UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

FLORIDA GROWERS ASSOCIATION, INC., NATIONAL COUNCIL OF AGRICULTURAL EMPLOYERS, FLORIDA CITRUS MUTUAL, FLORIDA FRUIT & VEGETABLE ASSOCIATION, G & F FARMS, LLC, and FRANBERRY FARMS, LLC,	)	
Plaintiffs,	)	
v.	)	No. 8:23-cv-00889-CEH-CPT
JULIE A. SU, Acting Secretary of Labor, BRENT PARTON, Principal Deputy Secretary of Labor, BRIAN PASTERNAK, Administrator of the Office of Foreign Labor Certification, and JESSICA LOOMAN, Acting Administrator, Wage and Hour Division,	)	
Defendants.	)	

BRIEF 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 brief to support 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"), which revises the methodology by which DOL determines the hourly Adverse Effect Wage Rate (AEWR) paid by H-2A employers.

The AEWR is a wage rate published by DOL for the purpose of protecting U.S. agricultural workers, such as Amicus Simpson, from the wage depression that would otherwise occur as a result of the admission of large numbers of foreign workers competing for agricultural jobs. *See* 20 C.F.R. § 655.0(a)(1) (stating that the purpose of the regulations, including the AEWR provision, is to "carry out the policies of the Immigration and Nationality Act (INA), that a nonimmigrant alien worker will not be admitted to fill a particular temporary job opportunity unless . . . the employment of the foreign worker in the job opportunity will not adversely affect the wages or working conditions of similarly employed U.S. workers"). The AEWR is designed to follow trends of the agricultural labor market, adjusting to meet wage averages as determined by supply and demand.

Under the 2023 Rule, the AEWR for the "vast majority" of agricultural workers in non-range occupations, which includes more than 98% 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 Farm Labor Survey (FLS) conducted by the U.S. Department of Agriculture (USDA). 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's rationale for the 2023 Rule was to fix two methodological flaws in the current 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," and thus failed adequately to guard against an adverse effect on wages. *Id.* Second, relying solely on FLS data does not permit DOL to set AEWRs for all geographical areas in the United States. *Id.* at 12,761–62. Conversely, the 2023 Rule's use, as set forth above, of the additional data sources to determine AEWRs is DOL's "reasonable approach," *id.* at 12.762, to balancing the interests of growers and farmworkers to ensure "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.

INTEREST 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 2013 Rule.

ARGUMENT

The H-2A program was created by the Immigration and Nationality Act, 8 U.S.C. § 1188, and is implemented 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 non-immigrant 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), 1188(a)(1); 20 C.F.R. § 655.100. Aliens admitted in this fashion are commonly referred to as H-2A workers.

Employers seeking the admission of H-2A workers must first file a temporary labor certification application with DOL. 20 C.F.R. § 655.130. The application must include a job offer, commonly referred to as a "clearance order" or "job order," complying with applicable regulations. 20 C.F.R. § 655.121(a)(1). Federal regulations establish the minimum benefits, wages, and working conditions that must be offered by the petitioning employer to avoid adversely affecting similarly situated U.S. workers. 20 C.F.R. §§ 655.120, .122, .135. Among these terms 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. 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).

Defendants have filed an opposition to Plaintiffs' motion for a preliminary injunction, explaining that the motion should be denied because Plaintiffs are unlikely to prevail on the merits of their *ultra vires*, arbitrary and capricious, and Regulatory Flexibility Act arguments; because they have failed to establish imminent irreparable harm; because the balance of equities and public interest weigh against relief; and because the requested relief is overbroad.

Amici submit this brief to elaborate on two points. First, Plaintiffs lack an adequate basis for obtaining preliminary relief because they fail to show imminent harm by demonstrating that the 2023 Rule will require them to pay a significant number of H-2A workers a higher AEWR in the near future. Second, if an injunction is issued, the Court should require Plaintiffs to take steps to ensure that wages earned by the workers are paid if the challenged rule is ultimately upheld.

ARGUMENT

Plaintiff's motion for a preliminary injunction should be denied. Although amici believe that the Department should prevail on every prong of the test for preliminary injunction, this brief focuses on Plaintiffs' failure to show irreparable harm.

