No. 13-___

IN THE

Supreme Court of the United States

PERI & SONS FARMS, INC.,

Petitioner,

v.

VICTOR RIVERA RIVERA ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the Fair Labor Standards Act (FLSA), the "'[w]age' paid to any employee includes the reasonable cost . . . to the employer of furnishing such employee with board, lodging, or other facilities." 29 U.S.C. § 203(m). Department of Labor (DOL) regulations prohibit employers from deducting from employees' wages the cost of "facilities" furnished "primarily for the benefit or convenience of the employer," if the deductions would reduce employees' pay below the minimum wage. 29 C.F.R. §§ 531.3(d)(1), 531.32(c). Employers also violate the FLSA if the employer pays the minimum wage, but "the employee 'kicks-back' . . . the whole or part of the wage," *id.* § 531.35, *e.g.*, by incurring without reimbursement an expense that primarily benefits the employer.

In 2008, DOL interpreted these regulations in the context of pre-employment travel and immigration expenses that foreign workers incur to obtain U.S. jobs through the H-2A and H-2B visa programs. DOL concluded that employers were not required to reimburse these expenses under the FLSA, because these costs primarily benefitted *employees*. In 2009, DOL reversed course and read these regulations to require employers to reimburse these expenses because they primarily benefit *employers*. Courts of appeals are intractably divided on two questions of substantial national importance affecting thousands of employers and 200,000 employees every year:

1. Whether, under the FLSA, employers are responsible for reimbursing foreign workers' pre-employment travel and immigration expenses.

2. Whether deference is owed to DOL's interpretation of the FLSA and its regulations.

PARTIES TO THE PROCEEDING

Petitioner Peri & Sons Farms, Inc. was the defendant in the district court and appellee in the Ninth Circuit.

Respondents, who were plaintiffs in the district court and appellants in the Ninth Circuit, are Victor Rivera Rivera, Ernesto Sebastian Castillo Rios, Vicente Cornejo Lugo, Jesus Garcia Mata, Luis Angel Garcia Mata, Gaudencio Garcia Rios, Simon Garcia Rios, Vicente Cornejo Cruz, Emilio Montoya Morales, Jorge Luis Aguilar Solano, Domingo Ramos Rios, Artemio Rincon Cruz, Sergio Rios Ramos, Pedro Rivera Camacho, Regulo Rincon Cruz, Aureliano Montes Montes, Manuel Rivera Rivera, Martin Flores Bravo, Virgilio Marquez Lara, Jose Balderas Guerrero, and Gerardo Rios Ramos.

CORPORATE DISCLOSURE STATEMENT

Petitioner Peri & Sons Farms, Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

STATUTES, RULES, AND REGULATIONS

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Ninth Circuit (App. 1a), is reported at 735 F.3d 892. The district court's opinion (App. 21a), is reported at 805 F. Supp. 2d 1042.

JURISDICTION

The Ninth Circuit entered judgment on November 13, 2013. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 3(m) of the Fair Labor Standards Act states, in relevant part: "'Wage' paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees." 29 U.S.C. § 203(m).

Pertinent FLSA regulations and Department of Labor interpretations of those regulations are set forth in the appendix. App. 36a-55a.

INTRODUCTION

Every year, hundreds of thousands of foreign workers migrate to this country through the H-2A and H-2B visa programs to perform seasonal and comparatively high-paying work for thousands of U.S. employers. These jobs are extremely attractive to foreign workers. To obtain them, foreign workers incur expenses in traveling from their hometowns to larger foreign cities where they can seek U.S.

employment and begin the immigration process. Foreign workers also pay fees to obtain U.S. consular approval for their visas—a necessary prerequisite to eligibility for U.S. employment—and to travel to their prospective U.S. employers' worksites to begin work. Employers responsible for major sectors of the U.S. economy, from agriculture to construction, depend upon these foreign workers for their economic survival. These employers are mostly small businesses. They face perennial shortages of U.S. workers for critical, labor-intensive positions, and the H-2A and H-2B programs are the only legal way to hire temporary foreign workers.

Though foreign workers strongly desire these positions, DOL restricts the number of foreign workers that U.S. employers may hire. Moreover, as part of the visa programs established under the nation's immigration laws, employers must pay major expenses—like workers' U.S. lodging and return travel expenses—to provide added benefits to workers. Employers must also comply with the FLSA. But since the inception of these visa programs in 1952, employers' FLSA obligations *never* included the reimbursement of foreign workers' pre-employment travel and immigration expenses. And in 2008, DOL announced that its interpretation of the FLSA and DOL's regulations was that employers were *not* required to reimburse these expenses because the expenses primarily benefit employees.[1]

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[1] The 1952 Immigration and Nationality Act created a new category of "H-2" visas for low-skilled, temporary agricultural and non-agricultural foreign workers. The 1986 Immigration Reform and Control Act divided H-2 visas into H-2A (agricultural) and H-2B (non-agricultural) types. Andorra Bruno, Cong. Research Serv., R 42434, *Immigration of Temporary*

In 2009, DOL abruptly reversed course, taking the position that these expenses are reimbursable under the FLSA because they primarily benefit employers. Employers thus must repay workers' pre-employment expenses in their first work-week, to the extent these expenses reduce workers' pay below the minimum wage. DOL's current and prior interpretations agreed on one point only: that courts owed controlling deference to DOL's then-extant view.

In the decision below, the Ninth Circuit held that Peri could be liable for failing to reimburse workers' pre-employment travel and immigration expenses solely on the ground that DOL's new interpretation was entitled to dispositive deference under *Auer v. Robbins*, 519 U.S. 452 (1997). As a result, employers in the Ninth and Eleventh Circuits—where almost half of all H-2A and H-2B workers are employed—face severe FLSA liability for failing to reimburse these expenses in the first work-week. *See* U.S. Dep't of Homeland Sec., *Yearbook of Immigration Statistics 2010, Supplemental Table 3: Nonimmigrant Admissions*, http://tinyurl.com/DHSH2stats. But employers in the Fifth Circuit, where more than one in six of all H-2A and H-2B workers are employed, face no such liability. *See id*. The Fifth Circuit rightly holds that the FLSA does *not* require reimbursement of these expenses. This split is not only entrenched; it is so clear that DOL repeatedly has recognized (and represented to several courts) that courts of appeals are divided on this issue.

The Ninth Circuit's unquestioning and dispositive deference to DOL's interpretation of the FLSA

Lower-Skilled Workers: Current Policy and Related Issues 2 (2012).

regulations also raises serious questions about the scope and viability of this Court's decision in *Auer*. The Ninth Circuit's holding that even contradictory agency interpretations receive controlling deference squarely conflicts with decisions in seven other circuits. Those other courts refuse to accept that an agency should be entitled to dictate the meaning of regulations when the agency previously insisted that its regulations meant the exact opposite. The Ninth Circuit's cursory acceptance of DOL's flip-flopping position rewards arbitrary agency decision-making, and invites agencies to suddenly and radically alter regulated parties' liabilities without resorting to the rule-making process. And DOL's expectation that courts will unquestioningly adopt whatever DOL's latest interpretation may be—and will even impose retroactive liability based on DOL's new position—illustrates the dangers of allowing courts to use *Auer* deference to abdicate their responsibility to interpret federal law.

This Court's review of these questions is urgently needed for employers and employees alike. Every year, thousands of employers welcome some 200,000 H-2A and H-2B workers, and must immediately determine their obligations as to workers' pre-employment expenses. Ambiguity over employers' obligations creates uncertainty for H-2A and H-2B workers as to what their wages will be. The split among the circuits over what employers' FLSA obligations are, and what weight DOL's views should receive, also has a clear and troubling effect nationwide. The Fifth, Ninth, and Eleventh Circuits—which form the southern border and attract the vast majority of all H-2A and H-2B workers—are intractably divided. *See Supplemental Table 3: Nonimmigrant Admissions*, *supra*. California hotels

and resorts, Nevada onion growers, Florida citrus farmers, Georgia peach producers, and other small businesses within the Ninth and Eleventh Circuits employ nearly 100,000 H-2A and H-2B workers a year, *see id*., and must reimburse workers' travel and immigration expenses immediately. That rule imposes a serious disadvantage on these employers relative to their competitors in the Fifth Circuit, who bear no such obligation. This split also creates intolerable uncertainty for employers and H-2A and H-2B workers in other circuits. This case is an ideal vehicle for this Court to resolve both of the questions presented, which are cleanly presented, outcome-determinative, and demand national resolution given their critical significance to major sectors of the U.S. economy.

STATEMENT

Thousands of employers hire some 200,000 foreign workers every year for low-skilled seasonal jobs through the H-2A and H-2B visa programs—and those figures are projected to grow substantially. *See, e.g.,* Rebecca Kaplan, *For Farmers, Immigration Questions Are Crucial*, Nat'l J. Daily, Sept. 3, 2013.[2] The H-2A program is the only legal means for employers to temporarily hire foreign agricultural workers, while the H-2B program is the only legal means for employers to temporarily hire foreign non-agricultural workers, *e.g*., landscapers, housekeepers, and construction workers. Based solely on DOL's current

[2] *See Supplemental Table 3: Nonimmigrant Admissions*, *supra*; U.S. Dep't of Labor, *H-2A Temporary Agricultural Visa Program FY 2012—Quarter 3: Select Statistics* 2-3, http://tinyurl.com/H-2AFY2012; U.S. Dep't of Labor, *H-2B Temporary Non-Agricultural Labor Certification Program—Selected Statistics, FY 2013*, http://tinyurl.com/H2B2013.

interpretation of the regulations, the Ninth Circuit held that employers can be held liable for violating the FLSA's minimum-wage requirement if they do not immediately reimburse the travel and immigration expenses that foreign workers incur in their home countries before beginning work in the United States.

A. Legal Framework

1. The FLSA provides that an employer "shall pay to each of his employees . . . wages" that are "not less than" hourly rates set by Congress. 29 U.S.C. § 206(a), (a)(1). "'Wage' paid to any employee includes the reasonable cost . . . to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees." *Id.* § 203(m). Thus, the FLSA allows employers to provide workers with certain "facilities" and deduct these costs from workers' pay even if workers' resulting cash wages fall below the minimum wage.

Under DOL regulations, a "wage" excludes "[t]he cost of furnishing 'facilities' found by the Administrator to be primarily for the benefit or convenience of the employer." 29 C.F.R. § 531.3(d)(1). Employers may not "include[]" such facilities "in computing wages," *i.e.*, by deducting the costs of these facilities from cash wages paid to employees. *Id.* DOL also regulates reductions of employees' wages through means other than deductions. The FLSA's minimum-wage requirement "will not be met where the employee 'kicks-back' directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee." 29 C.F.R. § 531.35. For example, if a clothing manufacturer pays employees the minimum wage but requires them to purchase their own sewing machines and thread,

the employer violates the FLSA minimum-wage provision because those items are considered employee kick-backs. *See id*.

