UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PERI & SONS FARMS, INC. and NATIONAL COUNCIL OF AGRICULTURAL EMPLOYERS,	
Plaintiffs,	
v.	**Civ No. 1:19-cv-00034-TJK**
R. ALEXANDER ACOSTA, in his official capacity as U.S. Secretary of Labor, *et al.*,	
Defendants,	
and	
MICHAEL CORTEZ, **c/o Texas RioGrande Legal Aid, Inc.** **1206 E. Van Buren St.** **Brownsville, Texas 78520,**	
ARNOLDO CHARLES, **c/o Texas RioGrande Legal Aid, Inc.** **1206 E. Van Buren St.** **Brownsville, Texas 78520,**	
and	
OLEGARIO LOPEZ, **c/o Texas RioGrande Legal Aid, Inc.** **1206 E. Van Buren St.** **Brownsville, Texas 78520,**	
[Proposed] Defendant-Intervenors.	

MOTION TO INTERVENE AS DEFENDANTS

In accordance with Rule 24(a) and (b) of the Federal Rules of Civil Procedure, Michael Cortez, Arnoldo Charles, and Olegario Lopez (the "Farmworkers") hereby move to intervene as defendants in this action.

As grounds for this motion, the Farmworkers state as follows:

1. As set forth in the accompanying memorandum of law and the exhibits thereto, including the Farmworkers' declarations, the Farmworkers are U.S. workers who among them have decades of experience working in agriculture and definite plans to work in or are ready to work in 2019 in agricultural jobs for which employers have imported large numbers of H-2A workers.[1] Furthermore, proposed intervenor Lopez is currently working for an H-2A employer along with H-2A workers and has been contractually entitled to receive the 2019 adverse effect wage rate ("AEWR") since January 9, 2019.

2. The Farmworkers have an interest in the subject matter of this litigation, *i.e.*, the 2019 AEWR to be paid for agricultural labor. As U.S. workers, the Farmworkers are among the intended beneficiaries of the 2019 AEWRs that went into effect on January 9. The Farmworkers will suffer injury in fact if Plaintiffs' challenge to the 2019 AEWR is successful, or if preliminary injunctive relief is granted, in that the Farmworkers will be deprived of the opportunity to apply for jobs with H-2A employers at the 2019 AEWR. Preliminary or permanent relief enjoining the 2019 AEWR also threatens to injure them because it will cause wage depression in the U.S. farm labor market generally. The U.S.

[1] Michael Cortez and Arnoldo Charles are U.S. citizens, and Olegario Lopez is a lawful permanent resident of the United States. All are U.S. workers under the H-2A regulations. *See* 20 C.F.R. § 655.103(b). As such, each of them is entitled to both a hiring preference over foreign workers for agricultural jobs that become available in this country and protection against depression of his wages and working conditions that might result from importation of foreign workers. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 596 (1982).

Department of Labor ("DOL") has promulgated the 2019 AEWR precisely to prevent such generalized wage depression, and enjoining that wage, as Plaintiffs' suit requests, threatens to remove the principal protection against such wage depression.

3. Disposition of this litigation may as a practical matter impair or impede the ability of the Farmworkers to protect their interests in their wages during the current and future agricultural employment seasons.

4. The federal Defendants cannot adequately protect the Farmworkers' interests. The federal Defendants are obligated to balance the interests of employers and workers and, as a result, the federal Defendants are unlikely to undertake all actions necessary to protect the interests of the Farmworkers and other agricultural workers. In particular, because defendant DOL has no financial stake in the 2019 AEWR, but instead only a policy interest, DOL is unlikely to seek and, indeed, may be precluded from seeking, adequate security pursuant to Fed. R. Civ. P. 65(c) to protect workers' right to receive the 2019 AEWR if Plaintiffs' suit is ultimately unsuccessful. In past employer challenges to DOL wage rates, DOL has failed to insist on adequate security for workers' wages. Only by intervening as parties can the Farmworkers ensure that their right to the 2019 AEWR is fully protected if an injunction is granted and later dissolved or reversed on appeal. The Farmworkers also intend to raise objections to Plaintiffs' standing that the federal Defendants are unlikely to raise.

5. Finally, the Farmworker Intervenors have interests distinct from those of proposed intervenor the United Farm Workers ("UFW"). The UFW is a union with institutional interests that are different from and that may conflict with the individual interests of the Farmworker intervenors. In addition, the Farmworkers' attorneys are

experienced with respect to challenges to DOL's temporary foreign worker wage rates both as attorneys for workers challenging inadequate DOL wage rates and as attorneys for workers acting as defendant-intervenors to protect the rights of workers in the face of challenges brought by growers and employer associations. The knowledge and experience of they bring to this case will provide a unique and important contribution to this litigation.

