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

BRIEF OF AMICI CURIAE FARMWORKER JUSTICE, JAMES SIMPSON, AND STEPHANUS DE KLERK IN SUPPORT OF APPELLEES AND AFFIRMANCE

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February 6, 2024

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

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INTEREST OF AMICI[1]

Amici Farmworker Justice, James Simpson, and Stephanus De Klerk submit this brief in support of appellees and urge the Court to affirm 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). The Final Rule—which revises the methodology that DOL uses to determine the Adverse Effect Wage Rate (AEWR) paid by H-2A employers to a small subset of H-2A workers and U.S. workers in corresponding employment—is a well-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. workers similarly employed. Amici 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. Amici submit this brief to emphasize that the Final Rule is consistent with DOL's long-standing obligation to ensure that the importation of H-2A workers does not depress the wages of U.S. workers—an objective that was confirmed, rather than changed, by the Immigration Reform and Control Act of 1986.

[1] No counsel for a party authored this brief in whole or in part, and no person other than the amici curiae or their counsel contributed money that was intended to fund the preparation or submission of this brief.

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 are determined by the Final Rule.

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. He has worked for a grower participating in the H-2A program and plans to do so in the future. 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 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.

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 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.

BACKGROUND

In 1952, Congress established a visa program that allows employers to import foreign workers to fill temporary jobs when U.S. workers are unavailable. Immigration and Nationality Act (INA), Pub. L. No. 82-414, 66 Stat. 163 (Jun. 27, 1952). The program became known as the H-2 program, taking its name from the subsection in which it appeared in the U.S. Code. *See* 8 U.S.C. § 1101(a)(15)(H)(ii) (1958). A series of regulations established DOL's role in ensuring that sufficient U.S. workers were not available and that the employment of H-2 workers would not adversely affect U.S. workers. *E.g.*, 8 C.F.R. § 475.2(c)(3) (1953); 8 C.F.R. § 214.2(h) (1968). In 1986, INA was amended by the Immigration Reform and Control Act (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986), which subdivided the H-2 program into the H-2A program for agricultural work and the H-2B program for nonagricultural jobs. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(a) & (b).

IRCA did not change DOL's obligation to ensure that the importation of foreign guest workers does not depress the wages of U.S. workers. Rather, it codified the 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). To ensure that the employment of H-2A workers does not depress the wages of U.S. workers, DOL regulations require that the employer pay the highest of the AEWR, the prevailing wage, the agreed-upon collective bargaining wage, the federal minimum wage, or the state minimum wage. *See* 20 C.F.R. §§ 655.120(a),.122(*l*). 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).

DOL began calculating the AEWR in 1963, and its methodology for doing so has evolved over time. From 1987 until the Final Rule took effect, except for an 18-month period in 2009-2010, DOL set the AEWR using the annual Farm Labor Survey (FLS) conducted by the U.S. Department of Agriculture. The FLS collects wage information for six Standard Occupational Classifications (SOCs) that

comprise the "field and livestock workers (combined)" category, and the survey results establish the AEWR.[2]

The Final Rule does not alter the methodology for setting the AEWR for the vast majority of workers. Farmworkers in the six SOCs that comprise the "field and livestock workers (combined)" category in the FLS continue to be paid an AEWR based on the FLS. When it issued the Final Rule, DOL estimated that about 98 percent of H-2A workers would remain in that category. 88 Fed. Reg. at 12,760, 12,766–69. The record in this case shows that, as of July 26, 2023, 96.7 percent of H-2A workers with AEWRs calculated under the Final Rule have been assigned an AEWR based on the "field and livestock workers (combined)" category in the FLS. JA 214.

