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IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

FRESNO DIVISION

UNITED FARM WORKERS, *et al.*, Plaintiffs, v. THE UNITED STATES DEPARTMENT OF LABOR, *et al.*, Defendants.	Case No. 1:20-CV-01690-DAD-JLT **DEFENDANTS' OPPOSITION TO MOTION TO INTERVENE (ECF 70)**

Defendants, the U.S. Department of Labor and Secretary Walsh in his official capacity, oppose the intervention motion filed by the National Council of Agricultural Employers and Western Growers Association (collectively, "Proposed Intervenors"). *See* Mot. to Intervene, ECF 70 ("Motion"). Proposed Intervenors do not meet the requirements for intervention as of right, *see* Fed. R. Civ. P. 24(a)(2), or the requirements for permissive intervention, *see* Fed. R. Civ. P. 24(b). Accordingly, the Motion should be denied.

BACKGROUND

On December 23, 2020, the Court granted Plaintiffs' motion for a preliminary injunction. *United Farm Workers v. Dep't of Labor*, No. 20-cv-1690 (E.D. Cal. Dec. 23, 2020), ECF 37. On January 12,

2021, the Court issued a supplemental order regarding preliminary injunctive relief. *See United Farm Workers v. Dep't of Labor*, No. 20-cv-1690 (E.D. Cal. Jan. 12, 2021), ECF 39. In that supplemental order, the Court "reserve[d] the issue of whether any award of backpay is warranted based upon the difference between the 2020 AEWRs and the final 2021 AEWRs, if any." ECF 39 at 2-3. The Court directed Defendants to "provide notice to all H-2A employers who submit job orders and applications for H-2A labor certification between December 21, 2020 and the publication of the final 2021 AEWRs, informing them of the potential backpay claim." ECF 39 at 3. Defendants published such notice on January 15, 2021.[1] DOL explained that the court had "reserved decision on whether an award of backpay is warranted based on the difference, if any, between the 2020 AEWRs and the final 2021 AEWRs," providing notice "to all employers who submit job orders and applications under the H-2A program between December 21, 2020, and the publication of 2021 AEWRs in the *Federal Register*, that affected H-2A workers may have a potential claim for backpay." *Id.*

On March 11, 2021, Plaintiffs filed a motion for backpay. ECF 44. Defendants opposed the issuance of a backpay award. ECF 47. The Court heard argument on Plaintiffs' motion on April 6, 2021, ECF 51, and in a subsequent hearing on May 11, 2021, ECF 57. On May 14, 2021, the Court granted Plaintiffs' motion in part. *United Farm Workers v. Dep't of Labor*, No. 20-cv-1690 (E.D. Cal. May 14, 2021), ECF 58. The Court's May 14 order applied to approximately 72 employers. *See* Pasternak Decl. ¶ 9, ECF 64-1. On June 3, 2021, Plaintiffs requested that the Court's May 14 order be expanded to apply to additional employers; Defendants opposed Plaintiffs' proposed expansion. ECF 64.

On June 10, 2021—five months after DOL alerted employers that "workers may have a potential claim" for backpay and three months after Plaintiffs filed their motion seeking a backpay order—Proposed Intervenors filed their Motion. ECF 70. On June 11, 2021, the Court issued a revised backpay order, moderately expanding the scope of the Court's May 14 order. *United Farm Workers v. Dep't of Labor*, No. 20-cv-1690 (E.D. Cal. June 11, 2021), ECF 74.

[1] *OFLC Announces Updates to Implementation of the H-2A Adverse Effect Wage Rate Methodology for Non-Range Occupations Final Rule; Compliance with District Court Order* (January 15, 2021), https://www.dol.gov/agencies/eta/foreign-labor/news.

ARGUMENT

I. The Proposed Intervenors Do Not Meet the Requirements for Intervention as of Right.

Proposed Intervenors cannot carry their burden of establishing all four criteria required to intervene as a matter of right under Federal Rule of Civil Procedure 24(a)(2). *See Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003) (proposed intervenor must (1) file timely motion, (2) have a significantly protectable interest in the action, (3) show that such interest would be impaired absent intervention, and (4) establish that existing parties do not adequately represent such interest). "The party seeking to intervene bears the burden of showing that *all* the requirements for intervention have been met." *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004) (emphasis in original). "Failure to satisfy any one of the[se] requirements is fatal to the application." *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 950 (9th Cir. 2009).

First, Proposed Intervenors fail to make the "compelling showing" required to rebut the presumption that Defendants adequately represent Proposed Intervenors' interests. *Id.* at 950-51; *see also Arakaki*, 324 F.3d at 1086 (presumption of adequacy is particularly strong when the government is a party). Defendants and Proposed Intervenors share the same "ultimate objective" in opposing the issuance of a backpay order, and Defendants have adequately represented that interest throughout this litigation.