6. The federal Defendants have indicated that they do not oppose this motion for intervention. Plaintiffs have indicated that they do oppose the motion. The Farmworkers request leave to defer filing an answer in intervention until such time as the federal Defendants are required to answer.

The grounds for this motion are more fully stated in the accompanying memorandum of law.

Dated: January 15, 2019

Respectfully submitted,

/s/ Michael T. Kirkpatrick
Michael T. Kirkpatrick
D.C. Bar No. 486293
Adam R. Pulver
D.C. Bar No. 1020475
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
Email: mkirkpatrick@citizen.org

Gregory S. Schell
(notice of appearance and certification under LCvR 83.2(g) to be filed)
Fla. Bar No. 287199
Southern Migrant Legal Services
A Project of Texas RioGrande Legal Aid, Inc.
9851 Daphne Avenue
Palm Beach Gardens, FL 33410-4734

(561) 627-2108
Email: gschell@trla.org

Douglas L. Stevick
(notice of appearance and certification under LCvR 83.2(g) to be filed)
Tex. Bar No. 00797498
Texas RioGrande Legal Aid, Inc.
5439 Lindenwood Avenue
Saint Louis, MO 63109
(314) 449-5161
Email: dstevick@trla.org

Edward Tuddenham
(notice of appearance and certification under LCvR 83.2(g) to be filed)
N.Y. Bar No. 2155810
23 Rue du Laos
75015 Paris
France
33 6 84 79 89 30
Email: etudden@prismnet.com

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PERI & SONS FARMS, INC. and NATIONAL COUNCIL OF AGRICULTURAL EMPLOYERS,	)	
Plaintiffs,	)	
v.	)	**Civ No. 1:19-cv-00034-TJK**
R. ALEXANDER ACOSTA, in his official capacity as U.S. Secretary of Labor, *et al.*,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF THE
FARMWORKERS' MOTION TO INTERVENE AS PARTIES DEFENDANT

U.S. farmworkers Michael Cortez, Arnoldo Charles, and Olegario Lopez ("Farmworker Intervenors" or "Farmworkers") move to intervene as defendants to defend against Plaintiffs Peri & Sons Farms and NCAE's challenge to the U.S. Department of Labor's ("DOL") 2019 Adverse Effect Wage Rate ("AEWR") Notice and to oppose Plaintiffs' request for a preliminary injunction. The challenged Notice, 83 Fed. Reg. 66,036 (Dec. 26, 2018) (effective Jan. 9, 2019), announces the 2019 AEWRs that result from the mathematical formula for calculating AEWRs adopted by DOL in February 2010. *See* 75 Fed. Reg. 6,884, 6,891–6,901 (Feb. 12, 2010). As explained in the preamble to the 2010 final rule, the AEWR is a special minimum wage that employers of temporary foreign agricultural workers ("H-2A" workers) are required to offer and include in the work contracts of their U.S. and H-2A workers. *Id.* The wage is calculated each year based on the most recent version of the data required by the 2010 formula. The Farmworkers are U.S. agricultural workers who are the intended beneficiaries of the

AEWR. They seek to intervene as of right to protect their interest in receiving the 2019 AEWR and to ensure that the AEWR serves its intended purpose of protecting the wages of U.S. agricultural workers from wage depression caused by the admission of H-2A workers. As explained below, the Farmworkers' interest in this matter is sufficient to support Article III standing and intervention as of right. Plaintiffs' suit threatens to impair that interest. Moreover, the Farmworkers' interest is sufficiently different from Defendants' interest that Defendants may not adequately protect their interests, particularly with respect to the requested preliminary and permanent injunctive relief. Farmworkers also have interests distinct from the proposed UFW Intervenor.

FACTS

As set forth in their accompanying declarations (Exhibits 1 to 3 hereto), the Farmworkers are U.S. workers who among them have decades of experience working in agriculture and who intend or are ready to work in 2019 in agricultural jobs for which employers have imported large numbers of H-2A workers.[1]

Proposed Defendant-Intervenor Charles is a U.S. citizen residing in South Texas. *See* Decl. of Arnoldo Charles ("Charles Decl.") ¶¶ 2–3 (Ex. 1 hereto). He has worked extensively as a farmworker, including detasseling and cleaning corn in Indiana, harvesting sweet potatoes in Mississippi, working at a nursery in Ohio, and working in onions, peppers, oranges, and grapefruit in Texas. *Id.* ¶¶ 4–5. He intends to work as a

