ORAL ARGUMENT HELD FEBRUARY 25, 2014

NO. 13-5118

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REYMUNDO ZACARIAS MENDOZA, *et al.*,
Plaintiffs-Appellants,

v.

THOMAS E. PEREZ, in his official capacity, *et al.*,
Defendants-Appellees,

and

MOUNTAIN PLAINS AGRICULTURAL SERVICES, *et al.*,
Intervenors-Appellees.

On Appeal from a Final Order of the
U.S. District Court for the District of Columbia
(Honorable Beryl A. Howell)

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March 12, 2014

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MISCELLANEOUS

GLOSSARY

APA	Administrative Procedure Act
DOL	U.S. Department of Labor
ETA	Employment and Training Administration
TEGL	Training and Employment Guidance Letter

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs submit this supplemental brief pursuant to the Court's February 28 order directing the parties to address (1) whether the statute of limitations for plaintiffs' claim is jurisdictional and, if not, whether defendants waived the defense; and (2) whether the statute of limitations bars plaintiffs' claim. Because plaintiffs' claim was timely filed, the Court need not reach the jurisdictional issue. Accordingly, below, plaintiffs address the questions in reverse order.

Suits under the Administrative Procedure Act (APA) are subject to the six-year limitations period set forth in 28 U.S.C. § 2401(a). Plaintiffs thus had six years to bring suit after the Department of Labor (DOL) issued the 2011 Training and Employment Guidance Letters (TEGLs) challenged in this case. Plaintiffs brought suit within months of the TEGLs' issuance—well within § 2401(a)'s limitation period. The timeliness of plaintiffs' claim should not be measured against DOL's issuance of earlier sets of special procedures for herders. The 2011 TEGLs are materially different from those earlier versions of special procedures on issues—such as wages and frequency of pay—that affect the plaintiffs. In any event, DOL's issuance of the TEGLs reopened the special procedures in full, which restarted the limitations period. In addition, DOL's special procedures for open range production of livestock workers were issued first in 2007 and again in

2011; thus, the six-year statute of limitations could not possibly have run on the challenge to the TEGL for this class of workers.

Should this Court nevertheless conclude that plaintiffs' claim would be untimely under § 2401(a), it should hold that the statute of limitations is not jurisdictional and that a statute-of-limitations defense has been waived. The Supreme Court's decisions in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), and *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008), have overtaken this Court's 1987 decision in *Spannaus v. DOJ*, 824 F.2d 52 (D.C. Cir. 1987), which held that § 2401(a) is jurisdictional. Those Supreme Court cases establish a rule that federal statutes of limitations are generally non-jurisdictional, and § 2401(a) is no exception. The defendants waived any statute-of-limitations defense by failing to raise it in any district court or appellate briefing.

ARGUMENT

I. Plaintiffs' Claim Is Not Barred by the Statute of Limitations.

Plaintiffs bring an APA claim to challenge DOL's adoption of two TEGLs—one for sheep- and goatherders and the other for open range production of livestock workers—issued without notice-and-comment rulemaking. Because Congress has not adopted a special statute of limitations for this type of challenge, plaintiffs' claim is subject to the statute of limitations in 28 U.S.C. § 2401(a), the general limitations period for civil suits against the government. *See Harris v. FAA*, 353

F.3d 1006, 1009 (D.C. Cir. 2004). Section 2401(a) provides in pertinent part that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). The right of action in a suit like this one "first accrues on the date of the final agency action." *Harris*, 353 F.3d at 1010.

Under § 2401(a), plaintiffs' claim was timely. The statute of limitations for plaintiffs' claim began to run in 2011, when DOL "rescind[ed] and replace[d] previous guidance" on special procedures for herders with the challenged TEGLs. Sheepherding TEGL, JA 38; *see* Open Range TEGL, JA 32 ("replac[ing]" earlier special procedures). Plaintiffs filed suit within a matter of months, challenging the only final agency action then in effect: the 2011 TEGLs.

The timeliness of plaintiffs' claim should not be measured against DOL's issuance of earlier sets of special procedures for two reasons. First, the TEGLs differ from earlier special procedures in material ways, including with respect to the wages and frequency of pay about which the plaintiffs specifically complain. Therefore, the TEGLs are not a mere continuation of those earlier policies. Rather, they represent the issuance of new substantive and legislative rules for which notice and comment rulemaking was required. *See, e.g.*, *Elec. Privacy Info. Ctr. v. DHS*, 653 F.3d 1, 5 (D.C. Cir. 2011).

