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.	)	
	)	

MEMORANDUM OF AMICI CURIAE JAMES SIMPSON, STEPHANUS DE KLERK, AND FARMWORKER JUSTICE IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Amici James Simpson, Stephanus De Klerk, and Farmworker Justice submit this memorandum in support of Defendant's opposition to Plaintiffs' motion for a preliminary injunction against application of the U.S. Department of Labor's (DOL) final rule 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) ("the 2023 Rule"). The 2023 Rule, which revises the methodology DOL uses to determine the statutorily mandated hourly Adverse Effect Wage Rate (AEWR) paid by H-2A employers, represents a reasonable and reasoned attempt to fulfill DOL's statutory duty to ensure that H-2A labor does not have an adverse effect on the wages of U.S. farmworkers, while responding to problems that arose under the prior regime. Amici largely agree with the arguments in DOL's opposition explaining that Plaintiffs have failed to establish that they are entitled to the extraordinary relief of a preliminary injunction. Amici submit this memorandum to make four specific arguments: (1) the 2023 Rule's reliance on the OEWS wage for occupations not included in the FLS Survey is reasonable; (2) Plaintiffs' speculation that one provision of the Rule might be applied unreasonably neither establishes the facial invalidity of the Rule nor justifies the broad relief they seek; (3) Plaintiff USA Farm Labor has not established an injury to itself warranting a preliminary injunction for the benefit of third parties; and (4) any preliminary relief should be conditioned on posting security to protect potentially injured workers.

INTERESTS OF AMICI CURIAE

Amicus James 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 more than a decade, he has worked for a grower

participating in the H-2A program and plans to either return to that job or accept other work as a truck driver for another 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 current AEWR for his occupation, which is light truck driver (SOC Code 53-3033), is $20.42 per hour, which is higher than the AEWR of $13.67 per hour under the former regulation. *Compare* DOL Final Rule, *Labor Certification Process for the Temporary Employment of Foreign Workers in the United States: Adverse Effect Wage Rates for 2023*, 87 Fed. Reg. 77,142, 77,143 (Dec. 16, 2022) (setting 2023 AEWR of $13.67/hour for Mississippi) *with* U.S. Bureau of Labor Statistics (BLS), May 2022 State Occupational Employment & Wage Estimates: Mississippi, https://www.bls.gov/oes.current/oes_ms.htm (listing OEWS for SOC Code 53-3033 as $20.42/hour); *see also* 88 Fed. Reg. at 12,771–72, 12,775, 12,777–78 (giving examples of when the AEWR under the new regulation will be higher than the AEWR under the superseded regulation).

Amicus Stephanus 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 currently paid at a rate of $13.67 per hour for his work. Under the 2023 Rule, his wage 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).

Amicus Farmworker Justice is a nonprofit organization that seeks to empower migrant and seasonal farmworkers to improve their living and working conditions, immigration status, health, occupational safety, and access to justice. Farmworker Justice accomplishes these aims through policy advocacy, litigation, training and technical assistance, coalition-building, and public education. Farmworker Justice represents and provides services to U.S. workers and H-2A workers whose wages will be determined by the 2023 Rule.

BACKGROUND

The H-2A program was created by the Immigration and Nationality Act (INA), 8 U.S.C. § 1188, and is implemented, as relevant here, through regulations set out at 20 C.F.R. §§ 655.100 to 655.185 and 29 C.F.R. §§ 501.0 to 501.47. The H-2A program authorizes the admission of nonimmigrant workers to perform agricultural labor or services of a temporary nature. An agricultural employer in the United States may import aliens to perform such labor if DOL certifies that (1) there are insufficient available workers within the United States to perform the job, and (2) the employment of aliens will not adversely affect the wages and working conditions of similarly situated U.S. workers. 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a) and 1188(a)(1), and 20 C.F.R. § 655.100. Individuals admitted in this fashion are commonly referred to as H-2A workers.

Eligible employers must complete a multi-step process to participate in the H-2A program. Prior to filing a petition with U.S. Citizenship and Immigration Services (USCIS), a division of the Department of Homeland Security, the employer must obtain a temporary labor certification from DOL's Office of Foreign Labor Certification (OFLC). DOL must certify that "there are not

sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition," and that "the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed." 8 U.S.C. § 1188(a)(1).