[1] Michael Cortez and Arnoldo Charles are U.S. citizens, and Olegario Lopez is a lawful permanent resident of the United States. All are U.S. workers under the H-2A regulations. *See* 20 C.F.R. § 655.103(b). As such, each of them is entitled to both a hiring preference over foreign workers for agricultural jobs that become available in this country and protection against depression of his wages and working conditions that might result from importation of foreign workers. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 596 (1982).

farm laborer during 2019 and has been told he has a job if he wants it in a nursery in Ohio where he has worked before. *Id.* ¶ 7. Following work at the nursery, he intends to take work detasseling corn in Indiana as he formerly did. *Id.* He would be particularly interested in accepting employment with an H-2A employer at the 2019 AEWRs, including $13.26 per hour for work in Indiana. *See id.* ¶ 8.

Proposed Defendant-Intervenor Lopez is a lawful permanent resident of the United States who resides in South Texas. *See* Decl. of Olegario Lopez ("Lopez Decl.") ¶¶ 2–3 (Ex. 2 hereto). He has worked in farm work in many crops in Texas and other states for much of his adult life. *Id.* ¶¶ 4–5. He is currently working at a cotton gin in the southeastern United States, where he does the same job as H-2A workers employed by the gin. *See id.* ¶¶ 5–7. He intends to work in agriculture in 2019 after his cotton gin job ends. *See id.* ¶¶ 10–11. He also expects to work in detasseling and other corn jobs in Illinois in 2019 and would be particularly interested in such jobs if they paid at least the 2019 AEWR of $13.26 per hour. *See id.* He also expects to return to his H-2A cotton gin job in the fall of 2019. *Id.* ¶ 8.

Proposed Defendant-Intervenor Cortez is a U.S. citizen residing in South Texas. *See* Decl. of Michael Cortez ("Cortez Decl.") ¶¶ 2–3 (Ex. 3 hereto). In early 2018, he applied for an H-2A job through the Texas Workforce Commission (TWC) that was set to begin in early March 2018. *Id.* ¶¶ 4–6. The job order was an H-2A job order for work in vegetables in West Texas. *Id.* ¶ 5. Proposed Intervenor Cortez was very interested in taking the job and repeatedly contacted the employer, but he was eventually informed that all of the harvesting positions were filled. Mr. Cortez intends to return to the TWC to look for employment in 2019 and would be very interested in applying for agricultural

employment in Texas with an H-2A employer at the state's 2019 AEWR rate of $12.23 per hour. *Id.* ¶¶ 8–9.

To further support the Farmworkers' allegations that they are interested in and would take H-2A jobs at the 2019 AEWR, they attach the declaration of one of their attorneys detailing information about H-2A job orders for the crops and states in which the Farmworkers have expressed their intention of working. *See* Declaration of Gregory S. Schell ("Schell Decl.") ¶¶ 2–7 (Ex. 4 hereto). 2018 job orders are referenced where relevant 2019 job orders have not yet been filed. *See id*. ¶¶ 3, 6. The declaration also makes clear that the wage rates the Farmworkers say they would accept are the 2019 AEWRs for H-2A work in the states referenced.

ARGUMENT

I. THE FARMWORKERS ARE ENTITLED TO INTERVENE AS A MATTER OF RIGHT.

Under Rule 24(a)(2) of the Federal Rules of Civil Procedure, the district court must grant a motion to intervene if it is timely, the prospective intervenor claims a legally protected interest in the action, and the action threatens to impair that interest, unless that interest is adequately represented by the existing parties. *Amador Cty. v. U.S. Dep't of Interior*, 772 F.3d 901, 903 (D.C. Cir. 2014); *Doe 1 v. FEC,* Civ. No. 17-2694 (ABJ), 2018 WL 2561043, at *2 (D.D.C. Jan. 31, 2018). In addition, a party seeking to intervene as of right must establish that he has standing. *See Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 316 (D.C. Cir. 2015); *Fund for Animals, Inc. v. Norton*, 322 F.3d 268, 271–72 (D.C. Cir. 2003). The Farmworkers satisfy all of these criteria.

A. The Farmworkers have standing.

The Farmworkers have standing because they are "imminently threatened with a concrete and particularized 'injury in fact' that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125 (2014). The challenged AEWR is published by DOL for the purpose of protecting U.S. agricultural workers, such as the Farmworkers, 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 provision mandating payment of the AEWR, 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"). As this court has observed, domestic farmworkers suffer an injury in fact when foreign workers are allowed to be imported at depressed wages, because the employment of cheap foreign labor has a depressive effect on the wages of similarly employed U.S. workers and deprives them of needed job opportunities. *AFL-CIO v. Brock*, 668 F. Supp. 31, 36 (D.D.C.), *remanded to DOL*, 835 F.2d 912 (D.C. Cir. 1987).

