ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

In the Matter of:	)	
DISTRICT COUNCIL OF IRON	)	ARB Case No. 2020-0035
WORKERS OF THE STATE OF	)	
CALIFORNIA AND VICINITY,	)	
Petitioner,	)	
v.	)	
WAGE AND HOUR DIVISION,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
Respondent.	)	
	)	

ADMINISTRATOR'S RESPONSE BRIEF

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STATEMENT OF THE ADMINISTRATOR IN RESPONSE TO PETITION FOR REVIEW

This case is before the Administrative Review Board ("ARB" or "Board") pursuant to the Davis-Bacon Act, as amended ("the DBA" or "the Act"), 40 U.S.C. 3141, *et seq.*, and the implementing regulations at 29 C.F.R. Parts 1 and 7, on the petition for review of the District Council of Iron Workers of the State of California and Vicinity ("District Council"). The District Council challenges the Wage and Hour Division's ("WHD") recognition of the distinct classifications of structural ironworker, reinforcing ironworker, and ornamental ironworker, rather than a general ironworker classification, in a DBA wage survey that WHD conducted to establish prevailing wage rates on residential construction in rural counties in the state of California.

In response to a request by the District Council for reconsideration of WHD's decision to treat structural ironworker, reinforcing ironworker, and ornamental ironworker as separate classifications for purposes of the California residential prevailing wage survey, the WHD's Administrator issued a final ruling on July 5, 2019, that affirmed the use of the three distinct classifications. *See Final Ruling in Response to Request for Review and Reconsideration* ("Final Ruling") (Jul. 5, 2019), Administrative Record ("AR") 1-7. Almost eight months later, on

February 25, 2020, the District Council filed a petition for review of the Administrator's ruling.

The Administrator, through counsel, hereby responds to the petition for review and, for the reasons set forth below, respectfully requests that the petition be denied.

ISSUES PRESENTED

1. Whether the District Council's petition for review is untimely, where the petition was filed nearly eight months after the Administrator issued her final ruling.

2. Whether the Administrator acted reasonably and within her discretion in treating structural ironworker, reinforcing ironworker, and ornamental ironworker as three distinct job classifications when determining DBA prevailing wage rates applicable to residential construction in rural California.

STATEMENT OF JURISDICTION

The Board conducts appellate review of the Administrator's rulings in DBA cases. *See Assoc. Gen. Contractors of Maine*, ARB Case No. 13-043, 2015 WL 2340493, at *1 (ARB April 30, 2015); *Coal. for Chesapeake Hous. Dev.*, ARB Case No. 12-010, 2013 WL 5872049, at *3 (ARB Sept. 25, 2013). Accordingly, the Board will not hear matters *de novo* unless there is a showing of extraordinary

circumstances. 29 C.F.R. 7.1(e). The Board reviews the Administrator's decisions "to determine whether they are consistent with the statute and the regulations, and are a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the Davis-Bacon Act." *Phoenix Field Office, Bureau of Land Mgmt.*, ARB Case No. 01-010, 2001 WL 767573, at *3 (ARB June 29, 2001); *see also Assoc. Gen. Contractors*, 2015 WL 2340493, at *1 (same). The Board "generally defers to the Administrator as being in the best position to interpret [the Davis-Bacon Act's implementing regulations] in the first instance…, and absent an interpretation that is unreasonable in some sense or that exhibits an unexplained departure from past determinations, the Board is reluctant to set the Administrator's interpretation aside." *Chesapeake Hous.*, 2013 WL 5872049, at *3 (citations and internal quotation omitted).

STATEMENT OF THE CASE

I. Statutory and Regulatory Framework

The Davis-Bacon Act requires that each contract over $2,000.00 "to which the Federal Government or the District of Columbia is a party, for construction, alteration or repair, including painting and decorating, of public buildings and public works . . . shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics" that are "employed directly on the site

of the work." 40 U.S.C. 3142(a), (c). The minimum wages to be paid are those that the Secretary of Labor determines to be prevailing for the "corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the locality where the work is to be performed." *Id.* at 3142(b). The Secretary's broad authority to administer the Act, including to develop and issue prevailing wage determinations, has largely been delegated to the Administrator. *See* Sec'y's Order 1-2014, Delegation of Authority and Assignment of Responsibility to Administrator, Wage and Hour Div., 5(A)(3), 79 Fed. Reg. 77527, 77527, 2014 WL 7275751 (Dec. 24, 2014); 29 C.F.R. 1.1(a), 1.3 ("For the purpose of making wage determinations, *the Administrator* will conduct a continuing program for the obtaining and compiling of wage rate information") (emphasis added).

WHD conducted its California residential Davis-Bacon prevailing wage survey in accordance with the relevant guidelines established by the General Accountability Office for compiling wage survey data and procedures set forth in WHD's *Davis-Bacon Construction Wage Determinations Manual of Operations* (1986) ("*Manual of Operations*" or "*Manual*") and *Prevailing Wage Resource Book* ("*PWRB*").[1] The prevailing wage rates issued by the Administrator are based

[1] The *Manual of Operations* is available at https://babel.hathitrust.org/cgi/pt?id=uiug.30112104405474;view=1up;seq=3, and relevant excerpts are included

on survey data derived from the information that responding contractors, labor unions, and other interested parties voluntarily provide. *See* 29 C.F.R. 1.1-1.7. During the survey process, WHD engages in numerous follow-up requests for data in order to ensure that a significant number of possible respondents are contacted and provided an opportunity to participate in the survey process. WHD also contacts contractors as necessary with any questions about the wage data that has been submitted in order to ensure that the data meets all of the survey's parameters and that the work reflected in the data has been properly classified. *See Manual of Operations* at 44, 58-59, AF 228, 230-31.

In calculating prevailing wage rates based on the survey data received, WHD follows several important and well-established policies. First, in order for WHD to publish a wage rate for a classification, the data for that classification must generally meet certain sufficiency requirements. At the time of the California residential survey at issue, the survey data for a classification met WHD's sufficiency requirements if it included wage information for at least six similarly classified employees paid by at least three contractors. Second, the county is the appropriate geographic unit for data collection, although data may be derived from

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in the Administrative Record, *see* AR 221-35 The PWRB is available at https://www.dol.gov/agencies/whd/government-contracts/prevailing-wage-resource-book.

broader geographic areas in some situations, as described below. *See* 29 C.F.R. 1.7(a), (b). Finally, data received from metropolitan and rural counties cannot be combined. *See* 29 C.F.R. 1.7(b).