2. Before 2008, DOL had not addressed whether employers must reimburse H-2A and H-2B workers' pre-employment travel and immigration expenses under the FLSA. DOL acknowledged in 1994 that it "ha[d] not yet issued an opinion letter or other guidance" to clarify its "interpretation and enforcement of the [FLSA] as it applies to worker-incurred transportation expenses." App. 41a-42a (1994 Reich Ltr.). From 1994 on, DOL's policy was to decline to assert FLSA violations against employers who did not reimburse employees' transportation expenses while DOL formulated a position. *Id.*; App. 48a (2000 Perry Ltr.); App. 52a-53a (2001 Iverson Ltr.). In 2000, with no policy forthcoming, DOL explained that its inaction was due to conflicting views within DOL, specifically that "[i]n the case of transportation costs there has been some disagreement" over whether these costs primarily benefit the employer or employee. App. 48a (2000 Perry Ltr.). DOL also stated in 2001 that it had no policy on worker-incurred immigration expenses. App. 55a (2001 Iverson Ltr.) (deeming such expenses "novel fact situations" and taking no position).[3]

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[3] DOL's *amicus* brief below states that "but for a brief three-month period, [DOL] has expressed a consistent interpretation of the requirements of the FLSA for some 50 years." Br. for the Sec'y of Labor as Amicus Curiae in Supp. of Plaintiffs-Appellants at 28, *Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892 (9th Cir. 2013), http://tinyurl.com/DOLPeri. DOL's pre-1994 letters, however, asserted that the FLSA might be violated based on *employer deductions* for *employer-provided* transportation—not the worker-incurred expenses at issue here. *See Castellanos-Contreras v. Decatur Hotels LLC*, 622 F.3d 393, 402 (5th Cir. 2010) (en banc) (reviewing history and concluding that DOL "did

In December 2008, DOL announced that employers had no reimbursement obligations under the FLSA for H-2A and H-2B workers' pre-employment travel and immigration expenses. DOL explained that "the better reading of the FLSA and the Department's own regulations is that relocation costs under the H-2A program are not primarily for the benefit of the employer." 73 Fed. Reg. 77,110, 77,149 (Dec. 18, 2008). DOL concluded that these costs "do not constitute kickbacks within the meaning of 29 CFR 531.35, and [that] reimbursement of workers for such costs in the first paycheck is not required by the FLSA." *Id*. DOL extensively disagreed with the Eleventh Circuit's decision in *Arriaga v. Florida Pacific Farms, LLC*, 305 F.3d 1228 (2002), which held that such costs primarily benefit the employer. DOL "expect[ed] that courts will defer to [DOL's] interpretation" rather than following *Arriaga*. 73 Fed. Reg. at 77,151. DOL reached the same conclusion for H-2B workers. 73 Fed. Reg. 78,020, 78,039-41 (Dec. 19, 2008).

In March 2009, following a change in administrations, DOL abruptly withdrew its 2008 interpretations. 74 Fed. Reg. 13,261 (Mar. 26, 2009). An August 2009 DOL bulletin then announced that the FLSA requires employers to reimburse H-2B workers' travel and immigration expenses in the first workweek. DOL, Field Assistance Bulletin 2009-2, *Travel and Visa Expenses of H-2B Workers Under the FLSA* 1 (2009), http://tinyurl.com/FAB2009. DOL acknowledged that this interpretation departed from past interpretations, stating that the new interpretation "supersedes all prior inconsistent

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not in fact include or promote a 'reimbursement required' position until the Department informally changed course in 2009").

interpretations," including the 2008 interpretation "and the enforcement practices set forth in" DOL opinion letters from 1994 to 2001. *Id.* at 7 n.2. Relying heavily on the Eleventh Circuit's *Arriaga* decision, DOL interpreted the FLSA regulations to mean that "[i]f an employee incurs pre-employment expenses that are primarily for the benefit of the employer, they are considered *de facto* deductions from the employee's wages during the first workweek." *Id*. at 3. DOL reasoned that H-2B workers' travel and visa expenses primarily benefit the employer. *Id.* at 10-12.

In a February 2010 preamble to H-2A regulations, DOL noted possible "confusion" as to whether the FLSA requires H-2A employers to reimburse travel and immigration expenses in the first work-week. DOL concluded that "the same FLSA analysis" that the 2009 bulletin applied to the H-2B program "applies to the H-2A program." 75 Fed. Reg. 6884, 6915 (Feb. 12, 2010).

B. Proceedings Below

1. Peri is a family-run farm based in Yerington, Nevada dedicated to growing onions, organic salad greens, alfalfa, broccoli, and cauliflower. Owner David Peri, a third-generation farmer, currently employs 250 year-round and 1,500 seasonal employees, making Peri one of America's largest remaining onion producers. Because Peri's crops require delicate handling, they must be weeded, harvested, and graded by hand. Due to the shortage of U.S. agricultural labor, Peri has long employed H-2A workers to grow and harvest its crops. T.J. Burnham, Layers of Success, Western Farmer-Stockman, Oct. 2010, at 1, http://tinyurl.com/WFSOct2010; T.J. Burnham, *Onion Packing Goes High Tech*, Western Farmer-Stockman, Oct. 2010, at 16; Ann Lindemann, *Onion King*, Edible

Reno-Tahoe, Summer 2010, at 30, 31-32, http://tinyurl.com/OnionKing.

On February 16, 2011, Respondents—24 Mexican citizens—sued Peri on behalf of a putative class of over 2,000 former H-2A workers, seeking unpaid wages, liquidated damages, and injunctive relief. Respondents claimed that before Peri employed them, they incurred expenses that the FLSA allegedly required Peri to reimburse in the first work-week. Those expenses included travel from Respondents' homes in Mexico to the U.S. consulate in Hermosillo, Mexico, to apply for H-2A visas; a recruitment fee to labor recruiters who knew of available positions; a visa fee paid to the U.S. Government; lodging while the U.S. consulate processed their visas; an I-94 immigration fee paid to the U.S. Government; and travel to Peri's farm in Nevada. Second Amended Complaint ¶¶ 15-18, 24, 31, *Rivera v. Peri & Sons Farms, Inc*., 805 F. Supp. 2d 1042 (D. Nev. 2011) (No. 3:11-cv-00118). Respondents asserted that Peri's failure to reimburse these expenses in the first work-week reduced their wages below the FLSA minimum wage.[4]

2. The district court dismissed Respondents' claim. App. 28a-29a. The court contrasted the Eleventh Circuit's *Arriaga* decision with the Fifth Circuit's *en banc* decision in *Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393 (2010), and repeatedly criticized *Arriaga*'s reasoning. App. 29a-32a. Relying on the Fifth Circuit's decision, the court held that FLSA regulations do not require employers

[4] Respondents did not claim that Peri failed to reimburse workers for some of these expenses once workers completed 50% of their contract period, as H-2A regulations require. App. 28a.

to reimburse H-2A workers' pre-employment travel and immigration expenses, because such expenses are not kick-backs of wages. App. 27a-32a. The court reasoned, "Section 531.35 does not itself treat as a kick-back the failure to make reimbursement for inbound travel and subsistence, but only for the self-provision of 'tools of the trade' by the employee and other such direct benefits to the employer." App. 30a. The court explained that travel and immigration expenses incurred by H-2A workers to obtain jobs differ fundamentally from items benefiting the employer, such as tools an employee needs to perform a job. App. 30a-31a.

3. While the case was on appeal, DOL filed an *amicus* brief in the Ninth Circuit stating that DOL's "interpretation of its regulations in the [2009] Bulletin," the 2010 preamble, and other sources, including the *amicus* brief itself, "are entitled to controlling deference." Br. for the Sec'y of Labor as Amicus Curiae in Supp. of Plaintiffs-Appellants at 29, *Rivera v. Peri & Sons Farms, Inc*., 735 F.3d 892 (9th Cir. 2013) (hereinafter *DOL Peri & Sons Amicus Br*.), http://tinyurl.com/DOLPeri.

DOL argued that controlling deference was warranted under *Auer* because a "change in [an] interpretation by [an] agency does not provide an independent ground for disregarding such interpretation." *Id*. Even though DOL did not announce until February 2010 its view that employers are responsible for H-2A workers' pre-employment travel and immigration expenses, DOL insisted that Peri should still be liable for failing to reimburse these expenses before that date. Under DOL's view, Peri was liable even for failing to reimburse expenses between December 2008 and March 2009—when DOL's express policy was that

such expenses were *not* reimbursable. DOL explained that its "interpretation in the [2009] Bulletin" regarding H-2B workers "simply clarifies what the law has always meant, and such clarifications do not create retroactivity concerns." *Id*. at 24-25.

With notably brief analysis on this issue, the Ninth Circuit reversed the district court. App. 20a. The Ninth Circuit agreed that DOL's interpretation of the FLSA in the 2010 regulatory preamble merited controlling deference. The court viewed the dispositive question as whether travel and immigration expenses "incurred by the farmworkers primarily benefitted Peri & Sons or the farmworkers." App. 8a. The court noted that "both employers and employees" obtained "clear benefits," but "the identity of the primary beneficiary is ambiguous." App. 9a. Because the court also viewed the FLSA regulations as "ambiguous," the Ninth Circuit held that it was "required to defer to [the] agency's reasonable interpretations of those regulations" under *Auer*. *Id*.

The Ninth Circuit observed that DOL's 2010 regulatory preamble "expressly addressed the status of inbound travel expenses" and "immigration and recruitment expenses" by determining that such expenses primarily benefit H-2A employers. App. 10a. The court concluded that this interpretation warranted controlling deference because "[t]here is no reason to think that the DOL's determination was not a product of its considered judgment." App. 11a. The court reasoned that although DOL had changed interpretations, inconsistency alone was not a reason to refuse deference. *Id*. The Ninth Circuit thus applied DOL's February 2010 interpretation to pre-employment expenses incurred between February 2008 and February 2011, when the complaint was

filed, on the theory that Peri "willful[ly]" violated the FLSA during that whole period. *See* App. 20.[5]

REASONS FOR GRANTING THE PETITION

In a published decision with far-reaching implycations, the Ninth Circuit held that under the FLSA, employers are subject to double damages and other liability for failing to reimburse foreign workers for travel and immigration-related expenses that those workers incurred in another country before their employment began. In the Ninth Circuit's view, these pre-employment costs must be treated as deductions from workers' wages because the costs primarily benefit the employer. No provision of the FLSA, or any FLSA regulation, purports to compel this result. The Ninth Circuit reached this result solely because a DOL interpretation of the FLSA regulations reversed DOL's prior view of its regulations.

That decision is wrong and deepens two entrenched circuit splits on issues of recurring and national importance. The first split, which divides the Ninth and Eleventh Circuits from the Fifth, is whether the FLSA requires employers to reimburse H-2A and H-2B workers' travel and immigration expenses in their first work-week. The second split involves a fundamental question of administrative law: whether, under *Auer*, an agency's interpretation of its own regulations is entitled to dispositive weight when the agency's current interpretation repudiates its prior interpretation. The Ninth Circuit gave controlling

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[5] Ordinarily, FLSA claims have a two-year limitations period, but an expanded, three-year limitations period is available for "willful" violations. The Ninth Circuit held that notwithstanding DOL's flip-flopping interpretations between 2008 and 2011, Respondents alleged "willful" violations. App. 19a-20a.

deference under *Auer* to DOL's new and contrary interpretation of the FLSA regulations. In contrast, the Fifth Circuit declined to defer to DOL's interpretation of the same FLSA regulations. More broadly, six other circuits refuse to treat an agency's current interpretation of its regulations as controlling if it contradicts the agency's prior interpretation.