Thus, courts in the D.C. Circuit have long recognized that U.S. farmworkers have standing with respect to challenges to the AEWR or other terms of work applicable to foreign nonimmigrant farmworkers. *See, e.g.*, *Mendoza v. Perez*, 754 F.3d 1002, 1010–1016 (D.C. Cir. 2014) (holding that U.S. sheepherders who intend to look for jobs in

herding if wages are sufficiently high have standing to challenge DOL procedures for admitting H-2A sheepherders); *AFL-CIO v. Dole*, 923 F.2d 182 (D.C. Cir. 1991) (action to set aside AEWR methodology); *UFW v. Solis*, 697 F. Supp. 2d 5 (D.D.C. 2010) (same); *Joseph v. U.S. Dep't of Labor*, 787 F. Supp. 245 (D.D.C. 1991) (U.S. workers' challenge to DOL calculation of prevailing wage); *NAACP v. Donovan*, 558 F. Supp. 218 (D.D.C. 1982) (U.S. worker challenge to piece-rate wages approved by DOL); *CATA v. Dole*, 731 F. Supp. 541, 544 (D.D.C. 1990) (holding that U.S. workers have Article III standing to challenge terms under which DOL certifies admission of H-2A workers because the domestic workers "are clearly within the zone of interests protected by the relevant statute"). Moreover, courts have granted workers intervention to defend regulations designed to protect their wages. *See, e.g.*, *Frederick Cty. Fruit Growers Ass'n, Inc. v. Martin*, 968 F.2d 1265 (D.C. Cir. 1992) (employer challenge to H-2 AEWR and piece-rate regulations in which U.S. farmworkers intervened and successfully pursued counterclaims).[2]

Here, because the AEWR is designed to protect workers such as the Farmworker Intervenors from wage depression, they are immediately threatened with injury in fact if

[2] *See also N.C. Growers' Ass'n, Inc. v. Solis*, No. 1:09CV411, 2009 WL 4729113 (M.D.N.C. Dec. 3, 2009), *aff'd sub nom. N.C. Growers' Ass'n, Inc. v. UFW*, 702 F.3d 755 (4th Cir. 2012) (unions representing U.S. workers permitted to intervene in employer challenge to DOL H-2A regulations); *Fla. Fruit & Vegetable Ass'n v. Brock*, 771 F.2d 1455 (11th Cir. 1985) (intervention of U.S. workers in suit by employers over AEWR and piece-rate regulations); *Shoreham Coop. Apple Producers Ass'n, Inc. v. Donovan*, 764 F.2d 135 (2d Cir. 1985) (same); *Va. Agric. Growers Ass'n, Inc. v. Donovan*, 597 F. Supp. 45, 47 (W.D. Va. 1984), *rev'd on other grounds*, 774 F.2d 89 (4th Cir. 1985) (same); *Va. Agric. Growers Ass'n, Inc. v. Donovan*, 579 F. Supp. 768 (W.D. Va. 1984), *aff'd*, 756 F.2d 1025 (4th Cir. 1985) (U.S. workers permitted to intervene in employer challenge to DOL regulations governing terms of foreign worker contract).

Plaintiffs' challenge to the new, higher 2019 AEWR is successful. Accordingly, the Farmworker Intervenors have standing to intervene in this action to defend their interests.

Although Farmworkers Charles and Cortez are not currently employed by an H-2A employer, they nonetheless have standing. The purpose of the AEWR is to protect domestic workers throughout the agricultural industry since the increased competition from foreign workers affects wages throughout the industry. The D.C. Circuit has fully endorsed competitor standing for U.S. agricultural workers who work in the same labor market as H-2A workers. *See Mendoza*, 754 F.3d at 1010–14 (D.C. Cir. 2014) (holding that former U.S. sheepherders who, though not currently working as sheepherders, had averred their desire to work in the occupation and their intention to do so if wages and working conditions were to improve, had standing to challenge DOL wage rates applicable to H-2A sheepherders); *see also Feller v. Brock*, 802 F.2d 722, 730 (4th Cir. 1986) (permitting, in suit by apple growers challenging DOL's piece-rate wages for H-2 workers, U.S. workers employed by non-H-2 growers competing with the plaintiff growers to intervene because "[t]heir wages were and are substantially contingent upon the availability of foreign workers to pick the crop" and because if foreign workers had been unavailable, or if the foreign workers could only be employed at a higher piece rate, "the wages of competing domestic pickers would have been higher").

