

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

USA FARM LABOR, INC., et al.,)
)
 Plaintiffs,)
)
 v.)
)
 JULIE SU, Acting Secretary of Labor,)
 et al.,)
)
 Defendants.)
 _____)

Civil Action No. 1:23-cv-00096-MR-WCM

**REPLY OF JAMES SIMPSON, STEPHANUS DE KLERK,
AND FARMWORKER JUSTICE IN SUPPORT OF MOTION
FOR LEAVE TO FILE BRIEF AS AMICI CURIAE**

James Simpson, Stephanus De Klerk, and Farmworker Justice moved for leave to file a 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”). Plaintiffs filed an opposition. ECF No. 22.

Whether to allow amicus participation is within the court’s discretion. *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). Courts consider, among other things, whether the proposed amicus brief is “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 whether the proposed amici “have a special interest in the subject matter of the suit,”

Edgar, 454 F. Supp. 3d at 522 (cleaned up). The Court should allow the filing of the amicus brief proposed here.

I. The proposed amici have a special interest in this case.

As explained in their motion, each of the proposed amici have a special interest in this case because, if DOL is enjoined from implementing or enforcing the 2023 Rule, farmworkers will suffer economic harm that the government defendants will not suffer.

DOL has long calculated the Adverse Effect Wage Rate (AEWR) paid to H-2A workers and U.S. workers in corresponding employment based on the annual Farm Labor Survey (FLS) conducted by the U.S. Department of Agriculture. Because the FLS does not collect data for all occupations, the 2023 Rule provides that DOL will use data from the Occupational Employment and Wage Statistics (OEWS) survey conducted by the Bureau of Labor Statistics to set the AEWR for occupations not included in the FLS. DOL estimates that the change to the AEWR methodology in the 2023 Rule will affect only about two percent of workers, but workers in the occupations not included in the FLS are likely to see wage increases based on the data in the OEWS.

Mr. Simpson and Mr. De Klerk work in the small percentage of H-2A occupations not included in the FLS. Mr. Simpson is a U.S. citizen and truck driver who hauls harvested agricultural commodities for growers participating in the H-2A program. Truck drivers are among the workers expected to see an increase in their AEWR under the 2023 Rule. Mr. De Klerk is a citizen of South Africa and has been an H-2A worker since 2010. Several of his jobs have been with H-2A employers who were customers of Plaintiff USA Farm Labor. Mr. De Klerk is currently employed in Arkansas as an H-2A agricultural equipment operator. His duties include driving trucks off the farm property and performing routine machinery maintenance and repairs. Truck drivers and farm mechanics are likely to see significant wage increases under the 2023 Rule.

Although Plaintiffs assert that Mr. De Klerk works in Alabama for Lindsay Sisk d/b/a Valley Farms and does not drive trucks or perform mechanic work, their assertion is not correct.

Farmworker Justice (FJ) is a national nonprofit organization that advocates for farmworkers and their organizations nationwide. FJ has substantial experience with litigation and policy advocacy related to the H-2A program.

Plaintiffs argue that because Mr. Simpson and Mr. De Klerk do not work currently for one of the Plaintiffs or one of Plaintiff USA Farm Labor's customers, their financial interests "will not be affected by the entry of a preliminary injunction" that bars DOL from applying the 2023 Rule to "Plaintiffs and employers on whose behalf Plaintiff USA Farm Labor filed an application." Pls.' Opp'n 5–6. Plaintiffs' argument fails for two reasons. First, Plaintiffs can obtain a preliminary injunction only by establishing, among other things, a likelihood of success on the merits. Thus, even if Mr. Simpson and Mr. De Klerk would not be immediately impacted by a preliminary injunction that bars application of the 2023 Rule only as to Plaintiffs and USA Farm Labor's customers, the Court's findings as to the merits are likely to influence the outcome of the case at subsequent stages where the permanent injunction sought by Plaintiffs would apply nationwide. Second, if the Court were to enjoin application of the 2023 Rule to USA Farm Labor's customers, H-2A employers nationwide could hire USA Farm Labor to submit their H-2A paperwork, potentially expanding application of the preliminary injunction to the employers of Mr. Simpson and Mr. De Klerk.

Plaintiffs concede that FJ is an organization with a special interest in H-2A policy, Pls.' Opp'n 6, and Plaintiffs do not dispute that the preliminary injunction they seek would affect FJ's constituents. Instead, Plaintiffs argue that if the proposed amicus brief is filed, "every single organization with an opinion on H-2A policy would also deserve to file an amicus brief" and "[t]he

floodgates would be wide open.” *Id.* There is no basis for such an assertion, and Plaintiffs cite no authority. Granting the current motion does not create any right for other would-be amici to file a brief, and later-filed motions to file additional amicus briefs are properly considered if and when they are filed.