In accordance with these principles, WHD first attempts to calculate a prevailing wage based on survey data at the county level. *See* 29 C.F.R. 1.7(a); *Manual of Operations* at 38, AR 225; *Chesapeake Hous.*, 2013 WL 5872049, at *4. If there is insufficient survey data for a particular classification in that county, then data from surrounding counties may be used. *See* 29 C.F.R. 1.7(b); *Manual of Operations* at 38-39, AR 225-26; *Chesapeake Hous.*, 2013 WL 5872049, at *7. If the survey data for an established county group is still insufficient to determine a prevailing wage rate, then, for classifications that have been designated as "key" classifications, WHD may expand to a "supergroup" of counties or even to the statewide level. *See Chesapeake Hous.*, 2013 WL 5872049, at *6 (concluding that "the use of wage data from a super group is a permissible exercise of the broad discretion granted the WHD under the statute and regulations" and that "even the use of statewide data is permissible").[2]

[2] Key classifications are those that are "normally necessary" for a particular type of construction. *See PWRB*, at 6. WHD expands the geographic area to a "supergroup" of counties or to the statewide level for purposes of calculating a prevailing wage rate only for key classifications.

If the sufficiency requirements for a survey are not satisfied at any level for a particular classification, then the classification is not listed on the wage determination. Instead, to the extent the classification is needed for a particular construction project, the classification may be added to the wage determination included in a particular contract through WHD's conformance process. *See* 29 C.F.R. 5.5(a)(1)(ii)(A); *Am. Bldg. Automation, Inc.*, ARB No. 00-067, 2001 WL 328123 (ARB Mar. 30, 2001).

The Administrator's authority to establish prevailing wages includes the authority to identify the classifications of laborers and mechanics performing work in the applicable locality. 40 U.S.C. 3142; 29 C.F.R. 1.2(a)(1) (defining the prevailing wage to be that paid to laborers or mechanics in the relevant "classification"). The classification of laborers and mechanics under the DBA is generally governed by 29 C.F.R. 5.5(a)(1), which provides that such workers are to be paid "the appropriate wage rate and fringe benefits on the wage determination *for the classification of work actually performed*, without regard to skill." *Id*. (emphasis added); *see also Manual of Operations* at 20, AR 223. Consistent with this regulatory provision, the Administrator "has broad discretion to recognize and define the various classes of workers for whom the prevailing wage must be determined." *Assoc. Builders & Contractors, Inc. v. Herman*, 976 F. Supp. 1, 17 (D.D.C. 1997) (citing *Bldg. & Constr. Trades Dep't, AFL-CIO v. Martin*, 961 F.2d

269, 271 (D.C. Cir. 1992)); *see also Miami Elevator Co.*, ARB Case Nos. 98-086, 97-145, 2000 WL 562698, at *3 (ARB Apr. 25, 2000) (because the Act "does not identify what classifications of construction workers are encompassed within the universe of 'laborers and mechanics,'" the "process of analyzing and assessing the various construction classifications" is entrusted to WHD); *Thomas & Sons Bldg. Contractors, Inc.*, ARB Case No. 9-164, 1999 WL 956535, at *6 (ARB Oct. 19, 1999) (noting that the Secretary of Labor has "preeminent authority… to determine worker classification issues under the Davis-Bacon Act").

In exercising its discretion under the Act, WHD classifies laborers and mechanics according to the nature of the work that they actually perform. *See Pythagoras Gen. Contracting Corp.*, ARB Case No. 09-007, 2011 WL 1247207, at *7 (ARB Mar. 1, 2011); *Miami Elevator*, 2000 WL 562698, at *18; *Trataros Constr. Corp.*, WAB Case No. 92-03, 1993 WL 306698, at *3 (WAB April 28, 1993); *Batteast Constr. Co.*, WAB Case No. 83-12, 1984 WL 161746, at *2 (WAB June 22, 1984). As the ARB has observed, "[u]nder the existing DBA regulatory scheme, decisions regarding appropriate job classifications under the Davis-Bacon Act ultimately should be centered on some form of fact-based analysis (for example, area practice data, reliance on the Administrator's expertise, or other data)." *Miami Elevator*, 2000 WL 562698, at *18. Classification under the Act therefore requires "an analysis based on evidence of duties *actually performed*."

Id. (emphasis added). A worker's *ability* to perform certain work duties is largely irrelevant in determining how work should be classified. *See Audio-Video Corp.*, ARB Case No. 96-163, 1997 WL 454062, at *3 (July 17, 1997).

II. Statement of Facts and Course of Proceedings

In 2013, WHD initiated a survey of prevailing wage rates on residential construction in rural counties in California. Through its wage survey, WHD sought wage data for residential construction projects that were active during the period of January 1, 2012 to June 30, 2013. WHD contacted numerous interested parties, including relevant construction contractors and the national offices of several international unions, to notify them that WHD was seeking wage data and that data collection would end on April 30, 2014. *See Final Ruling*, AR 3.

In response to its requests for wage data, WHD received data reflecting that some type of ironwork was performed on 12 projects. WHD determined that the data submitted for five of the projects was not usable either because the project did not involve residential construction or because the project did not involve construction during the January 1, 2012 to June 30, 2013 survey period. The wage data that WHD received for each of the remaining seven projects was usable and was reported on Standard Form WD-10, "Report of Construction Contractor's Wage Rates," an optional form that is used to promote consistency in the submission of wage data to WHD. The seven WD-10 forms, each of which

contained wage data for a residential construction project in a rural California county during the survey period, identified a total of eighteen individual workers. Each form identified the worker's job classification as "Iron Worker," and the type of work performed as "Structural/Reinforcing/Ornamental."[3]

Consistent with its regulatory authority and established survey procedures, WHD contacted the contractors for each of the seven projects at issue in order to determine what kind of ironwork each worker had performed. These follow-up inquiries revealed that, on each of the seven construction projects, the workers performed only one particular type of ironwork. Specifically, through its clarification process, WHD determined that three workers employed by two contractors had performed reinforcing ironwork. Because this limited wage data did not satisfy either WHD's six-worker or three-contractor sufficiency criteria, WHD was unable to publish a prevailing wage rate for the reinforcing ironworker classification. WHD also determined through its clarification process that fifteen of the workers, employed by two contractors, had performed structural ironwork. Although data for 15 workers satisfied WHD's six-worker sufficiency criterion, WHD was unable to publish a prevailing wage rate for the structural ironworker classification because the data did not satisfy WHD's three-contractor sufficiency

[3] Confirmation forms reflecting the information contained on the WD-10s are attached to the District Council's brief.

criterion. Finally, because no data was submitted for ornamental ironwork, WHD did not publish a prevailing wage rate for that classification.