Nor does the fact that the Farmworkers seek to defend DOL's AEWR regulation, rather than challenge it, affect their standing. They have the same standing interest in defending a regulation designed to protect their wages as they do in challenging wage

regulations that fail to protect their interest. This Court has permitted worker intervention in these circumstances,[3] as have courts throughout the country.[4]

B. The intervention motion is timely.

Timeliness is evaluated based on the circumstances involved, including the time elapsed since the inception of the suit, the purpose for which intervention is sought, the applicant's need for intervention as a means for protecting his rights, and the probability of prejudice to the parties already in the case. *See Amador Cty.*, 772 F.3d at 903. The Farmworkers' intervention is timely, coming just several days after suit was filed and prior to the filing of responsive pleadings. *Crossroads Grassroots Policy Strategies,* 788 F.3d at 320; *Fund for Animals, Inc.*, 322 F.3d at 735 (holding intervention was timely when filed less than two months after suit was filed and before the defendants had filed an answer). The Farmworkers will conform to the schedule the Court has established for briefing on Plaintiffs' motion for a preliminary injunction, as well as with any schedule the existing parties agree upon for briefing the merits of the action, thereby eliminating the possibility of any delay that might otherwise result from the Farmworkers' intervention.

C. The Farmworkers have a legally protected interest in the 2019 AEWRs.

Because they have standing, the Farmworkers necessarily have a legally protectable interest for purposes of Rule 24(a)(2). *Fund for Animals*, 322 F.3d at 735 ("Our conclusion that [the proposed intervenor] has constitutional standing is alone

[3] *See, e.g.*, *Frederick Cty. Fruit Growers*, 968 F.2d at 1265 (employer challenge to H-2 AEWR and piece-rate regulations in which U.S. farmworkers intervened and successfully pursued counterclaims).
[4] See the cases cited in n.2, *supra*.

sufficient to establish that [it] has 'an interest in the property or transaction which is the subject of the action.'"); *Cty. of San Miguel v. MacDonald*, 244 F.R.D. 36, 46 (D.D.C. 2007) ("The District of Columbia Circuit has held that by satisfying the requirements of standing a party can demonstrate that a legally protected interest exists.").

D. Plaintiffs' suit, if successful, will impair or impede the Farmworker Intervenors' ability to protect their interests.

The statutory and regulatory scheme governing the admission of foreign agricultural workers is designed to ensure that the admission of foreign workers will not adversely impact the wages and working conditions of U.S. workers. *Alfred L. Snapp & Son*, 458 U.S. at 596. 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*, 923 F.2d at 184; *see also Prod. Farm Mgmt. v. Brock*, 767 F.3d 1368, 1369 (9th Cir. 1985) (noting that the AEWR guards against adverse effects on the wages of "similarly employed United States workers"); *UFW*, 697 F. Supp. 2d at 6 (stating that DOL utilizes AEWRs "[t]o ensure that the wages of U.S. workers will not be adversely affected by H-2A workers").

If the Court grants Plaintiffs' requested preliminary or permanent injunction, the Farmworkers will lose the critical protection against wage depression provided by the AEWR. Intervenor Lopez and others who are presently employed by H-2A growers would face what has been characterized as an "imminent threat of lost earnings" if their wage rates were reduced from the 2019 AEWR levels. *Cty. of San Miguel*, 244 F.R.D. at 47. Enjoining the 2019 AEWR would also result in H-2A employers offering U.S. workers looking for agricultural employment, such as Intervenors Charles and Cortez, lower wages than they would otherwise have to offer, and that, in turn, will tend to

depress the wages offered by non-H-2A employers since they will not have to compete with the 2019 AEWR wages offered by H-2A employers. As presently constituted, the AEWRs already contain a built-in lag, being based on data that are a year old. *UFA, AFL-CIO v. Chao*, 227 F. Supp. 2d 102, 104–05 (D.D.C. 2002) (noting that AEWRs are based on the previous year's annual regional hourly wage); *AFL-CIO*, 668 F. Supp. at 35 (acknowledging the "lag" in the availability of U.S. Department of Agriculture data used to compute AEWRs). If Plaintiffs prevail, H-2A employers will be able to hire workers at the 2018 AEWR, based on earnings data from 2017, which will lead to precisely the sort of wage depression the AEWRs were designed to prevent. The wages paid the H-2A foreign agricultural workers will impact the wages of the Farmworkers and other domestic workers, whose earnings are "substantially contingent" on the H-2A wage rates. *Feller*, 802 F.2d at 730.

