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The Honorable Salvador Mendoza Jr.

9 **UNITED STATES DISTRICT COURT**
10 **EASTERN DISTRICT OF WASHINGTON**

11 RAMON TORRES
HERNANDEZ, and
12 FAMILIAS UNIDAS POR LA
JUSTICIA, AFL-CIO, a labor
organization,
13

Plaintiffs,

14 v.
15

16 UNITED STATES
DEPARTMENT OF LABOR
and MILTON AL STEWART,
17 in his official capacity as
United States Secretary of
18 Labor,
19

Defendants.
20
21
22

No. 1:20-cv-03241-SMJ

AMICUS CURIAE
BRIEF OF THE
ATTORNEY GENERAL
OF WASHINGTON

February 18, 2021
Without Oral Argument:
2:00 p.m.

I. INTRODUCTION

The Attorney General submits this brief to address the questions of equity and the public interest presented by Plaintiffs' motion for preliminary injunction and Defendant U.S. Department of Labor's (USDOL) response. *See* ECF Nos. 19, 23; *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008). The Attorney General also seeks to correct the record regarding the role of the Washington State Employment Security Department (ESD) in the 2019 Agricultural Peak Employment Wage and Practices Employer and Worker Surveys.

II. ARGUMENT

A. Washington Farmworkers' Skilled Work Anchors the Local Food Supply and Boosts the State's Economy

Washington is an agricultural powerhouse, in large part due to the hard work and skill of the men and women who work in the fields. Washington farmworkers harvest more than 300 crops each year, and Washington farms are the highest producers in the nation of apples, blueberries, sweet cherries, pears, hops, concord grapes, spearmint oil, and wrinkled seed peas.¹

Agriculture is a critical driver of the state economy, constituting 12% of

¹ Wash. State Emp. Sec. Dep't, *2017 Agricultural Workforce Report: Labor Market and Economic Analysis* (2017 Agriculture Workforce Report) 5 (Sept. 2019), <https://esdorchardstorage.blob.core.windows.net/esdwa/Default/ESDWAGOV/labor-market-info/Libraries/Industry-reports/Annual-Ag-Report/2017%20Agricultural%20Workforce%20Report.pdf>.

1 the economy overall.² In 2019, Washington’s farms produced a gross domestic
 2 product of more than \$8 billion, a figure that has nearly doubled in the last fifteen
 3 years.³ Combined, agriculture and food manufacturing operations generate more
 4 than \$20.4 billion in annual revenue.⁴

5 Washington farmworkers are skilled and productive—to the benefit of
 6 their employers and the state. According to a 2019 analysis by ESD, agricultural
 7 employers in Washington enjoy a per-employee GDP that is 24.7% higher than
 8 the national average.⁵ And farmworkers are productive compared to workers in
 9 other industries: the agricultural sector’s per-employee GDP is 33.5% above the
 10 construction industry and 108.1% above food and accommodation services.⁶

11
 12 ² Wash. Farm Bureau, <https://wsfb.com/ag-in-washington>.

13 ³ U.S. Bureau of Econ. Analysis, *Real GDP by State: Washington: Farms, 2019*,
 14 <https://apps.bea.gov/iTable/iTable.cfm?reqid=70&step=1#reqid=70&step=1>
 15 (choose “Annual Gross Domestic Product (GDP) By State”; then choose “Real
 16 GDP in chained dollars (SAGDP9)” and “NAICS (1997-forward)”; and then
 17 choose “Washington,” “Farms,” “Levels,” and “2019”).

18 ⁴ Wash. State Dep’t of Com., Choose Wash., *A bumper crop of opportunity:*
 19 *Industry snapshot*, [http://choosewashingtonstate.com/why-washington/our-key-](http://choosewashingtonstate.com/why-washington/our-key-sectors/agriculture-food-processing/)
 20 [sectors/agriculture-food-processing/](http://choosewashingtonstate.com/why-washington/our-key-sectors/agriculture-food-processing/).

21 ⁵ 2017 Agricultural Workforce Report, *supra* note 1, at 5, 5 fig.1.