As the Court stated during the June 15 status conference, ECF 76, Defendants have vigorously opposed a backpay order at every stage of these proceedings. In their opposition to Plaintiffs' motion for backpay, Defendants disputed Plaintiffs' contention that the 2020 AEWRs were no longer valid as of January 1, 2021. ECF 47 at 2-4. Defendants argued that DOL therefore lacked the authority to retroactively apply the 2021 AEWRs. *Id.* at 4-5. Defendants also argued that the APA did not empower the Court to grant such a remedy. *Id.* at 5-6. Defendants asserted that, even if the Court had the power to issue a backpay award in certain circumstances, the issuance of such an award here would be unprecedented, unsupported by the cases cited by Plaintiffs. *Id.* at 6-10. When Plaintiffs sought to expand the Court's May 14 order, *see* ECF 64 at 2-8, Defendants opposed that request too, *see id.* at 8-10. Specifically, Defendants argued that "[e]xpanding the Court's May 14 order would result in imposing a backpay requirement on thousands of employers"—like those allegedly represented by Proposed Intervenors—"who were not on notice that a backpay order would apply to them." *Id.* at 10.

Proposed Intervenors mischaracterize this history. They say that a May 18 stipulation and proposed order, which served to extend the deadline for Defendants to comply with the Court's May 14 order—an extension Proposed Intervenors presumably supported—demonstrated that Defendants' and Proposed Intervenors' interests had become "newly-divergent." ECF 70 at 14. Specifically, Proposed Intervenors point to language in that stipulation in which the parties informed the Court that they were "working together in good faith to propose limited clarifying revisions to certain aspects of the Court's order."[2] ECF 60 at 2. But that good faith effort to limit the number of disputes requiring resolution by the Court is, of course, only part of the story, and Proposed Intervenors' narrative omits the final chapter. As described above, what the parties ultimately filed on June 3 was a request by Plaintiffs to expand the scope of the Court's May 14 order and a response by Defendants in opposition to that significant expansion—an argument that the Court embraced in declining to broaden the Court's backpay order to the extent that Plaintiffs had sought. *See* ECF 64 (presenting the parties' opposing positions on expansion); ECF 74 (rejecting Plaintiffs' proposed expansion). It is not clear how, as Proposed Intervenors allege, Defendants "again . . . fail[ed] to adequately represent the interest of the Intervenors individually and as a whole class of H-2A employers" in this June 3 filing. That contention rings particularly hollow given that the Court agreed with Defendants not to significantly expand the May 14 order. *See* ECF 74.

Indeed, nowhere in Proposed Intervenors' Motion do they point to any argument that they would have made beyond those already pressed by Defendants. Proposed Intervenors theorize that Defendants' interests may "not necessarily coincide" with their own and speculate that Defendants "may want to find an amicable way out of this litigation," ECF 70 at 21, but they do not identify any concrete way in which these possibilities have caused Defendants to present anything short of a fulsome opposition to the issuance of a backpay order. Because Defendants have made arguments in defense of Proposed

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[2] Proposed Intervenors' argument appears to be that any attempted cooperation between two adverse parties demonstrates inadequate representation and justifies third-party intervention. That is incorrect. Decisions about whether to confer in good faith with opposing counsel are choices of litigation strategy, and "differences in strategy . . . are not enough to justify intervention as a matter of right." *United States v. City of Los Angeles*, 288 F.3d 391, 402–03 (9th Cir. 2002); *see also Arakaki*, 324 F.3d at 1086 ("Where parties share the same ultimate objective, differences in litigation strategy do not normally justify intervention.").

Intervenors' interests throughout this litigation, Proposed Intervenors have failed to make the compelling showing required to rebut the presumption that Defendants have adequately represented their interests in opposing the issuance of a backpay order. *See Perry*, 587 F.3d at 952.

Second, Proposed Intervenors have not filed a timely motion. "Courts weigh three factors in determining whether a motion to intervene is timely: (1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." *Alisal Water Corp.*, 370 F.3d at 921 (cleaned up).

Proposed Intervenors explain why they are intervening for the narrow purpose of opposing a backpay award, as opposed to intervening to defend the underlying rule. *See* ECF 70 at 6; *see also Alisal Water Corp.*, 370 F.3d at 921 ("a party's interest in a specific phase of a proceeding may support intervention at that particular stage of the lawsuit"). But they do not provide any compelling reason for why they waited so long to participate in this stage of the litigation.

The possibility of a backpay award has been apparent for five months. On January 12, 2021, the Court issued an order stating that it was reserving the "issue of whether any award of backpay is warranted." ECF 39 at 2. The Court directed Defendants to provide notice of that possibility to employers, which it did on January 15, 2021.[3] That possibility became more likely three months ago, on March 11, 2021, when Plaintiffs filed a motion seeking an order requiring DOL to inform employers that they must remit backpay and certify compliance with this backpay requirement. ECF 44. Two months ago, on April 6, 2021, the Court heard argument on Plaintiffs' motion. ECF 51. On May 11, 2021, the Court held a subsequent hearing on the motion. ECF 57. And, over one month ago, on May 14, 2021, the Court granted Plaintiffs' motion in part. ECF 58.

Throughout these five months, Proposed Intervenors have remained on the sidelines. Proposed Intervenors attempt to excuse their recent interest in this phase of the litigation by pointing to two developments, both from mid-May. ECF 70 at 14. Neither justifies their late-stage intervention.

[3] *OFLC Announces Updates to Implementation of the H-2A Adverse Effect Wage Rate Methodology for Non-Range Occupations Final Rule; Compliance with District Court Order* (January 15, 2021), https://www.dol.gov/agencies/eta/foreign-labor/news.

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