On October 13, 2016, the District Council requested reconsideration of the residential wage determinations for the rural California counties included in the survey at issue. *See Petitioner Request for Review and Reconsideration and Exhibits A-P* ("*Request for Reconsideration*") (Oct. 13, 2016), AR 8-219. In its request, the District Council challenged WHD's use of the separate classifications of structural ironworker, reinforcing ironworker, and ornamental ironworker rather than one general ironworker classification. *Request for Reconsideration* at 1-10, AR 8-17. The District Council also contended that WHD should have utilized a lower sufficiency standard under which data on at least three workers employed by two contractors, rather than data on at least six workers employed by three contractors, would suffice to publish a prevailing wage rate. *Request for Reconsideration* at 10-12, AR 17-19.

On July 5, 2019, the Administrator issued a final ruling addressing the arguments raised by the District Council and denying the request for reconsideration. *Final Ruling*, AR 1-7. The Administrator first explained that in exercising its broad authority to designate the job classifications that appear on wage determinations, WHD is guided by the work actually performed by the workers for whom wage data is submitted during the survey process. The

Administrator then noted that WHD has historically regarded structural, reinforcing, and ornamental ironworkers as separate classifications. In this case, the District Council's collective bargaining agreement ("CBA") identified structural, reinforcing, and ornamental ironworkers as distinct "job classifications," and when WHD clarified the work actually performed on the relevant projects for which WHD received wage data, each of the contractors confirmed that their workers performed only structural or reinforcing ironwork. Noting that such clarification is an established WHD process, the Administrator concluded that WHD properly treated each type of ironwork as a separate job classification for purposes of the California residential survey. Finally, the Administrator observed that WHD's use of a six worker/three contractor sufficiency standard was a well-established and reasonable exercise of her broad discretion to ensure that prevailing wage rates are based on sufficient data. The Administrator therefore affirmed WHD's determination that it lacked sufficient data to include any ironworker classification on the wage determinations at issue.

Nearly eight months later, on February 25, 2020, the District Council filed a petition for review with the Board. *Petition for Review* ("Pet.") (Feb. 25, 2020). In its petition, the District Council argues that WHD abused its discretion by treating structural ironworker, reinforcing ironworker, and ornamental ironworker

as separate classifications rather than as a single, unitary ironworker classification, in the California residential prevailing wage survey at issue.[4]

By Notice of Appeal and Order Establishing Briefing Schedule, dated March 6, 2020, the Board ordered the Administrator to file the administrative record and a brief in response to the District Council's petition by April 3, 2020. On March 27, 2020, the Administrator, through counsel, requested an extension of time in which to file the administrative record and her response brief. The Board re-established the briefing schedule by Order dated March 30, 2020 and directed that the Administrator file the administrative record and a brief in response to the petition for review on or before June 2, 2020.

SUMMARY OF ARGUMENT

The petition for review should be dismissed as untimely. Under the governing regulations, the District Council was required to file its petition for review "within a reasonable time from" the Administrator's final ruling. 29 C.F.R. 7.9(a). Instead, the District Council waited almost eight months to file its petition for review and has not offered any justification for its delay. The relevant

[4] As noted *supra*, the District Council's request for reconsideration also disputed the Administrator's use of a six worker/three contractor sufficiency standard. In its petition for review, the District Council notes that it is no longer challenging WHD's use of that sufficiency standard. Pet. at 2.

regulatory provisions and Board precedent reflect that a delay of this magnitude is not reasonable.

Should the Board reach the merits, it should find that the Administrator acted reasonably and within her discretion in designating structural ironworker, reinforcing ironworker, and ornamental ironworker as three distinct job classifications. WHD has broad discretion to recognize and define job classifications, and it classifies laborers and mechanics based on the work they actually perform. WHD historically has treated structural, reinforcing, and ornamental ironwork as three different classifications. The District Council (through its collective bargaining agreement), the international union with which the District Council is affiliated, and the Bureau of Labor Statistics likewise recognize that these three types of ironwork involve distinct classifications or occupations. Moreover, in accordance with WHD's established survey procedures, WHD contacted each of the contractors for which "Ironworker" wage data had been submitted in the California wage survey at issue, and determined that each worker for whom wage data had been submitted had actually performed only one type of ironwork.

Neither of the District Council's two grounds for challenging the Administrator's final ruling alters the conclusion that WHD properly analyzed the wage data it received. First, contrary to the District Council's contention, WHD

recognizes structural ironworkers, reinforcing ironworkers, and ornamental ironworkers as "key classes" of laborers and mechanics. WHD thus did not abuse its discretion when it attempted to calculate a prevailing wage rate for each of the three classifications based on statewide data. Second, WHD did not abuse its discretion when it declined to publish a prevailing wage for a general ironworker classification, as such an approach would have been contrary to WHD's historical practices, the wage data that WHD analyzed, and WHD's legal obligation to base classification decisions on the work actually performed by laborers and mechanics. For all of these reasons, the Board should affirm the Administrator's ruling.

ARGUMENT

I. The District Council's Petition for Review Should Be Dismissed Because It Was Filed Nearly Eight Months after the Administrator Issued Her Final Ruling

Although the District Council was required to file its petition for review "within a reasonable time" of the Administrator's final ruling, 29 C.F.R. 7.9(a), the District Council waited almost eight months to file its petition and has not identified any extraordinary circumstances to justify its delay. The pertinent regulatory provisions and Board precedent in analogous circumstances reflect that such a lengthy, unexplained delay is not reasonable under any relevant measure. Accordingly, the petition should be dismissed.