Only this Court can resolve these issues of extraordinary importance. The division within the Fifth, Ninth, and Eleventh Circuits directly affects the vast majority of all H-2A and H-2B workers. As of 2010, Arizona and California alone employed over half of all H-2A workers who enter the United States, while Louisiana, Florida, Texas, and Georgia are also among the top ten destinations for H-2A workers. *See Supplemental Table 3: Nonimmigrant Admissions, supra*. Texas alone employs over 25% of the country's H-2B workers; Louisiana and Florida rank second and third; and California is among the top ten employers of H-2B workers. *See id*. The split between the Fifth, Ninth, and Eleventh Circuits imposes an unfair competitive disadvantage on employers in the Ninth and Eleventh Circuits solely because they are located in circuits that require employers to reimburse these costs. This split in authority also creates costly and untenable uncertainty for the thousands of employers who hire H-2A and H-2B employees every year, not to mention the employees who do not know what their wages should be.

This uncertainty is especially acute given that DOL has taken diametrically opposed positions on the FLSA's proper interpretation. Yet DOL expects courts to give controlling deference to whatever DOL's current interpretation happens to be—and also demands that courts apply its new interpretation

retroactively, to impose liability for past conduct that DOL's prior interpretations expressly authorized.

The significance of these issues is undeniable. DOL itself considers the proper interpretation of the FLSA's minimum-wage provision in this context a "question of exceptional importance." Br. for the Sec'y of Labor as Amicus Curiae in Supp. of Plaintiffs-Appellees' Pet. for Panel Reh'g and Reh'g En Banc at 2, *Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393 (5th Cir. 2010) (en banc) (hereinafter *DOL Castellanos-Contreras Reh'g Br.*). Only this Court can clarify the meaning of the FLSA and the limits of the Court's decision in *Auer*. This case is an ideal vehicle for resolving both issues.

I. The Decision Below Conflicts with Decisions in Other Circuits and Is Clearly Incorrect

A. The Ninth Circuit's Erroneous Decision Widens a Split over Whether Travel and Immigration Expenses Are Reimbursable

The decision below widens an acknowledged and unequivocal split among the courts of appeals as to whether H-2A and H-2B workers' pre-employment travel and immigration expenses are subject to employer reimbursement. In the Eleventh and Ninth Circuits, they are; in the Fifth Circuit, they are not. The Ninth Circuit did not cite the Fifth or Eleventh Circuits' decisions in reaching a decision that widened this split. Yet the district court pointedly contrasted the Fifth and Eleventh Circuits' conflicting holdings. App. 29a-30a. DOL's *amicus* brief to the Ninth Circuit noted this split, and urged the court to reject the Fifth Circuit's holding. *DOL Peri & Sons Amicus Br.*, *supra*, at 13-14, 24, 29 n.9. The Ninth Circuit erred in holding that employers must reimburse pre-

employment travel and immigration expenses in the first work-week. This conflict over the meaning of a core FLSA provision should not be allowed to persist, and manifestly warrants this Court's review.

1. In the Ninth and Eleventh Circuits, employers may be held liable under the FLSA for H-2A and H-2B workers' pre-employment expenses. App. 11a-12a (H-2A and H-2B); *Arriaga*, 305 F.3d at 1241-46 (H-2A); *Morante-Navarro v. T&Y Pine Straw, Inc.*, 350 F.3d 1163, 1165-66 & n.2 (11th Cir. 2003) (H-2B). The Ninth Circuit reached this conclusion solely by deferring to DOL's current interpretation of its regulations, which parrots the Eleventh Circuit's *Arriaga* decision. App. 9a-11a (holding that *Auer* "required" courts to defer to DOL). In *Arriaga*, the Eleventh Circuit reviewed the FLSA regulations *de novo* and concluded that pre-employment travel and immigration expenses were "de facto deductions" from workers' wages. 305 F.3d at 1237. The Eleventh Circuit reasoned that because these expenses "are costs which arise out of the employment of H-2A workers" and would not "arise as an ordinary living expense," the expenses primarily benefit the employer. *Id*. at 1242, 1244; *accord Morante-Navarro*, 350 F.3d at 1165-66 & n.2 (extending analysis to H-2B workers).

Employers in the Fifth Circuit, however, have no obligation under the FLSA to reimburse these same expenses. *Castellanos-Contreras*, 622 F.3d at 402, 404. The *en banc* Fifth Circuit emphasized that "[n]o statute or regulation expressly states that inbound travel expenses must be advanced or reimbursed by an employer of an H-2B worker," and that "[s]ilence on this issue, in the face of . . . specific laws governing transportation, is deafening." *Id.* at 400. The court

noted similar silence as to immigration expenses, and concluded that "this lack of law would seem to end the matter as to both the travel and visa expenses." *Id*. The court also rejected the workers' interpretation of when an expense primarily benefits the employer as "stretch[ing]" the regulations "too far." *Id*. In direct conflict with the Eleventh Circuit's reasoning, the Fifth Circuit emphasized that "[o]ur precedents look to the nature of disputed expenses rather than simply declaring every cost that is helpful to a given job an employer expense." *Id*. at 400-01. The Fifth Circuit also rejected the Eleventh Circuit's view that travel and visa "expenses are specific and unique to the employer in question," noting that workers could, for instance, find new U.S. employers after their initial employment ended. *Id*. at 401 n.7; *cf. Arriaga*, 305 F.3d at 1242, 1244. The Fifth Circuit concluded that "as a matter of law," pre-employment travel and visa "expenses are not reimbursable" under the FLSA. 622 F.3d at 403. In so holding, "the majority opinion creates a split between us and the Eleventh Circuit," the dissenters repeatedly stressed. *Id*. at 405 (Dennis, J., dissenting); *accord id.* at 407, 418-20.[6]

This conflict is clear and deeply entrenched. District judges outside the divided circuits have recognized

[6] The only ground the Fifth Circuit offered for distinguishing its holding from *Arriaga*'s conflicting holding was that the *Arriaga* plaintiffs were H-2A workers, while the *Castellanos-Contreras* plaintiffs were H-2B workers. 622 F.3d at 402-03. But the Eleventh Circuit extended *Arriaga* to H-2B workers. *Morante-Navarro*, 350 F.3d at 1165-66 & n.2. And for FLSA purposes, H-2A and H-2B workers' travel and immigration expenses are indistinguishable. DOL and other courts thus consider the two programs interchangeable on this issue. *E.g.*, *DOL Peri & Sons Amicus Br.*, *supra*, at 10 n.5; *Salazar-Martinez v. Fowler Bros.*, 781 F. Supp. 2d 183, 187 n.3 (W.D.N.Y. 2011).

that the split exists and affects both H-2A and H-2B workers. *Salazar-Martinez v. Fowler Bros.*, 781 F. Supp. 2d 183, 186 (W.D.N.Y. 2011) ("[t]he Fifth and Eleventh Circuits are split on the issue" as to H-2A workers); *Teoba v. Trugreen Landcare LLC*, 769 F. Supp. 2d 175, 184 (W.D.N.Y. 2011) (noting "split of authority" as to H-2B workers).

DOL repeatedly has recognized that the circuit courts are divided over whether the FLSA requires employers to reimburse pre-employment travel and immigration expenses. DOL's *amicus* brief below represented that "numerous [district] courts have come to the same conclusion" as *Arriaga* "in both H-2A and H-2B cases," but "[t]he Fifth Circuit, however, came to the opposite conclusion in an H-2B case." *DOL Peri & Sons Amicus Br.*, *supra*, at 13-14.

DOL also urged *en banc* review in *Castellanos-Contreras* because the Fifth Circuit's panel decision—which the *en banc* court affirmed—"conflicts with decisions of the Eleventh Circuit concluding that inbound transportation and visa fees of H-2A (a substantially similar visa program) and H-2B workers are for the primary benefit or convenience of the employer." *DOL Castellanos-Contreras Reh'g Br.*, *supra*, at 2-3. And DOL stressed the serious effects of this conflict: according to DOL, the proper interpretation of the FLSA's minimum-wage requirements "presents a question of exceptional importance." *Id.* at 2.

DOL further acknowledges that its current interpretation of the FLSA does not govern in the Fifth Circuit—and that employers thus face utterly different obligations depending upon the fortuity of whether they fall within that circuit's jurisdiction. A recent DOL interpretation explains that "employers

covered by the FLSA must pay [transportation and immigration] expenses to nonexempt employees in the first workweek, to the level necessary to meet the FLSA minimum wage (*outside the Fifth Circuit*)." 77 Fed. Reg. 10,038, 10,077 (Feb. 21, 2012) (emphasis added) (citing H-2A and H-2B cases).[7]

This circuit split is so well-established that "it remains unsettled whether relocation costs are the responsibility of the employer under U.S. law." Marsha Chien, *When Two Laws Are Better Than One: Protecting the Rights of Migrant Workers*, 28 Berkeley J. Int'l L. 15, 32 (2010). Other law review articles echo this conclusion. *E.g.*, Elizabeth Johnston, Note, *The United States Guestworker Program: The Need for Reform*, 43 Vand. J. Transnat'l L. 1121, 1133 (2010) ("There is a two-way circuit split over whether or not employers are responsible for repaying workers the cost of pre-employment expenses . . . ."); Charles C. Mathes, Note, *The Department of Labor's Changing Policies Toward the H-2B Temporary Worker Program: Primarily for the Benefit of Nobody*, 80 Fordham L. Rev. 1801, 1804-05 (2012) ("Courts have reached opposite conclusions as to whether these costs are 'primarily for the benefit and convenience of the employer' and therefore must be reimbursed under the [FLSA]." (footnote omitted)).

This case presents an ideal vehicle for resolving this conflict. Further percolation among the circuits would serve no purpose other than to perpetuate the sharp discrepancy in liability that exists in the circuits that

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[7] DOL's recognition of the existence of a circuit split and the importance of the issue in its prolific statements and *amicus* briefs—including its *amicus* brief below—also obviate any need to call for the views of the Solicitor General.

have reached the issue and to prolong the uncertainty in the rest of the country. The Fifth, Ninth, and Eleventh Circuits attract a significant majority of all H-2A and H-2B workers, and are already intractably pitted against each other in a two-to-one split. *See Supplemental Table 3: Nonimmigrant Admissions, supra*; Andorra Bruno, Cong. Research Serv., R 42434, *Immigration of Temporary Lower-Skilled Workers: Current Policy and Related Issues* 28 (2012). Awaiting decisions from other courts of appeals in jurisdictions that hire fewer H-2A and H-2B employees would leave employers and employees in a state of intolerable uncertainty. Significantly, cases raising this issue rarely reach the courts of appeals, and have never before been candidates for certiorari review before this Court. H-2A and H-2B employers face intense pressure to settle these suits early on because the FLSA entitles winning plaintiffs to double damages, attorney's fees, and costs. *See* 29 U.S.C. § 216(b). These expenses are particularly difficult for small or family-owned farms and businesses to bear.

