

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION**

TECHE VERMILION SUGAR CANE)	
GROWERS ASSOCIATION, INC., et al.,)	Civil Action No. 6:23-cv-00831
)	
Plaintiffs,)	Judge Robert B. Summerhays
)	
v.)	Magistrate Judge Carol B.
)	Whitehurst
JULIE A. SU, et al.,)	
)	
Defendants.)	

MOTION OF JESUS IGNACIO DIAZ CASTRO, RICARDO GUADALUPE ARCE RUIZ, JAMES SIMPSON, AND FARMWORKER JUSTICE FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF DEFENDANTS’ OPPOSITION TO MOTION FOR A PRELIMINARY INJUNCTION

Movants Jesus Ignacio Diaz Castro, Ricardo Guadalupe Arce Ruiz, James Simpson, and Farmworker Justice respectfully request leave to file a brief as amici curiae in support of Defendants’ opposition to Plaintiffs’ motion for a preliminary injunction barring enforcement of a final rule of the U.S. Department of Labor (DOL) titled *Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States*, 88 Fed. Reg. 12,760 (Feb. 28, 2023) (“2023 Rule”). The proposed brief is attached as Exhibit 1. Defendants consent to the filing of the amicus brief. Plaintiffs take no position on the filing of the amicus brief. No party’s counsel authored any part of the brief, nor have any party or their counsel contributed money intended to fund the preparation or submission of the brief. No person other than proposed amici and their counsel contributed any money intended to fund the preparation or submission of the brief.

INTERESTS OF MOVANTS

The 2023 Rule revises the methodology that DOL uses to determine the hourly Adverse Effect Wage Rate (AEWR) paid by H-2A employers. Movants Diaz Castro, Arce Ruiz, and Simpson are workers whose wages would be depressed if Defendants were enjoined from enforcing the 2023 Rule. Movant Farmworker Justice is a national nonprofit organization that advocates on behalf of, and provides assistance to, farmworkers who would be affected by an injunction against the 2023 Rule.

Movants Diaz Castro and Arce Ruiz are citizens of Mexico who earn their livings driving heavy trucks. They have obtained H-2A visas allowing them to work as truck drivers in the United States. Both Diaz Castro and Arce Ruiz worked for Sterling Sugars Sales Corporation of Franklin, Louisiana, driving heavy trucks from the Sterling sugar mill to various farms in Louisiana to pick up harvested sugarcane and transporting the sugarcane back to the mill for processing. Declarations of Diaz Castro and Arce Ruiz, attached as Exs. 2 & 3. They were paid the AEWR for Agricultural Equipment Operators, which is currently about \$13.67 an hour. Had the 2023 Rule been in effect, they would have been paid the AEWR for Heavy and Tractor-Trailer Truck Drivers, which is currently \$23.16 an hour. Both Diaz Castro and Arce Ruiz intend to continue working as truck drivers through the H-2A program. Movant Diaz Castro is currently working as an H-2A truck driver in Texas, and Movant Arce Ruiz is currently working as an H-2A truck driver in California. *Id.* If the 2023 Rule is enjoined, they will suffer lost income because they will be paid the AEWR for Agricultural Equipment Operators rather than the higher wage rate for Heavy and Tractor-Trailer Truck Drivers.

Mr. Simpson is a U.S. citizen who resides in Sunflower, Mississippi. He earns his living as a truck driver, hauling harvested agricultural commodities over public highways from farms to

storage or processing facilities. For over a decade, he has worked for a farmer participating in the H-2A program and plans to either return to that job or accept other work as a truck driver for an H-2A grower in his area this harvest season. Simpson Declaration, attached as Ex. 4. In practice, the AEWB serves as the minimum wage for this work. Under the methodology required by the 2023 Rule, the AEWB would be higher than under the methodology set by the prior regulations. *See, e.g.*, 88 Fed. Reg. at 12,771–12,772, 12,775, 12,777–12,778 (giving examples of when the AEWB under the new regulation will be higher than the AEWB under the superseded regulation).

Farmworker Justice is a national nonprofit organization, founded in 1981, that works with farmworkers and their organizations throughout the nation to, among other things, improve wages and working conditions. In addition to work at the policy level, Farmworker Justice provides legal advocacy, training, and technical assistance to farm labor unions, other farmworker organizations, attorneys, migrant health centers, job training programs, and immigrant advocacy groups. *See* <https://www.farmworkerjustice.org/about-farmworker-justice/>.

ARGUMENT

The decision whether to permit amici curiae “lies solely within the district court’s discretion.” *Pegasus Equine Guardian Ass’n v. U.S. Army*, No. 2:17-cv-0980, 2019 WL 362598, at *1 (W.D. La. Jan. 28, 2019). “There is no rule governing the appearance of an amicus curiae in the district courts,” *id.*, but the district courts “refer to Rule 29 [of the Federal Rules of Appellate Procedure] in determining whether to grant leave to file an amicus brief,” *id.* (citations omitted). Rule 29(a)(3)(A) provides that a motion for leave to file an amicus brief must state “the movant’s interest.” The motion must provide “the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.” Fed. R. App. P. 29(a)(3)(B). District courts often allow amicus participation at the preliminary injunction stage and in challenges to