At issue here is the methodology for calculating the AEWR for jobs not included in the six SOC codes that comprise the "field and livestock workers (combined)" category. Because the FLS does not gather data for occupations such as supervisors, construction workers, mechanics, and truck drivers, the Final Rule sets the AEWR for such jobs using data from the Occupational Employment and Wage Statistics (OEWS) survey. To determine the appropriate classification, DOL

[2] The six occupations and SOC codes are Farmworkers and Laborers, Crop, Nursery and Greenhouse Workers (45–2092); Farmworkers, Farm, Ranch, and Aquacultural Animals (45–2093); Agricultural Equipment Operators (45–2091); Packers and Packagers, Hand (53–7064); Graders and Sorters, Agricultural Products (45–2041); and All Other Agricultural Workers (45–2099).

considers the totality of the information in the H-2A application and compares the duties of the employer's job opportunity with the definitions and tasks listed in the SOC system. If the job opportunity cannot be classified within a single SOC, more than one SOC code is assigned and the H-2A employer is required to pay the highest applicable wage.

DOL adopted the new methodology for calculating the AEWR for jobs not included in the FLS to fix a flaw in the former rule. The former rule's use of FLS wage data for field and livestock workers to set a single AEWR for all H-2A workers in a state, including for H-2A workers performing jobs in SOC codes not encompassed by the field and livestock classification, did not reflect the actual wages earned by workers in those excluded SOC codes, which "generally account for more specialized or higher paid job opportunities." 88 Fed. Reg. at 12,761. 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). Longstanding DOL regulations emphasize that 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) (citing *Fla. Sugar Cane League, Inc. v. Usery*, 531 F.2d 299 (5th Cir. 1976)). And "the policy which

permeates the immigration statutes [is] that domestic workers rather than aliens be employed wherever possible." *Elton Orchards, Inc. v. Brennan*, 508 F.2d 493, 500 (1st Cir. 1974); *see* 20 C.F.R. § 655.0(a)(3) (same).

Before the Final Rule, some employers took advantage of the flaw in the prior rule to bring in H-2A workers and pay them as though they were picking crops in the field, even though they were engaged in construction work or driving tractor-trailers. Although the buildings under construction happened to be on farms, or the tractor-trailers happened to be hauling agricultural products, that did not change the character of the tasks performed. Yet some employers filled such jobs with H-2A workers paid an AEWR based on the "field and livestock workers (combined)" category in the FLS, rather than the higher wages typically earned by construction workers and truck drivers. *See, e.g.*, Brief of Mary J. Wilson in *Luna Vanegas v. Signet Builders, Inc.*, No. 21-2644, 2021 WL 5872474 (7th Cir. Dec. 7, 2021) (describing the harm to U.S. construction workers and the businesses that employ them from the use of H-2A workers paid the FLS-based AEWR to build structures on farms); Stephen Franklin, *The Visa Loophole that Big Ag Construction Firms Love to Exploit*, In These Times (Apr. 2018), https://inthesetimes.com/features/farm_industry_migrant_workers_h2a_visa_exploitation.html; Bruce Rushton, *Farming Out Work*, Ill. Times (July 14, 2016), https://www.illinoistimes.com/springfield/farming-out-ork/Content?oid=11445326.

To close that loophole and protect U.S. workers from wage depression, the Final Rule sets the AEWR based on the job duties to be performed by the workers. For occupations not included in the FLS, the Final Rule provides that DOL will rely on data from the OEWS. The FLS collects information about wages paid directly to farmworkers by farm owners and operators. In contrast to the FLS, the OEWS includes wages paid by farm labor contractors or other agricultural service companies. This distinction is particularly important because agricultural workers in the occupations not included in the FLS are more often employed by labor contractors and other agricultural support services employers. 88 Fed. Reg. at 12,771. There has been a steady increase in the percentage of farmworkers hired through labor contractors: In 2008, farm labor contractors hired an estimated 30 percent of farmworkers in H-2A jobs. *See 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. at 12,770 n.60.