22 ⁶ *Id.*

B. Washington Farmworkers Have Been Asked to Shoulder Extraordinary Burdens During the Pandemic

As the COVID-19 pandemic descended, the United Nations warned that lockdown measures and worker scarcity could lead to a global food shortage.⁷ Washington’s government took steps to avoid a disruption in the food supply. Beginning with the first “Stay Home, Stay Healthy” order, Governor Inslee designated farm work (along with meat processing, dairy, and other work in the food-and-agriculture sector) as “essential” work.⁸ Farmworkers have been exempt from every extension and modification of the original Stay Home, Stay Healthy order.⁹ The U.S. government likewise designated “food and agriculture” a “critical infrastructure industry” and assigned workers in that industry a

⁷ See, e.g., Fiona Harvey, *Coronavirus measures could cause global food shortage, UN warns*, Guardian (Mar. 26, 2020), <https://www.theguardian.com/global-development/2020/mar/26/coronavirus-measures-could-cause-global-food-shortage-un-warns>.

⁸ See Proclamation of the Governor No. 20-25, Appendix (Wash. Mar. 23, 2020) (essential critical infrastructure workers), <https://www.governor.wa.gov/sites/default/files/WA%20Essential%20Critical%20Infrastructure%20Workers%20%28Final%29.pdf>.

⁹ See Proclamations of the Governor Nos. 20-25–20-25.12 (Wash. Mar. 19, 2020 to Jan. 11, 2021), <https://www.governor.wa.gov/office-governor/official-actions/proclamations>.

1 “special responsibility to maintain your normal work schedule.”¹⁰

2 Since the very beginning of the pandemic, therefore, farmworkers have
3 been asked to report to work every day, even while other Washingtonians shelter
4 at home. This has exposed farmworkers to increased COVID-19 risk, given that
5 “[f]arm workers often work side by side close to one another, and some live
6 together on the farm in temporary worker housing.”¹¹

7 The health impacts for Washington farmworkers have been sobering.
8 Despite orders of the Governor to require agricultural-worker safety protocols
9 and testing, and efforts by the Washington State Departments of Agriculture,
10 Health, and Labor & Industries to provide COVID-safety mandates, training
11 materials, and response plans,¹² virus outbreaks at farms have been

13 ¹⁰ Memorandum from Christopher C. Krebs, Dir. Cybersecurity & Infrastructure
14 Sec. Agency, on Identification of Essential Critical Infrastructure Workers
15 During COVID-19 Response (Mar. 19, 2020), [https://www.cisa.gov/
16 sites/default/files/publications/CISA-Guidance-on-Essential-Critical-
17 Infrastructure-Workers-1-20-508c.pdf](https://www.cisa.gov/sites/default/files/publications/CISA-Guidance-on-Essential-Critical-Infrastructure-Workers-1-20-508c.pdf) (quoting President Trump’s guidance).

18 ¹¹ Wash. State Dep’t of Health, *Farm Workers and COVID-19* (May 1, 2020),
19 <https://medium.com/wadepthealth/farm-workers-and-covid-19-730c876c079a>.

20 ¹² See Proclamation of the Governor, No. 20-57.1 (Wash. Aug. 19, 2020),
21 https://www.governor.wa.gov/sites/default/files/proclamations/proc_20-57.1.pdf
22 [f?utm_medium=email&utm_source=govdelivery](https://www.governor.wa.gov/sites/default/files/proclamations/proc_20-57.1.pdf?utm_medium=email&utm_source=govdelivery) (concerning the health of

commonplace.¹³ This has resulted in disproportionately high rates of farmworker infection and illness.¹⁴ Hispanic or Latino farmworkers are particularly vulnerable: the CDC found that although they make up 36.5% of all food-manufacturing and agriculture workers in surveyed states (including Washington), they account for 72.8% of workers to contract COVID-19.¹⁵

agricultural workers); Wash. State Coronavirus Response (COVID-19), *Information About Agricultural Worker Safety*, <https://coronavirus.wa.gov/information-for/business/agricultural-worker-safety>; Wash. State Dep't of Agric., *COVID-19 Information*, <https://agr.wa.gov/about-wsda/news-and-media-relations/covid-19>; Wash. Admin. Code §§ 246-358-002; 296-307-16102 (emergency farmworker housing rules).

¹³ See, e.g., Nat'l Ctr. for Farmworker Health, *COVID-19 in Rural America: Impact on Farms & Agricultural Workers* 5–6 (Feb. 1, 2021), http://www.ncfh.org/uploads/3/8/6/8/38685499/msaws_and_covid-19_fact_sheet_2.1.21.pdf (collecting reports of COVID outbreaks and deaths on Washington farms).

¹⁴ See, e.g., Richard Read, *COVID-19 strikes Washington state farmworkers and swamps rural hospitals*, LA Times (Aug. 4, 2020), <https://www.latimes.com/world-nation/story/2020-08-04/coronavirus-northwest-farm-workers>.