DOL regulations have long set out the requirements for obtaining a temporary labor certification. The application must include a job offer, commonly referred to as a "clearance order" or "job order." 20 C.F.R. § 655.121(a)(1). To ensure DOL complies with its statutory duty to ensure that the H-2A program does not depress the wages of U.S. agricultural workers like Amicus Simpson, DOL regulations set minimum levels for benefits, wages, and working conditions to be included in the offer. 20 C.F.R. §§ 655.120, .122, .135. Among these regulations is the "offered wage" rate provision, which requires that for every hour or portion thereof worked during a pay period, the employer must pay the workers the highest applicable wage. 20 C.F.R. § 655.120, .122(l). For purposes of this lawsuit, that wage is the AEWR. The AEWR is designed to follow trends of the agricultural labor market, adjusting to meet wage averages as determined by supply and demand. In the absence of a separate contract between the H-2A employer and the worker, the clearance order, with the offered wage rate, is the contract. 20 C.F.R. § 655.122(q). The employer must pay this wage not only to an H-2A worker such as Mr. De Klerk, but also to a U.S. worker in corresponding employment such as Mr. Simpson. *See* 20 C.F.R. § 655.103(b), .182(d)(1)(i).

Since 1987, with the exception of an 18-month period in 2009-2010, DOL has set the AEWR using the annual Farm Labor Survey (FLS) conducted by the U.S. Department of Agriculture. Under the 2023 Rule, the AEWR for the "vast majority" of agricultural workers in non-range occupations, which includes more than 98 percent of farmworkers, will continue to be based on the average hourly wage rate for "field and livestock worker[s]" for a state or region as

reported by the FLS. 88 Fed. Reg. at 12,760, 12,766–69; *accord* 20 C.F.R. § 655.120(b)(1)(i)(A) (codifying this principle). When FLS wage data is not available for field and livestock workers in a particular area, DOL will generally use Occupational Employment and Wage Statistics (OEWS) survey reports to set the AEWR for such field and livestock workers. 88 Fed. Reg. at 12,769–70; *accord* 20 C.F.R. § 655.120(b)(1)(i)(B)–(C) (codifying this rule). DOL will continue to apply a single AEWR to all such H-2A jobs certified in a state. *See* 88 Fed. Reg. at 12,761.

For certain specially occupations not in the category of field and livestock workers, such as supervisors, farm construction workers, farm mechanics, and truck drivers, the 2023 Rule for the first time sets AEWRs for each state using the applicable Standard Occupational Classification (SOC) code for the occupation. 88 Fed. Reg. at 12,770–71; *see also* 20 C.F.R. § 655.120(b)(1)(ii) (codifying this principle). DOL anticipates that the AEWR for workers in these SOC codes will increase relative to the AEWR increases for workers whose AEWRs are set by the FLS. 88 Fed. Reg. at 12,771–72.

DOL issued the 2023 Rule to fix two methodological flaws in the prior rule that resulted in an adverse effect on the wages of U.S. farmworkers. *Id.* at 12,761. First, the former rule's use of FLS wage data for field and livestock workers to set a single AEWR for each state, including for jobs such as truck drivers in SOC codes not encompassed by the field and livestock classification, did not reflect the actual wages of workers in those excluded SOC codes, which "generally account for more specialized or higher paid job opportunities." *Id.* The rule thus failed adequately to guard against an adverse effect on wages. *Id.* Second, relying solely on FLS data did not permit DOL to set AEWRs for all geographical areas in the United States. *Id.* at 12,761–62.

Correcting these flaws, the 2023 Rule, by using the OEWS as an additional data source to determine AEWRs, takes a "reasonable approach," *id.* at 12,762, to balancing the interests of

growers and farmworkers. It ensures "that the employment of H-2A workers will not have an adverse effect on the wages of agricultural workers in the United States similarly employed, while ensuring that employers can access legal agricultural labor," and to accommodate DOL's need for "the sound administration of the H-2A program in deciding how to administer the AEWR." *Id.* at 12,761.