Specifically, the Sheepherding TEGL provides that an employer need only pay a "prevailing wage," JA 39, whereas the 1989 and 2001 special procedures for sheepherders indicated that employers would be required to pay a prevailing wage or a "special monthly Adverse Effect Wage Rate" that could be set by DOL, whichever was higher. *See* Dist. Ct. Doc. 28-3 at 7, DOL, Employment and Training Administration (ETA), Field Memorandum 24-01, Special Procedures: Labor Certification for Sheepherders and Goatherders Under the H-2A Program (Aug. 1, 2001); *accord* Dist. Ct. Doc. 28-2 at 9, DOL, ETA, Field Memorandum 74-89, Special Procedures: Labor Certification for Sheepherders Under the H-2A Program (May 31, 1989). The 2011 Open Range TEGL permits monthly paychecks to herders in some circumstances, while the 2007 special procedures for such workers did not expressly address this issue. *Compare* Open Range TEGL, JA 34, *with* Dist. Ct. Doc. 28-4 at 4, DOL, ETA, TEGL No. 15-06, Special Procedures for Occupations Involved in the Open Range Production of Livestock (Feb. 9, 2007). The 2011 Open Range TEGL also provides a more detailed description of the methodology to be used in calculating the prevailing wage than did its predecessor. *Compare* Open Range TEGL, JA 32-33, *with* 2007 TEGL No. 15-06, Dist. Ct. Doc. 28-4 at 3.[1]

[1] In arguing that the TEGLs actually benefited the plaintiffs, intervenors have themselves conceded that the TEGLs made "meaningful changes" to earlier (continued)

Second, to the extent that the 2011 TEGLs carried over some policies from earlier sets of special procedures, their issuance was nonetheless sufficient to mark the start of the six-year limitations period under this Court's reopener doctrine. Under that doctrine, "[i]f for any reason [an] agency reopens a matter and, after reconsideration, issues a new and final order, that order is reviewable on its merits," even if "the agency merely reaffirms its original decision." *Sendra Corp. v. Magaw*, 111 F.3d 162, 167 (D.C. Cir. 1997). *Cf. Harris*, 353 F.3d at 1011 (holding that an agency did not reopen an earlier notice, and thus did not restart the limitations period, where there was no evidence that the agency "in any way altered or reconsidered its [earlier] decision").

To determine "whether an agency reconsidered a previously decided matter" for purposes of the reopener doctrine, this Court "look[s] to the entire context of the rulemaking." *CTIA-Wireless Ass'n v. FCC*, 466 F.3d 105, 110 (D.C. Cir. 2006) (internal quotation marks omitted); *accord Public Citizen v. NRC*, 901 F.2d 147,

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sets of special procedures "to provide for more frequent payment, to restrict variances under which workers would share housing, to impose upon employers a seven-day notice requirement before transferring workers to another employer, to provide for the provision of mobile emergency communication tools, and to dispense with the requirement that employers advertise positions in the newspaper." Dist. Ct. Doc. 29-2, Intervenors' Mem. in Supp. of Summ. J. at 23-24. Although plaintiffs do not agree with the intervenors' overall rosy portrayal of the TEGLs, they do agree that the TEGLs differ from earlier sets of special procedures on a host of issues.

149-50 (D.C. Cir. 1990) (holding that an agency's decision to reissue a policy statement was subject to the reopener doctrine); *see also*, *e.g.*, *State of Ohio v. EPA*, 838 F.2d 1325, 1328-29 (D.C. Cir. 1988) (holding that a rule "brought forward in identical language and supplemented in [a later] promulgation" was subject to challenge because the agency "explained the unchanged but republished portion of the regulation in the notice of proposed rulemaking in general policy terms" and responded to a comment on the unchanged portion of the rule).

Here, numerous indicia—ranging from the TEGLs' publication to their timing and DOL's own statements—confirm that DOL reconsidered the special procedures in full, even though it did not change every aspect of them. DOL published the TEGLs in the Federal Register, which it had not done for special procedures issued in 1989, 2001, and 2007. DOL's action in this regard reflects reconsideration of earlier policies that culminated in a new effort to inform the public about changes to those policies and ways in which the policies remained the same.