It is the *sine qua non* of injunctive relief that a preliminary injunction may not issue absent a showing of irreparable harm. *Swain v. Junior*, 961 F.3d 1276, 1284, 1292 (11th Cir. 2020). "[T]he asserted irreparable injury must be neither remote nor speculative, but actual and imminent." *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (quotation omitted). "An injury is 'irreparable' only if it cannot be undone through monetary remedies." *Ne. Fl. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990). Making such a showing requires persuasive evidence. *See Swain*, 961 F.3d at 1262–63; *City of Jacksonville*, 234 F.3d at 1285–86.

I. Plaintiffs have not shown irreparable harm because they are not yet employing H-2A workers and can avoid future harm.

Plaintiffs have failed to demonstrate significant imminent harm warranting the extraordinary remedy of an injunction that will lower the wages of hundreds of thousands of farmworkers nationwide. Plaintiffs offer only a few specific examples of tangible harm, none of which are both significant and imminent.

Plaintiffs' reliance on the declaration of Michelle Williamson (ECF No. 16-9) is misplaced. Ms. Williamson is the director of operations for her family's strawberry growing operations, G&F Farms and Franberry Farms, LLC. *Id.* ¶ 1. Her stated concerns regarding the impact of the new regulations on the growers' operations are misleading. Neither G&F Farms nor Franberry Farms directly employs H-2A guestworkers.[1] These farms may be securing H-2A labor through a farm labor contractor that furnishes labor to strawberry growers in their area. In such a case, it is the farm labor contractor who employs and pays the H-2A workers, not growers such as G&F Farms and Franberry Farms. As a result, Ms. Williamson has no factual basis for her assertions regarding the financial impact, if any, of the new regulations because it is the growers' labor contractors, rather than the growers themselves, who will be required to pay the workers any increase in wages. In addition, the 2022-23 Florida strawberry season has concluded and will not start up again until November. *See* "In the heart of Florida's strawberry season, an expert explains why they're so sweet," *University of Florida/IFAS Blogs*, Feb. 2, 2022, https://blogs.ifas.ufl.edu/news/2022/02/02/in-the-heart-of-floridas-strawberry-season-an-expert-explains-why-theyre-so-wonderful ("[I]t's a short

[1] This statement is based on analysis of DOL's H-2A performance data, which are published on a quarterly basis on the agency's website. These disclosures include all H-2A applications processed by DOL during the covered period, including applications ultimately withdrawn or denied.

season (November to March).”). Any wage increases that might result from the publication of revised OEWS data in July 2023 will not impact these growers and others in the Florida strawberry industry for months afterwards.

Plaintiffs also offer the declaration of Paul Meador, ECF No. 16-10, in support of their motion. Meador is the president of Plaintiff Florida Growers Association, Inc. (“FGA”). *Id.* ¶ 1. In recent years, FGA has hired hundreds of H-2A workers for employment in the Florida vegetable and citrus harvests, including H-2A workers to be employed as heavy truck drivers or farm mechanics. The following chart summarizes FGA’s use of H-2A truck drivers and mechanics during the recently completed Florida harvest and shows that FGA faces no imminent impact from the publication of revised OEWS data in July 2023:

FLORIDA GROWERS ASSOCIATION, INC.[2]

H-2A application number	Job classification	Number of H-2A workers	Contract dates
H-300-22168-292435	Farm mechanics	18	8/17/22–5/30/23
H-300-22195-352630	Farm mechanics	20	9/12/22–5/30/23
H-300-22195-353090	Heavy truck drivers	130	9/12/22–5/30/23
H-300-22223-411906	Heavy truck drivers	200	10/10/22–5/30/23

Meador also expresses concerns regarding potential wage increases for the first-line supervisors employed by his business, Everglades Harvesting, Inc. But, as with the workers employed by FGA, there are no H-2A supervisors currently

[2] The clearance orders in the table are attached hereto as Exhibits A to D.

employed by Everglades and, based on last season's schedule, none will be re-hired before September:

EVERGLADES HARVESTING, INC.[3]

H-2A application number	Job classification	Number of H-2A workers	Contract dates
H-300-22195-351971	First-line supervisors	20	9/12/22–5/30/23

Finally, Plaintiffs point to the declaration of Michael Joyner, ECF No. 16-13, to establish imminent and irreparable injury. Joyner is the President of Plaintiff Florida Fruit & Vegetable Association (FFVA). *Id.* ¶ 1. While FFVA assists many of its members with their H-2A applications, *id.* ¶ 9, it is not itself an employer of agricultural workers.