ARGUMENT

I. DOL's use of the OEWS for occupations not included in the FLS is reasonable.

The I NA does not define "adverse effect" or how it should be measured—DOL is entrusted with those tasks. *AFL-CIO v. Brock*, 835 F.2d 912, 914 (D.C. Cir. 1987). DOL has broad discretion to set AEWRs in accordance with "any number of reasonable formulas," and its choice of rates is entitled to deference. *Fla. Fruit & Vegetable Ass'n. v. Brock*, 771 F.2d 1455, 1459–60 (11th Cir. 1985). In a challenge to an earlier version of the AEWR methodology, the Fourth Circuit upheld DOL's choice, based on the agency's explanation of its reason for choosing that formulation. *Va. Agric. Growers Ass'n v. Donovan*, 774 F.2d 89, 93 (4th Cir. 1985).

Plaintiffs do not dispute that wage rates vary for different agricultural occupations or that the FLS wage rate for combined field and livestock workers is limited to a subset of agricultural occupations. *See* USDA, Nat'l Ag. Stats. Serv., Farm Labor (May 2023), at 23, https://downloads.usda.library.cornell.edu/usda-esmis/files/x920fw89s/dj52xk49x/0r968j49d/fml0523.pdf (listing occupational classifications included). Accordingly, the FLS can, in Plaintiffs' words, "provide[ ] the gold standard for wage data in agriculture," Pls.' Mem. 4, only for the occupations included in the survey.

Under the 2023 Rule, DOL will use OEWS data to calculate the AEWR for occupations *not* included in the FLS. The decision to use OEWS data is entirely reasonable. Neither the FLS

nor the OEWS includes the wages of all farmworkers or all agricultural occupations. The FLS includes only wages paid directly to farmworkers by farm owners and operators. It does not include wages paid farmworkers by farm labor contractors or other agricultural service companies. For example, none of the wages paid H-2A workers by Plaintiffs Kaup Produce, Inc. or Coteau Tiling, Inc. would be included in the FLS because both of those entities are H-2A labor contractors, rather than fixed-site employers. *See* 20 C.F.R. § 655.103(b), .132, & Exs. A and B (job orders from Kaup and Coteau identifying worksites as farms owned and operated by other entities). In contrast, the OEWS does gather data regarding wages paid by labor contractors and other agricultural support services employers, and it includes occupations that are not included in the FLS.

In the past, DOL relied on FLS data in large part because farm owners and operators employed a substantial majority of the nation's farmworkers. *Temporary Agricultural Employment of H-2A Aliens in the United States: Final Rule*, 75 Fed. Reg. 6,844, 6,901 (Feb. 12, 2010). However, as noted in the 2023 Rule, there has been a steady increase in the percentage of farm workers hired through labor contractors. In 2008, farm labor contractors hired an estimated 30 percent of farmworkers in H-2A jobs. *Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement: Final Rule*, 73 Fed. Reg. 77,110, 77,174 (Dec. 18, 2008). By 2022, this percentage had increased to 43 percent. *See* 88 Fed. Reg. 12,760, 12,770 n.60.

As Plaintiffs point out, for an 18-month period in 2009-2010, DOL computed the AEWR for all H-2A workers using the OEWS. *See* Pls.' Mem. 4–6. Although the OEWS at that time was based on the wages of less than a third of farmworkers, DOL's use of the dataset was upheld. *United Farm Workers v. Solis*, 697 F. Supp. 2d 5, 10 (D.D.C. 2010) (holding that the agency provided "an explanation that is reasonable and consistent with the regulation's language and

history, thus supporting the DOL's objectives") (citation and internal quotation marks omitted). In issuing the 2023 Rule, DOL considered the available sources of information and, relying on its expertise, selected the OEWS as the data source best suited to prevent an adverse effect on the wages of workers in agricultural occupations not included in the FLS. Nothing more is required.

II. Plaintiffs' concern that the 2023 Rule might be applied unreasonably does not make the Rule facially invalid or justify the injunction sought.

