IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Civil Action No. 5:24-cv-527

NORTH CAROLINA FARM BUREAU FEDERATION, INC.; HIGHT FAMILY FARMS, LLC; and TRIPLE B FARMS, INC.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF LABOR; JOSÉ JAVIER RODRIGUEZ, in his official capacity as Assistant Secretary of the United States Department of Labor; and JESSICA LOOMAN, in her official capacity as Administrator, Wage & Hour Division of the United States Department of Labor,

Defendants.

MEMORANDUM IN SUPPORT OF PROPOSED INTERVENORS' MOTION FOR PERMISSIVE INTERVENTION

OR

CONDITIONAL MOTION FOR INTERVENTION AS OF RIGHT AND TO PARTICIPATE AS AMICI

This Court should grant Juan Hernandez Vega, Odin Millard, Dexter Starks, Willie Shelly, Farmworker Justice, and the UFW Foundation (together, "Proposed Intervenors") permissive intervention in this matter to defend a regulation that affords vital protections to Proposed Intervenors or their clients. Permissive intervention is warranted because this Motion is timely, Proposed Intervenors have defenses that share a common question of law or fact with the main action, and intervention will neither unduly delay nor prejudice the original parties' rights. *See* Fed. R. Civ. P. 24(b)(1), (b)(1)(B), (b)(3). Recognizing the value of including groups and individuals like Proposed Intervenors in challenges to the H-2A program, a federal court in this state has previously granted permissive intervention in a similar case. *See, e.g.*, *N.C. Growers Ass'n, Inc. v. Solis*, No. 1:09-cv-411, 2009 WL 4729113 (M.D.N.C. Dec. 3, 2009).

Should this Court disagree that permissive intervention is warranted, Proposed Intervenors request that this Court treat their motion as "a standby or conditional application for leave to intervene" as of right "and ask [this Court] to defer consideration" of whether Proposed Intervenors are entitled to such relief until it is clear the Government Defendants do not adequately represent their interests in this litigation. *See Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 101 F.3d 503, 509 (7th Cir. 1996) ("*SWANCC*"). While Proposed Intervenors have made a "timely motion," *see* Fed. R. Civ. P. 24(a), deferring consideration until the inadequacy of the Government Defendants' representation of Proposed Intervenors' interests is unmistakable—such as if, in the future, the Government Defendants cease to defend the Final Rule—will conserve judicial resources.

Finally, should this Court deny permissive intervention and treat this Motion as a standby or conditional motion pursuant to *SWANCC*, Proposed Intervenors request that they be permitted to file *amici* briefs in support of the Government Defendants on any motion for preliminary relief and any dispositive motion.[1]

[1] Article III standing is no barrier to Proposed Intervenors' participation at this stage. First, "a party who lacks standing can nonetheless take part in a case as a permissive intervenor." *Shaw v. Hunt*, 154 F.3d 161, 165 (4th Cir. 1998); *NAACP, Inc. v. Duplin Cnty.*, No. 7:88-cv-5-FL, 2012 WL 360018, at *3 n.3 (E.D.N.C. Feb. 2, 2012) (Flanagan, J.). Second, the Government Defendants plainly have standing to defend the Final Rule. *See Diamond v. Charles*, 476 U.S. 54, 62 (1986) (noting that the government "has standing to defend the [legality] of its [laws]"). Proposed Intervenors seek the same relief as the Government Defendants—a dispositive ruling that leaves the Final Rule untouched—so they can piggyback on Defendants' standing. *See Town of Chester v. Laroe Estates, Inc.*, 581 U.S. 433, 439 (2017) (explaining that the rule that "[a]t least one [party] must have standing to seek each form of relief requested in the complaint . . . applies to intervenors of right"). Third, at least one of the Proposed Intervenors has Article III standing in their own right. Should this Court conclude that further inquiry into the Proposed Intervenors' standing is necessary, Proposed Intervenors will provide more fulsome briefing on the issue at that time.

I. BACKGROUND

A. *This Litigation*

Plaintiffs filed their Complaint on September 13, 2024. ECF No. 1. The Complaint alleges that the Final Rule, *see* Improving Protections for Workers in Temporary Agricultural Employment in the United States, 89 Fed. Reg. 33,898 (Apr. 29, 2024), violates the Administrative Procedure Act, *see* 5 U.S.C. §§ 701–06.

