No. 23-2108

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

USA FARM LABOR, INC., *et al.*,
Plaintiffs-Appellants,
v.
JULIE SU, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of North Carolina

MOTION OF FARMWORKER JUSTICE, JAMES SIMPSON, AND STEPHANUS DE KLERK FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF APPELLEES AND AFFIRMANCE

Pursuant to Rule 29(a)(3) of the Federal Rules of Appellate Procedure, movants Farmworker Justice, James Simpson, and Stephanus De Klerk respectfully seek leave to file a brief as amici curiae in support of appellees and affirmance of the district court's denial of 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 Final

Rule). Appellees consent to the filing of the amicus brief; appellants oppose the filing of the amicus brief.[1]

A. The Movants' Interest

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 are determined by the Final Rule.

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. He has worked for a grower participating in the H-2A program and plans to do so in the future. In practice, the Adverse Effect Wage Rate (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

[1] Pursuant to Local Rule 25(a)(3), the proposed amicus brief will be filed as a separate entry on the Court's docket concurrently with the filing of this motion.

required by the Final Rule, Mr. Simpson will likely earn a higher wage when working as a truck driver for an H-2A employer than he did under the former regulation.

Stephanus De Klerk is a citizen of the Republic of South Africa. He has been employed in the United States as an H-2A worker and plans to continue to be so employed. Mr. De Klerk's duties typically include driving trucks off the farm property and repairing farm equipment. He is paid the AEWR for his work. Under the methodology required by the Final Rule, Mr. De Klerk will likely earn a higher wage than he did under the former regulation.

The district court granted movants' motion for leave to file an amicus brief in support of defendants' opposition to plaintiffs' motion for a preliminary injunction. JA 384.

B. The proposed amicus brief is desirable and relevant to the disposition of the case.

The proposed amicus brief is desirable because movants have a special interest in the subject matter of the case that differs from that of any party. Should this Court reverse the district court's decision and remand with instructions to enter a preliminary injunction against enforcement of the Final Rule, movants and the workers for whom they advocate would suffer economic harm—harm that appellee DOL would not suffer. As the district court found, a preliminary injunction would

harm "parties who are not represented in this action, such [as] H-2A and corresponding U.S. workers who would benefit from the 2023 Final Rule." JA 417.

The proposed amicus brief would assist the Court in resolving this appeal. While movants largely agree with the arguments in DOL's brief explaining that appellants have failed to establish that they are entitled to the extraordinary relief of a preliminary injunction, the proposed amicus brief provides important context regarding the need for the Final Rule. The brief explains that DOL adopted the new methodology for calculating the AEWR for jobs not included in the Farm Labor Survey because workers in those occupations generally earn more than field workers. Some employers took advantage of the former rule to bring in H-2A workers and pay them as though they were picking crops, even though they were engaged in higher-skilled and higher-paid occupations like construction and truck driving. For such higher-skilled jobs, the former rule failed to fulfill DOL's statutory mandate to ensure that the importation of foreign workers "will not adversely affect the wages and working conditions of workers in the United States similarly employed." 8 U.S.C. § 1188(a)(1)(B). Setting appropriate minimum levels for wages is critical to avoiding wage depression "since U.S. workers cannot be expected to accept employment under conditions below the established minimum levels," 20 C.F.R. § 655.0(a)(2), and to furthering the statutory policy that "U.S. workers rather than aliens be employed wherever possible," *id.* § 655.0(a)(3).

Further, the proposed amicus brief emphasizes that the Final Rule is consistent with DOL's long-standing obligation to ensure that the importation of temporary foreign workers does not depress the wages of U.S. workers. That obligation has remained the same since the 1952 enactment of the Immigration and Nationality Act (INA). Nonetheless, appellants argue that the statutory objective was changed in 1986 when the INA was amended by the Immigration Reform and Control Act (IRCA). The proposed amicus brief explains, however, that IRCA codified requirements, long set forth in regulations, that allow an agricultural employer to import foreign workers to perform temporary agricultural work only by petitioning DOL for a certification that "(A) 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 (B) 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); *see AFL-CIO v. Brock*, 835 F.2d 912, 918–19 (D.C. Cir. 1987) (explaining that, in enacting IRCA, "Congress made absolutely no alteration to the statutory mandate that underlies AEWRs" and that "[t]he regulatory adverse effect prohibition promulgated pursuant to the INA was expressly retained in the IRCA").