SUMMARY OF ARGUMENT

The district court correctly concluded that appellants are not likely to succeed on the merits of their claim that DOL violated the Administrative Procedure Act by failing to consider the Final Rule's effect on illegal immigration. First, DOL's statutory mandate with respect to calculating the AEWR is to ensure that the

employment of H-2A 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). That mandate was confirmed with the enactment of IRCA in 1986. Second, appellants' assertion that the objective of the H-2A program is to control illegal immigration by providing employers with access to cheap foreign labor is unfounded. The H-2A program provides access to foreign labor only where the wages paid will not depress the wages of U.S. workers. Third, DOL was not required to entertain speculation that a higher AEWR for a small subset of H-2A jobs would drive employers to abandon the program and risk civil and criminal penalties by hiring unauthorized workers. Absent evidence to the contrary, DOL is entitled to presume that employers will comply with the law. Thus, although DOL acknowledged comments asserting that a higher AEWR would increase the employment of unauthorized workers, it correctly rejected such comments as unreasonably speculative and beyond the scope of a rulemaking aimed at ensuring that the AEWR methodology protects U.S. workers from wage depression caused by the presence of H-2A workers.

ARGUMENT

I. The AEWR methodology is intended to prevent the employment of H-2A workers from depressing the wages of U.S. workers.

The INA established the H-2 program in 1952 with the dual purposes of ensuring an adequate labor force while protecting the wages and working conditions

of U.S. workers. Its statutory and regulatory framework requires that U.S. workers be given a preference over foreign workers for available jobs and that, to the extent that foreign workers are brought in, there is no adverse effect on U.S. workers. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 596 (1982). To protect U.S. workers from any wage depression caused by the presence of foreign workers, DOL calculates the AEWR. Although the methodology for calculating the AEWR has evolved over the years, the statutory purpose has not changed.

In 1986, the INA was amended by IRCA, which "expressly incorporate[d] the adverse effect prohibition that [DOL] had earlier introduced by regulations in order to meet Congress' resolve that American workers not be injured by immigration policies." *AFL-CIO v. Brock*, 835 F.2d 912, 914 (D.C. Cir. 1987). In enacting IRCA, "Congress made absolutely no alteration to the statutory mandate that underlies AEWRs. The regulatory adverse effect prohibition promulgated pursuant to the INA was expressly retained in the IRCA." *Id.* at 918–19. Indeed, cases from both before and after IRCA describe the program's objectives in the same way. *Compare, e.g.*, *Va. Agric. Growers Ass'n v. DOL*, 756 F.2d 1025, 1031 (4th Cir. 1985) (upholding DOL regulations for the H-2 program that rationally balanced the statutory policies of admitting needed seasonal foreign labor while protecting the wages of U.S. workers), *and Rowland v. Marshall*, 650 F.2d 28, 29 (4th Cir. 1981) ("The purpose of the AEWR is to prevent the importation of nonimmigrant aliens from deflating

the wages and from adversely affecting the working conditions of United States workers similarly employed."), *with N.C. Growers' Ass'n v. United Farm Workers*, 702 F.3d 755, 759 (4th Cir. 2012) (explaining that Congress's intent for the H-2A program was to prefer U.S. workers over H-2A workers "and that the employment of H-2A workers would not adversely affect the wages or working conditions of U.S. workers"), *and AFL-CIO v. Dole*, 923 F.2d 182, 187 (D.C. Cir. 1991) (explaining that the statute's goals are to provide an adequate labor supply and to protect U.S. workers from wage depression).

II. The H-2A program is not a tool for controlling illegal immigration.

Appellants argue that IRCA changed the H-2A program's objective from allowing the importation of foreign workers to address labor shortages while protecting the wages of U.S. workers, to controlling illegal immigration by providing employers with access to cheap foreign labor. According to appellants, "the H-2A program removes any incentive to hire undocumented workers," Appellants' Br. 1–2, by giving farmers "access to a lawful alternative," *id.* at 16. They argue that the Final Rule reverses course and, "by making H-2A labor unaffordable, … incentivizes the employment of undocumented immigrants." *Id.* Appellants' argument fails for at least two reasons.

