UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

USA FARM LABOR, INC., *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 1:23-cv-00096-MR-WCW
	)	
JULIE SU, Acting Secretary of Labor, *et al.*,	)	
	)	
	)	
Defendants.	)	
	)	

MOTION OF JAMES SIMPSON, STEPHANUS DE KLERK, AND FARMWORKER JUSTICE FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF DEFENDANTS' OPPOSITION TO MOTION FOR A PRELIMINARY INJUNCTION

James Simpson, Stephanus De Klerk, and Farmworker Justice hereby move for leave to file the attached brief as amici curiae in support of Defendants' opposition to Plaintiffs' motion for a preliminary injunction against the U.S. Department of Labor's (DOL) final rule, *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) ("the 2023 Rule"). Defendants consent to the filing of the amicus brief; Plaintiffs oppose the filing of the amicus 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 Simpson and De Klerk are two agricultural workers whose wages would be depressed if Defendants were enjoined from implementing and 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.

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. In practice, the AEWR serves as the minimum wage for this work. *See* 20 C.F.R. § 655.120(a) (providing that an H-2A employer must pay the highest of the AEWR, any prevailing wage rate, the collective bargaining wage, the federal minimum wage, or the state minimum wage). Under the methodology required by the 2023 Rule, the AEWR would be higher than under the methodology set by existing regulations. *See, e.g.*, 88 Fed. Reg. at 12,771–12,772, 12,775, 12,777–12,778 (giving examples of when the AEWR under the new regulation will be higher than the AEWR under the superseded regulation).

Mr. De Klerk is a citizen of the Republic of South Africa. He has been employed in the United States as an H-2A guestworker since 2010. He is currently employed in Arkansas as an H-2A worker under an employment contract that extends from March through November of 2023. Mr. De Klerk's duties at his current job include driving trucks off the farm property and performing routine machinery maintenance and repair. He is presently paid at a rate of $13.67 per hour for his work. Under the 2023 Rule, the minimum wage he could be paid would likely increase to $22.76 per hour for work as a farm mechanic (SOC Code 49-3041) and $20.45 per hour for work as a light truck driver (SOC Code 53-3033). *Compare* 87 Fed. Reg. at 77,142 (setting 2023 AEWR of $13.67 per hour for Arkansas), *with* BLS, May 2022 State Occupational Employment & Wage Estimates: Arkansas, https://www.bls.gov/oes/current/oes_ar.htm (listing OEWS for SOC Code 53-3033 as $20.45/hour and for SOC Code 49-3041 as $22.76/ hour).

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.

ARGUMENT

"Decisions about whether and how to allow amicus participation in federal district court are left to the discretion of the trial judge." *Edgar v. Coats*, 454 F. Supp. 3d 502, 522 (D. Md. 2020) (citation and internal quotation marks omitted), *aff'd on other grounds sub nom. Edgar v. Haines*, 2 F.4th 298 (4th Cir. 2021). In exercising that discretion, district courts often look to Rule 29 of the Federal Rules of Appellate Procedure, which indicates that amici should state "the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case." *Wash. Gas Light Co. v. Prince George's Cty. Council*, Civ. No. DKC 08-0967, 2012 WL 832756, at *3 (D. Md. Mar. 9, 2012), *aff'd on other grounds*, 711 F.3d 412 (4th Cir. 2013) (quoting Fed. R. App. P. 29(b)(2)). District courts frequently allow amicus participation at the preliminary injunction stage. *See Fl. Growers Ass'n v. Su*, No. 8:23-cv-00889, ECF No. 32 (M.D. Fla. May 24, 2023) (minute entry 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.*, *Tafas v. Dudas*, 511 F. Supp. 2d 652, 660 (E.D. Va. 2007); *N.C. Right to Life, Inc. v. Leake*, No. 5:99-CV-798-BO(3), 2000 WL 36741021, at *1 (E.D.N.C. Mar. 13, 2000). Amicus briefs are allowed where the court "deems the proffered information timely and useful," *Bryant v. Better Bus. Bureau of Greater Md., Inc.*, 923 F. Supp. 720, 728 (D. Md. 1996) (citation and internal quotation marks omitted), and "[a]micus briefs have been allowed at the trial level where they provide

helpful analysis of the law, they have a special interest in the subject matter of the suit, or existing counsel is in need of assistance." *Edgar,* 454 F. Supp. 3d at 522 (cleaned up).

These considerations weigh in favor of allowing Movants to appear as amici. They have a "special interest in the subject matter of the suit" that differs from that of any party, *Bryant*, 923 F. Supp. at 728, they can offer "helpful analysis of the law," *id.*, and they are filing this brief "a relatively short time after the case began," rather than "months after" the case was filed, *Tafas*, 511 F. Supp. at 660.

First, Movants' interest in this case is not theoretical or academic. Should DOL be enjoined from implementing or enforcing the 2023 Rule, Movants and the workers they advocate for 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. Under the 2023 Rule, 20 C.F.R. § 655 .120(b)(1)(ii), the wage rates of Simpson and De Klerk are likely to increase on July 1, 2023, with the publication of the updated OEWS data that is used to calculate the AEWR for the occupations in which they anticipate being employed.

The injunction 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 AEWR 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 AEWR guards against adverse effects on the wages of "similarly employed United States workers"). The AEWRs 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 AEWRs would result in H-2A employers offering U.S. workers seeking agricultural employment 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 AEWR 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 of, from the perspective of farmworkers themselves and advocacy groups that serve and represent them, the arguments 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, and only 14 days after Plaintiffs filed the motion for preliminary injunction. It will not delay the briefing or argument in this case.

CONCLUSION

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

Dated: June 9, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document was filed with the Clerk of Court using the CM/ECF System, which will send notification of such filing to the following:

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This the 9th day of June, 2023.

/s/ Robert J. Willis
Robert J. Willis, Esquire