2. The decision below is also wrong. The FLSA and associated regulations do not require employers to reimburse H-2A and H-2B workers' pre-employment expenses. *See Castellanos-Contreras*, 622 F.3d at 403. Section 3(m) of the FLSA defines wages only with reference to deductions that employers may make for furnishing employees with certain items once employees begin work. 29 U.S.C. § 203(m). Likewise, 29 C.F.R. § 531.35 refers to kick-backs of "whole or part of the wage *delivered to the employee*." (emphasis added). That language again presupposes that the employee incurs costs *after* employment begins. But Respondents incurred these travel and immigration expenses well before Peri employed them—and incurred many of these expenses before the State

Department even deemed them *eligible* for employment. *See* 73 Fed. Reg. at 77,149-51; 73 Fed. Reg. at 78,039-41.

The FLSA only limits an employer's ability to require employees to pay for items that primarily benefit the employer—not items primarily benefitting the employee, or equally benefitting employers and employees. *See* 21 C.F.R. §§ 531.32(c), 531.35. H-2A and H-2B workers' pre-employment travel and immigration costs do not primarily benefit the employer. *Castellanos-Contreras*, 622 F.3d at 400-02. H-2A and H-2B workers incur these expenses to obtain U.S. jobs that pay far more than jobs in their home countries, and well above U.S. minimum wage. These workers obtain many other singular benefits. H-2A workers, for instance, receive free housing, guaranteed work hours, free travel back to their home countries, tax exemptions, and social services. The expenses H-2A and H-2B workers incur to obtain U.S. jobs are fundamentally unlike expenses deemed primarily for the employer's benefit, which generally include specific items (like uniforms, gear, or tools) that employers require for employees to perform their day-to-day jobs. *Id*. at 400-01; 29 C.F.R. §§ 531.3(d)(2), 531.32(c).

H-2A and H-2B workers' travel and immigration expenses are highly analogous to the kinds of items that the FLSA regulations *exclude* from the definition of items that primarily benefit the employer. The FLSA regulations do not require employers to reimburse relocation expenses, and consider employer-provided transportation for commutes to and from work as an "other facility" that is not for the employer's benefit. 29 C.F.R. § 531.32(a) (categorizing "[t]ransportation furnished [to] employees between their homes and

work where the travel time does not constitute hours worked . . . and the transportation is not an incident of and necessary to the employment" as an "other facility"). There is no material difference between the transportation involved in relocation or a potentially lengthy day-to-day commute—neither of which primarily benefits the employer—and the travel involved in the initial journey to reach a job. *Castellanos-Contreras*, 622 F.3d at 400-01; 73 Fed. Reg. at 77,150-51, 78,040-41.

Requiring H-2A and H-2B employers to reimburse workers' travel expenses in the first work-week under the FLSA also would render longstanding H-2A regulations superfluous and inexplicable. For decades, DOL's H-2A regulations have required employers to reimburse H-2A workers' inbound travel expenses only if workers complete 50% of their work contract period. 20 C.F.R. § 655.122(h)(1). The rationale for that rule is that reimbursement at the 50% mark balances workers' and employers' incentives: by covering these costs at a later date, employers gain assurance that workers will remain throughout the season, avoiding devastating sudden labor shortages. *See, e.g.*, 43 Fed. Reg. 10,306, 10,308 (Mar. 10, 1978). If the FLSA already required employers to reimburse most, if not all, of workers' travel expenses in the first work-week, the 50% rule would not serve its purpose of giving workers a significant financial incentive to remain.

B. The Ninth Circuit's Decision Conflicts with Decisions in This Court and in Other Circuits That Withhold *Auer* Deference from Conflicting Agency Interpretations

The Ninth Circuit's decision also created a split on a fundamental question of administrative law that only this Court can resolve. The Ninth Circuit's decision squarely conflicts with seven circuits over whether courts must give controlling deference to an agency's interpretation of its own regulations that contradicts its earlier interpretation. The answer to that question requires this Court to clarify the limits and viability of *Auer* in this commonly-recurring situation.

1. The Fifth and Ninth Circuits have taken irreconcilable positions on the degree of deference owed to DOL's interpretations of the FLSA regulations at issue—and thus whether DOL's views control the outcome in FLSA suits against H-2A and H-2B employers for pre-employment expenses.

The Ninth Circuit gave controlling deference under *Auer* to DOL's new interpretation of the FLSA regulations in a 2009 bulletin and 2010 regulatory preamble. The Ninth Circuit did so despite acknowledging that DOL's current interpretation diverged from its prior interpretation. App. 11a. Under the Ninth Circuit's view of *Auer*, such inconsistency, in and of itself, is no reason to conclude that an interpretation does not reflect an agency's considered judgment. *Id*. And the Ninth Circuit went further by allowing new agency interpretations to impose retroactive liability on employers for conduct that pre-dates the agency's new interpretation. The Ninth Circuit even imposed potential retroactive liability on Peri for conduct that occurred when DOL's

interpretation expressly absolved employers of any liability. *See id*.

The Ninth Circuit's decision unambiguously conflicts with the *en banc* Fifth Circuit's analysis of whether to defer to DOL's interpretation of the same FLSA regulations. As in the Ninth Circuit, DOL filed an *amicus* brief in the Fifth Circuit urging that the agency's interpretations of the FLSA regulations should receive "substantial deference." En Banc Br. for the Sec'y of Labor as Amicus Curiae in Supp. of Plaintiffs-Appellees at 24, *Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393 (5th Cir. 2010) (*en banc*). But in sharp contrast to the Ninth Circuit, the Fifth Circuit cited concerns about the "inconsistency and ambiguity" of DOL's interpretations as grounds for refusing to give DOL's interpretations *any* deference. *Castellanos-Contreras*, 622 F.3d at 402. In direct conflict with the Ninth Circuit, the Fifth Circuit also rejected the notion that DOL's 2009 bulletin should govern pre-2009 employer obligations, and refused to "engage in the ex post imposition of new duties that did not clearly exist at the time of the events giving rise to this suit under the guise of *Auer* deference." *Id*. at 401-02 n.9.

There is no question that the Fifth and Ninth Circuit's holdings are incompatible. DOL itself urged the Ninth Circuit to give its interpretation controlling deference by arguing that "the Fifth Circuit erred in declining to give deference to the Department's views." *DOL Peri & Sons Amicus Br.*, *supra*, at 29 n.9.

2. Review is also warranted because this Court has indicated—contrary to the Ninth Circuit—that an agency's interpretation does not warrant controlling deference when it contradicts prior interpretations. *E.g., Christopher v. SmithKline Beecham Corp*., 132 S.

Ct. 2156, 2166 (2012) (*Auer* deference is unjustified "when the agency's interpretation conflicts with a prior interpretation"); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994) ("[A]n agency's interpretation of a statute or regulation that conflicts with a prior interpretation is entitled to considerably less deference . . . ." (internal quotation marks omitted)); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988) (declining to defer to agency interpretation "contrary to the narrow view . . . advocated [by the agency] in past cases"). To be sure, other decisions of this Court could be read to suggest that a change in DOL's interpretation alone may not deprive that interpretation of *Auer* deference. *See Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 296 n.7 (2009); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007). Any uncertainty over the scope of *Auer* deference under this Court's precedents is all the more reason for this Court to provide the lower courts with much-needed clarity.

Moreover, the Ninth Circuit's decision conflicts with the decisions of six other circuits, which decline to afford an agency's current interpretation of its own regulations controlling deference if it contradicts prior interpretations. *E.g.*, *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1139 (10th Cir. 2013) (refusing to apply *Auer* deference because "on prior occasions, the [agency] has repeatedly taken a position . . . that is inconsistent, and conflicts with, [its current] interpretation"); *Sw. Pharmacy Solutions, Inc. v. Ctrs. for Medicare & Medicaid Servs.*, 718 F.3d 436, 442 (5th Cir. 2013) (*Auer* deference does not extend to prior interpretations "inconsistent with [the agency's] proffered interpretation"); *Union Carbide Corp. & Subsidiaries v. Comm'r*, 697 F.3d 104, 109 (2d Cir. 2012) (an interpretation that "conflict[s] with prior

interpretation[s] of the same regulation" is an "enunciated categor[y] where we would withhold deference" (internal quotation marks omitted)); *Gose v. U.S. Postal Serv.*, 451 F.3d 831, 837-38 (Fed. Cir. 2006) (no *Auer* deference for inconsistent agency interpretation); *Clason v. Johanns*, 438 F.3d 868, 871 (8th Cir. 2006) ("[A]n inconsistent agency interpretation is less authoritative than a consistent one . . . ."); *Mining Energy, Inc. v. Dir., Office Of Workers' Comp. Programs*, 391 F.3d 571, 574 n.1 (4th Cir. 2004) ("[Agency's] interpretation of the regulation is entitled to 'considerably less deference' because [it] has taken essentially two contradictory positions."); *Akzo Nobel Salt, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 212 F.3d 1301, 1304-05 (D.C. Cir. 2000) (no *Auer* deference because "flip-flop[ping]" interpretations show lack of "considered judgment").

The Ninth Circuit's directly contrary view of *Auer* was both outcome-determinative and deeply flawed. Had the Ninth Circuit followed this Court's and other circuits' precedents and refused to give controlling deference to DOL's inconsistent interpretation, Peri would have obtained meaningful judicial review of how the FLSA regulations should be construed and whether DOL's view was correct. Instead, the Ninth Circuit treated DOL's current position as dispositive without *any* analysis of the merits. App. 9a-11a. And the Ninth Circuit cursorily accepted that DOL's position defines employers' liability not only going forward, but also regarding conduct that occurred before DOL announced its new position—even during a period when DOL expressly relieved employers of liability.

Agencies ordinarily receive deference on the assumption that their views incorporate unique or

specialized knowledge. But DOL's current interpretation references no particular or new facts about H-2A or H-2B workers, let alone any institutional knowledge about the underlying objectives DOL's regulations sought to advance. DOL's current interpretation merely paraphrases the Eleventh Circuit's *Arriaga* decision, which DOL had previously castigated at length as riddled with legal errors. *See* 73 Fed. Reg. at 77,149-51.

The Ninth Circuit's decision vividly exemplifies the dangers of empowering a single actor to both make law and control its interpretation. *See Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring). Rather than using the notice-and-comment process to promulgate clear rules, DOL issued regulations that do little to clarify the types of costs that employers must pay under the FLSA. And DOL's regulations on their face concededly do not require employers to reimburse the costs at issue. Deferring to DOL's interpretations of these regulations rewards DOL for arrogating the power to arbitrarily switch between diametrically-opposed interpretations through informal pronouncements that lack the notice and predictability of rule-making. *See id*.

Nor does the potential for abuse stop there. DOL's position that its new interpretation merely "clarifies what the law has always meant," and creates no "retroactivity concerns," *DOL Peri & Sons Amicus Br.*, *supra*, at 25, makes *Auer* a license for the agency to redefine what the law means in ways that impose massive, retrospective liability. Under the Ninth Circuit's view of *Auer* deference, employers like Peri, who took DOL's 2008 interpretation relieving them of FLSA liability at its word, now face FLSA liability

even for the period during which this interpretation was in effect, all because DOL subsequently changed its mind about the FLSA's meaning. This case presents an ideal opportunity for this Court to revisit, or at least limit, *Auer*.