First, as explained above, IRCA did not change the objective of the H-2A program or the AEWR. IRCA overhauled many aspects of U.S. immigration policy,

and it included provisions that provided for the legalization of undocumented immigrants already in the United States, Pub. L. No. 99-603 at § 201, 100 Stat. at 3394, and that banned the hiring of unauthorized workers after the effective date of the Act, *id.* at § 101, 100 Stat. at 3360. IRCA discourages employers from using unauthorized foreign labor by requiring employers to verify that those they hire are authorized to work in the United States, *id.*, 100 Stat. at 3361–63, and by imposing civil and criminal penalties on employers who hire unauthorized workers, *id.*, 100 Stat. at 3366–68. And IRCA included provisions to streamline the legalization of undocumented agricultural workers to avoid a sudden labor shortage. *Id.* at § 302, 100 Stat. at 3417. But the part of IRCA that amended the INA with respect to the H-2 program simply codified the requirements for employers who want to hire lawful temporary foreign workers; it did not change the regulatory status quo. *Id.* at § 301, 100 Stat. at 3411. Thus, the objective of the AEWR methodology has remained constant, both before and after IRCA's enactment in 1986.

Appellants argue that IRCA took a carrot-and-stick approach to controlling illegal immigration, and that the "stick" of employer sanctions is complemented by the "carrot" of providing access to cheap but legal foreign labor through the H-2A program. Appellants' Br. 20–21. But the objective of the H-2A program is not to provide cheap foreign labor; it is 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 AEWR methodology adopted by the Final Rule is intended to avoid wage depression by ensuring that workers in higher-skilled and higher-paid jobs are not paid as though they were field workers just because their work happens to take place on a farm or involve agricultural products. The AEWR is, by definition, intended to prevent access to foreign labor at wages *below* those earned by U.S. workers similarly employed.

Second, appellants' assertion that the H-2A program removes any incentive to hire unauthorized workers is wrong. Appellants concede that there has always been a financial incentive for unscrupulous employers to hire unauthorized workers because such workers are "uniquely subject to abuse and exploitation." Appellants' Br. 18. The H-2A program did not eliminate the use of unauthorized labor in agriculture. To the contrary, about 44 percent of farmworkers in the United States lack work authorization.[3] The Final Rule, which is likely to increase the AEWR for about 2 percent of the jobs for which employers seek certification to hire H-2A workers, is unlikely to have an appreciable effect on illegal immigration.

[3] U.S. Department of Labor, *Findings from the National Agricultural Workers Survey (NAWS) 2019–2020: A Demographic and Employment Profile of United States Farmworkers*, Research Report No. 16, at 7, 76 (Jan. 2022), https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS%20Research%20Report%2016.pdf.

III. DOL was not required to consider the AEWR methodology's effect, if any, on controlling illegal immigration.

Appellants speculate that agricultural employers who would otherwise use H-2A workers to fill higher-skilled specialty jobs not included in the FLS will risk civil and criminal penalties by hiring unauthorized workers to fill those positions rather than pay H-2A workers the AEWR required by the Final Rule. Appellants' Br. 24–25. Such speculation is far-fetched and unsupported by the record. Not one of the twenty-four plaintiffs in this case has declared an intention to abandon the H-2A program in favor of hiring unauthorized workers.

In promulgating the Final Rule, DOL was entitled to presume that agricultural employers will obey the law absent evidence to the contrary. *See Am. Whitewater v. Tidwell*, 770 F.3d 1108, 1120 (4th Cir. 2014) (rejecting plaintiffs' "speculative" claim that agency action would cause people to illegally trespass on their property); *see also Coal. for Responsible Reg'l Dev. v. Coleman*, 555 F.2d 398, 400 (4th Cir. 1977) (explaining that a court may not fault an agency for failing to consider "remote and speculative" possibilities). Appellants cite no case where a rule was vacated because of unsubstantiated concerns that it would drive the regulated party to engage in illegal conduct.

In any event, DOL acknowledged the comments submitted in opposition to the Final Rule that "raised concerns that steep wage increases would price farmers out of the H-2A program, leading them back to using undocumented labor."

Appellants' Br. 24. And DOL explained that the 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 AEWR methodology.

CONCLUSION

For these reasons and those set forth in DOL's Brief, the Court should affirm the district court's denial of a preliminary injunction.

Respectfully submitted,

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February 6, 2024

CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Federal Rule of Appellate Procedure 29(a)(5) because, excluding the material referenced in Federal Rule of Appellate Procedure 32(f), it contains 3,477 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