The Board "has jurisdiction to hear and decide in its discretion appeals concerning questions of law and fact from final decisions" under the regulations implementing the Davis-Bacon and Related Acts ("DBRA"). 29 C.F.R. 7.1(b).[5] However, such review is subject to prescribed time limits. Under 29 C.F.R. 7.4(a), which governs petitions for review that seek a modification or other change in a wage determination, "[r]equests for review of wage determinations must be timely made." *Id*; *see also id*. at 7.2(a). Under 29 C.F.R. 7.9(a), which governs the Board's review of final agency decisions in all other types of administrative proceedings under the DBRA, a petition for review must be filed "within a reasonable time from any final decision." *Id*.

Board precedent applying the time limitations set forth in 29 C.F.R. 7.4(a) and 7.9(a) reflects that the Board has evaluated the particular circumstances of each case to determine whether a petition was "timely" or filed "within a reasonable time." In *Pizzagalli Construction Co*., for instance, the Board concluded that a contractor's challenge to a conformance ruling by the WHD Administrator satisfied the "'reasonable time' requirement" of 29 C.F.R. 7.9(a)

[5] Congress has included DBA prevailing wage requirements in numerous statutes – referred to collectively as Davis-Bacon "Related Acts" – under which Federal agencies assist construction projects through grants, loans, guarantees, insurance, and other methods. *See* 29 C.F.R. 5.1(a). The Board's regulations at 29 C.F.R. Part 7 apply to appeals under the Related Acts as well as under the DBA.

"[u]nder the circumstances," which included that the contractor initially filed its petition for review with the Administrator and the Administrator did not object to the appeal on timeliness grounds. ARB Case No. 98-090, 1999 WL 377283, at *3 n.2 (ARB May 28, 1999);[6] *see also The Heavy Constructors Ass'n of the Greater Kansas City Area*, ARB Case No. 96-128, 1996 WL 376828, at *3 (ARB July 2, 1996) (concluding, without analysis or explanation, that contractor's petition for review would be accepted as filed "within a reasonable time," where contractor initially sought review of Administrator's ruling in federal court and, while the federal case was pending, the Administrator apparently advised the contracting agency that she would grant the relief sought by the contractor notwithstanding her ruling); *Edward E. Davis Contracting, Inc. Wage Rates for Floor & Ceiling Tile Installer, Ft. McClelland, AL*, WAB Case No. 79-08, 1980 WL 95651 (WAB July 8, 1980) (dismissing petition for review as untimely under 29 C.F.R. 7.4(a) based on six-month delay in filing the petition).

Under the circumstances of this case, the Board should conclude that the District Council failed to file its petition for review "within a reasonable time"

[6] The Board's decision does not indicate when the contractor filed its petition for review with the Administrator. Although approximately nine months elapsed between the Administrator's final ruling and the filing of the petition with the Board, the Administrator's decision not to object on timeliness grounds, coupled with the Board's brief discussion of the timeliness issue, suggests that the contractor may have promptly filed its petition with the Administrator.

under 29 C.F.R. 7.9(a).[7] As noted, nearly eight months elapsed between issuance of the Administrator's final ruling on July 5, 2019 and the District Council's February 25, 2020 petition for review. During that lengthy interval, unlike the petitioners in *Pizzagalli* and *Heavy Constructors Ass'n*, the District Council took no action to seek further review by the Administrator or in any other forum. Moreover, unlike *Heavy Constructors Ass'n*, the Administrator never indicated that she would grant the District Council's requested relief after she issued her final ruling.

[7] Although the District Council's petition could be viewed as a challenge to a wage determination subject to Section 7.4(a)'s timeliness requirement (indeed, the Administrator's ruling indicated that Section 7.4(a) would govern any appeal, *see Final Ruling*, AR 7), the text of Section 7.4(a) and relevant Board precedent suggest that Section 7.4 applies only when an interested party is challenging the inclusion of a specific wage determination in a particular contract, and that Section 7.9 therefore applies where, as here, an interested party seeks a prospective change to a wage determination unrelated to any particular contract. *See* 29 C.F.R. 7.4(a) ("Timeliness is dependent upon the pertinent facts and circumstances involved, including without limitation the contract schedule of the administering agency, the nature of the work involved, and its location."); *Dick Enter., Inc.*, ARB Case No. 95-046A, 1996 WL 704227, at *5 (ARB Dec. 4, 1996) ("A portion of this Board's jurisdiction consists of the pre-award challenges to wage determinations. *See* 29 C.F.R. 1.6, 7.4. Historically, when made, such challenges have been treated expeditiously in order to satisfy contract solicitation and award schedules established by contracting agencies."); *Heavy Constructors Ass'n,* 1996 WL 376828, at *3 (concluding that because the petitioners did not "challenge the validity of the wage determination" in their contract, "the general rules requiring timely challenges to wage determinations are inapplicable").

The District Council's petition for review does not identify any circumstances that would render its eight-month delay "reasonable," nor does it articulate any equitable basis for deviating from precedent in analogous circumstances, which reflects that a "reasonable time" ordinarily denotes a significantly shorter period for seeking reconsideration of a decision under the DBRA. *See, e.g.*, *Thomas & Sons Bldg. Contractors, Inc*., ARB Case No. 98-164, 2001 WL 706733 (ARB June 8, 2001) (denying motion for reconsideration of Board decision under the DBRA; motion was not filed within a reasonable time due to five-month delay in seeking reconsideration); *U.S. Dep't. of Energy*, ARB Case No. 03-016 (ARB Mar. 31, 2004), slip op. at 5-8 (concluding that "an interested party must request the Administrator to review issues relating to DBA wage determinations [under 29 C.F.R. 5.13] within a reasonable time," and that, unless equitable modification is warranted, a 60-day limit for seeking reconsideration by the Administrator "serves as a useful guide for defining the outer limits of what constitutes a 'reasonable time' under Section 5.13.").[8]

[8] 29 C.F.R. 5.13 provides that all questions under the DBRA shall be referred to the Administrator "for appropriate ruling or interpretation." In this case, the District Council sought reconsideration by the Administrator under a separate provision, 29 C.F.R. 1.8, which provides that "[a]ny interested person may seek reconsideration of a wage determination under [29 C.F.R. Part 1] or of a decision of the Administrator regarding application of a wage determination."