Plaintiffs filed a Motion for Summary Judgment on October 14, 2024—over a month before the Government Defendants were even required to appear and answer. *See* Summons, ECF No. 10 (Oct. 1, 2024); Fed. R. Civ. P. 12(a)(2), (3) (U.S. agencies and officers have 60 days from service to answer a complaint). The Government Defendants have until November 22, 2024, to file a response to the Motion for Summary Judgment.

B. *Proposed Intervenors*

The Proposed Intervenors are farmworkers on H-2A visas, farmworkers in corresponding employment, and farmworker advocacy groups. Each Proposed Intervenor's interests are directly threatened by the Plaintiffs' challenge to the Final Rule.

Juan Hernandez Vega is a farmworker from Mexico who has worked with an H-2A visa in North Carolina for the past seven growing seasons. Vega Decl. ¶ 1 (Ex. 1). He hopes to return to work in North Carolina on an H-2A visa next year and in the following years. *Id.* ¶ 3. He benefits from the protections afforded by the Final Rule. For example, he and his coworkers sometimes meet with "legal services providers, advocates, health centers, and churches." *Id.* ¶ 4. The Final Rule prevents Mr. Vega's employer from retaliating against him for doing so. *See* 20 C.F.R. § 655.135(h)(1)(v). The Final Rule also benefits him by requiring the new Adverse Effect Wage

Rate to take effect upon publication and by requiring seat belts in employer-provided transportation. Vega Decl. ¶ 5; 20 C.F.R. §§ 655.120(b)(2), 655.122(h)(4)(i)–(ii).

Odin Millard is a farmworker from South Africa who has worked on H-2A visas in Tennessee, North Dakota, and Kansas over the past three years. Millard Decl. ¶ 1 (Ex. 2). He currently works in Kansas, and intends to return to Kansas on an H-2A visa next year and in following years. *Id.* ¶¶ 2–3. He benefits from the protections afforded by the Final Rule. For example, in a prior job, his "H-2A employer confiscated [his] passport and other immigration documents, preventing [him] from leaving." *Id.* ¶ 4. The Final Rule prevents Mr. Millard's current and future H-2A employers from doing so. *See* 20 C.F.R. § 655.135(o). He further benefits from the Final Rule's "provision on progressive discipline," which will "help make sure that H-2A workers like [him] get fair notice and a chance to remedy anything [they] are doing wrong." Millard Decl. ¶ 5; 20 C.F.R. § 655.122(n)(2)(E). And the sections of the Final Rule making it harder for debarred employers to use successors in interest to circumvent the H-2A program's regulations are also "helpful [to him], because H-2A workers . . . don't always know which employers have violated employment laws." Millard Decl. ¶ 6, 20 C.F.R. § 655.104.

Dexter Starks is a U.S. citizen and has worked as a farmworker in Mississippi for over 15 years. Starks Decl. ¶ 1 (Ex. 3). Over "the last several years, [his] employer has also employed H-2A workers to do the same work as the U.S. farmworkers like [him]." *Id.* ¶ 2. As a U.S. worker in corresponding employment, he thus receives the same wages and benefits as his coworkers on H-2A visas. *Id.* ¶ 3. Mr. Starks benefits directly from the Final Rule. For example, he believes "the provisions about termination and progressive discipline help make sure that U.S. workers like [him] get warnings before the employer can terminate [them] and give [them] a chance to fix things." *Id.* ¶ 4. "The Final Rule also makes clear that I can only be fired for certain reasons, and

they can't just fire me so they can replace me with H-2A workers." *Id.* Mr. Starks also benefits financially because the Final Rule "moves up the date of the increase in the Adverse Effect Wage Rate (AEWR)," which means his pay will increase sooner than it would without the Final Rule. *Id.* ¶ 5.