Moreover, the timing of the 2011 TEGLs shows that DOL fully reconsidered the special procedures. As the TEGLs recognize, the 2010 H-2A Final Rule "implement[ed] changes that affect[ed] special procedures." Sheepherding TEGL, JA 38 (discussing DOL, Employment and Training Administration, Final Rule: Temporary Agricultural Employment of H-2A Aliens in the United States, 75 Fed.

Reg. 6884 (Feb. 12, 2010)); Open Range TEGL, JA 32 (same). The TEGLs thus represent DOL's determination to "revise" special procedures for herders in light of changes to the general H-2A regulations. 20 C.F.R. § 655.102.

DOL's statements, both in earlier sets of special procedures and in the TEGLs, also confirm that the agency fully reopened consideration of the policies in 2011. In the 1989 and 2001 special procedures for sheepherders, DOL stated that the procedures had an "expiration date" of 1995 and 2003, respectively. *See* Dist. Ct. Doc. 28-3 at 1, 2001 Sheepherding Special Procedures; Dist. Ct. Doc. 28-2 at 1, 1989 Sheepherding Special Procedures. Although DOL apparently continued to apply the procedures after those dates as if they had not expired, its statements in 1989 and 2001 indicate that the agency did not promulgate those policies to be permanent.

Moreover, in the TEGLs themselves, DOL states that the TEGLs "rescind[] and replace[]" the earlier sets of special procedures. Sheepherding TEGL, JA 38; Open Range TEGL, JA 32 ("replac[ing]" earlier guidance); *see also* Sheepherding TEGL, JA 38-39 (explaining that DOL "is continuing a special variance to the offered wage rate requirements"); Open Range TEGL, JA 32-33 (same). And DOL broadly emphasizes that the TEGLs "reflect . . . new regulatory and policy objectives." Sheepherding TEGL, JA 38; Open Range TEGL, JA 32. In addition, as a side-by-side comparison of the TEGLs with their predecessors reveals, DOL

made myriad changes in language *throughout* the documents, including changes to provisions on wages, frequency of pay, housing, and emergency communications, *see supra*, p.4 & n.1, making clear that DOL's review of earlier sets of special procedures was not limited to isolated portions of those policies. Accordingly, the Court need look no further than DOL's own words to conclude that the agency reopened the TEGLs in 2011, thus triggering both the requirement of notice-and-comment rulemaking and a new statute of limitations period on the substance of the TEGLs and the process used to adopt them.

Finally, even if this Court were to gauge the timeliness of plaintiffs' claim based only on the earlier sets of special procedures, plaintiffs would still prevail on their challenge to the Open Range TEGL. DOL issued rules on special procedures for open range production of livestock workers on only two occasions—once in 2007 and again in 2011—and plaintiffs sued within six years of both of these agency actions. Therefore, plaintiffs' challenge to the Open Range TEGL is timely by any measure.

II. Section 2401(a)'s Statute of Limitations Is Not Jurisdictional, and the Defendants Waived Any Statute-of-Limitations Defense.

Because defendants did not raise a statute-of-limitations defense at any point in the briefing of this case, that defense is waived unless § 2401(a)'s limitations period is jurisdictional. If this Court determines that plaintiffs' claim is untimely, in whole or in part, under § 2401(a), it should overrule—in light of intervening

Supreme Court case law—earlier Circuit precedent holding that § 2401(a)'s limitations period is jurisdictional.

In *Spannaus v. DOJ*, 824 F.2d 52 (D.C. Cir. 1987), this Court held that § 2401(a)'s limitations period is jurisdictional. It explained that "[u]nlike an ordinary statute of limitations, § 2401(a) is a jurisdictional condition attached to the government's waiver of sovereign immunity, and as such must be strictly construed." *Id.* at 55. *Spannaus* rested by analogy on the Supreme Court's decisions in *Soriano v. United States*, 352 U.S. 270 (1957), and *United States v. Mottaz*, 476 U.S. 834 (1986), which held that 28 U.S.C. § 2501 and a statute of limitations then codified at 28 U.S.C. § 2409a(f) (1982), respectively, were jurisdictional. *Spannaus*, 824 F.2d at 55; *see Soriano*, 352 U.S. at 271; *Mottaz*, 476 U.S. at 843-44.