Other pertinent regulatory provisions governing appeals to the ARB also weigh in favor of interpreting Section 7.9(a)'s "reasonable period of time" requirement relatively strictly, not in an elastic manner under which an eight-month delay in seeking appellate review would be deemed "reasonable." Under the Service Contract Act ("the SCA"), the prevailing wage statute applicable to federal contracts for services, "[a] petition for review of a final written decision (other than a wage determination) of the Administrator" must be filed "within 60 days of the decision of which review is sought." 29 C.F.R. 8.7(b). Appeals of wage determinations under the SCA are subject to even stricter time limits. *Id*. at 8.3, 8.6. These provisions under the DBA's sister statute counsel against an overly lenient interpretation of Section 7.9(a)'s "reasonable time" requirement.

The Department's regulations governing petitions for review of an Administrative Law Judge ("ALJ") decision in DBRA enforcement proceedings are similarly instructive. Petitions for review in DBRA enforcement cases are subject both to 29 C.F.R. 7.9, including its "reasonable period of time requirement," and the time limit set forth in 29 C.F.R. 6.34. *See* 29 C.F.R. 6.34, 7.1, 7.9; *see also, e.g.*, *H.P. Connor & Co.*, WAB Case No. 90-07, 1991 WL 494722 (Feb. 26, 1991). Under 29 C.F.R. 6.34, a petition for review of an ALJ decision under the DBRA must be filed "[w]ithin 40 days after the date of the

decision of the Administrative Law Judge (or such additional time as is granted by the Administrative Review Board)."[9]

It stands to reason that 29 C.F.R. 6.34 and 29 C.F.R. 7.9(a) should be read in harmony, and that Section 7.9's reference to filing a petition "within a reasonable time," like the language in Section 6.34 recognizing the Board's authority to relax the 40-day deadline, confers authority on the Board to extend filing deadlines for equitable reasons, while also establishing a strict, 40-day deadline absent a basis for tolling. Although Section 6.34 does not apply in the instant case, it is yet another indicator that Section 7.9's "reasonable period of time" requirement should not be interpreted to provide an open-ended opportunity to petition for review many months after the underlying decision was issued. Indeed, it would be incongruous to apply a general 40-day deadline to appeals of ALJ decisions while permitting petitions for review of Administrator rulings to be filed many months later. Instead, the "within a reasonable time" standard set forth in Section 7.9(a) should be interpreted to require prompt filing within a relatively short period such as 40 days, *see* 29 C.F.R. 6.34, or 60 days, *see U.S. Dep't. of Energy*, slip op. at 7;

[9] This 40-day period is not jurisdictional and may be tolled for equitable reasons. *See, e.g.*, *Superior Paving & Materials, Inc.*, No. 99-065, 1999 WL 708177, at *2 (ARB Sept. 3, 1999) (accepting petition that was filed three days after expiration of 40-day deadline, and distinguishing cases in which the petition was filed two to six weeks late and the petitioner either provided no explanation or an inadequate explanation for the delay).

29 C.F.R. 8.7(b), subject to equitable tolling where warranted, and consistent with the ARB's role as an appellate tribunal. The District Council's eight-month delay in seeking review, coupled with the absence of any suggestion that equitable factors explain the delay in whole or in part, warrants dismissal of the petition under 29 C.F.R. 7.9(a).[10] Under every relevant metric, the District Council's petition was not filed "within a reasonable time."

II. The Administrator Acted Reasonably and Within Her Discretion in Designating Structural Ironwork, Reinforcing Ironwork, and Ornamental Ironwork as Distinct Job Classifications

WHD's course of action in implementing the California residential DBA wage survey, clarifying the data gathered, determining which job classifications were appropriate, and concluding that the data was insufficient to publish a wage rate for any of the job classifications at issue comported fully with the regulations, Board precedent, WHD's Manual of Operations, and WHD's own longstanding practice of considering structural, reinforcing, and ornamental ironwork to be

[10] To the extent that the District Council may contend that principles of equitable tolling apply here, that is not the case. Equitable tolling requires a showing of extraordinary circumstances. *In the Matter of Gary Vander Boegh*, ARB Case No. 15-062, 2017 WL 1032322, at *7 (ARB Feb. 24, 2017). "A party seeking relief from finality of a judicial or administrative order or judgment must, at a minimum, posit facts or allegations which set up an extraordinary situation which cannot fairly or logically be classified as mere neglect." *Id.* The District Council has not alleged, much less established, any such circumstances.

distinct job classifications. WHD thus was well within its discretion in employing the methodology and making the determinations that it did in this case, and the Administrator was well within her discretion in denying the District Council's request for reconsideration as a result.

As noted, WHD "has broad discretion to recognize and define the various classes of workers for whom the prevailing wage must be determined." *Assoc. Builders & Contractors*, 976 F. Supp. at 17 (citing *Bldg. & Constr. Trades Dep't, AFL-CIO v. Martin*, 961 F.2d 269, 271 (D.C. Cir. 1992)); *see also Miami Elevator*, 2000 WL 562698, at *3 (the "process of analyzing and assessing the various construction classifications" is entrusted to WHD); *Thomas & Sons*, 1999 WL 956535, at *6 (noting that the Secretary of Labor has "preeminent authority… to determine worker classification issues under the Davis-Bacon Act"). In determining appropriate job classifications, WHD relies on "evidence of duties *actually performed*." 29 C.F.R. 5.5(a)(1).

WHD has long regarded structural ironworkers, reinforcing ironworkers, and ornamental ironworkers as three separate classifications under the DBA. *See, e.g.*, *Manual of Operations* at 100, AR 229 (1986 publication listing "Ironworkers, structural" and "Ironworkers, reinforcing" as separate classifications for building and heavy construction in particular); *see also, e.g.*, *New Mexico Nat'l Elec. Contractors Ass'n*, ARB Case No. 03-020, 2004 WL 1261216, at *2 (ARB May

28, 2004) (noting that WHD had received sufficient survey data to publish a rate for structural ironworker but not for reinforcing ironworker); *cf. Pizzagalli*, 1999 WL 377283, at *6 (noting that the duties of a general ironworker classification on the applicable wage determination "clearly encompass[ed] the duties" of a proposed reinforcing ironworker classification, but further observing that WHD had received wage data for structural, reinforcing, and ornamental ironwork in the underlying survey). In conducting Davis-Bacon wage surveys, WHD thus separately analyzes the survey data it receives for structural ironwork, reinforcing ironwork, and ornamental ironwork and publishes a wage rate for each of those classifications to the extent that it receives sufficient data to warrant publication. *See, e.g.*, Gen. Wage Decision No. MD202000065, mod. 0 (Jan. 3, 2020) (containing only an ornamental ironworker classification); Gen. Wage Decision No. CO20200004, mod. 0 (Jan. 24, 2020) (containing only a structural ironworker classification).[11]

[11] WHD sometimes lists structural ironworker, reinforcing ironworker, and ornamental ironworker classifications together on a wage determination for purposes of convenience when the *same* wage and fringe benefit rates prevail for all three classifications. Thus, for example, a wage determination listing "Ironworkers: Structural, Reinforcing, and Ornamental" or "Ironworkers: Structural and Reinforcing" typically signifies that the same wage and fringe benefit rates prevailed in each of those separate classifications, not that WHD regarded them as a single "ironworker" classification. *See Final Ruling*, AR 5.