¹⁵ Ctrs. for Disease Control & Prevention, *Coronavirus Disease Among Workers in Food Processing, Food Manufacturing, and Agriculture Workplaces* (Jan. 2021), https://wwwnc.cdc.gov/eid/article/27/1/20-3821_article.

1 In sum, during the pandemic, farmworkers have continued to work and
 2 secure the food supply, despite significant risks to themselves and their families.
 3 The Attorney General invites the Court to give appropriate weight to these public
 4 interests.

5 **C. Lower Wages Will Exacerbate Poverty in Farmworker Communities**

6 To the extent the elimination of piece rate wages in favor of an hourly wage
 7 guarantee artificially depresses farmworker wages, that will harm Washington's
 8 farmworker families who already struggle to meet basic needs. National and state
 9 data reflect the ugly truth that farmworkers, despite the difficult and critical work
 10 they perform to keep food on our tables, are paid wages that keep them in
 11 poverty.¹⁶

12 Farmworkers have historically faced acute challenges in finding affordable
 13

14 ¹⁶ Trish Hernandez & Susan Gabbard, *Findings from the National Agricultural*
 15 *Workers Survey (NAWS) 2015-2016: A Demographic and Employment Profile of*
 16 *United States Farmworkers, Research Report No. 13* 36 (Jan. 2018),
 17 [https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS_Research_Repo](https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS_Research_Report_13.pdf)
 18 [rt_13.pdf](https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS_Research_Report_13.pdf) (one-third of farmworker family incomes below poverty level); Wash.
 19 State Farmworker Hous. Tr., *The Washington State Farmworker Survey, A*
 20 *Sustainable Bounty: Investing in Our Agricultural Future* 4 (Jul. 2008),
 21 <http://lib.ncfh.org/pdfs/7482.pdf> (average household income of Washington
 22 farmworkers is below the federal poverty level for a family of four).

1 housing given their low wages.¹⁷ They face hunger and food insecurity,
 2 particularly because their work is seasonal, rather than year-round.¹⁸ And many
 3 farmworkers are uninsured and often seek care at free public or migrant health
 4 clinics, or forego healthcare if they cannot afford to pay out of pocket.¹⁹ In light
 5 of these facts, neither equity nor the public interest countenance an artificial
 6 depression of farmworker wages.²⁰

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 8 ¹⁷ Wash. State Dep't of Cmty., Trade & Econ. Dev., *Farmworker Housing in*
 9 *Washington State: Safe, Decent, and Affordable* 1 (Mar. 2005),
 10 [https://www.commerce.wa.gov/wp-content/uploads/2018/06/HTF-Reports-Far](https://www.commerce.wa.gov/wp-content/uploads/2018/06/HTF-Reports-Farm-Worker-Housing-Report.pdf)
 11 [m-Worker-Housing-Report.pdf](https://www.commerce.wa.gov/wp-content/uploads/2018/06/HTF-Reports-Farm-Worker-Housing-Report.pdf) (“persistent lack of safe, affordable housing” for
 12 farmworkers who “do not earn enough to afford market-rate housing”).

13 ¹⁸ Farmworker Just., *Hunger amidst plenty: food assistance in farmworker*
 14 *communities*, [https://www.farmworkerjustice.org/blog-post/hunger-amidst-](https://www.farmworkerjustice.org/blog-post/hunger-amidst-plenty-food-assistance-in-farmworker-communities/)
 15 [plenty-food-assistance-in-farmworker-communities/](https://www.farmworkerjustice.org/blog-post/hunger-amidst-plenty-food-assistance-in-farmworker-communities/) (“Numerous studies across
 16 the United States have thoroughly documented the staggering rates of both
 17 hunger and food insecurity that plague farmworker communities.”).

18 ¹⁹ The Washington State Farmworker Survey, *supra* note 16, at 7 (80% of
 19 Washington farmworkers surveyed lacked health insurance; 69% receive
 20 healthcare from community or migrant clinics).

21 ²⁰ Amicus is aware of no credible factual support for the claim that the piece rate
 22 was abandoned in response to *Lopez Demetrio v. Sakuma Bros. Farms, Inc.*, 355

D. USDOL Had the Final Say in Determining Whether the Hourly Wage Guarantee Question Was Asked, and Whether Data from the Employee Survey Would Be Used

1. USDOL instructed ESD to include the hourly wage guarantee

Washington officials were surprised to read USDOL’s assertion that it is not responsible for the decision to include the hourly guarantee on the 2019 employer survey. *See* ECF No. 19 at 31. As USDOL knows, ESD included the guaranteed hourly wage rate question based on direction from USDOL.