Finally, the proposed amicus brief explains that, contrary to appellants' claims, the H-2A program is not intended to control illegal immigration by providing

employers with access to cheap foreign labor. Rather, it is intended to provide access to foreign labor *only* where there is a lack of sufficient U.S. workers to fill the jobs, and *only* where the employer will pay wages sufficient to avoid depressing the wages of U.S. workers. The challenged AEWR methodology is designed to fulfill DOL's statutory mandate to prevent the employment of H-2A workers from depressing the wages of similarly employed U.S. workers. That employers not participating in the H-2A program might engage in the unlawful hiring of unauthorized workers is a problem beyond the scope of the Final Rule.

CONCLUSION

The Court should grant movants leave to file an amicus brief in support of appellees.

Respectfully submitted,

Gregory S. Schell
Southern Migrant Legal Services
A Project of Texas RioGrande Legal Aid, Inc.
311 Plus Park Blvd., Ste. 135
Nashville, TN 37217
(615) 538-0725
Counsel for Amicus James Simpson

/s/ Michael T. Kirkpatrick
Michael T. Kirkpatrick
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
Counsel for Amici Curiae Farmworker Justice, James Simpson, and Stephanus De Klerk

Douglas L. Stevick
Texas RioGrande Legal Aid, Inc.
300 S. Texas Blvd.
Weslaco, TX 78596
(956) 982-5557
Counsel for Amicus James Simpson

Peter Murray
Southern Minnesota Regional
Legal Services
55 5th St. E., Ste. 400
St. Paul, MN 55101
(651) 894-6951
Counsel for Amicus Stephanus De Klerk

February 6, 2024

CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 1,447 words. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

/s/ Michael T. Kirkpatrick
Michael T. Kirkpatrick

CERTIFICATE OF SERVICE

I certify that on February 6, 2024, I caused the foregoing to be filed with the Clerk of the Court through the Court's ECF system, which will serve notice of the filing on all filers registered in the case.

/s/ Michael T. Kirkpatrick
Michael T. Kirkpatrick

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 23-2108 Caption: USA Farm Labor, Inc. v. Su

Pursuant to FRAP 26.1 and Local Rule 26.1,

Farmworker Justice, James Simpson, and Stephanus De Klerk
(name of party/amicus)

who is amici curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: s/ Michael T. Kirkpatrick Date: February 2, 2024

Counsel for: Aimici Curiae

Print to PDF for Filing

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPEARANCE OF COUNSEL FORM

BAR ADMISSION & ECF REGISTRATION: If you have not been admitted to practice before the Fourth Circuit, you must complete and return an Application for Admission before filing this form. If you were admitted to practice under a different name than you are now using, you must include your former name when completing this form so that we can locate you on the attorney roll. Electronic filing by counsel is required in all Fourth Circuit cases. If you have not registered as a Fourth Circuit ECF Filer, please complete the required steps at Register for eFiling.

THE CLERK WILL ENTER MY APPEARANCE IN APPEAL NO. 23-2108 as

☑ Retained ☐ Court-appointed(CJA) ☐ CJA associate ☐ Court-assigned(non-CJA) ☐ Federal Defender

☐ Pro Bono ☐ Government

COUNSEL FOR: Farmworker Justice, James Simpson, and Stephanus De Klerk

_____ as the
(party name)

☐ appellant(s) ☐ appellee(s) ☐ petitioner(s) ☐ respondent(s) ☑ amicus curiae ☐ intervenor(s) ☐ movant(s)

s/ Michael T. Kirkpatrick
(signature)

Please compare your information below with your information on PACER. Any updates or changes must be made through PACER's Manage My Account.

Michael T. Kirkpatrick
Name (printed or typed)

202-588-7728
Voice Phone

Public Citizen Litigation Group
Firm Name (if applicable)

_____
Fax Number

1600 20th Street NW

Washington, DC 20009
Address

mkirkpatrick@citizen.org
E-mail address (print or type)

CERTIFICATE OF SERVICE *(required for parties served outside CM/ECF)*: I certify that this document was served on _____ by ☐ personal delivery; ☐ mail; ☐ third-party commercial carrier; or ☐ email (with written consent) on the following persons at the addresses or email addresses shown:

_____ _____
Signature Date