The International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers (the international union with which the District Council is affiliated) likewise distinguishes between structural, reinforcing, and ornamental ironworkers and describes the distinct duties of each classification. *See* International Ass'n of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Become an Ironworker, http://www.ironworkers.org/become-an-ironworker/careers (last visited June 2, 2020), AR 236-36(c). Structural ironworkers "[u]nload, erect, and connect fabricated iron beams" to form the "skeleton" of a project, primarily on industrial, commercial and large residential buildings. *Id.*, AR 236(a). By contrast, reinforcing ironworkers "fabricate and place steel bars (rebar) in concrete forms to reinforce structures" and "[p]lace rebar on appropriate supports and tie them together with tie wire." *Id*., AR 236(b) Ornamental ironworkers, also known as architectural ironworkers, install metal stairways, gratings, doors, windows, railings, and similar building components, typically after the structure of the building has been completed. *Id*., AR 236(c).

The Bureau of Labor Statistics' Occupational Employment Statistics ("OES") survey program, which produces employment and wage estimates for approximately 800 occupations, likewise distinguishes between "reinforcing iron and rebar workers" and "structural iron and steel workers," treating each as a

separate occupation for which the OES survey collects wage data.[12] Notably, the distinctions between these classifications of ironwork also are reflected in the District Council's collective bargaining agreement, which provides that structural, reinforcing, and ornamental ironworkers are separate "job classifications." *Request for Reconsideration*, Exhibit F, 3(c), AR 75-76.

The distinct nature of these three classifications of ironwork also was reflected in the projects for which WHD received relevant wage data in its California residential survey. Although the WD-10 forms that WHD received identified each worker as an "Ironworker," WHD is empowered under the DBA's implementing regulations to supplement the information it obtains through its survey program, including the wage information provided on WD-10s, "by such means… and from any sources determined to be necessary." 29 C.F.R. 1.3(c). Consistent with this regulatory authority, the *Manual of Operations* specifies that

[12] Under the OES survey, the duties of structural iron and steel workers are defined as follows: "Raise, place, and unite iron or steel girders, columns, and other structural members to form completed structures or structural frameworks. May erect metal storage tanks and assemble prefabricated metal buildings. *Excludes "Reinforcing Iron and Rebar Workers"* (47-2171)." The duties of reinforcing iron and rebar workers are described as "Position and secure steel bars or mesh in concrete forms in order to reinforce concrete. Use a variety of fasteners, rod-bending machines, blowtorches, and hand tools." *See* U.S. Bureau of Labor Statistics, Occupational Employment Statistics, https://www.bls.gov/oes/current/oes472221.htm (last visited June 1, 2020) (emphasis added).

WHD will "[c]all contractors to obtain missing/ambiguous data on returned WD-10s." *Manual of Operations* at 44, AR 228. *See also Road Sprinkler Fitters Local Union No. 669*, ARB Case No. 10-123, 2012 WL 2588591, at *5 (ARB June 20, 2012) ("telephone contact" is a legitimate source of information when the Administrator conducts a DBA wage survey).

Consistent with its established procedures, the governing regulations, and Board precedent, WHD contacted each of the contractors for which "Ironworker" wage data had been submitted in order to clarify and determine the kind of work that was actually performed on the projects at issue. WHD's follow-up activities revealed that in each case, each worker performed either structural ironwork or reinforcing ironwork, and no worker performed ornamental ironwork. Based on this additional information, WHD determined that the usable wage data it had received through the survey process reflected that three workers employed by two contractors performed reinforcing ironwork on residential projects in rural counties in California, and that 15 workers employed by two contractors performed structural ironwork on such projects.

As noted, WHD only publishes a wage rate for a classification where the usable data satisfies the applicable sufficiency requirements. In this case, WHD applied a sufficiency threshold of six workers employed by three contractors. As the usable data for reinforcing ironworkers did not satisfy either the six-worker or

three-contractor sufficiency criteria even when WHD considered all of the usable wage data for all rural counties in state of California, WHD did not publish a wage rate for the reinforcing ironworker classification. Similarly, although the usable data for the structural ironworker classification satisfied the six-worker sufficiency criterion, WHD received data for only two contractors and therefore was unable to publish a wage rate for the classification.

In short, in conducting the survey, clarifying the content of the WD-10 forms, determining which job classifications were relevant, and concluding that the usable data was insufficient to publish a prevailing wage rate for any ironworker classification, WHD adhered to the governing regulations, Board precedent, its own Manual of Operations, and its well-established historical practice of considering structural, reinforcing, and ornamental ironwork to be separate job classifications. The Administrator thus acted reasonably and within her discretion in denying the District Council's request for reconsideration.

III. The District Council's Grounds for Challenging the Administrator's Ruling Are Unpersuasive

The District Council challenges the Administrator's ruling on two grounds. First, the District Council contends that WHD does not recognize structural ironworkers, reinforcing ironworkers, and ornamental ironworkers "as 'key classes' of laborers and mechanics in its Prevailing Wage Resource Book," and

that it therefore was an abuse of discretion for WHD to "expand the geographic scope of [the California residential] prevailing wage survey to include data from the entire state for the purpose of publishing prevailing wage rates." Pet. at 9-10, 18. Second, the District Council contends that WHD abused its discretion by failing to publish a prevailing wage rate for the "key classification" of ironworker. These two arguments appear to be intertwined: if the District Council could demonstrate that structural ironworkers, reinforcing ironworkers, and ornamental ironworkers are not key classes and that WHD thus violated its internal procedures by attempting to calculate prevailing wage rates for those classifications based on statewide data, such a violation would support the District Council's second contention that WHD should have recognized a general "ironworker" classification as the relevant key classification and should have calculated a prevailing wage rate for that classification based on statewide data. Both of the District Council's arguments rest on incorrect premises, however, and neither warrants reversal of the Administrator's determination.