To illustrate the impact of the new regulations, Joyner cites the experience of FFVA member ATP Logistics (ATP). *Id.* ¶ 11.[4] While ATP has employed H-2A workers in a range of positions during the 2022-23 agricultural season, ATP is currently employing barely a handful of such workers. Based on its hiring practices, ATP is not expected to employ additional H-2As for months:

[3] The clearance order in the table is attached hereto as Exhibit E.

[4] According to DOL's database, ATP is not itself an employer of H-2A workers. Presumably Joyner is referring to ATP Agri-Services, Inc. and ATP Groves, LLC, both of which have employed H-2A workers in recent years, but neither of which is a Plaintiff.

ATP AGRI-SERVICES, INC. and ATP GROVES, LLC[5]

H-2A application number	Job classification	Number of H-2A workers	Contract dates
H-300-22208-379315	Heavy truck drivers	8	9/25/22–7/24/23
H-300-22264-486307	Crop workers	124	11/25/22–6/1/23

ATP does face the prospect of paying its eight H-2A heavy truck drivers the OEWS wage beginning on July 1. But this will only marginally increase ATP's labor costs. According to its temporary labor certification application, ATP's H-2A heavy truck drivers are anticipated to work 36 hours per week. During the roughly three-week period from the date on which the revised OEWS wages are published (July 1) and the contract ending date (July 24), ATP expects its H-2A truck drivers to each work at total of approximately 108 hours. The differential between the current Florida statewide OEWS wage for heavy truck drivers ($23.89) and Florida's 2023 FLS-based AEWR ($14.33) is $9.56/hour, or a total of $1032.48 per worker for the estimated 108 hours remaining in the H-2A workers' contracts following July 1, 2023. The total of less than $10,000 in increased wages for the eight ATP H-2A truck drivers is hardly the sort of dire economic harm that warrants the extraordinary remedy of a preliminary injunction that would lower the wages of tens of thousands of farmworkers across the country.

[5] The clearance orders in the table are attached hereto as Exhibits F to G.

ATP's situation underscores additional reasons why Plaintiffs' motion should be denied. First, ATP has limited the spillover effect of the new regulation by submitting separate job orders for its crop workers and truck drivers. Other employers concerned about paying higher OEWS wages to their entire workforce simply because one of the crop workers serves as van driver or hauls harvested crops to a nearby packing facility may wish to follow ATP's example. By filing two job orders—one exclusively for crop workers and another for a crop worker with additional driving duties—employers can substantially eliminate the prospect that the entire workforce will need to be paid the higher OEWS wage.

Secondly, paying the higher OEWS to its heavy truck drivers does not represent a major structural change for ATP. The company currently hires guestworkers through the H-2B program to transport non-agricultural commodities, as shown below. The job requirements for these H-2B jobs are identical to those for the H-2A heavy truck drivers, which undermines Plaintiffs' protestations that there is something nefarious about basing the wages of some H-2As on the earnings of workers performing similar tasks in non-agricultural settings. For the ATP truck drivers, the only readily apparent difference between those employed as H-2As and those hired as H-2Bs is that the H-2B drivers receive a substantially higher wage. DOL's new regulations eliminate this disparity.

ATP AGRI-SERVICES, INC. H-2B WORKERS[6]

H-2B application number	Job classification	Number of H-2B workers	Contract dates
H-400-22221-405382	Heavy truck drivers	35	10/23/22–6/30/23
H-400-22229-420801	Heavy truck drivers	12	11/15/22–5/31/23

In short, Plaintiffs fall far short of the required factual showing of irreparable injury.

Thus, Plaintiffs have not shown that preliminary injunctive relief is needed. Proceeding expeditiously to address the merits of this litigation is a more appropriate way to address Plaintiffs' concerns. Alternatively, the Court could simply consolidate the preliminary injunction hearing with the merits of the case pursuant to Rule 65(a)(2).