In seeking a preliminary injunction, Plaintiffs make much of their "key concern[]" that "DOL w[ill] assign occupations (and therefore the AEWR) based on a single duty found anywhere in a job description, whether or not the duty was material to the actual job." Pls.' Mem. 18; *see also id.* at 6–7 (claiming, without citation, that under 2023 Rule, "the Farm Labor Survey is used only when there are no duties shared with non-agricultural occupations"). Plaintiffs do so while *conceding* that DOL has "repeatedly" stated otherwise, pledging to apply a "totality of the circumstances test." Pls.' Mem. 18. Plaintiffs' speculation that DOL will depart from this principle does not support Plaintiffs' facial challenge or justify the relief that Plaintiffs seek.

The relevant provision of the 2023 Rule states that "[i]f the job duties on the job order cannot be encompassed within a single occupational classification, the applicable AEWR shall be the highest AEWR for all applicable applications." 20 C.F.R. § 655.120(b)(5). Accordingly, if an employer decides to combine the duties of two different occupations into a single job, and one of those occupations is included in the FLS and the other is not, the higher of the FLS wage or the OEWS wage will apply. This aspect of the 2023 Rule is a reasonable approach to handling such "dual employment" given the potential for gamesmanship and the statutory purpose in protecting against wage depression.[1] As DOL noted, one alternative, "requir[ing] the employer to compensate

[1] As DOL explained in response to comments, the ultimate choice "to file one H-2A application for a job opportunity encompassing duties of more than one SOC code; to file more

workers on a per-hour basis at the AEWR determination applicable to the particular duties performed during that hour," would be infeasible and impose significant administrative burden on employers. 88 Fed. Reg. at 12,779. DOL also considered and rejected another alternative proposed by commenters, that it adopt a rule making the "primary duty" dispositive, explaining why such a rule would be administratively difficult and could run contrary to the statutory purpose, "encourag[ing] employers to combine work from various SOC codes, interspersing higher-skilled, higher-paying work among many workers so that the higher-paying work is never a duty performed by any one employee more than the specified percentage." *Id.* at 12,781.

In support of their motion, Plaintiffs distort DOL's rejection of this "primary duty" test, suggesting that DOL stated that it will "assign occupations . . . based on a single duty found anywhere in a job description, whether or not the duty was material to the actual job." Pls.' Mem. 18. But nothing in either the regulatory text or the accompanying preamble supports that suggestion. To the contrary, DOL explicitly did *not* set out a bright-line rule for how it would determine whether "the job duties on [a] job order cannot be encompassed within a single occupational classification," 655.120(b)(5), instead leaving it to each certifying officer to "evaluate each H-2A job opportunity on a case-by-case basis, considering the totality of the information in an H-2A application and job order, to determine the appropriate SOC code(s)." 88 Fed. Reg. at 12,780. While Plaintiffs claim that "DOL excludes the single most important factor in defining the occupation—the primary duty or purpose of a job," Pls.' Mem. 18 (emphasis omitted), there is no reason to believe this factor would be excluded from such case-by-case

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than one H-2A application, each focused on the duties of a single SOC code; or, to find avenues other than H-2A to address particular duties that are not regularly required, such as driving a semi tractor-trailer truck to market when crops are harvested," remains with the employer. 88 Fed. Reg. at 12,779.

analyses. The only evidence Plaintiffs cite, *see id.* at 19, is a skeletal example in the preamble that accompanied the Proposed Rule—an example that lacks the force of law and does not, on its face, support Plaintiffs' conclusion. That Plaintiffs think the job should have been characterized differently does not mean DOL will categorically exclude any factor from its case-by-case analyses.

Plaintiffs' concern that section 655.120(b)(5) may be applied unreasonably in hypothetical scenarios does not indicate they are likely to succeed on the merits of their facial challenge to the 2023 Rule. It is well-established that "[t]he fact that [a plaintiff] can point to a hypothetical case in which [a] rule might lead to an arbitrary result does not render the rule 'arbitrary or capricious.'" *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 619 (1991); *see also EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 524 (2014) ("The possibility that the rule, in uncommon particular applications, might exceed EPA's statutory authority does not warrant judicial condemnation of the rule in its entirety."). If an employer believes that a DOL certifying officer has unreasonably determined that "the job duties on [a] job order cannot be encompassed within a single occupational classification," 20 C.F.R. § 655.120(b)(5), because it ignored the "primary duty" or for any other reason, that employer can challenge that determination pursuant to DOL's well-established administrative procedures, *id*. § 655.120(d)(2), and, ultimately, in an APA challenge as to a particular application of the Rule.