There is no other forum in which the Farmworkers can oppose the issuance of Plaintiffs' requested injunction. Even if the Farmworkers sought to collaterally attack such an injunction through a separate lawsuit, "there is no question that the task of reestablishing the status quo" would be "difficult and burdensome." *Fund for Animals*, 322 F.3d at 735. In addition, there is no other court in which the Farmworkers and other affected employees can request Fed. R. Civ. P. 65(c) security and other essential actions to ensure payment of wages at the 2019 AEWR should an injunction ultimately be overturned.

E. The Farmworkers' interests are not adequately represented by DOL.

To intervene as of right, the Farmworker Intervenors must show that Defendants *may* not adequately protect their interests. *Fund for Animals*, 322 F.3d at 737 ("As we

have recognized, interests need not be wholly 'adverse' before there is a basis for concluding that existing representation of a 'different' interest may be inadequate. . . . [E]ven a shared general agreement ... does not necessarily ensure agreement in all particular respects . . ."). The burden of making this showing is minimal and "not onerous." *Id.*; *accord Cal. Valley Miwok Tribe v. Salazar*, 281 F.R.D. 43, 47 (D.D.C. 2012) ("The D.C. Circuit has emphasized repeatedly that the standard to demonstrate inadequacy of representation is lenient.").

Frequently, government agencies cannot adequately represent the interests of would-be intervenors "because government entities are usually charged with 'representing the interests of the American people,' whereas aspiring intervenors . . . are dedicated to representing their personal interests." *Cty. of San Miguel*, 244 F.R.D. at 48; *accord Cal. Valley Miwok Tribe*, 281 F.R.D. at 47. Here, the responsibility of DOL is to balance the interests of both employers and workers in regulating the admission of foreign workers. *UFA*, 227 F. Supp. 2d at 108 ("In adopting an AEWR policy, DOL must balance the competing goals of the statute—providing an adequate labor supply to growers and protecting the jobs of domestic farmworkers."); *Rogers v. Larson*, 563 F.2d 617, 626 (3d Cir. 1977) (holding that DOL must balance the need to assure an adequate labor force with the need to protect the jobs of citizens); *Feller*, 802 F.2d at 730 (ruling that DOL could not adequately represent the intervenor workers' interest because "[e]ven if DOL agreed with the [workers] on the merits, the government's position is defined by the public interest"). As a result of the differences between the interests of DOL and those of the Farmworker Intervenors, Defendants may not adequately represent the Farmworkers' interests in a number of ways, most notably with respect to protecting the

wages due U.S. and H-2A workers under the 2019 AEWRs. DOL has no financial stake in the 2019 AEWR Notice; it will suffer no monetary costs or damages as a result of an injunction. For that reason, and because it must balance the interest of employers and workers, DOL has not sought a bond or other security to protect worker wages in past employer challenges to DOL's wage rates.

For example, in 2009, when growers obtained an injunction blocking DOL's effort to, *inter alia*, suspend regulations that had substantially lowered farmworker wages, DOL took no action to protect the interests of farmworkers in the event that the injunction was modified or reversed. It was left to the farmworkers seeking intervention in that case to press for the disputed wages to be escrowed. *See N.C. Growers' Ass'n, Inc. v. Solis*, No. 09-cv-411, Docket No. 39, Resp. of Applicant Def.-Intervenors to Pls.' Mot. for Prelim. Inj., at 18 (M.D.N.C. June 18, 2009) (Ex. 5 hereto). DOL also failed to seek a bond or other security when employers sought to enjoin DOL's wage rate for non-agricultural temporary foreign workers. *See Bayou Lawn & Landscape Servs. v. Solis*, No. 3:11-cv-00445-MCR-EMT, Docket No. 40, Fed. Defs.' Br. in Opp'n to Pls.' Mot. for Prelim. Inj. (N.D. Fla. Sept. 30, 2011) (Ex. 6 hereto). The same thing happened the next year when the employer-plaintiffs sought to enjoin DOL's comprehensive regulations governing the importation of H-2B workers. *See Bayou Lawn & Landscape Servs. v. Solis*, No. 3:12-cv-00183-MCR-CJK, Docket No. 20, Fed. Defs.' Br. in Opp'n to Pls.' Mot. for TRO and Prelim. Inj. (N.D. Fla. Apr. 23, 2012) (Ex. 7 hereto) (government opposed preliminary injunction against comprehensive 2012 regulations, including wage regulations, without seeking any bond or other security).