Willie Shelly is a U.S. citizen and works "at a farm in Mississippi that also employs H-2A workers to do the same work as" he does. Shelly Decl. ¶¶ 1–2 (Ex. 4). He "intend[s] to keep working on this farm for as long as they'll keep hiring" him. *Id.* at 2. Mr. Shelly is in corresponding employment, so his "employer must provide [him] and the other U.S. workers at the farm the same wages and benefits as the H-2A workers." *Id.* ¶ 3. "The 2024 H-2A Final Rule will help [Mr. Shelly] and [his] fellow U.S. workers." *Id.* ¶ 4. Mr. Shelly has "seen many U.S. farmworkers get replaced by H-2A workers." *Id.* He believes that the Final Rule's for-cause termination and progressive discipline provisions "will be very beneficial to [him] and [his] fellow U.S. workers to make sure [they] can keep [their] jobs and livelihoods" rather than being arbitrarily fired and replaced with H-2A workers. *Id.*

Farmworker Justice "is a national non-profit organization that serves farmworkers, their families, and their communities across the United States to improve living and working conditions, immigration status, health, occupational safety, and access to justice." Johnson Decl. ¶ 2 (Ex. 5). The organization "took a leadership role among 40 signatories in organizing and preparing extensive comments on the 2023 Proposed H-2A Rule." *Id.* ¶ 3. Farmworker Justice has long "represent[ed] farmworkers with H-2A visas who brought claims involving their H-2A contract and retaliation for asserting workplace rights, or who were not paid their rightful wage, [or] had their passports confiscated by their employer." *Id.* ¶ 4. It has "conducted trainings and produced training materials related to the Final Rule." *Id.* ¶ 5. Farmworker Justice has "limited resources.

Striking down the Final Rule would limit the U.S. Department of Labor's ability to debar bad actors, whose repeat bad acts would result in an added strain on the limited available legal resources available to . . . Farmworker Justice." *Id.* ¶ 6.

The UFW Foundation is a nonprofit that serves "farmworkers and low-income immigrants in California, Arizona, Washington, Oregon, . . . Michigan," and Georgia. Iñiguez-López Dec. ¶ 2 (Ex. 6). Its "membership includes H-2A workers and corresponding U.S. farm workers." *Id.* These "members could assert rights that would be strengthened by the" Final Rule challenged in this case." *Id.*; *see also id.* ¶ 5 (listing protections UFW Foundation's members would enjoy under the Final Rule). The UFW Foundation's organizers and staff "have heard countless stories of the abuses suffered by H-2A and corresponding U.S. farm workers by employers." *Id.* ¶ 3. For example, "[w]orkers who the UFW Foundation work[s] with report that their employer prohibits them from meeting with key service providers like the UFW Foundation and having to covertly meet with medical, legal services, and other providers." *Id.* These workers also "report paying illegal recruitment fees and their employers confiscating passports and other travel documents and transporting them to states where they did not agree to work in." *Id.* The UFW Foundation also supports workers who "report widespread wage theft by H-2A employers against H-2A and corresponding U.S. farm workers." *Id.* And "[m]any [of these] farm workers report employer-provided transportation not having seat belts, those seat belts not being function, or [the seat belts being provided] only for drivers." *Id.* The UFW Foundation "advocated in support of the [Final Rule] when it was originally proposed," including "submitting a public comment that featured the testimonies of approximately 100 farm workers" and signing onto Farmworker Justice's comments in support of the proposed rule. *Id.* ¶ 4.

II. ARGUMENT

A. *Proposed Intervenors Meet the Standard for Permissive Intervention*

Fed. R. Civ. P. 24(b)(1) provides that "[o]n timely motion, the court may permit anyone to intervene who . . . (B) has a claim or defense that shares with the main action a common question of law or fact." *See* Fed. R. Civ. P. 24(b)(1). Further, "[i]n exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Indeed, this case is in a remarkably similar posture to *Solis*, in which the U.S. District Court for the Middle District of North Carolina granted permissive intervention to farmworkers to defend against a challenge to a previous update to the H-2A regulations. *See* 2009 WL 4729113, at *1. As in *Solis*, this Court should grant permissive intervention here.

i. This Motion is Timely

Courts in this circuit assess timeliness based on "three factors: first, how far the underlying suit has progressed; second, the prejudice any resulting delay might cause the other parties; and third, why the movant was tardy in filing its motion." *Alt v. EPA*, 758 F.3d 588, 591 (4th Cir. 2014). All three factors plainly counsel in favor of timeliness here.

First, the underlying suit is at the starting line. Indeed, Proposed Intervenors file this Motion "at the outset of the case", *SWANCC*, 101 F.3d at 509, in part to ensure that timeliness is unquestionably met.