II. The Questions Presented Are of Critical and Recurring Importance to U.S. Businesses and Workers

The issues presented profoundly affect thousands of employers and some 200,000 workers per year in dozens of industries that are critical to the U.S. economy and the nation's food supply. Farmers, along with non-agricultural employers like hotels, landscapers, amusement parks, and Christmas-tree growers, face a perennial and severe shortage of U.S. workers even when they offer substantially above the minimum wage. *E.g.*, Alan Gomez, *An Immigration Food Fight*, USA Today, Mar. 18, 2013, at A1; Labor, Immigration & Emp. Benefits Div., U.S. Chamber of Commerce, *The Economic Impact of H-2B Workers* 13-14 (2010), http://tinyurl.com/H-2BImpact. But the only legal way for these employers to hire temporary foreign workers to alleviate these shortages is through the H-2A and H-2B visa programs.

The H-2A program "has been a critical lifeline to producers unable to find local labor for short-lived work that can be rigorous and intensive." Letter from Sen. Michael Bennet et al. to Sec'y of Labor Hilda Solis, Mar. 15, 2012, http://tinyurl.com/BennetLtr. H-2A workers "have become essential to the nation's $17.9 billion wheat crop." Alan Bjerga, *Visa Cap Threatens Harvests in U.S., Chic. Trib.*, Aug. 6, 2013, at C2. Without H-2A workers, Washington's apple crop would have rotted in orchards. *See* Dan Wheat, *Survey: Wash. Labor Picture Improved in October,*

Capital Press, Nov. 25, 2013. Brief delays in H-2A visa processing during the 2013 government shutdown prompted warnings that "crops will literally wither in the field for lack of workers to pick them." Keith Morelli, *Fla. Citrus Crop May Be Casualty of Shutdown*, Tampa Trib., Oct. 22, 2013, at 1. North Carolina's farms rely so heavily on H-2A workers that "foreign workers allow those farms—and their whole contribution to North Carolina's economy—to exist." Michael A. Clemens, *International Harvest: A Case Study of How Foreign Workers Help American Farms Grow Crops—and the Economy* 2 (2013), http://tinyurl.com/IntlHarvest.

The H-2B program is equally important to many non-agricultural industries and the millions of American workers they employ. "Without . . . help" from H-2B workers, small businesses "would be forced to limit services, lay off permanent U.S. workers or even worse close their doors." 152 Cong. Rec. S2710 (daily ed. Apr. 3, 2006) (statement of Sen. Barbara Mikulski). The $175 billion landscaping industry, which supports nearly two million American jobs, owes its survival to H-2B workers. *Examining the Role of Lower-Skilled Guest Worker Programs in Today's Economy: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. & the Workforce*, 113th Cong. 64 (2013) (joint statement of Sabeena Hickman & Michael Geary). Without H-2B workers, Maryland's and Virginia's seafood industries would disappear, and "pretty soon there may not be any crabmeat left for the crabcakes from either State to put on their menus." 151 Cong. Rec. S3536 (daily ed. Apr. 13, 2005) (statement of Sen. John Warner). Restaurants, hotels, amusement parks, and ski lodges across the nation likewise depend upon H-2B workers

to sustain their businesses. *The Economic Impact of H-2B Workers, supra*, at 2, 4, 20.

One of the greatest threats to employers' continued participation in the H-2A and H-2B programs is uncertainty over further regulatory burdens—including potential FLSA liability. *Id*. at 20-21. These programs already impose exceptional burdens on employers. For instance, employers may only hire H-2A workers after proving to DOL that there are insufficient U.S. workers to fill agricultural jobs. 20 C.F.R. § 655.103(a). Employers must pay to advertise positions to U.S. workers and recruit U.S. workers until foreign workers leave for the U.S. *Id*. §§ 655.150-58. Employers must also bestow unique benefits on employees. Employers must pay H-2A workers well above the minimum wage; offer a guaranteed number of hours of work; provide free housing; reimburse workers' inbound travel costs once they complete 50% of the work period; and pay for workers' travel back to their home countries. *Id*. § 655.122(c)-(q); DOL Wage & Hour Div., *Employee Rights Under the H-2A Program* (2012), http://tinyurl.com/H-2ARts.

The costs of these existing obligations are so high that a family-owned shrub grower spent nearly *$1 million* in a single year to comply with DOL requirements—which included constructing a handicap-accessible ramp to workers' lodgings, even though the work is impossible for disabled persons to perform. Fawn Johnson, *When the Feds Come Knocking*, Nat'l J., Sept. 18, 2013; *accord* Clemens, *supra*, at 3. Complying with existing H-2A require-ments also forces employers to submit *two feet* of paperwork per season. Gabriel Silerman, *Farmers Question Burden of Legal Labor*, Agweek, Dec. 26, 2011, at 33. Many employers find the current requirements so

burdensome that they are on the brink of converting their crops to machine-harvestable varieties—or selling their farms entirely. Silerman, *supra; see also America's Agricultural Labor Crisis: Enacting a Practical Solution: Hearing Before the Subcomm. on Immigration, Refugees & Border Sec. of the S. Comm. on the Judiciary*, 112th Cong. 27-28 (2011) (statement of Connie Horner).

The question presented involves additional, substantial costs that employers can ill-afford to bear. And without this Court's review, all H-2A and H-2B employers in the Ninth (and Eleventh) Circuits will bear these costs, even though DOL has never bothered to issue a formal rule. Most H-2A workers come from Mexico, South Africa, and Peru, and most H-2B workers come from Mexico, Jamaica, and Guatemala. *See* U.S. Dep't of State, *FY2010 Nonimmigrant Visas Issued*, 15-21, http://tinyurl.com/DOSFY10. Pre-employment travel and immigration costs can run to thousands of dollars per worker—and come at the cost of employers' ability to continue supporting American jobs. *E.g.*, Johnson, *supra*. Because these pre-employment expenses are substantial, if these expenses are considered kick-backs of "wages," in practice employers must always reimburse considerable sums in the first work-week to meet the minimum wage. And because seasonal employers start their busy seasons heavily indebted to their lenders and with little cash on hand, being forced to pay these costs at the start of the season is disproportionately onerous. Further exacerbating these burdens, the H-2A and H-2B programs require employers to offer the same terms to any U.S. workers they attract—meaning that an employer would have to pay for the transportation and subsistence costs of a U.S. worker who moved across the country for

the job even if that worker quit after the first week. *See* 20 C.F.R. § 655.20(q); *id*. § 655.122(a).

These added costs already risk crippling beleaguered small businesses. But the circuit split between the Fifth, Ninth, and Eleventh Circuits over whether the FLSA requires reimbursement of these expenses makes employers' plight even worse. As the law now stands, employers in the Ninth and Eleventh Circuits face cumbersome, up-front costs that no businesses in the Fifth Circuit face. Over half of all H-2A workers nationwide work on farms in Arizona and California, and can obtain immediate reimbursement of inbound travel and immigration expenses. *See Supplemental Table 3: Nonimmigrant Admissions, supra*. But farms in Louisiana and Texas, two of the other top ten States for employing H-2A workers, have no such obligation. *See id*. Similarly, Texas, Louisiana, and Florida are the top three destinations for H-2B workers; Texas *alone* accounts for over 25% of all H-2B workers nationwide. *See id*. Yet, simply by virtue of being located within the Fifth Circuit, Texas and Louisiana employers are relieved of a significant up-front cost that their Florida counterparts must bear.

Farms in the Fifth, Ninth, and Eleventh Circuits often compete nationwide to sell the same crops. Onions, for instance, overwhelmingly grow within the Fifth and Ninth Circuits. Nat'l Onion Ass'n, *How & Where Onions Are Grown*, http://tinyurl.com/Onion States. But as a result of the decision below, Nevada farmers are significantly and arbitrarily disadvantaged compared to their Texan counterparts. And in the tight, highly competitive markets for crops, these cost disparities can make all the difference in sustaining businesses.

Worse still is the uncertainty facing thousands of employers in other circuits. Even after DOL announced its new interpretation of the FLSA regulations, the GAO confirmed that employers face uncertain regulatory obligations "because some of [DOL's] decisions seemed inconsistent." U.S. Gov't Accountability Office, GAO-12-706, *H-2A Visa Program: Modernization and Improved Guidance Could Reduce Employer Application Burden* 25 (2012). The GAO singled out "confusion" regarding the relationship between the FLSA and the H-2A regulations as a particular source of "uncertainty about the appropriate time to reimburse workers for their in-bound travel costs." *Id*. DOL's failure to provide employers with clear and consistent guidance comes at a high price, compounding the already significant odds that employers will be sued in a rising tide of FLSA litigation. *See* U.S. Gov't Accountability Office, GAO-14-69, *Fair Labor Standards Act: The Department of Labor Should Adopt a More Systematic Approach to Developing Its Guidance* 6, 10, 21-23 (2013). This uncertainty affects thousands of workers too: workers in different States will be reimbursed differently, even though they are part of the same visa program—leaving them unsure about what and when they should be paid.

Employers outside the Fifth, Ninth, and Eleventh Circuits thus face an intolerable choice: They can hobble themselves competitively by reimbursing workers' travel and immigration costs in the first work-week. Or they can bear the risk of expensive litigation—an especially acute risk as H-2A and H-2B employers frequently face the prospect of being investigated or sued for FLSA wage and hour infractions. *See America's Agricultural Labor Crisis*, 112th Cong. 10 (statement of Tom Nassif). If they

guess wrong, they are subject to double damages, attorney's fees, and costs.

This Court's intervention is urgently needed to resolve recurring issues of tremendous significance. At least once every year, thousands of employers welcome newly arrived H-2A and H-2B workers and must immediately determine their obligations concerning workers' pre-employment expenses. Only this Court can create a uniform interpretation of the FLSA, a federal statute of surpassing importance to employers and employees. Only this Court can prevent the fortuity of circuits' jurisdictional lines from skewing competitive conditions for this country's economically critical small businesses.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 11-17365
D.C. No. 3:11-cv-00118-RCJ-VPC

VICTOR RIVERA RIVERA; ERNESTO SEBASTIAN CASTILLO RIOS; VICENTE CORNEJO LUGO; JESUS GARCIA MATA; LUIS ANGEL GARCIA MATA; GAUDENCIO GARCIA RIOS; SIMON GARCIA RIOS; VICENTE CORNEJO CRUZ; EMILIO MONTOYA MORALES; JORGE LUIS AGUILAR SOLANO; DOMINGO RAMOS RIOS; ARTEMIO RINCON CRUZ; SERGIO RIOS RAMOS; PEDRO RIVERA CAMACHO; REGULO RINCON CRUZ; AURELIANO MONTES MONTES; MANUEL RIVERA RIVERA; MARTIN FLORES BRAVO; VIRGILIO MARQUEZ LARA; JOSE BALDERAS GUERRERO; GERARDO RIOS RAMOS,

Plaintiffs-Appellants,

v.