Because DOL has not sought adequate security to protect workers in past employer wage challenges, and because at least one court has held that it is precluded from seeking such security, *see McGregor Printing Corp. v. Kemp*, Civ. A. No. 92-3255(GHR), 1992 WL 118794, at *7 (D.D.C. May 14, 1992) (noting that, pursuant to Rule 65(c), only a party can seek a bond, and only for the damages it has suffered, not for damages suffered by non-parties), it is critical that the Farmworkers be permitted to intervene as parties to protect their interests in ensuring that Plaintiffs post adequate security for the 2019 AEWRs. In the absence of a bond or other security, it is questionable whether DOL would have authority to seek repayment of the disputed wages in the event a preliminary or permanent injunction were dissolved or reversed. *See W. Colo. Fruit Growers Ass'n, Inc. v. Marshall*, 473 F. Supp. 693, 696–99 (D. Colo. 1979) (dismissing government's counterclaim for damages suffered by workers as a result of violations of the terms of employers' labor certification). Even if workers could seek payment of the 2019 AEWR in the event an injunction were dissolved, in the absence of notice to affected workers informing of them of the existence of this wage dispute and the issuance of a preliminary injunction, H-2A or U.S. workers would not likely know of their right to claim back wages in the event a preliminary or permanent injunction were reversed. DOL has not sought such notice in cases, like the present one, involving employer challenges to DOL regulations, and the Farmworkers anticipate that DOL will not do so here either. That decision may reflect DOL's judgment as to the best way to balance the interests of employers and workers, but it is decidedly *not* in the interests of the Farmworkers.

DOL's history of not taking steps to protect affected workers in the face of employer challenges to its wage rules highlights a second potential divergence between the interest of the Farmworkers and DOL. In the Farmworkers' view, each individual employer who seeks to benefit from an injunction must participate in this case to (1) establish that he or she is, in fact, likely to suffer immediate irreparable injury; and (2) if an injunction is issued, to provide the necessary worker contact information and wage data so that notice can be issued and the necessary amount of a bond or other security may be calculated. *See, e.g.*, *Va. Agric. Growers Ass'n, Inc. v. Donovan*, No. 83-146-D, TRO (W.D. Va. Apr. 26, 1985) (Ex. 8 hereto) (requiring individual growers benefiting from injunction against new AEWR to escrow monthly the disputed wages as they are earned by the workers, to notify affected workers of the escrow account, and to maintain their addresses); *Frederick Cty. Fruit Growers Ass'n, Inc. v. Brock,* No. 85-0142-D, TRO (W.D. Va. Dec. 17, 1985) (Ex. 9 hereto) (same). In addition, the Farmworkers intend to argue that the need for such participation by individual H-2A employers precludes Plaintiff NCAE from establishing associational standing. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 342–43 (1977) (to establish associational standing, plaintiff must show participation of its individual members in the litigation is not required). DOL in the past has not raised such standing arguments when associations have challenged DOL wages rates. *See, e.g.*, Exs. 5–7. For this reason as well, DOL may not adequately represent the Farmworkers' interest, thereby entitling the Farmworkers to intervention as of right.

Although it is not Farmworkers' burden to show that their interests diverge from those of the UFW, the other proposed defendant-intervenor in this case, their interests do

diverge. The UFW is a union whose institutional interests are different from the individual interests of the proposed Farmworker Intervenors. Those institutional interests may conflict with Farmworkers' wholly individual interests. Moreover, counsel for the Farmworkers have more than 40 years of experience with litigation relating to DOL's labor certification regulations generally and employer challenges to DOL wage regulations in particular. These counsel bring valuable knowledge and experience to this case that the UFW intervenor does not.[5] The Farmworkers are, of course, willing to abide by any conditions the Court deems necessary to ensure the efficient conduct of the litigation, such as those imposed on the multiple intervenors in *Wildearth Guardians v. Salazar*, 272 F.R.D. 4, 20–21 (D.D.C. 2010) (requiring, *inter alia*, intervenors to confer to determine whether their positions may be set forth in a consolidated manner).