Although Plaintiffs have filed a motion for summary judgment, *see* ECF No. 11, that does not affect the timeliness of this motion. That is because the Plaintiffs' motion is premature. Initially, the administrative record has not even been compiled—a prerequisite for summary judgment in an APA case. Unlike an ordinary civil case,

> when the court is reviewing a final agency action under the APA, the [summary judgment] standard set forth in Rule 56(a) does not apply. Instead of reviewing the record [produced in discovery] for disputed facts that would preclude summary judgment, the function of the district court is a more limited one: to determine whether or not as a matter of law *the evidence in the administrative record* permitted the agency to make the decision it did.

Am. First Legal Found. v. Cardona, 630 F. Supp. 3d 170, 178 (D.D.C. 2022) (cleaned up) (emphasis added); *see also Hoffler v. Hagel*, 122 F. Supp. 3d 438, 446 (E.D.N.C. 2015) (same); *Camp v. Pitts*, 411 U.S. 138, 142 (1973) ("In applying [the 5 U.S.C. § 706(2)(A)] standard, the focal point for judicial review should be the administrative record . . . ."). Without an administrative record, this Court procedurally cannot adjudicate a summary judgment motion. And so the filing of such a premature motion does not make this Motion untimely.

Second, no party would suffer prejudice from "any resulting delay" because there will be no "resulting delay." *Alt*, 758 F.3d at 591. At this early stage, there is no need to pause the case for Proposed Intervenors to catch up. Proposed Intervenors will abide by any filing deadlines imposed by the relevant rules and by this Court, including filing an opposition to the pending Motion for Summary Judgment by the current deadline of November 22, 2024.

Third, Proposed Intervenors are not "tardy in filing [their] motion." *Id.* Proposed Intervenors have filed this Conditional Motion at the outset to assist this Court in resolving the issues presented at every stage of the case.

ii. Proposed Intervenors' Defenses Share Common Questions of Law or Fact with the Main Action

Proposed Intervenors have multiple "defense[s] that share[] with the main action . . . common question[s] of law or fact." Fed. R. Civ. P. 24(b)(1)(B). This requirement is easily met in cases where a proposed intervenor seeks to defend the legality of a government action alongside the government. *See, e.g.*, *White v. EPA*, No. 2:24-cv-13, 2024 WL 2221715, at *1 (E.D.N.C. May 16, 2024) (noting that public interest groups "who seek to defend the lawfulness

of the [challenged] Rule, assert a defense that shares common questions of law or fact" and granting permissive intervention).

iii. Proposed Intervenors' Participation Will Not Unduly Delay or Prejudice Any Other Party

In no way will Proposed Intervenors' participation cause undue delay. Such concerns usually arise where allowing intervention would require slowing down or reopening briefing schedules or extending or enlarging discovery. *See, e.g.*, *Republican Nat'l Comm. v. N.C. State Bd. of Elections*, No. 5:24-cv-547-M, 2024 WL 4349904, at *4 (E.D.N.C. Sept. 30, 2024) (ruling that permissive intervenors would cause undue prejudice or delay by seeking discovery); *Cawthorn v. Circosta*, No. 5:22-cv-50-M, 2022 WL 511027, at *3 (E.D.N.C. Feb. 21, 2022) (denying permissive intervention where briefing had already been completed). Neither applies here. If granted intervention, Proposed Intervenors will respond to the Motion for Summary Judgment by November 22, 2024. As for discovery, that is unlikely to occur in this APA case, where "the district judge sits as an appellate tribunal," confined (with rare exceptions unlikely to apply here) to the administrative record. *Owusu-Boakye v. Barr*, 376 F. Supp. 3d 663, 667 (E.D. Va. 2019) (quoting *Am. Bioscience Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001)).[2]

Nor would Proposed Intervenors' participation cause "undue prejudice" to the existing parties' rights by duplicating the Government Defendants' briefing. To be sure, as explained above, Proposed Intervenors share common questions of law or fact with the main action. But Proposed Intervenors will draft their briefs to avoid parroting the Government's arguments. Thus, granting the motion for permissive intervention "may significantly contribute to a full development of the legal and factual issues and ensure that all competing legal arguments are

[2] In some cases, APA challenges involve discovery into parties' standing. However, Proposed Intervenors do not intend to seek discovery on Plaintiffs' standing unless the Government Defendants do so.

presented." *Students for Fair Admissions Inc. v. Univ. of N.C.*, 319 F.R.D. 490, 496 (M.D.N.C. 2017) (granting permissive intervention); *see also Capacchione v. Charlotte-Mecklenburg Bd. of Educ.*, 179 F.R.D. 505, 510 (W.D.N.C. 1998) (granting permissive intervention where intervenors "will likely aid the Court in defining and focusing [the] issues").