Plaintiffs also argue that FJ should not be allowed to participate as an amicus because FJ’s “mission is to aid the migrant farmworkers who would be benefited by the Final Rule which would raise their wages.” *Id.* at 9. But courts have long recognized that “an amicus is not normally impartial,” *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970), and “there is no rule that amici must be totally disinterested,” *Funbus Sys., Inc. v. Cal. Pub. Util. Comm’n*, 801 F.2d 1120, 1125 (9th Cir. 1982) (citation omitted); *see also Bryant*, 923 F. Supp. at 728 (granting advocacy organizations’ motion for leave to file amicus brief supporting a party’s position) (citing *Strasser* and *Funbus*). Indeed, an amicus brief is often most helpful where the proposed amicus, like FJ, has significant experience working on the issues presented. *See Finkle v. Howard Cty.*, 12 F. Supp. 3d 780, 783 (D. Md. 2014) (“The Court recognizes that, here, *Amici* have significant collective experience with litigation and policy advocacy that is relevant to many of the issues raised by the present case.”) (citation and internal quotation marks omitted).

II. The proposed amicus brief is timely and useful.

The proposed amicus brief is timely because it was submitted only 14 days after Plaintiffs filed their motion for a preliminary injunction. It will not delay the briefing or argument in this case because Plaintiffs had the proposed amicus brief for eleven days before filing their reply in support of their motion for a preliminary injunction. They could have responded to the arguments in the amicus brief when they responded to the arguments in the government’s opposition, and Plaintiffs assert that the arguments are much the same. Pls.’ Opp’n 7. In parallel litigation pending

in the Middle District of Florida, the district court granted leave to file an amicus brief submitted by the same amici seeking to participate here, with no apparent impact on the timing of the resolution of the motion for a preliminary injunction in that case. *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).

Finally, Plaintiffs' proposal that the Court prohibit the proposed amici from retaining counsel of their choice and require that they be represented by a single lawyer makes no sense. The proposed amicus brief has already been drafted and submitted and the number of lawyers appearing on the brief cannot "complicate the case and generate satellite litigation." Pls.' Opp. 9. Allowing the amicus brief to be filed does not authorize the proposed amici to do anything else; thus, it cannot complicate the litigation.

CONCLUSION

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

Dated: June 22, 2023

Respectfully submitted,

/s/ Robert J. Willis

Robert J. Willis
North Carolina Bar #10730
Law Office of Robert J. Willis
P.O. Box 1828
Pittsboro, NC 27312
Telephone: (919) 821-9031
Facsimile: (919) 821-1763
e-mail: rwillis@rjwillis-law.com
Attorney for Proposed Amici

Michael T. Kirkpatrick
D.C. Bar No. 486293
Public Citizen Litigation Group
1600 20th Street NW

Washington, DC 20009
Telephone: (202) 588-7728
e-mail: mkirkpatrick@citizen.org
(*Pro Hac Vice* application pending)
Attorney for Proposed Amici

Gregory S. Schell
Florida Bar No. 287199
e-mail: gschell@trla.org
Teresa Pulaski
D.C. Bar No. 1780810
e-mail: tpulaski@trla.org
Southern Migrant Legal Services
A Project of Texas RioGrande Legal Aid, Inc.
311 Plus Park Blvd., Ste. 135
Nashville, TN 37217
Telephone: (615) 538-0725
Facsimile: (615) 366-3349
(*Pro Hac Vice* application pending)
Attorneys for Proposed Amicus James Simpson

Peter Murray
Minnesota Bar No. 0402764
Southern Minnesota Regional Legal Services
55 5th St. E., Ste. 400
St. Paul, MN 55101
Telephone: (651) 894-6951
e-mail: peter.murray@smrls.org
(*Pro Hac Vice* application pending)
Attorney for Proposed Amicus De Klerk

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 pending)
Attorney for Proposed Amicus James Simpson

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:

Mark Stevens, Clark Hill PLC, mstevens@clarkhill.com; Wendel V. Hall, Hall Global wendel@halllawoffice.net; Patrick H. Flanagan, Cranfill Sumner LLP, phf@cshlaw.com; Joshua S. Press, joshua.press@usdoj.gov; and Gill P. Beck, Assistant United States Attorney Deputy Director, gill.beck@usdoj.gov.

This the 22nd day of June, 2023.

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