PERI & SONS FARMS, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the District of Nevada
Robert Clive Jones,
Chief District Judge, Presiding

Argued and Submitted
June 14, 2013—San Francisco, California
Filed November 13, 2013

OPINION

Before: Diarmuid F. O'Scannlain and Milan D. Smith, Jr., Circuit Judges, and James K. Singleton, Senior District Judge.*

Opinion by Judge O'Scannlain

COUNSEL

José Jorge Behar, Chicago, Illinois, argued the cause and filed the briefs for the plaintiffs-appellants. With him on the briefs were Matthew J. Piers, Chicago, Illinois, and Mark R. Thierman, Reno, Nevada.

Brad Johnston, Yerington, Nevada, argued the cause for the defendant-appellee. Gregory A. Eurich, Denver, Colorado, and Joseph Neguese, Denver, Colorado, filed the brief for the defendant-appellee.

Diane A. Heim, Washington, D.C., argued the cause and filed the brief for Amicus Curiae Secretary of Labor, in support of the plaintiffs-appellants. With her on the briefs were M. Patricia Smith, Washington, D.C., Jennifer S. Brand, Washington, D.C., and Paul L. Frieden, Washington, D.C.

Monte B. Lake, Washington, D.C., filed the brief for Amicus Curiae National Council of Agricultural Employers, in support of the defendant-appellee.

OPINION

O'SCANNLAIN, Circuit Judge:

We are asked to decide claims of Mexican temporary farmworkers under the Fair Labor Standards Act and relevant state law.

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* The Honorable James K. Singleton, Senior District Judge for the U.S. District Court for the District of Alaska, sitting by designation.

I

A

Peri & Sons is a Nevada corporation that produces, harvests, and packages onions.[1] The plaintiffs are Victor Rivera Rivera and twenty-three other Mexican citizens ("the farmworkers") admitted to the United States to cultivate, harvest, and process onions on Peri & Sons' farm. Since 2004, Peri & Sons has hired such foreign workers through the H-2A program of the United States Department of Labor (DOL).

American agricultural employers may hire aliens for temporary labor under the H-2A program if the DOL certifies 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). Before submitting an Application for Temporary Employment Certification, *see* 20 C.F.R. § 655.130, an "employer must submit a job order," *id*. § 655.121(a)(1). Job orders must comply with various requirements relating to the terms of employment. *See, e.g., id*. § 655.122.

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[1] Because this case was dismissed upon a motion under Federal Rule of Civil Procedure 12(b)(6), we assume the truth of factual allegations in the operative complaint. *See Caviness v. Horizon Cmty. Learning Ctr., Inc*., 590 F.3d 806, 812 (9th Cir. 2010); *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006).

The farmworkers incurred expenses related to their employment with Peri & Sons. Some had to pay a hiring or recruitment fee of between $100 and $500 to Peri & Sons' employees in order to be considered for employment. All had to obtain H-2A visas from the United States Consulate in Hermosillo, Sonora, Mexico. Each farmworker paid the necessary fees and covered his own lodging costs in Hermosillo. The farmworkers also paid a fee to obtain Form I-94 from the United States Citizenship and Immigration Services upon entering the country. These immigration and travel expenses exceeded $400 for each plaintiff. In addition, the farmworkers purchased protective gloves, which were required for the performance of their jobs, at a cost of at least $10 per week. They each also incurred expenses of at least $100 in traveling from Peri & Sons' farm in Nevada back to their homes in Mexico.

The farmworkers claim that these expenses were primarily for Peri & Sons' benefit but that the company did not properly reimburse them.

B

The farmworkers filed their original complaint on February 16, 2011. The operative complaint for this appeal, however, is the Second Amended Complaint (SAC), which contained four counts. First, the SAC alleged that Peri & Sons violated the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq*., partially because it failed to reimburse each farmworker during his first week of employment for travel and immigration expenses. Second, it claimed that Peri & Sons breached its employment contracts by violating the terms of the job orders submitted to the DOL. Third, it alleged violations of Nevada wage-and-hour laws for failure to pay the minimum wage and failure

to pay wages owed under employment contracts. Fourth, it asserted violations of the minimum wage requirement in the Nevada Constitution.

The district court dismissed the SAC with prejudice. It rejected the farmworkers' FLSA claims on the ground that 29 C.F.R. § 531.35 did not treat the relevant expenses as kickbacks. The district court dismissed the breach of contract claims because the farmworkers did not plead specific violations of the contracts beyond reiterating the wage claims. As to the state law statutory and constitutional claims, the district court treated them as "redundant" and dismissed both for the same reason it dismissed the FLSA claims. It also applied a two-year statute of limitations to the wage claims, both state and federal, holding that those having accrued before February 16, 2009 were barred. The farmworkers timely appealed.

II

A

Both the specific regulations governing the H-2A program and the more general FLSA regulations promulgated by the DOL control whether and when employers must reimburse employees for inbound travel and immigration expenses. The parties agree that Peri & Sons' relationship with the farmworkers is subject to the H-2A regulations but dispute whether it is subject to the FLSA regulations.

Regulations concerning the H-2A program require employers to reimburse an employee who "completes 50 percent of the work contract period . . . for reasonable costs incurred by the worker for transportation and daily subsistence from the place from which the worker has come to work for the employer . . . to the place of employment." 20 C.F.R. § 655.122(h)(1). Peri

& Sons argues that this regulation only obligated it to reimburse its employees' travel expenses after the employees had completed half of their work rather than during each employees' first week.

The FLSA, on the other hand, requires that employers reimburse certain expenses during each employee's first week of work. *See* 29 C.F.R. § 531.36 (applying the rule to "any such workweek"). The farmworkers argue that this FLSA regulation required Peri & Sons to reimburse them for immigration and travel expenses during the first week of work. Peri & Sons argues that it is not subject to this FLSA regulation because applying the FLSA regulation to H-2A employees would, as a practical matter, make the H-2A regulation superfluous. Peri & Sons also contends that deducting travel costs would frequently reduce a worker's first week's wages far below the minimum wage.

We must evaluate such arguments in light of the DOL's regulatory interpretation. A DOL regulation has clarified "that the FLSA applies independently of the H-2A requirements and imposes obligations on employers regarding payment of wages." 20 C.F.R. § 655.122(h)(1); *accord id*. § 655.122(p)(1) ("[An] employer must make all deductions from the worker's paycheck required by law."). Before issuing its regulation, the DOL had rejected many of the specific arguments raised here by Peri & Sons. *See* Temporary Agricultural Employment of H-2A Aliens in the United States, 75 Fed. Reg. 6884, 6915 (Feb. 12, 2010). Under *Chevron, U.S.A., Inc. v. NRDC, Inc*., 467 U.S. 837, 843–44 (1984), we must defer to the DOL's interpretation if: (1) the statutory provision is ambiguous, and (2) the agency's interpretation is reasonable.

The FLSA certainly does not unambiguously exempt H-2A employers from its requirements and related regulations. *See* 29 U.S.C. § 206 (requiring "[e]very employer" to pay the minimum wage to covered employees); *id*. § 213 (providing exemptions not relevant to Peri & Sons). Thus, the FLSA either unambiguously applies the reimbursement requirement to H-2A employers or contains an ambiguity on this point. Assuming without deciding that the statute is ambiguous, the DOL's interpretation is reasonable. Because the DOL's interpretation neither makes it impossible to comply with both provisions nor creates surplusage,[2] it is "a permissible construction of the statute." *Chevron*, 467 U.S. at 843.

B

Because Peri & Sons is subject to the FLSA reimbursement regulations, we must next decide whether the travel and immigration expenses incurred by the farmworkers are covered by such regulations.

The FLSA requires employers to pay at least the federal minimum wage to each employee "engaged in commerce." 29 U.S.C. § 206(a)(1). An employer has not satisfied the minimum wage requirement unless the compensation is "free and clear," meaning the employee has not kicked back part of the compensation to the employer. 29 C.F.R. § 531.35. Thus, employers generally may not issue paychecks at the minimum

[2] The FLSA regulations require reimbursement in the first week to the extent that the expenses reduced an employee's wages below the minimum wage. The H-2A regulations require full reimbursement over a longer period of time. The H-2A regulations, therefore, are not superfluous because an employee paid more than the minimum wage would receive some reimbursement in the first week and some reimbursement later.

wage rate and then require employees to give some of the money back. An employer may charge its employees for the reasonable cost of providing them "board, lodging, or other facilities" because such charges are not kickbacks, meaning they can be included in the wage calculation. 29 U.S.C. § 203(m). Facilities "primarily for the benefit or convenience of the employer" do not count as "other facilities" and are not included in the wage calculation. 29 C.F.R. § 531.3(d)(1).

To the extent deductions for items not qualifying as "board, lodging, or other facilities"—such as items primarily benefitting the employer—lower an employee's wages below the minimum wage, they are unlawful. *Id*. § 531.36(b). Thus, the question before us is whether the expenses incurred by the farmworkers primarily benefitted Peri & Sons or the farmworkers.

1

The farmworkers argue that they incurred travel and immigration expenses, including fees associated with recruitment, visas, and I-94 forms, for the benefit of Peri & Sons. Peri & Sons, on the other hand, characterizes immigration expenses as primarily for the benefit of the employee.

The FLSA regulations provide an illustrative list of facilities that are "primarily for the benefit or convenience of the employer":

> (i) Tools of the trade and other materials and services incidental to carrying on the employer's business; (ii) the cost of any construction by and for the employer; (iii) the cost of uniforms and of their laundering, where the nature of the business requires the employee to wear a uniform.

29 C.F.R. § 531.3(d)(2); *see also id*. § 531.32(c) (listing, as a facility primarily for the benefit of the employer, "transportation charges where such transportation is an incident of and necessary to the employment (as in the case of maintenance-of-way employees of a railroad)"). Meals, however, "are always regarded as primarily for the benefit and convenience of the employee." *Id*. § 531.32(c).

The status of inbound travel and immigration expenses is ambiguous under this regulatory standard. Travel and proper immigration costs are essential for the H-2A employment relationship to come to fruition. Presumably, both employers and employees benefit from the employment relationship. Employers can only hire H-2A workers after demonstrating that they are unable to satisfy their labor needs with American workers, *see* 20 C.F.R. § 655.161(b), so an employer's benefit is clear. Of course, foreign workers probably would not travel to the United States for temporary employment if employment of a similar quality were available closer to their homes. The employees' benefit is also clear. With such clear benefits to both the farmworkers and Peri & Sons, the identity of the primary beneficiary is ambiguous.

When regulations are ambiguous, we are required to defer to an agency's reasonable interpretations of those regulations. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) ("Because the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless plainly erroneous or inconsistent with the regulation." (internal quotation marks omitted)). Deference, however, is not appropriate if the agency's "interpretation is nothing more than a convenient litigating position or a post hoc rationalization" for its actions rather

than a "fair and considered judgment on the matter in question." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (internal quotation marks and citations omitted). A change in an agency's interpretation does not present a "separate ground for disregarding the [agency's] present interpretation" unless the change leads to "unfair surprise." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170–71 (2007).

The DOL has expressly addressed the status of inbound travel expenses. Section 655.122(p) explains that an H-2A employer who is "subject to the FLSA may not make deductions that would violate the FLSA." 20 C.F.R. § 655.122(p)(1). In a section interpreting § 655.122(p) and the FLSA regulations, a regulatory preamble provides that "an H-2A employer covered by the FLSA is responsible for paying inbound transportation costs in the first workweek of employment to the extent that shifting such costs to employees (either directly or indirectly) would effectively bring their wages below the FLSA minimum wage." 75 Fed. Reg. at 6915.