Moreover, Proposed Intervenors' and counsel's collective experience with the H-2A program and with litigation surrounding that program—including in two other pending challenges to the Final Rule[3]—mean they will "offer a valuable perspective" different from the government's, *White*, 2024 WL 2221715, at *1, which "will allow [this Court] to proceed fully-informed," *Defs. of Wildlife v. N.C. Dep't of Transp.*, 281 F.R.D. 264, 269 (E.D.N.C. 2012) (Flanagan, J.); *see also North Carolina v. Alcoa Power Generating, Inc.*, No. 5:13-cv-633-BO, 2013 WL 12177042, at *1 (E.D.N.C. Oct. 29, 2013) (holding that permissive intervention was warranted where intervenor possessed "experience in litigating the question forming the basis of this suit" that "may serve to aid in judicial economy"); *Capacchione*, 179 F.R.D. at 510 (granting permissive intervention in part because "Proposed Intervenors' counsel . . . has extensive experience in this type of litigation" and thus "will also aid the Court in defining and focusing the issues").

B. *Alternatively, This Court Should Treat This Motion as a Standby or Conditional Motion for Intervention As-of-Right and Defer Consideration*

Federal Rule of Civil Procedure 24(a) provides:

> On [A] timely motion, the court must permit anyone to intervene who: . . . (2) [B] claims an interest relating to the property or transaction that is the subject of the action, and [C] is so situated that disposing of the action may as a practical matter

[3] The undersigned (Nathan Leys) serves as counsel for a coalition of *amici* public interest groups and farmworkers in *Kansas v. U.S. Dep't of Labor*, No. 2:24-cv-76 (S.D. Ga.) (ECF Nos. 74-1, 119-1), and for proposed Intervenor-Defendants in *Barton v. U.S. Dep't of Labor*, No. 5:24-cv-249 (E.D. Ky.) (ECF No. 38).

> impair or impede the movant's ability to protect its interest, unless [D] existing parties adequately represent that interest.

See Fed. R. Civ. P. 24(a).

Should this Court agree that permissive intervention is warranted under Rule 24(b), it need not consider whether Proposed Intervenors meet the Rule 24(a) standard for intervention as-of-right. But if this Court disagrees that Proposed Intervenors meet the Rule 24(b) standard, Proposed Intervenors request this Court treat this Motion as "a standby or conditional application for leave to intervene" as-of-right "and ask [this Court] to defer consideration of the question of adequacy of representation" under Fed. R. Civ. P. 24(a)(2) until such time as the Government Defendants no longer adequately represent Proposed Intervenors' interests. *See SWANCC*, 101 F.3d at 509.

i. Proposed Intervenors Meet the Timeliness, Interest, and Impairment Requirements for Intervention As-of-Right

Of the four requirements for intervention as-of-right, the first three are easily met. The Fourth Circuit has explained that in assessing whether a proposed intervenor has met the conditions of Rule 24(a), courts should apply the principle "that liberal intervention is desirable to dispose of as much of a controversy involving as many apparently concerned persons as is compatible with efficiency and due process." *Feller v. Brock*, 802 F.2d 722, 729 (4th Cir. 1986) (cleaned up); *accord Defs. of Wildlife*, 281 F.R.D. at 267.

1. *Timeliness*

This motion is timely for the reasons described *supra* at Part II.A.i. *See Alt*, 758 F.3d at 591 (holding that timeliness inquiry is identical between permissive and as-of-right intervention).

2. *Proposed Intervenors' Interests in This Litigation*

Proposed Intervenors have "interest[s] relating to the . . . subject of the action," Fed. R. Civ. P. 24(a)(2), sufficient to justify intervention.