Not only is Plaintiffs' speculation that section 655.120(b)(5) may be unreasonably applied irrelevant to the merits of their facial challenge, but it also cannot be used to justify a preliminary injunction against the Rule, in its entirety, being applied as to all of Plaintiff employers' job orders, as well as to job orders submitted by USA Farm Labor on behalf of non-party clients. Notably, section 655.120(b)(5) has practical effect only where a single job order includes *both* job duties

associated with an occupation included in the FLS *and* duties associated with an occupation that is not included in the FLS. And even as to these job orders, Plaintiffs appear to concede that there are situations where it would be appropriate to use the AEWR associated with the higher-paying wage—that is, where their preferred "primary duties" test were satisfied. *See* Pls.' Mem. 18. That DOL's totality of the circumstances test might lead to different results than the test Plaintiffs prefer from a policy perspective in *some* instances does not justify a preliminary injunction against all applications of the 2023 Rule.

III. Speculation as to third-party behavior does not entitle USA Farm Labor to an injunction on behalf of any employer that may hire it.

In analyzing a motion for preliminary injunction, the questions of irreparable harm and the scope of relief go hand in hand. *See, e.g.*, *Roe v. Dep't of Def.*, 947 F.3d 207, 231 (4th Cir. 2020) ("[A] court must ensure a preliminary injunction is no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.") (citation and internal quotation marks omitted). As to the 23 "plaintiff farms and agribusinesses," 2nd Am. Compl. ¶¶ 16–39, Plaintiffs' theory of irreparable harm and scope of relief are relatively straightforward: They claim that they will suffer irreparable harm by having to pay higher wages, and they seek an injunction that would prevent DOL from requiring them to do so. *See* Pls.' Mem. 20, 25. Plaintiff USA Farm Labor, however, would not be required to pay anyone higher wages under the 2023 Rule. Plaintiffs claim irreparable harm to USA Farm Labor based on speculation as to the conduct of third parties to whom the Rule would apply: employers that hire USA Farm Labor to prepare and submit job orders on their behalf. Plaintiffs have not met their burden to show that such third-party behavior will cause USA Farm Labor irreparable harm or that injunctive relief extending to any employer that hires USA Farm Labor during the pendency of this litigation—relief that would provide a boon to USA Farm Labor's business—is necessary to maintain the status quo.

USA Farm Labor "assists farmers and ranchers with the required paperwork" for the H-2A program, "connects employers with workers (via a network of independent contractor recruiters) and provides them with general information regarding regulatory compliance and best practices." Pls.' Mem., Ex. 2, Fick Aff. ¶ 2. Its theory of irreparable harm is based on a "survey[] . . . "about this new rule" it claims to have administered to its customers, as to which only 15.4 percent of its customers responded. *Id.* ¶ 5. It has not provided a copy of this survey in its filings in this Court or even provided any indication that a statistician or other expert was involved in creating, administering, or analyzing this survey. Rather, Manuel Fick, USA Farm Labor's President and Chief Executive Officer, reports that the survey "asked respondents if they would continue to use the H-2A Program if this new rule goes into effect" and that 64.75 percent of the 15.4 percent of USA Farm Labor customers who responded (i.e., less than 10 percent of USA Farm Labor's total customers) said that they would not. *Id.* Based on this representation, USA Farm Labor extrapolates that it will lose "over $3,000,000 next year"—without providing any information as to how it came to that figure or as to USA Farm Labor's annual revenue. It does not suggest that it performed any sort of analyses as to *which* of its customers responded to the survey, or the characteristics of those respondents. *Cf.* 2nd Am. Compl. ¶ 15 (noting that some of USA Farm Labor's clients' applications cover only one worker, and others cover more).

Given the lack of information about the survey, it should not be considered in ruling on the motion. Even at the preliminary injunction stage, survey evidence must bear *some* indicia of reliability. *See, e.g.*, *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 277–81 (4th Cir. 2002) (finding district court abused discretion in giving any weight to methodologically deficient survey and focus group evidence at preliminary injunction stage); *Parks v. City of Charlotte*, No. 3:17-CV-00670-GCM, 2018 WL 4643193, at *4 (W.D.N.C. Sept. 27, 2018) (at preliminary injunction

stage, "mak[ing] a less formal review of [ ] affidavits to see if they present the indicia of reliability common to expert testimony"). Here, the Court has no information that would allow it to assess whether the survey questions were objectively stated, and there is no indication that basic methods of statistical analysis were used. *Cf. Scotts Co.*, 315 F.3d at 280 (finding that "deficiencies in the survey's design," including lack of objectivity in framing of questions, deprived it of weight).