[5] Edward Tuddenham and/or Greg Schell have been lead counsel for intervenors and proposed intervenors in the following employer challenges to DOL H-2, H-2A, and H-2B wage rates and regulations: *La. Forestry Ass'n v. Solis*, 889 F. Supp. 2d 711 (E.D. Pa. 2012) (H-2B); *N.C.Growers' Ass'n*, 702 F.3d 755 (H-2A); *Frederick Cty. Fruit Growers Ass'n*, 968 F.2d 1265 (H-2); *Fla. Fruit & Vegetable Ass'n*, 771 F.2d 1455 (H-2); *Shoreham Coop. Apple Producers Ass'n*, 764 F.2d 135 (H-2); *Va. Agric. Growers Ass'n,* 774 F.2d 89 (H-2). They have also been lead counsel for workers challenging DOL's H-2A and H-2B regulations. *See, e.g.*, *CATA v. Perez*, 378 F. Supp. 3d 361 (D.N.J. Dec. 7, 2015) (H-2B); *CATA v. Perez*, 774 F.3d 173 (3d Cir. 2014); *CATA v. Solis*, Civ. No. 09-240, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010) (H-2B); *NAACP v. Sec'y of Labor*, 846 F. Supp. 91 (D.D.C. 1994) (H-2A); *AFL-CIO*, 923 F.2d 182; *Donaldson v. US DOL*, 930 F.3d 339 (4th Cir. 1991) (H-2A); *Morrison v. USDOL*, 713 F. Supp. 664 (S.D.N.Y. 1989) (H-2); *Phillips v. Brock*, 652 F. Supp. 1372 (D. Md. 1987) (H-2A). Mr. Tuddenham and Mr. Schell were the attorneys who established that H-2 and U.S workers had the right to enforce DOL's labor certification requirements as a matter of contract, *see Salazar v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1341–1343 (5th Cir. 1985); *Frederick Cty. Fruit Growers*, 968 F.2d at 1268–69; *Cuellar-Aguilar v. Deggeller Attractions, Inc.*, 812 F.3d 614, 618–620 (8th Cir. 2016), and a right to restitution when DOL erroneously certifies H-2 workers at an unlawfully low wage, *Frederick Cty. Fruit Growers*, 968 F.2d at 1272–75.

II. ALTERNATIVELY, THE FARMWORKERS SHOULD BE ALLOWED PERMISSIVE INTERVENTION UNDER RULE 24(b)(1).

Rule 24(b)(1)(B) provides for permissive intervention where the applicant "has a claim or defense that shares with the main action a common question of law or fact." If a prospective intervenor satisfies these criteria, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights. *In re Endangered Species Act Section 4 Deadline Litig.*, 270 F.R.D. 1, 6 (D.D.C. 2010). The Farmworkers should be allowed to permissively intervene because they have timely filed their motion to intervene, intervention will not unduly delay these proceedings, and their defenses have questions of law in common with the main action.

A. The Farmworkers' motion to intervene is timely, and intervention will not unduly delay the proceedings.

The Farmworkers' motion to intervene is timely because it is being filed within approximately a week after the original complaint was filed and before any answer has been filed. *See Fund for Animals*, 322 F.3d at 735. The Farmworkers' intervention will not result in delay or prejudice the rights of any of the original parties. The Farmworkers do not seek to introduce new claims into the suit. As noted above, the Farmworkers will comply with the scheduling order entered by the Court with respect to preliminary relief and with any other scheduling order entered by the Court.

B. The Farmworkers' defense of the 2019 AEWRs has a question of law in common with the main action.

Because the Farmworkers seek to defend the 2019 AEWRs, they seek to pursue issues common to the main action even though they have different interests from the government. Although defense of their interests will likely involve arguing points that Defendants may not raise, such as issues regarding Plaintiffs' standing and the need for

and form of security for an injunction, the Farmworkers seek to intervene as defendants to litigate the claim raised by Plaintiffs in the case.

CONCLUSION

For the foregoing reasons, this Court should grant Farmworkers Cortez, Charles, and Lopez's request to intervene as of right, or, in the alternative, to permissively intervene in this action.

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Respectfully submitted,

/s/ Michael T. Kirkpatrick
Michael T. Kirkpatrick
D.C. Bar No. 486293
Adam R. Pulver
D.C. Bar No. 1020475
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
Email: mkirkpatrick@citizen.org

Gregory S. Schell
(*Pro Hac Vice* practice pursuant to LCvR 83.2(g))
Fla. Bar No. 287199
Southern Migrant Legal Services
A Project of Texas RioGrande Legal Aid, Inc.
9851 Daphne Avenue
Palm Beach Gardens, FL 33410-4734
(561) 627-2108
Email: gschell@trla.org

Douglas L. Stevick
(*Pro Hac Vice* practice pursuant to LCvR 83.2(g))
Tex. Bar No. 00797498
Texas RioGrande Legal Aid, Inc.
5439 Lindenwood Avenue
Saint Louis, MO 63109
(314) 449-5161
Email: dstevick@trla.org

Edward Tuddenham
(*Pro Hac Vice* practice pursuant to LCvR 83.2(g))
N.Y. Bar No. 2155810
23 Rue du Laos
75015 Paris
France
33 6 84 79 89 30
Email: etudden@prismnet.com