A. WHD recognizes the Structural Ironworker, Reinforcing Ironworker, and Ornamental Ironworker Classifications As "Key Classifications."

Contrary to the District Council's contention, WHD considers the structural ironworker, reinforcing ironworker, and ornamental ironworker classifications to be "key classifications." Key classifications are those that are "normally

necessary" for a particular type of construction. *See PWRB*, at 6. Key classifications are distinct from non-key classifications in two respects. First, WHD publishes a wage determination based on a survey only when WHD has received sufficient data to publish rates for at least half of the key classifications in the relevant category of construction (*e.g.*, six of the twelve key classifications for residential construction). *See Chesapeake Hous. Dev.*, 2013 WL 5872049, at *2. Second, the designation of a classification as a "key classification" affects the geographic area for which wage data may be used to calculate a prevailing wage rate. For non-key classifications, WHD will calculate a prevailing wage rate based only on data at the county or county group levels. Conversely, for classifications that have been designated as "key," if WHD receives insufficient wage data at the county or group levels, WHD will expand the geographic area to a "supergroup" of counties or even to the statewide level for purposes of calculating a prevailing wage rate. *See Chesapeake Hous.*, 2013 WL 5872049, at *6 (concluding that "the use of wage data from a super group is a permissible exercise of the broad discretion granted the WHD under the statute and regulations" and that "even the use of statewide data is permissible").

In contending that the classifications of structural ironworker, reinforcing ironworker, and ornamental ironworker are not key classifications, the District Council relies entirely on its characterization of a table in the *PWRB* listing "key"

crafts. *See PWRB*, at 6. Specifically, the District Council contends that because this table refers to "Iron workers" rather than to any of the three specific ironworker classifications, only the classification of "Ironworker" is a key craft, and thus it was error for WHD to attempt to calculate prevailing wage rates for the classifications of structural ironworker, reinforcing ironworker, and ornamental ironworker at the statewide level. Critically, however, the table on which the District Council relies is a general listing of key classifications that WHD publishes for informational purposes and that does not purport to list every individual classification that WHD considers a key classification for which a prevailing wage rate may be calculated at the supergroup or statewide levels.[13] For example, the table lists "Power Equipment Operators (operating engineers)" ("PEO") as a key classification rather than the individual types of PEO classifications that WHD treats as key classifications even though they are not specifically listed on the table. This general notation in no way undermines WHD's treatment of individual PEO classifications as key classifications.

[13] The *PWRB* "contains materials developed primarily for use in [WHD's] prevailing wage training conferences," and is "intended to provide practical guidance to procurement personnel and the general public rather than definitive legal advice." *PWRB*, at 2 (Legal Disclaimer).

Indeed, in *Chesapeake Housing*, the Board concluded that WHD permissibly calculated a wage rate for the key classification of crane operator based on statewide data even though crane operator, as a specific type of PEO, is not listed as a key classification on the *PWRB* table on which the District Council relies. 2013 WL 5872049, at *2.[14] Similarly, WHD recognizes various types of truck driver classifications (such as dump truck driver) as key classifications for which wage rates may be calculated at the supergroup or statewide levels even though only the general category of truck drivers is listed on the *PWRB* table. The reference to "Iron workers" on the table is a similarly general reference. Because the *PWRB* in certain instances simply lists categories of key classes, the structural ironworker, reinforcing ironworker, and ornamental ironworker classifications can be—and are—key classifications even though they are not expressly listed on the table at issue.

Moreover, the District Council's contention, if accepted, would subvert WHD's wage survey program. The District Council appears to be suggesting that if a particular classification is not "key," and if there does not appear to be

[14] All of the interested parties in *Chesapeake Housing*, including the Building and Construction Trades Department, AFL-CIO, which was represented by counsel for the District Council in this case, recognized that the crane operator classification was a key classification. *See* Brief of the Bldg. and Constr. Trades Dep't., AFL-CIO, ARB Case Nos. 11-074, 11-078 and 11-082 at 4, 7, 18 (Jan. 9, 2012), AR 244, 257, 258.

sufficient data to publish a wage rate for the classification at the county or group level, then it would be "impermissible" and "serve no valid purpose" for WHD to verify the nature of the work performed as part of WHD's wage survey program. Pet. at 10. However, as reflected in WHD's *Manual of Operations*, WHD reasonably has determined that clarifying data should occur *before*, not after, a determination of whether WHD has received sufficient data to publish a prevailing wage rate. *See Manual of Operations* at 44, 58, 61, AR 228, 230, 233; *see also* Fact Sheet #81: The Davis-Bacon Wage Survey Process, www.dol.gov/agencies/whd/fact-sheets/81-DBRA-Surveys. Until WHD has determined what work was actually performed on particular projects through its clarification process, WHD may not be able to determine which classification performed the work and thereby properly determine whether WHD's sufficiency standards have been satisfied. Indeed, it may not become apparent until after the clarification process that particular wage data reflects work performed by a key classification. If WHD were prohibited from clarifying data that, as submitted, appeared to fall within a non-key classification simply because it appeared that there was insufficient data for that classification at the county or group levels,

WHD would be unable to determine whether the work in fact fell within a key classification.[15]

B. WHD Did Not Abuse Its Discretion By Not Publishing a Prevailing Wage for a General "Ironworker" Classification.

The District Council's contention that WHD abused its discretion by not publishing a prevailing wage for a general ironworker classification, Pet. at 11-18, also rests on erroneous premises. As explained *supra*, WHD does not consider "ironworker" to be a unitary classification, but rather has a longstanding policy of considering structural ironworkers, reinforcing ironworkers, and ornamental ironworkers as three separate classifications under the DBA. It would have been inconsistent with that policy to combine the separate structural ironworker and reinforcing ironworker data WHD received into a single "ironworker" classification. Moreover, the District Council's CBA expressly refers to structural

[15] For example, WHD sometimes receives WD-10s that contain vague descriptions of the work performed, such that, for instance, WHD is unable to determine from the face of a WD-10 whether the work was performed by plumbers (a key classification) or pipefitters (a non-key classification). In such circumstances, WHD clarifies the nature of the work *before* determining whether sufficient data exists to publish a prevailing wage rate for either classification. Under the District Council's approach, by contrast, if a vaguely worded WD-10 suggested but did not establish that the work in question was pipefitter work, and if it appeared that there was insufficient pipefitter data to publish a pipefitter rate at the county or group levels, then WHD would not be able to conduct follow-up clarification – even if such clarification would demonstrate that some of the work in question fell within the plumber classification, and even if WHD would have lacked sufficient plumber data to publish a plumber wage rate in the absence of such clarification.

ironworkers, reinforcing ironworkers, and ornamental ironworkers as separate "job classifications." AR 75-76.