First, several of the Proposed Intervenors are individual farmworkers in corresponding employment or on H-2A visas, who are directly protected by the provisions of the Final Rule. *See* Vega Decl. ¶¶ 4–5, Millard Decl. ¶¶ 4–6, Starks Decl. ¶¶ 3–5, Shelly Decl. ¶¶ 3–4. The UFW Foundation has many members who are similarly situated. *See* Iñiguez-López Decl. ¶ 5. Obviously, these proposed intervenors have an interest in preserving a legal rule granting H-2A workers and workers in corresponding employment new protections. *See Feller*, 802 F.2d at 729–30 (holding that farmworkers whose wages were affected by DOL rulemaking regarding AEWR under predecessor to H-2A program had cognizable interest for intervention as-of-right).

Second, the organizational Proposed Intervenors provide services, legal and otherwise, to workers on H-2A visas and in corresponding employment. *See* Johnson Decl. ¶¶ 1–2, 4; Iñiguez-López Decl. ¶¶ 2–3. The Final Rule will shape how they advocate for their clients or members. And by reducing abuses in the H-2A system, the Final Rule will also reduce the strain on these groups as they attempt to respond to such violations of program rules.

Third, the Final Rule is the result of years of advocacy, including by several of Proposed Intervenors. For example, Farmworker Justice and the UFW Foundation drafted influential comments during the rulemaking process. *See* Farmworker Justice, Comment Letter on Proposed Rule Improving Protections for Workers in Temporary Agricultural Employment in the United States (Nov. 14, 2023), https://www.regulations.gov/comment/ETA-2023-0003-0296; UFW & UFW Found., Comment Letter on Proposed Rule Improving Protections for Workers in Temporary Agricultural Employment in the United States (Nov. 14, 2023), https://www.regulations.gov/comment/ETA-2023-0003-0339; *see also* Final Rule, 89 Fed. Reg. 33,898 *passim* (citing Farmworker Justice and UFW Foundation comments throughout). This constitutes an "interest" for Rule 24 purposes because organizations have an interest in

preserving and defending policy reforms for which they have advocated. *See W. Energy All. v. Zinke*, 877 F.3d 1157, 1165–67 (10th Cir. 2017); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) ("A public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported.").

3. *The Outcome of This Litigation May Impair Proposed Intervenors' Interests*

Finally, the outcome "of [this] action may as a practical matter impair or impede the [Proposed Intervenors'] ability to protect [their] interests." Fed. R. Civ. P. 24(a). Plaintiffs explicitly seek a nationwide injunction and nationwide vacatur of the challenged Final Rule. *See* Compl. at 19 (Prayer for Relief), ECF No. 1. That outcome would undoubtedly impair the interests of Proposed Intervenors who are farmworkers. *See Feller*, 802 F.2d at 730 (holding that "[p]ractical impairment of each [farmworker's] interest is also apparent" where action sought to challenge regulatory increase to AEWR under predecessor to H-2A program). It would similarly impair the direct-service organizations' interest in reducing demands on organizational resources to respond to worker abuses. And it would obviously impair the interests of those Proposed Intervenors who advocated for the Final Rule in seeing the Final Rule upheld. Thus, each Proposed Intervenor "stand[s] to gain or lose by the direct legal operation of [this Court's] judgment" in this case. *Teague v. Bakker*, 931 F.2d 259, 261 (4th Cir. 1991).

ii. Pursuant to *SWANCC*, This Court Should Defer Consideration of the Alternative Motion to Intervene As-of-Right Until the Government Defendants' Representation of Proposed Intervenors' Interests Is Plainly Inadequate

Where a proposed intervenor needs to ensure their motion to intervene is timely, but recognizes that at the inception of the case that they may not be able successfully to demonstrate that the present parties' representation of their interests is inadequate, that proposed intervenor may file a conditional or standby motion to intervene. The Seventh Circuit blessed this approach in *SWANCC*. That case involved a challenge to a federal agency's denial of a Clean Water Act

permit. 101 F.3d at 504. A citizens' group moved to intervene to defend the agency's decision. *Id*. The Seventh Circuit held that the citizens' group failed to meet the standard for intervention as-of-right under Fed. R. Civ. P. 24(a) because the agency — "*as of now*" — adequately represented the groups' interests in defeating the challenge to the permit denial. *Id.* at 508 (emphasis in original).