Without any credible evidence of irreparable harm to USA Farm Labor via actions that its customers might take, there is no basis for an injunction against application of the 2023 Rule "to any H-2A job order submitted" by USA Farm Labor on behalf of non-party employers. Pls.' Mem. 25. Indeed, any such injunction would likely *boost* USA Farm Labor's business, by encouraging H-2A employers to hire USA Farm Labor to submit their job orders. H-2A employers who never used USA Farm Labor—either because they submitted job orders themselves or used the services of a competitor, *see* 2nd Am. Compl. ¶ 15 (noting that USA Farm Labor is "among the top three H-2A filing agents nationwide")—would be incentivized to hire USA Farm Labor for the first time, since only its customers would be allowed to pay lower wages to H-2A workers. The likely result would be a windfall to USA Farm Labor, doing far more than "protect[ing] the status quo and prevent[ing] irreparable harm during the pendency of a lawsuit," the proper purposes of a preliminary injunction, *Di Biase v. SPX Corp.*, 872 F.3d 224, 230 (4th Cir. 2017).

IV. If an injunction is issued, Plaintiffs must provide adequate security to workers.

If the Court concludes that some or all Plaintiffs have carried their burden to show entitlement to a preliminary injunction, any injunction should be crafted to preserve the ability of farmworkers to recover wages that will be owed if the 2023 AEWRs ultimately take effect. *See, e.g.*, *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) ("[A] court need not grant the total relief sought by the applicant but may mold its decree to meet the exigencies of the

particular case.") (citation and internal quotation marks omitted). Rather than the broad order that Plaintiffs request enjoining enforcement of the 2023 Rule in its entirety, the Court should condition any injunction on Plaintiffs' agreement to the following conditions:

> (1) that all employers submitting H-2A labor certification applications subject to such an injunction pay the 2023 AEWR (if it is upheld) retroactively to all H-2A and similarly employed U.S. workers;
>
> (2) that all employers applying for or obtaining H-2A labor certification applications subject to such an injunction agree to (a) pay the difference between the 2023 AEWR (or the wage actually paid if higher) and the current AEWR for each hour worked into an escrow account (or post security for that amount) on a monthly basis as the wages are earned, and (b) preserve the wage records supporting the amount escrowed or secured until this case is concluded and the escrow funds disbursed to employers or to workers; and
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> (3) that all employers applying for or obtaining H-2A labor certification applications subject to such an injunction notify their workers (a) of the existence of the escrow or security and the promise to pay the 2023 wage when established, and (b) of the importance of keeping their employers and the parties to this suit informed of any changes at their permanent home addresses in their countries of origin, telephone numbers, and email addresses.

Such conditions would be adequate to protect the interests of Plaintiffs and their client employers because, if the lawsuit is successful, employers will recover promptly any escrowed or secured funds, with interest, that exceed the lawful AEWR as determined by this Court. At the same time, these conditions are needed to protect agricultural workers because, if Plaintiffs do not prevail, the workers will be able to recover the disputed wages. Although there is no doubt that a preliminary injunction will nonetheless harm the workers—because they will only be able to compete for jobs on the basis of a *promise* to pay the 2023 AEWR when it is ultimately established, rather than receive payment of that wage as it is earned—the above conditions would reduce that harm.

These conditions are not novel. Courts have imposed such conditions on preliminary injunctions on behalf of employers challenging DOL wage rates for temporary foreign workers. For example, in *Virginia Agricultural Growers Ass'n v. Donovan*, 597 F. Supp. 45, 47 (W.D. Va.