Plaintiffs cannot show irreparable injury for an additional reason: Participation in the H-2A program is entirely voluntary. No statute or regulation requires an employer to file an H-2A application and contractually bind itself to pay the OEWS wages that will be published on July 1, 2023. And employers have no legal right to demand access to H-2A workers at terms other than those set by DOL, even if such workers are vital to their businesses: "To recognize a legal right to use alien workers upon a showing of business justification would be to negate the policy which permeates the immigration statutes, that domestic workers rather

[6] The job orders in the table are attached hereto as Exhibits H to I. The first job order has a typo/scrivener's error for the year for the start and end dates of the order. *See* Ex. H, at 2.

than aliens be employed wherever possible." *Elton Orchards, Inc. v. Brennan*, 508 F.2d 493, 500 (1st Cir. 1974) (affirming DOL decision to refer all available U.S. workers to one orchard and thereby deny that orchard access to the experienced foreign workers the employer preferred); *see also Va. Agric. Growers Ass'n, Inc. v. DOL*, 756 F.2d 1025, 1030 (4th Cir. 1985) (same); *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1342–43 (5th Cir. 1985) ("There is no hardship exception to DOL's labor standards for H-2 workers.") (internal quotation marks omitted); *Comité De Apoyo A Los Trabajadores Agricolas v. Solis*, No. 09-240, 2011 WL 2414555 at *4 (E.D. Pa. June 16, 2011) (holding that DOL cannot consider hardship on employers as a reason for delaying the effective date of a substantial increase in the minimum wage applicable to the importation of H-2B workers).

Plaintiffs who have not already hired H-2A workers can avoid the harm they allege by choosing not to participate in the H-2A program and, instead, focus their efforts on hiring U.S. workers at whatever wages they deem necessary and appropriate, just like any other business. Harm that arises from a party's voluntary choice cannot, as a matter of law, constitute irreparable harm. *See* 11A Charles Alan Wright & Arthur R. Miller, *et al.*, *Federal Practice and Procedure* § 2948.1 (3d ed. 2018) ("[A] party may not satisfy the irreparable harm requirement if the harm complained of is self-inflicted."); *see also Scroos LLC v. Attorney Gen. of the*

United States, No. 6:20-cv-689-Orl-78LRH, 2020 WL 5534281, at *3 (M.D. Fla. Aug. 27, 2020) ("Self-inflicted wounds do not constitute irreparable harm."); *7-Eleven, Inc. v. Kapoor Bros. Inc.*, 977 F. Supp. 2d 1211, 1227 (M.D. Fla. 2013) (holding that franchisee's breach of a franchising agreement constituted a self-inflicted wound precluding preliminary injunctive relief). Plaintiffs will, no doubt, claim that U.S. workers are difficult to find, but Plaintiffs have offered no evidence detailing their efforts to locate and hire U.S. workers beyond the bare minimum recruitment efforts and labor standards set by the H-2A program. No doubt, Plaintiffs, like the apple grower in *Elton Orchards*, may prefer to hire the dependable foreign workers they have used in the past. *See* 508 F.2d at 500 (affirming that DOL's decision to fill the labor needs of one orchard with inexperienced U.S. workers while admitting experienced foreign workers to work for competitor orchards is consistent with Congressional policy). But simply because Plaintiffs prefer to hire dependable foreign workers does not allow this Court to assume, as Plaintiffs invite the Court to do, that there are no qualified U.S. workers available to fill Plaintiffs' labor needs or that participation in the H-2A program is anything other than voluntary.

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

> (1) that all employers submitting H-2A labor certification applications during the pendency of this litigation 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 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
>
> (3) that all employers applying for or obtaining H-2A labor certifications 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.

By conditioning a preliminary injunction on the above requirements, Plaintiffs no longer have to be concerned with irreparable injury since, if their suit is successful, employers will recover promptly any escrowed or secured funds, with interest, that exceed the lawful AEWR as determined by this Court. Moreover, workers will also

be able to recover the disputed wages if Plaintiffs' challenges are unsuccessful. Although there is no doubt that the public interest will still be harmed—because U.S. workers 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 Association, Inc. 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. J). 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, *Va. Agric. Growers Ass'n, Inc. v. Donovan*, 774 F.2d 89 (4th Cir. 1985), 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 v. Brock*, 771 F.2d 1455 (11th Cir. 1985); *Shoreham Coop. Apple Producers Ass'n, Inc. 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 Association, Inc. 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. K). 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. L). 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, Inc. 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 USDA's failure to issue a "fair and reasonable wage" for 1971 as required by the Sugar Act, entering a preliminary injunction restraining USDA "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. Not to impose such conditions would effectively allow Plaintiffs to escape liability for the 2023 AEWR even if that rate is later upheld by the Court and would result in the very 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.

Dated: May 22, 2023

Respectfully submitted,

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