With regard to immigration and recruitment expenses,[3] the preamble incorporated by reference the analysis from a previous field assistance bulletin. *Id.* ("Because of the similar statutory requirements and similar structure of the H-2A and H-2B programs, the same FLSA analysis applies to the H-2A program as was set forth in the Field Assistance Bulletin [2009-2 (Aug. 21, 2009)]."). That analysis stated: "[T]ravel and immigration-related costs necessary for workers hired

[3] This analysis does not apply to passport fees. *See* 20 C.F.R. § 655.135(j). The farmworkers, however, have voluntarily dismissed their claim for reimbursement of passport fees.

under the H-2B program are for the primary benefit of their employers, and the employers therefore must reimburse the employees for those costs in the first workweek if the costs reduce the employees' wages below the minimum wage." U.S. Dep't of Labor Wage and Hour Div., Field Assistance Bulletin 2009-2, 9 (Aug. 21, 2009), *available at* http://www.dol.gov/whd/FieldBulletins/FieldAssistanceBulletin2009_2.pdf. It also stated that "under both the visa program regulations and the FLSA, we believe that employers are responsible for paying the fees of any recruiters they retain to recruit foreign workers and provide access to the job opportunity." *Id*. at 12.

2

In the face of regulatory ambiguity, the DOL's determination that inbound travel and immigration expenses primarily benefit H-2A employers was reasonable. There is no reason to think that the DOL's determination was not a product of its considered judgment. Although the DOL briefly changed its interpretation at one point in 2008, there is no indication that the change caused any unfair surprise for Peri & Sons.[4] Therefore, we defer to the DOL's interpretation. The district court erred in ruling that Peri & Sons was not required to reimburse its employees during the first week of work for inbound travel and immigration expenses to the extent that

[4] The withdrawal of the brief-lived 2008 interpretation expressly stated that the 2008 "interpretation may not be relied upon as a statement of agency policy." Withdrawal of Interpretation of the Fair Labor Standards Act Concerning Relocation Expenses Incurred by H-2A and H-2B Workers, 74 Fed. Reg. 13,261, 13,262 (Mar. 26, 2009).

such expenses lowered their compensation below the minimum wage.

III

The farmworkers also argue that, under the common law of Nevada, Peri & Sons breached their employment contracts by failing to adhere to the terms of the job order. The purported breaches of contract stemmed from not only the FLSA violations discussed above but also the refusal to reimburse the farmworkers for the cost of their outbound travel and for the cost of gloves necessary to perform the job. The district court dismissed this claim on the ground that the SAC did not plead the breach with sufficient specificity.

The Federal Rules of Civil Procedure require federal plaintiffs to include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Rule 8(a) "generally requires only a plausible 'short and plain' statement of the plaintiff's claim, not an exposition of his legal argument." *Skinner v. Switzer*, 131 S. Ct. 1289, 1296 (2011). Such a statement must give the defendant "fair notice of the basis for [the plaintiffs'] claims." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002).

Under Nevada law, "the plaintiff in a breach of contract action [must] show (1) the existence of a valid contract, (2) a breach by the defendant, and (3) damage as a result of the breach." *Saini v. Int'l Game Tech.*, 434 F. Supp. 2d 913, 919–20 (D. Nev. 2006) (citing *Richardson v. Jones*, 1 Nev. 405, 408 (1865)). The farmworkers' complaint explained the contracts and damages at issue. It asserted that the underlying contracts were the job "orders described in Paragraphs 12 to 14 of this Complaint." Such is a plausible claim because "[i]n the absence of a separate, written work

contract entered into between the employer and the worker, the required terms of the job order and the certified Application for Temporary Employment Certification will be the work contract." 20 C.F.R. § 655.122(q). The SAC also claimed that the farmworkers had "substantial injuries in the form of lost wages."

The SAC alleged breaches by Peri & Sons. Employment contracts between H-2A employers and employees must "[a]t a minimum . . . contain all of the provisions required by this section." *Id*. § 655.122(q). Such mandatory terms include provisions prohibiting H-2A employers from "mak[ing] deductions that would violate the FLSA," *id*. § 655.122(p), and requiring H-2A employers to "provide or pay for the worker's transportation and daily subsistence from the place of employment to the place from which the worker . . . departed to work for the employer," *id*. § 655.122(h)(2). In light of these terms of the contract, the factual allegations incorporated into the breach of contract claim plausibly state a claim.

The district court erred in concluding that the farmworkers had not pled their breach of contract claims with sufficient specificity. Such allegations were sufficient to give Peri & Sons fair notice and to make the farmworkers' breach of contract claims plausible.[5]

[5] Contrary to Peri & Sons' assertion, the farmworkers did not waive their recruiting fees argument by failing to raise it below. The Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss alleged that some of the farmworkers had been required to pay recruiting fees and argued that reimbursement of such fees was required by law.

IV

The farmworkers asserted claims under Nevada wage-and-hour laws that are largely duplicative of their claims under the FLSA and their claims for breach of contract.

A

In claims under Nevada Revised Statutes §§ 608.250 and 608.260, as well as the Nevada Constitution, the farmworkers allege that Peri & Sons failed to pay the Nevada minimum wage under the same kickback theory on which they relied for their FLSA claims. The district court dismissed these claims on the same grounds that it dismissed the FLSA claims, reasoning that the Nevada Supreme Court would follow federal precedent on this issue. We agree with the district court that the Nevada Supreme Court would probably interpret Nevada law to follow federal law on this issue. *Cf.* Nev. Rev. Stat. § 608.250 (directing the Labor Commissioner to set the minimum wage "in accordance with federal law"); Nev. Admin. Code § 608.160(2)(a) (prohibiting an employer from "deduct[ing] any amount from the wages due an employee unless . . . [t]he employer has a reasonable basis to believe that the employee is responsible for the amount being deducted").

Peri & Sons claims that the Nevada courts would not interpret state law to follow federal law on this issue. The cases on which Peri & Sons relies, however, merely indicate that the Nevada courts do not interpret state law in accordance with federal law when the relevant statutes contain materially different language. In *Boucher v. Shaw*, 196 P.3d 959, 963 n.27 (Nev. 2008), the Nevada Supreme Court refused to adopt a test used in the federal courts to determine

whether an individual is an "employer." The court so ruled because the Nevada statute defining "employer" did not include any language indicating that officers of corporate employers were included. *See id*. The relevant federal statute, on the other hand, defined "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d).

In *Dancer v. Golden Coin, Ltd*., 176 P.3d 271, 274 (Nev. 2008), the court interpreted Nevada law to exclude tips from the calculation of an employee's minimum wage even though federal law permitted the inclusion of tips. Again, the state and federal statutes used significantly different language. *Compare* 29 U.S.C. § 203(m)(2) (including tips in the definition of wages), *with* Nev. Rev. Stat. § 608.160(1)(b) (making it unlawful to count "any tips or gratuities bestowed upon the employees" in a calculation of the minimum wage). In this case, on the other hand, the relevant state law is not textually inconsistent with federal law. *Compare* 29 U.S.C. § 206(a) ("Every employer shall pay to each of his employees . . . wages at the following rates . . . ."), *with* Nev. Rev. Stat. § 608.250(1) ("[T]he Labor Commissioner shall, in accordance with federal law, establish by regulation the minimum wage which may be paid to employees in private employment within the State.").

Because we disagree with the district court's interpretation of federal law, its dismissal of these state law claims cannot stand.

B

In claims under Nevada Revised Statutes §§ 608.040 and 608.050, the farmworkers allege that Peri & Sons failed to pay wages due under their employment

contracts. The success of these claims depends upon the success of the contract claims discussed above. Because we conclude that the farmworkers adequately pled their claims for breach of contract, we also conclude that the district court should not have dismissed their state law causes of action for wages due under those contracts.

The district court, however, dismissed the farmworkers' claims under § 608.140 for a different reason. Section 608.140 only permits a plaintiff to recover attorneys' fees when the plaintiff establishes "that a demand has been made, in writing, at least 5 days before suit was brought, for a sum not to exceed the amount" recovered. Nev. Rev. Stat. § 608.140. Because the farmworkers failed to allege that they had made such a demand, the district court dismissed their claim under § 608.140. The farmworkers did not include any argument about making a demand in their opening brief. As a result, they waived their right to challenge the district court's ruling on this issue. *See Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir. 1988); *Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 738 (9th Cir. 1986). The district court properly dismissed the farmworkers' § 608.140 claim.

V

The district court dismissed all of the farmworkers' wage-and-hour claims to the extent that they accrued before February 16, 2009, applying a two-year statute of limitations.[6] The farmworkers first argue that the

[6] The farmworkers interpret the district court's order as applying a two-year statute of limitations to their breach of contract claims as well. It is not entirely clear whether the district court

district court should not have addressed statute of limitations issues on a motion to dismiss because plaintiffs are not required to counter affirmative defenses in their complaints. They also assert that their state constitutional claims are subject to a four-year statute of limitations, and that their FLSA claims are subject to a three-year statute of limitations.[7] Peri & Sons contends that it was proper for the district court to consider statutes of limitations issues, that the farmworkers waived arguments about longer periods of limitations, and that we, even if we choose to consider such arguments, should reject them.

A

The farmworkers are correct to note that plaintiffs ordinarily need not "plead on the subject of an anticipated affirmative defense." *United States v. McGee*, 993 F.2d 184, 187 (9th Cir. 1993). When an affirmative defense is obvious on the face of a complaint, however, a defendant can raise that defense in a motion to dismiss. *See Cedars-Sinai Med. Ctr. v. Shalala*, 177 F.3d 1126, 1128–29 (9th Cir. 1999) (citing 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure: Civil § 1357 (3d ed. 1998) ("A complaint showing that the governing statute of limitations has run on the plaintiff's claim for relief is the most common situation in which the affirmative defense appears on the face of the pleading and provides a basis for a motion to dismiss under Rule 12(b)(6) . . . ."⟩). In this

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did so, but to the extent it did, it was in error. Nevada law provides a six-year statute of limitations for breach of contract claims. Nev. Rev. Stat. § 11.190(1)(b).

[7] The farmworkers have not challenged the district court's application of a two-year statute of limitations to their claims under Nevada statutes. Accordingly, we do not disturb the district court's ruling on that issue.

case, the statute of limitations issues are apparent on the face of the complaint. The district court, therefore, was correct to address them.

B

With regard to their state constitutional claims, the farmworkers assert that the district court erred in failing to apply a catch-all four-year statute of limitations. *See* Nev. Rev. Stat. § 11.190(2)(c) (requiring "[a]n action upon a . . . liability not founded upon an instrument in writing" to be brought within four years). Peri & Sons argues that the farmworkers cannot present this argument for the first time on appeal. In response, the farmworkers suggest that they did not have an opportunity to raise the argument below because the district court acted *sua sponte* in applying a two-year statute of limitations to their state constitutional claims.

