These factors weigh against transfer here.

First, plaintiffs have chosen to litigate in Washington, DC. Although DOL is correct that this factor is given less deference where the plaintiffs themselves are not based in the chosen forum, "that circumstance merely reduces this Court's deference to plaintiffs' choice but does not eliminate it." *Union Neighbors United*, 2014 WL 12803803, at *2.

Second, DOL prefers not to litigate in DC, although it is located here, its counsel are located here, and its declarant is located here. In light of all the factors, DOL's preference alone does not outweigh plaintiffs' choice of forum.

Third, the claims arose in Washington because "the controversy 'stems from the formulation of national policy on an issue of national significance.'" *Oceana, Inc. v. Pritzker*, 58 F. Supp. 3d 2, 6 (D.D.C. 2013) (quoting *Greater Yellowstone Coal. v. Kempthorne*, No. CIV.A. 07-2111 (EGS), 2008 WL 1862298, at *5 (D.D.C. Apr. 24, 2008)). Plaintiffs allege that DOL has established a uniform, nationwide policy as to foreign labor certifications, for jobs around the country. The OFLC Administrator, who has been delegated the authority to issue such certifications, is based in Washington, DC. *See supra* at 17. And defendants' own evidence suggests that DOL policy as to the H-2A program is made in Washington, DC. *See, e.g.*, Thompson Decl. at 3, Ex. 2. "When a plaintiff directly challenges a policy promulgated in the District of Columbia," venue is appropriate here. *See Aracely*, 319 F. Supp. 3d at 128 (citing *Ravulapalli v. Napolitano*, 773 F. Supp. 2d 41, 56 (D.D.C. 2011)). This factor also weighs against transfer.

The remaining factors, collectively referred to as the "convenience factors," are, at most, neutral. DOL generically states that "potential witnesses and sources of proof for both parties are located in the Northern District of Illinois." Defs.' Mem. at 16. It is unclear to what witnesses or

sources of proof DOL is referring, given that this case arises under the APA, under which "courts typically decide the issues presented on the papers and the administrative record, and 'the convenience factors carry little weight in the transfer analysis.'" *W. Watersheds Project v. Tidwell*, 306 F. Supp. 3d 350, 360 (D.D.C. 2017); *accord Oceana*, 58 F. Supp. at 7. Even if, as DOL contends, each of the five challenged "adjudications" was made in Chicago, there is no suggestion that a "difficulty in gathering sources of proof [is] at issue here." *W. Watersheds*, 306 F. Supp. at 360. The administrative record as to plaintiffs' policy claims likely includes documents housed in the District of Columbia. And to the extent defendants intend to seek discovery from plaintiffs, no plaintiff is located in the Northern District of Illinois.[7] Thus, the convenience factors do not support transfer.

C. Public interest considerations weigh against transfer to Illinois.

Likewise, public interest considerations—"(1) the transferee district's familiarity with the governing law; (2) the relative congestion of the courts of the transferor and potential transferee; and (3) the local interest in deciding local controversies at home," *Aracely*, 319 F. Supp. 3d at 130—do not weigh in favor of transfer.

First, this case only involves federal law claims, as to which the Northern District of Illinois possesses no special expertise. On the other hand, the federal courts in the District of Columbia

[7] Defendants make the illogical argument that it would be more convenient for plaintiff FLOC to litigate in the Northern District of Illinois than Washington because FLOC "is headquartered in the Midwest." Defs.' Mem. at 16-17. First, as alleged in the Complaint, FLOC's members are located "throughout the eastern half of the United States." Compl. ¶ 13. No FLOC members work or reside in the counties that comprise the Northern District of Illinois. *See* Velasquez Decl. ¶ 9. Moreover, if convenience were judged on the location of headquarters, FLOC's Toledo, Ohio headquarters is approximately 250 miles from the Northern District of Illinois courthouse in Chicago—hardly a "convenience" that would justify trumping FLOC's choice of forum. In any event, in this APA case, plaintiffs do not anticipate that their presence in court will be required.

are exceedingly familiar with administrative law cases, and have adjudicated numerous challenges to DOL's policies and practices regarding H-2A wages.[8]

As to relative congestion, DOL does not argue that the Northern District of Illinois is less congested than this court. Defs.' Mem. at 17. To the contrary, as they note, the median case completion time for civil cases is 25 percent longer in that court than in this Court. *See id.* Thus, this factor weighs in favor of this Court retaining jurisdiction. *Cf. Aracely*, 319 F. Supp. 3d at 130 (finding faster median case completion time in Southern District of Texas weighed "slightly in favor of transfer").