The guaranteed hourly wage rate question was first included in ESD’s 2016 employer survey instrument as a result of wafla’s campaign to encourage association members to respond to the 2015 survey iteration with hourly wage rates. *Accord* ECF No. 30-2 at ¶ 17. In developing the 2016 survey, an ESD economist sought USDOL’s guidance on wafla’s proposed question about piece rates with an hourly guarantee. *See* Exhibit A (explaining wafla’s request for a question about “piece rates [that] guarantee hourly earnings”).

ESD sought direction from Brian Pasternak, a senior USDOL official with the Office of Foreign Labor Certification—the top office in Washington, D.C. that “provides national leadership and policy guidance” on H-2A program

P.3d 258, 262 (Wash. 2015), and *Carranza v. Dovex Fruit Co.*, 416 P.3d 1205, 1207-08 (Wash. 2018). *Cf.* ECF No. 19 at 24 (citing two blog posts). Indeed, ESD’s 2019 worker survey provides data that over 86% of surveyed workers still reported being paid the piece rate after those cases were decided. ECF No. 6-32.

1 implementation.²¹ Pasternak responded that he had “no concern” with including
2 the question. Exhibit A.

3 Following the survey, the hourly wage guarantee continued to raise
4 concerns. Employers had submitted internally contradictory responses, which
5 were noticed by analysts at ESD and USDOL. For example, after ESD submitted
6 a batch of ETA 232s, an analyst at USDOL contacted ESD to point out that some
7 employers reported an hourly wage rate *as well as* a lower hourly guarantee for
8 the same activity. *See* Exhibit B. The ESD economist agreed that the responses
9 did not make sense. *Id.* (“We agree with you that it does not make sense for there
10 to be an hourly earnings guarantee when paid by the hour—however, this is what
11 some employers indicated.”). ESD recommended for DOL “not to use the hourly
12 earnings guarantee portion when the prevailing rate is an hourly rate,” but said
13 “we understand that the final determination is DOL’s.” *Id.*

14 Pasternak initially agreed that the employer responses reflected a problem.
15 *See id.* ESD again agreed, responding, “we think that some employers might have
16 mixed up hourly rates and hourly earnings guarantee For now, we would
17 suggest just reporting the hourly rate paid.” *Id.* Shortly thereafter, however,
18 Pasternak clarified, with respect to the *piece rate*, “that the addition of the hourly
19 guarantee is a GOOD IDEA!” *Id.* He specified, “[w]e do need to have that noted
20

21 ²¹ U.S. Dep’t of Labor, Emp. & Training Admin., Off. of Foreign Labor
22 Certification, <https://www.foreignlaborcert.doleta.gov/mission.cfm>.

1 in any wage survey results.” *Id.* Based on this specific direction and USDOL’s
 2 instructions on Form ETA 232, ESD reported piece rates with hourly guarantees
 3 separately from base wage structures reported solely as piece rates. *Id.*; accord
 4 ECF No. 24-4 at 4 (Form ETA 232 instructions that, “Piece rates with earnings
 5 guarantee represent a different method of payment from piece rates without
 6 earnings guarantee, and should be listed separately.”).

7 **2. USDOL decided not to use or consider the worker survey results**

8 ESD has conducted an agricultural worker survey since 2016, focusing on
 9 the apple and cherry harvests. ECF No. 6-32 at 2. The 2019 worker survey ran
 10 from July through October 2019. *Id.* ESD received 2,059 unique responses, using
 11 two data collection modes—telephone interviews and field administration. *Id.*

12 The use of the worker survey to determine prevailing wage has been
 13 limited by USDOL policy. In 2016, ESD requested guidance from DOL “on how
 14 to use worker survey responses to compare with employer responses.” *Id.* at 3.
 15 The response instruction was that “USDOL does not ‘use’ worker survey results.
 16 Worker surveys are a mechanism by which [ESD] can ‘validate’ or ‘verify’ the
 17 wage survey responses that come in from the growers.” *Id.* Based on USDOL’s
 18 directive, ESD uses the worker responses to this important survey as a tool to
 19 compare employer responses; however, ESD follows USDOL’s direction and
 20 prepares the ETA 232 forms based solely on employer responses. *Id.*

21 **III. CONCLUSION**

22 Amicus requests that the Court consider the information provided herein.

1 Dated this 11th day of February 2021.

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3 Respectfully submitted,

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