Most significantly, however, the District Council's extensive discussion of local area practice principles, Pet. at 12-18, conflates two distinct questions: *what type of work was performed* (the issue that WHD addressed when it clarified whether work reported as "ironwork" was in fact structural ironwork, reinforcing ironwork, or ornamental ironwork) and *which classification predominantly performs particular work* (a separate issue that WHD addresses when it has determined what type of work was performed but still needs to determine, as a matter of local area practice, which classification or classifications predominantly perform the work). The *Manual of Operations* and other authority on which the District Council relies make clear that these are two distinct issues. In focusing on the second issue (area practice), the District Council has not addressed the Administrator's authority to determine the type of work that was actually performed on the projects at issue in this case.

WHD's *Manual of Operations* prescribes the "guidelines, standards and techniques" that WHD used to issue the California prevailing wage determinations at issue. *Manual of Operations* at vii, AR 222. The *Manual* contains a detailed description of the DBA wage survey process, which includes a discussion of the steps taken during the survey process and the sequence in which they are taken.

For example, the *Manual* contains a summary chart reflecting that, after WHD plans and publicizes the survey, mails WD-10 forms to contractors and other interested parties, and follows up with non-respondents, WHD will "[c]all contractors to obtain missing/ambiguous data on returned WD-10s and resolve area practice issues." *Id*. at 44, AR 228.[16] This description makes clear that obtaining "missing/ambiguous data on returned WD-10s" (which is what WHD did in this case) and resolving "area practice issues" are two distinct activities.

The *Manual* also contains a detailed description of the steps that WHD takes to clarify and analyze survey data. Like the summary chart, this description distinguishes between efforts to clarify what work was performed on a particular project and efforts to clarify who predominantly performed the work as a matter of local area practice. *Id*. at 58-61, AR 230-233. The *Manual* notes, for example, that the clarification and analysis step of the survey process involves "intensive effort" to "reconcile ambiguities and incompleteness in the data." *Id*. at 58, AR 230. As the *Manual* explains, "[d]etermining the nature of work performed by various occupational classifications reported is an area that often needs clarification." *Id*. Only after discussing this aspect of the clarification process

[16] The *Manual* directs WHD staff to call contractors for clarification (rather than unions, as the District Council suggests) because contractors generally are in the best position to expeditiously answer questions about the type of work they performed on a particular project.

does the *Manual* turn to the distinct issue of clarifying *who* has performed certain work. *Id*. at 58-59, AR 230-231; *see also id.* at 40, AR 227 ("Area practice must be determined when work traditionally performed by employees in one classification (occupation) is performed by workers in another class and at a different wage rate.").[17]

The District Council's lengthy discussion of the *Manual of Operations*, the "*Fry Brothers* rule" incorporated in the *Manual*, and section 15f05 of WHD's Field Operations Handbook ("FOH") focuses exclusively on WHD's procedures for conducting local area practice surveys to determine who predominantly performs a particular type of work. Thus, for example, the District Council emphasizes the *Manual* and FOH provisions explaining that, in conducting area practice surveys, WHD will ask the relevant unions "if they perform the work in question" and, "if all parties agree" that a particular union performs the work in question, then the area practice "is established." Pet. at 17. However, in clarifying the wage data at issue in this case, WHD was not determining who predominantly performed the

[17] For example, WHD may contact a contractor to clarify whether the wage data it reported reflected drywall installation or general carpentry work. This step in the clarification process involves determining what work was actually performed on the project, after which WHD can determine which classification prevailed in performing the work, i.e., whether, as a matter of local area practice, drywall installation is predominantly performed by the specialty classification of drywall installers or by the general classification of carpenters.

work in question, but rather was determining what *type* of ironwork was performed. The District Council's reliance on *Abhe & Svoboda v. Chao*, 508 F.3d 1052 (D.C. Cir. 2007), a DBRA enforcement case, is misplaced for the same reason. In that case, the nature of the work (bridge painting) was undisputed, and the issue was whether WHD had properly determined which classification on the wage determination performed such work.

At bottom, the District Council contends that WHD should have published a prevailing wage rate for a unitary ironworker classification because the District Council claims that workers performing structural or reinforcing ironwork are all "ironworkers." However, as both the *Manual of Operations* and Board precedent make clear, it is the nature of the work *actually performed* by a worker, not the worker's *ability* to perform certain work duties, that determines how work should be classified. In this case, WHD properly exercised its authority to clarify the information on the WD-10 Forms it received, *Manual of Operations* at 58, AR 230; 29 C.F.R. 1.3(c), as during the survey process WHD is not bound by a contractor's or union's own characterization of its work. As a result of its clarification process, and in accordance with WHD's established policies, WHD properly classified the workers at issue as structural ironworkers or reinforcing ironworkers based on the work they actually performed.

CONCLUSION

The District Council's petition for review is untimely, and, as a result, the Board should dismiss the petition for review. If, however, the Board should reach the merits of this case, it should find that the District Council failed to establish that the Administrator abused her discretion in determining that structural, reinforcing, and ornamental ironwork are distinct job classifications. To the contrary, the Administrator followed long-standing policies consistent with the Davis-Bacon Act and its implementing regulations in determining that structural, reinforcing, and ornamental ironwork are three separate job classifications. Accordingly, the Board should find that the Administrator acted reasonably and within her discretion, and should dismiss the District Council's petition for review.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), because it contains 8864 words, including headings, footnotes, and quotations, but excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally-spaced typeface, Times New Roman, in 14-point font. This brief was prepared using Microsoft Word 2016.

/s/ Susannah M. Maltz

SUSANNAH M. MALTZ

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Statement of the Administrator in Response to the Petition for Review was served June 2, 2020 by email, with the consent of the recipient, on the following:

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