agency action. *See USA Farm Labor, Inc. v. Su*, No. 1:23-cv-00096 (W.D.N.C. June 28, 2023) (text-only order granting leave to file amicus brief in support of defendants’ opposition to preliminary injunction against same rule at issue here); *Fla. Growers Ass’n, Inc. v. Su*, No. 8:23-cv-00889, ECF No. 31 (M.D. Fla. May 24, 2023) (order granting movants leave to file amicus brief in support of defendants’ opposition to preliminary injunction against same rule at issue here); *see also, e.g., Pegasus Equine Guardian Ass’n v. U.S. Army*, No. 2:17-cv-0980, 2018 WL 2745985, at *1 (W.D. La. Jun. 7, 2018); *McKinney ex rel. NLRB v. Carey Salt Co.*, No. 11-0287, 2011 WL 1898923, at *1 (W.D. La. May 18, 2011); *Pel-Star Energy, Inc. v. U.S. Dep’t of Energy*, 890 F. Supp. 532, 535–36 (W.D. La. 1995). Factors that guide the court’s decision on whether to allow amicus participation include whether “the proffered information is timely and useful.” *Pegasus Equine Guardian Ass’n*, 2019 WL 362598, at *1 (citation and internal quotation marks omitted).

These considerations weigh in favor of allowing Movants to appear as amici. First, Movants have a special interest in this case that is not theoretical or academic. Should DOL be enjoined from implementing or enforcing the 2023 Rule, Movants and the workers for whom they advocate would suffer economic harm—harm that the government defendants will not suffer. The individual Movants anticipate being employed in occupations that, under the challenged 2023 Rule, will pay higher wages, based on DOL’s Occupational Employment and Wage Statistics (OEWS) data, than under the current rule, which relies on data from the U.S. Department of Agriculture’s Farm Labor Survey (FLS) that consists primarily of wages of lower-paid crop workers.

The injunction that Plaintiffs seek would also lead to decreased wages for U.S. workers, like many of the farmworkers for whom Farmworker Justice advocates and to whom it provides services, who seek agricultural employment in non-FLS occupations where wages will be set by

OEWS data. The statutory and regulatory scheme governing the admission of foreign agricultural workers is designed to ensure that their admission will not adversely impact the wages and working conditions of U.S. workers. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 596 (1982). The AEW is integral to this effort because it imposes a wage floor that is “obviously designed to prevent cheaper foreign labor from undercutting domestic wages in the future.” *AFL-CIO v. Dole*, 923 F.2d 182, 184 (D.C. Cir. 1991); *see also Prod. Farm Mgmt. v. Brock*, 767 F.2d 1368, 1369 (9th Cir. 1985) (noting that the AEW guards against adverse effects on the wages of “similarly employed United States workers”). The AEWs accomplish this by “set[ting] a wage floor that employers participating in the H-2A program must pay to all agricultural workers.” *Peri & Sons Farms, Inc. v. Acosta*, 374 F. Supp. 3d 63, 66 (D.D.C. 2019). Accordingly, enjoining the 2023 AEWs would result in H-2A employers offering U.S. workers seeking employment in the agricultural sector in non-FLS occupations, such as Mr. Simpson, lower wages than they would otherwise have to offer. In turn, that will tend to depress the wages offered by non-H-2A employers since they will not have to compete with what otherwise would have been the 2023 AEW wages offered by H-2A employers.

Second, the perspective presented by Movants in the proposed brief is important and different from that advanced by the government. While proposed amici agree with Defendants that the 2023 Rule is lawful, their proposed brief focuses on the practical implications, from the perspective of H-2A workers and U.S. workers similarly employed, and advocacy groups that serve and represent them, of the arguments that Plaintiffs raise both on the merits and as to the scope of the injunction they seek.

Finally, the proposed amicus brief is timely—filed the same day as the Government’s opposition to the preliminary injunction. It will not delay the briefing or argument in this case

because Plaintiffs will have the opportunity in their reply to respond to the arguments in the proposed brief.

CONCLUSION

The motion for leave to file a brief as amici curiae should be granted.

Dated: July 28, 2023

Respectfully submitted,

s/ Mary Yanik

Mary Yanik

Louisiana Bar No. 36973

Tulane Immigrant Rights Clinic

6329 Freret St, Suite 130

New Orleans, Louisiana 70118-6248

Telephone: (504) 865-5153

Facsimile: (504) 862-8753

myanik@tulane.edu

Admitted to Practice in W.D. La

Attorney for Proposed Amici

Michael T. Kirkpatrick

D.C. Bar No. 486293

Public Citizen Litigation Group

1600 20th St. NW

Washington, DC 20009

Telephone: (202) 588-7728

e-mail: mkirkpatrick@citizen.org

(Pro Hac Vice application forthcoming pursuant to LCvR 83.2.6)

Attorney for Proposed Amici

Douglas L. Stevick

Texas Bar No. 0079498

Texas RioGrande Legal Aid, Inc.

300 S. Texas Blvd.

Weslaco, TX 78596

Telephone: (956) 982-5557

Facsimile: (956) 591-8752

e-mail: dstevick@trla.org

(Pro Hac Vice application forthcoming pursuant to LCvR 83.2.6)

Attorney for Proposed Amici Diaz Castro, Arce Ruiz, and Simpson

CERTIFICATE OF CONFERENCE

On July 27, 2023, I contacted counsel for the parties to attempt to obtain consent for the granting of this motion. Counsel for Defendants, Alexandra McTague, stated that Defendants consent. Counsel for Plaintiffs, J. Walter Green, stated that Plaintiffs take no position.

s/ Michael T. Kirkpatrick
Michael T. Kirkpatrick
Attorney for Proposed Amici