1985), tobacco growers sought to challenge the validity of DOL's AEWR methodology. The employers sought temporary and preliminary relief from the wage rate for the same reasons that Plaintiffs here do—*i.e.*, once they paid the wages calculated pursuant to the challenged methodology, there would be no way to recover the wages if the AEWR methodology was ultimately found to be illegal. The Court granted the injunction, but to ensure that workers (including workers recruited in the meantime) would receive the wages if the rate was ultimately upheld, the court required the employers to agree in their labor certification applications to pay the AEWR ultimately approved by the court. Logistically, this required placing the disputed wages in an escrow account monthly or, alternatively, providing bank letters of credit sufficient to cover the wages and interest on the wages. *See Va. Agric. Growers Ass'n, Inc. v. Donovan*, Civ. No. 83-0146-D, Temporary Injunction Order for 1985, at 3–5 (W.D Va. Apr. 26, 1985) (attached hereto as Ex. C). In addition, the order required the employers to obtain the addresses of all workers whose wages were being escrowed and to provide workers with a notice explaining the escrow account and the need for the workers to keep their employer informed of their addresses until the case was resolved. *Id.* at 5–6. DOL's AEWR methodology was ultimately upheld, *Donovan*, 774 F.2d at 89, and the escrow funds were distributed to the workers. Preliminary injunctions were granted in similar challenges to the 1983 AEWR methodology in other circuits, *see, e.g.*, *Fla. Fruit & Vegetable Ass'n*, 771 F.2d 1455; *Shoreham Coop. Apple Producers Ass'n v. Donovan*, 764 F.2d 135 (2d Cir. 1984), and in both challenges, the lower courts conditioned the injunction on escrow requirements similar to those ordered in the Fourth Circuit case.

In *Frederick County Fruit Growers Ass'n v. Brock*, Civ. No. 85-0142-D (W.D. Va. Dec. 17, 1985), apple and tobacco employers challenged the legality of DOL's H-2A piece rate rule. The court granted an injunction but conditioned it on the employers' escrowing the disputed wages

as they were earned, maintaining records, and providing notice to workers explaining the existence of the escrow account. *Id.*, Temporary Restraining Order ¶¶ 1–4 (attached hereto as Ex. D). To ensure that the order was complied with, the court required the employers to obtain signed acknowledgements from their workers stating that they had received the notices. *Id.* ¶ 4. A similar injunction conditioned on escrowing disputed piece rates was entered in *Tri-County Growers v. Brock*, Civ. No. 85-0038-M, Order at 2–5 (N.D. W.Va. Aug. 28, 1985) (attached hereto as Ex. E). The escrow funds in both cases were ultimately paid to the workers when the D.C. Circuit upheld DOL's piece rate rule, *see Frederick Cty. Fruit Growers Ass'n v. Martin*, 968 F.2d 1265, 1276 (D.C. Cir. 1992), and the Fourth Circuit dissolved the *Tri-County Growers* injunction, *see Feller v. Brock*, 802 F.2d 722, 731 (4th Cir. 1986) (ordering "immediate distribution of the funds escrowed pursuant to this injunction"); *see also NAACP v. Donovan*, 558 F. Supp. 218, 225–26 (D.D.C. 1982) (in challenge to DOL's failure to promulgate 1982 AEWRs, granting final relief and ordering funds escrowed by employers pursuant to preliminary injunction to ensure payment of 1982 AEWR, once set, to be paid to workers); *Freeman v. USDA*, 350 F. Supp. 457, 461–62 (D.D.C. 1972) (in challenge to Department of Agriculture's failure to issue a "fair and reasonable wage" for 1971 as required by the Sugar Act, entering a preliminary injunction restraining the agency "from making any further subsidy payments" to employers to ensure that employers reimbursed workers for the difference between the wage paid and the lawful 1971 wage, to be later set, for work already performed).

Here, if a preliminary injunction were granted, similar conditions would be critical to ensure that workers received the disputed wages if the injunction were dissolved or reversed on appeal. Without such conditions, Plaintiff employers and Plaintiff USA Farm Labor's clients

would escape liability for the 2023 AEWR, even if that rate were later upheld by the Court. That result is exactly the sort of adverse effect on U.S. workers that the statute is designed to prohibit.

CONCLUSION

Plaintiffs' motion for preliminary injunctive relief should be denied. In the event that such relief is granted, the injunction should impose the conditions stated above.

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Respectfully submitted,

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