Finally, DOL argues that transfer is appropriate because of the "local" nature of this matter. Defs.' Mem. at 17. It makes no attempt to explain what makes this challenge brought by plaintiffs from around the country, to a policy devised by a federal cabinet agency and applied to employers and jobs around the country, "local" to Illinois. In determining whether a controversy is "local" in nature, courts in this district consider a number of factors, including:

> where the challenged decision was made; whether the decision directly affected the citizens of the transferee state; the location of the controversy[;] whether the issue involved federal constitutional issues rather than local property laws or statutes; whether the controversy involved issues of state law[;] whether the controversy has some national significance; and whether there was personal involvement by a District of Columbia official.

Otay Mesa Prop. L.P. v. U.S. Dep't of Interior, 584 F. Supp. 2d 122, 126 (D.D.C. 2008). Although DOL argues, without evidence, that the individual certifications were processed in Chicago, they do not suggest that the challenged policy was developed in Chicago or that DOL employees in

[8] *See, e.g.*, *Mendoza v. Perez*, 754 F.3d 1002 (D.C. Cir. 2014); *NAACP, Jefferson Cty. Branch v. U.S. Sugar Corp.*, 84 F.3d 1432 (D.C. Cir. 1996); *AFL-CIO v. Dole*, 923 F.2d 182 (D.C. Cir. 1991); *AFL-CIO v. Brock*, 835 F.2d 912 (D.C. Cir. 1987); *United Farm Workers v. Solis*, 697 F. Supp. 2d 5 (D.D.C. 2010); *United Farm Workers of Am., AFL-CIO v. Chao*, 227 F. Supp. 2d 102 (D.D.C. 2002).

Chicago had any discretion in applying that policy. No plaintiff lives or works in Illinois; none of the challenged certifications involve work in Illinois or for Illinois-based employers. *See* Compl.¶¶ 9-13, 31, 34, 37, 40, 43. No members of organizational plaintiff FLOC work or reside in the Northern District of Illinois. *See* Velasquez Decl.¶ 9. No Illinois property or other law is involved.

Defendants' argument that this case lacks "national significance" is bewildering. As in *Aracely*, the core of this case is a challenge to "an alleged national policy… which carries with it nationwide significance." 319 F. Supp. 3d at 131. Plaintiffs from around the country allege that DOL has taken, and continues to take, unlawful action that has the impact of artificially lowering wages for U.S. workers across the country. *See* Compl. ¶ 23 (citing 2010 DOL Rule discussing economic theory). In similar cases where a national policy was challenged, courts have routinely denied motions to transfer. *See, e.g.*, *Ctr. for Biological Diversity v. Ross*, 310 F. Supp. 3d 119, 128 (D.D.C. 2018); *Stewart v. Azar*, 308 F. Supp. 3d 239, 247 (D.D.C. 2018).

None of the cases DOL cites involve challenges to nationwide policies. *Sierra Club v. Flowers*, 276 F. Supp. 2d 62 (D.D.C. 2002), cited in Defs.' Mem. at 16, for example, concerned issuance of permits for mining in Florida's Everglades. DOL here, as in *Ravulapalli*, 773 F. Supp. 2d at 56, relies on "cases where the plaintiff is seeking to compel a local field office to adjudicate a pending application after unreasonable delay." *See* Defs.' Mem. at 16 n.4 (citing *Aftab v. Gonzalez*, 597 F. Supp. 2d 76 (D.D.C. 2009); *Al-Ahmed v. Chertoff*, 564 F. Supp. 2d 16 (D.D.C. 2008); and *Mohammi v. Scharfen*, 609 F. Supp. 2d 14 (D.D.C. 2009)). This case, in contrast, does not concern unreasonable delay or a specific pending adjudication. It involves no "localized" issue. Rather, "the outcome of this case will have no direct or unique impact upon the residents of [the Northern District of Illinois]," *Otay Mesa*, 584 F. Supp. 2d at 127, and cannot be described as a

"local" controversy. *See Ravulapalli*, 773 F. Supp. 2d at 56 (no localized interest where plaintiffs challenge a national policy).