But the court was also "sympathetic to the aspiring intervenors' concern that at some future point in this litigation the government's representation of their interest may turn inadequate yet it would be too late to do anything about it." *Id.* Thus, the court set out the following solution:

> The proper way to handle such an eventuality is for the would-be intervenor, when as here no present inadequacy of representation can be shown, to file at the outset of the case a standby or conditional application for leave to intervene and ask the district court to defer consideration of the question of adequacy of representation until the applicant is prepared to demonstrate inadequacy. This procedure, to which we find no objection in the federal rules or elsewhere, would not expose the applicant for intervention to charges of foot-dragging that doom as belated the usual post-judgment application to intervene.

Id. at 509; *see also* Order, *Miller v. Vilsack*, No. 4:21-cv-595 (N.D. Tex. May 2, 2022), ECF No. 198 (granting conditional motion to intervene); *Driftless Area Land Conservancy v. Huebsch*, No. 19-cv-1007, 2020 WL 779296 (W.D. Wis. Feb. 18, 2020) (recognizing possibility of a conditional motion to intervene under *SWANCC*), *rev'd on other grounds*, 969 F.3d 742 (7th Cir. 2020); *Baude v. Heath*, No. 1:05-cv-00735, 2005 WL 4889256 (S.D. Ind. Sept. 23, 2005) (similar); *Hoosier Env't Council, Inc. v. U.S. Army Corps of Eng'rs*, No. IP 98-0606 C M/S, 2000 WL 1428664 (S.D. Ind. May 4, 2000) (similar).

Proposed Intervenors are in a similar posture. They presently share the same objective as the Government Defendants in defending the Final Rule. And at this extremely early stage in this litigation, it is not clear whether the Government Defendants' interests or litigation strategy will

later diverge from Proposed Intervenors', such that "the government's representation of [the intervenors'] interest[s] may turn inadequate yet it [may] be too late to do anything about it." *SWANCC,* 101 F.3d at 508.

For example, the next Presidential administration may abandon its defense of the rule. *See Feller*, 802 F.2d at 730 (holding district court abused discretion in denying intervention on adequacy grounds where DOL stated "that on the merits, it agrees with the growers" in challenge to AEWR regulations under predecessor to H-2A program); *cf. Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2288 (2024) (Gorsuch, J., concurring) (noting concerns of "regulatory whiplash" when presidential administrations reverse course on their predecessor's regulatory policies). Or the Government defendants may elect "tactical choice[s]" that result in the Final Rule being inadequately defended. *See Berger v. N.C. State Conf. of the NAACP*, 597 U.S. 179, 198 (2022) (state agency's defense of state law held inadequate where agency "declined to offer" evidence in support of the challenged law and "declined to seek a stay" of an injunction against the law).

Proposed Intervenors thus request, pursuant to *SWANCC*, that should this Court deny permissive intervention, it defer consideration on the motion for intervention as-of-right until future developments in this lawsuit demonstrate that the Government defendants do not adequately represent their interests.

III. CONCLUSION

For the foregoing reasons, Proposed Intervenors request that this Court grant them permissive intervention as defendants in this action or, if permissive intervention is unwarranted, treat their motion to intervene as a conditional or standby application for intervention as of right

pursuant to *SWANCC* and allow them to participate as *amici* until such time as the Government Defendants plainly do not adequately represent the Proposed Intervenors' interests.

Respectfully submitted this 8th day of November, 2024.

/s/ *Nathan Leys*
Nathan Leys (CT 442014)
(*pro hac vice* motion forthcoming)
FarmSTAND
712 H St. NE, Suite 2534
Washington, D.C. 20002
Phone: (202) 630-3095
Fax: (978) 845-2282
E-mail: nathan@farmstand.org

/s/ *Clermont F. Ripley*
Clermont F. Ripley, N.C. Bar No. 36761
Carol L. Brooke, N.C. Bar No. 29126
NORTH CAROLINA JUSTICE CENTER
P.O. Box 28068
Raleigh, NC 27611
(919)856-2154
(919)856-2175 fax
Email: carol@ncjustice.org
Email: clermont@ncjustice.org