In the years since *Spannaus*, there has been a sea change in the law applicable to determining whether claims-processing and other rules are jurisdictional, with the Supreme Court narrowly defining rules that affect a district court's subject matter jurisdiction. *See*, *e.g.*, *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011) (collecting cases). The Supreme Court now applies a "clear-statement principle" to determine whether a statute's scope is jurisdictional. *Gonzalez v. Thaler*, 132 S. Ct. 641, 649 (2012). And in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), and *John R. Sand & Gravel*

Co. v. United States, 552 U.S. 130 (2008), the Supreme Court made clear that, even in the context of suits against the government that implicate the government's waiver of sovereign immunity, statutes of limitations are presumptively *non*-jurisdictional.

In *Irwin*, the Supreme Court held that Title VII's requirement that a federal employee must file a discrimination complaint within thirty days of the employee's receipt of notice of final agency action was not jurisdictional. The plaintiff argued that the filing deadline had been equitably tolled and that his complaint, which was not filed within thirty days, was timely as a result. The availability of equitable tolling hinged on the non-jurisdictional nature of the filing deadline. *Irwin*, 498 U.S. at 93-94.

The Supreme Court in *Irwin* recognized that the filing requirement was "a condition to the waiver of sovereign immunity and thus must be strictly construed." *Id.* at 94. However, it adopted a "general rule" under which "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Id.* at 95-96. It explained:

> Once Congress has made . . . a waiver [of sovereign immunity], we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver. Such a principle is likely to be a realistic assessment of

> legislative intent as well as a practically useful principle of interpretation.

Id. at 95. *Irwin* thus created a general rule that statutes of limitations for suing the government are presumptively non-jurisdictional. *See Menominee Indian Tribe v. United States*, 614 F.3d 519, 525 (D.C. Cir. 2010); *see also Norman v. United States*, 467 F.3d 773, 775 (D.C. Cir. 2006) (stating that *Irwin* "held that federal statutes of limitations are not jurisdictional").

In *John R. Sand*, the Supreme Court confirmed that statutes of limitations, even those for claims against the government, are typically non-jurisdictional. *See* 552 U.S. at 137; *see also Menominee Indian Tribe*, 614 F.3d at 523 (citing *John R. Sand* for this proposition); *Alaska Airlines, Inc. v. DOT*, 575 F.3d 750, 759 (D.C. Cir. 2009) (citing *John R. Sand* as "teach[ing] that a statute of limitations ordinarily serves only as an affirmative defense"). *John R. Sand* held that 28 U.S.C. § 2501, a statute of limitations for bringing suits in the Court of Federal Claims that is similar though not identical in structure to § 2401(a), was jurisdictional. Its decision rested, however, not on § 2501's text, but on an unbroken line of Supreme Court cases dating to the 1880s that had held § 2501 to be jurisdictional. 552 U.S. at 134-35. Given these unique circumstances, and based on principles of *stare decisis*, the Court declined to disturb its prior holdings. *Id.* at 138-39. The Court distinguished the decision in *Irwin* by stating that the statute of limitations there, "while similar to [§ 2501] in language, [was] unlike [§ 2501] in

the key respect that the Court had not previously provided a definitive interpretation." *Id.* at 137.

Under *Irwin* and *John R. Sand*, § 2401(a) is presumptively non-jurisdictional, and nothing in the provision's "'text, context, and relevant historical treatment'" suggests otherwise. *Menominee Indian Tribe*, 614 F.3d at 524 (quoting *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166 (2010)). Indeed, § 2401(a) does not speak in jurisdictional terms at all, eschewing any reference to "jurisdiction" or even to "courts." Rather, § 2401(a) states what any number of statutes of limitations provide: a claim not filed within the time specified is "barred." Nor does historical treatment counsel in favor of interpreting § 2401(a) as jurisdictional. *See Menominee Indian Tribe*, 614 F.3d at 525 (considering this factor before holding that a statute of limitations governing submission of contract disputes to a federal contract officer was not jurisdictional). Unlike § 2501, the provision at issue in *John R. Sand*, the Supreme Court has never held that § 2401(a) is jurisdictional, and at least two circuits have held that it is not. *See Clymore v. United States*, 217 F.3d 370, 374 & n.16 (5th Cir. 2000); *Cedars-Sinai Med. Center v. Shalala*, 125 F.3d 765, 770 (9th Cir. 1997). *But see, e.g., Center for*

Bio. Diversity v. Hamilton, 453 F.3d 1331, 1334 (11th Cir. 2006) (holding, in reliance on *Spannaus* and without citing *Irwin*, that § 2401(a) is jurisdictional).[2]