Because the public interest considerations, like the private interest considerations, weigh against transfer, the motion should be denied.

III. Hypothetical Future Rule Changes Do Not Warrant a Stay.

Finally, DOL requests a stay "until the scope of DOL's rulemaking on the prevailing wage rate is better known," Defs.' Mem. at 2, which they believe will be true in six months. The request for a stay is essentially a retread of DOL's prudential ripeness argument and should be rejected for largely the same reasons.

Because any regulatory changes are completely hypothetical and years away, and because plaintiffs will continue to be harmed in the interim, a stay is inappropriate. *See, e.g.*, *Am. Hosp. Ass'n*, 2018 WL 5777397, at *2 (declining to stay case pending outcome of rulemaking given lack of certainty of that outcome); *Fox Television Stations, Inc. v. FilmOn X LLC*, 150 F. Supp. 3d 1, 24 n.18 (D.D.C. 2015) (denying request to stay pending rulemaking where there was "no certainty" as to when the agency would act or as to whether there would be any relevant substantive change at all). Any future rulemakings cannot retroactively make what DOL has already done or will do in the coming months lawful.

As DOL notes, "the party seeking a stay must make out 'clear case of hardship or inequity in being required to go forward if there is even a fair possibility that the stay requested will work damage to someone else.'" Defs.' Mem. at 9 (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)). DOL cannot meet this standard. DOL continues to issue labor certifications under the challenged policy, and each certification causes harms to plaintiffs and other workers, as discussed

above. On the other hand, DOL has not made *any* showing that litigating now will cause it hardship or inequity.

Although DOL is correct that, hypothetically, at some point years down the road, it may adopt a regulatory change that could moot plaintiffs' claims, the same is true in dozens of APA cases. Future regulatory changes do not justify a stay of live claims where, for now, the changes "are merely hypothetical possibilities." *Am. Bar Ass'n v. FTC*, 636 F.3d 641, 647 (D.C. Cir. 2011). Even if DOL "view[s] them as likely possibilities," such future regulatory actions "are nothing more than possibilities regarding regulations and enforcement policies that do not presently exist." *Id*; *see also Alternatives Research & Dev. Found. v. Glickman*, 101 F. Supp. 2d 7, 15-16 (D.D.C. 2000) (denying motion to stay pending petition for rulemaking, because "[w]hile this action may become moot at some future point, there is no basis at this time for the Court to conclude that the matter should be stayed as premature").

Thus, the motion to stay should be denied. The Court should require the filing of an answer and the administrative record, so that the case may proceed to summary judgment briefing.

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss, transfer, or stay should be denied in its entirety.

Respectfully submitted,

/s/ *Adam R. Pulver*

Adam R. Pulver
D.C. Bar No. 1020475
Michael T. Kirkpatrick
D.C. Bar No. 486293
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
apulver@citizen.org
Counsel for All Plaintiffs

Gregory S. Schell
Florida Bar No. 287199
SOUTHERN MIGRANT LEGAL SERVICES
A Project of Texas RioGrande Legal Aid, Inc.
9851 Daphne Avenue
Palm Beach Gardens, FL 33410-4734
(561) 627-2108
gschell@trla.org
Counsel for Plaintiff Garcia

Dave Mauch
Texas Bar No. 24086837
TEXAS RIOGRANDE LEGAL AID, INC.
6502 Nursery Drive, Suite 302
Victoria, TX 77904
(361) 237-1681
dmauch@trla.org
Counsel for Plaintiff Garcia

Mark Heller
Ohio Bar No. 27027
Emily Brown
Ohio Bar No. 92553
ADVOCATES FOR BASIC LEGAL EQUALITY, INC.
525 Jefferson Avenue, Ste. 300
Toledo, OH 43604
Counsel for Plaintiffs Gomez, Avila, Princilus, and FLOC

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