Plaintiffs recognize that their position would require this Court to overrule existing circuit precedent. Such treatment is in order, however, in light of the intervening Supreme Court case law and could be done with the endorsement of the *en banc* Court rather than through full court *en banc* rehearing. *See* D.C. Circuit Policy Statement on *En Banc* Endorsement of Panel Decisions 1 (Jan. 17, 1996) (stating that a panel may overrule, with the *en banc* Court's endorsement, a precedent that, "due to an intervening Supreme Court decision," the "panel is convinced is clearly an incorrect statement of current law"). Moreover, numerous panels in recent years have recognized the potential instability of *Spannaus*'s

[2] This Court has stated that the *Irwin* presumption in favor of equitable tolling depends in part on whether "the injury to be redressed is of a type familiar to private litigation." *Chung v. DOJ*, 333 F.3d 273, 277 (D.C. Cir. 2003) (holding that the Privacy Act statute of limitations is not jurisdictional). Although *Chung* suggested in dicta that "[a] petition for review of an informal agency rulemaking would not likely meet th[is] test," *id.*, *Chung* poses no barrier here. *Chung*'s statement in this regard was limited to the context of whether equitable tolling should be presumed for a non-jurisdictional statute of limitations, not whether a statute of limitations is jurisdictional in the first place. *See, e.g.*, *Menominee Indian Tribe*, 614 F.3d at 209, 212 (addressing the similarity between an injury on which a claim against the government was based and the types of injuries suffered by plaintiffs in private litigation only in the context of determining whether equitable tolling was available for a statute deemed non-jurisdictional in an earlier part of the opinion). Moreover, *John R. Sand*, which post-dates *Chung*, did not consider, in evaluating whether a statute of limitations was jurisdictional, whether a claim against the government has a private analog, which suggests that this consideration is not properly part of the test.

jurisdictional holding after *Irwin* and *John R. Sand*, further suggesting that reconsideration of *Spannaus* would be appropriate if the Court reaches the jurisdictional issue here. *See P&V Enter. v. Army Corps of Eng'rs*, 516 F.3d 1021, 1026-27 & n.3 (D.C. Cir. 2008) (affirming dismissal of an untimely claim under § 2401(a) for lack of subject-matter jurisdiction but noting that neither party had challenged *Spannaus* in light of *Irwin* and *John R. Sand*); *Felter v. Kempthorne*, 473 F.3d 1255, 1260 (D.C. Cir. 2007) (describing district court's "interesting analysis" of whether *Irwin* "undermined this court's precedent holding section 2401(a) to be jurisdictional" but determining that the Court need not reach the issue); *Harris*, 353 F.3d at 1013 n.7 (recognizing a tension between *Spannaus* and *Irwin* but determining that the Court need not resolve the issue).

Because § 2401(a) is not jurisdictional, it can be waived. *See John R. Sand*, 552 U.S. at 133. Defendants have undoubtedly waived any statute-of-limitations defense by failing to argue in the district court or on appeal that the statute of limitations bars plaintiffs' claim. Although defendants discussed similarities between the 2011 TEGLs and earlier sets of special procedures, they did so as a substantive response to the merits of plaintiffs' claim or in the context of plaintiffs' standing, never suggesting that the suit was untimely. Based on the briefing, plaintiffs would have had no way of knowing that defendants intended to pursue

such a defense. Accordingly, defendants have waived any statute of limitations defense that might have been available to them.

CONCLUSION

For the foregoing reasons, 28 U.S.C. § 2401(a)'s statute of limitations does not bar plaintiffs' claim. This Court should accordingly reverse the district court's order dismissing the plaintiffs' claim for lack of standing, hold that DOL's issuance of the TEGLs without notice and an opportunity for public comment violated the APA, and remand to the district court for an appropriate remedy.

Dated: March 12, 2014

Respectfully submitted,

/s/ Julie A. Murray

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the Court's February 28, 2014, order limiting the supplemental brief to fifteen pages.

/s/ Julie A. Murray
Julie A. Murray

CERTIFICATE OF SERVICE

I certify that on March 12, 2014, I caused the foregoing to be filed with the Clerk of the Court through the Court's ECF system, which will serve notice of the filing on all filers registered in this case.

/s/ Julie A. Murray
Julie A. Murray