The district court, however, did not act *sua sponte* on this issue. Peri & Sons clearly argued to the district court that the two-year statute of limitations applies to the farmworkers' state constitutional claims. Instead of arguing in favor of a four-year statute of limitations, the farmworkers merely contended that the issue should not be resolved on a motion to dismiss, a contention we have already rejected. The farmworkers' failure to raise the argument below constitutes a waiver. *See Costanich v. Dep't of Soc. & Health Servs.*, 627 F.3d 1101, 1110 (9th Cir. 2010). The district court properly dismissed the state constitutional claims to the extent they accrued more than two years before the farmworkers filed suit.

C

With regard to the FLSA claims, the SAC clearly alleged that Peri & Sons' violations were "deliberate,

intentional, and willful." The farmworkers argue that this allegation was sufficient to implicate the three-year statute of limitations in 29 U.S.C. § 255(a) for "a cause of action arising out of a willful violation." Peri & Sons contends that the farmworkers waived this argument by failing to raise it before the district court. *See Costanich*, 627 F.3d at 1110. The farmworkers, however, argued before the district court that they "adequately alleged that Defendant's FLSA violations were willful" and cited a Supreme Court case discussing the three-year statute of limitations for willful violations. *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 135 (1988) ("Ordinary violations of the FLSA are subject to the general 2-year statute of limitations. To obtain the benefit of the 3-year exception, the Secretary must prove that the employer's conduct was willful . . . .").

While the farmworkers' argument could have been clearer, it ought to be read in light of the contention by Peri & Sons to which they were responding. In front of the district court, Peri & Sons acknowledged that willful violations were subject to a three-year statute of limitations but argued that there was no "factual basis" for finding the purported violations to be willful. Given the apparent source of the disagreement between the parties on the statute of limitations question, it was reasonable for the farmworkers to focus on the contested issue rather than the conceded one in their submission to the district court. On these facts, the farmworkers' submission was sufficient to raise the issue before the district court. It was not waived.

On appeal, Peri & Sons continues to argue that there is no factual basis for applying the three-year statute of limitations because any violation could not

have been willful when the federal courts have disagreed with each other over the legality of such actions. The opinion on which Peri & Sons relies, *Gaxiola v. Williams Seafood of Arapahoe, Inc.*, 776 F. Supp. 2d 117, 128 (E.D.N.C. 2011), however, arose on summary judgment, not a motion to dismiss. *Id.* at 120. At the pleading stage, a plaintiff need not allege willfulness with specificity. *See* Fed. R. Civ. P. 9(b) ("Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."). We conclude that the farmworkers sufficiently alleged willfulness and that the district court erred in applying a two-year statute of limitations at this stage.

VI

For the foregoing reasons, we reverse the district court's dismissal of the farmworkers' FLSA claims to the extent that they accrued within three years of filing, reverse its dismissal of their breach of contract claims, affirm its dismissal of their claims under § 608.140, and reverse its dismissal of their other state statutory and constitutional claims to the extent that they accrued within two years of filing.[8] We remand for proceedings not inconsistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

[8] Because of their success on this appeal, we award costs to the plaintiffs-appellants.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

[Filed 07/27/11]

3:11-cv-00118-RCJ-VPC

VICTOR RIVERA RIVERA *et al*.,
Plaintiffs,

vs.

PERI & SONS FARMS, INC.,
Defendant.

ORDER

This proposed class action arises out of alleged labor violations by a farm with respect to migrant workers from Mexico. Pending before the Court are a Motion to Dismiss (ECF No. 27), a Motion for Leave to File Second Amended Complaint (ECF No. 34), and Motion for Protective Order (ECF No. 36). For the reasons given herein, the Court grants the motion to amend, grants the motion to dismiss as against the Second Amended Complaint ("SAC"), with leave to amend in part, and denies the motion for protective order.

I. FACTS AND PROCEDURAL HISTORY

Plaintiffs and putative class members are Mexican citizens lawfully admitted to the United States who worked for Defendant Peri & Sons Farms, Inc. ("Peri") in Yerington, Nevada for various periods of time since February 16, 2005. (*See* Second Am. Compl. ¶¶ 1–2, 7, May 16, 2011, ECF No. 34-1). Plaintiffs came to the United States to work pursuant

to H2-A guest-worker visas issued pursuant to 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1188(a)(1) and 20 C.F.R. § 655. (*Id.* ¶¶ 9–10).

When an employer applies to the Department of Labor for H-2A clearance orders ("DOLCO"), it must certify that it has complied (or will comply) with certain requirements under Title 20 of the Code of Federal Regulations, and Defendant made such certifications in this case. (*See id.* ¶ 12). Those requirements include: (1) that workers will be paid wages at or above the adverse effect rate ("AER")[1], *see* 20 C.F.R. § 655.122(l); (2) that the employer will comply with all federal and state employment laws and regulations, *see id.* § 655.135(e) and § 653.501(d)(2)(xii); (3) that the employer will provide required tools, equipment, and supplies necessary to the work free of charge, *see id.* § 655.122(f); (4) that the employer will pay for transportation from the worker's home to the place of employment and subsistence en route, *see id.* § 655.122(h)(1); and (5) that the employer will pay for transportation back to the worker's home and subsistence en route if he completes the contract period, *see id.* § 655.122(h)(2). (*See* Second Am. Compl. ¶ 10).

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[1] The AER is calculated by the Department of Labor to reflect the lowest wage a guest worker can be paid without depressing the wages of similarly employed U.S. workers. *See* 20 C.F.R. § 655.200(c). The AER for agricultural employment in Nevada is "the prevailing wage rate[] in the area of intended employment." *Id.* § 655.207(a)–(b). The prevailing wage rate is determined by the Administrator of the local Wage and Hour Division of the Employment Standards Administration of the Department of Labor, *see* 29 C.F.R. § 1.2(c), who makes the calculation according to predetermined standards, *see id.* § 1.2(a). It is not clear where these rates are published, and Plaintiff does not identify where the prevailing wage rates it provides are published, but the allegation that the wages paid were below the rates cited is sufficient for the purposes of a motion to dismiss.

Plaintiffs allege that the DOLCOs function as privately enforceable employment contracts between Plaintiffs and Defendant, with the Title 20 requirements as terms. (*See id.* ¶ 14).

Plaintiffs allege that each time they traveled from Mexico to Yerington, Defendant required them to pay for hiring or recruitment fees of between $100 and $500, bus fare, Mexican passports, H-2A visa applications, lodging near the U.S. Consulate in Hermosillo, Mexico, and I-94 forms at the U.S.–Mexico border, for a total cost of over $400. (*See id.* ¶¶ 15–18). They also allege that Defendant never reimbursed them for their return travel to Mexico, costing over $100 for each return trip. (*Id.* ¶ 26). They also allege that the work required the use of protective gloves that Defendant did not provide, and that they were forced to pay $10 per week or more for their own gloves. (*See id.* ¶ 20). Plaintiffs argue that all these expenses were incurred primarily for Defendant's benefit, and that Defendant never reimbursed them. (*See id.* ¶ 21).

Plaintiffs also allege that Defendant paid them as little as $6.50 per hour, and that the AER has never fallen below $8.36 since February 16, 2006. (*See id.* ¶ 22). At some times, Defendant paid Plaintiffs at a piece rate rather than an hourly rate, and in addition to not properly counting all pieces (onions) picked, that piece rate often did not equal the AER. (*Id.* ¶ 23). Plaintiffs also argue that they were paid less than the federal and state minimum wages during the first week they worked, because even though they were nominally paid at a rate above the federal and state minimum wages, if one subtracts the expenses Plaintiffs incurred in anticipation of employment from their first week's pay, the resulting wage rate is below the federal and state minimum wages. (*See id.*

¶ 25). Plaintiffs also allege they were not paid for each hour worked, although they do not plead any facts in support. (*See id.* ¶ 25).

Plaintiffs filed the Complaint in this Court on February 16, 2011 and filed the First Amended Complaint ("FAC") on March 7, 2011. Defendant moved to dismiss on April 13, 2011, which motion was timely due to a stipulated extension to respond. The parties stipulated that Plaintiffs could respond to the motion to dismiss through May 16, 2011, and on that date Plaintiffs filed both their response and the present motion for leave to amend the FAC to address concerns in the motion to dismiss. The SAC lists four claims: (1) Minimum Wage Violations Under § 206(a) of the Fair Labor Standards Act ("FLSA"); (2) Breach of Contract (the DOLCOs); (3) State Wage and Hour Law Violations Under Nevada Revised Statutes ("NRS") Sections 608.040, 608.050, 608.140, 608.250, and 608.260; and (4) Minimum Wage Violations Under Article 15, Section 16 of the Nevada Constitution ("Section 16"). The first claim is brought as a collective action under FLSA, and the second through fourth claims are brought as class actions under Rule 23(b)(2) and (3). (*See id.* ¶¶ 27–28).[2] In the interest of efficiency, the Court will grant the motion for leave to

[2] The Court will not at this time consider whether the Rule 23 claims are preempted by the FLSA collective action claim. *See Wang v. Chinese Daily News, Inc.*, 623 F.3d 743, 760–62 (9th Cir. 2010) (holding that the FLSA's § 16(b) opt-in provision did not prevent supplemental jurisdiction over a predominating Rule 23 class action pursuant to California labor laws, but that supplemental jurisdiction was within the district court's discretion). The Court notes, however, that under Rule 23(a)(4) Plaintiffs will have a difficult time showing adequate representation of potentially thousands of foreign migrant workers under an opt-out procedure.

amend and will examine the motion to dismiss as against the SAC. Finally, Defendant has moved for a protective order to stay discovery until the present motion to dismiss is determined. That motion is denied as moot.

II. LEGAL STANDARDS

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action that fails to state a claim upon which relief can be granted. A motion to dismiss under Rule 12(b)(6) tests the complaint's sufficiency. *See N. Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint does not give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering whether the complaint is sufficient to state a claim, the court will take all material allegations as true and construe them in the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). The court, however, is not required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action with conclusory allegations is not sufficient; a plaintiff must plead facts showing that a violation is plausible,

not just possible. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Twombly*, 550 U.S. at 555).

"Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion. However, material which is properly submitted as part of the complaint may be considered on a motion to dismiss." *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citation omitted). Similarly, "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss" without converting the motion to dismiss into a motion for summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Moreover, under Federal Rule of Evidence 201, a court may take judicial notice of "matters of public record." *Mack v. S. Bay Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if the district court considers materials outside of the pleadings, the motion to dismiss is converted into a motion for summary judgment. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001).

III. ANALYSIS

Defendant argues that both the federal and state wage claims are barred by the applicable statutes of limitations. *See* 29 U.S.C. § 255(a); Nev. Rev. Stat. § 608.260. The two-year federal statute of limitations bars only those claims that accrued before February 16, 2009. The state also has a two-year statute of limitations, and Section 16 is silent on the limitation period for minimum wage actions, so the Court will not imply a repeal of section 608.260's two-year limitation period. *See Washington v. State*, 30 P.3d

1134, 1137 (Nev. 2001). The Court will therefore dismiss all federal and state wage claims accruing before February 16, 2009, without leave to amend.

A. Minimum Wage Violations Under § 206(a) of the FLSA

Plaintiffs do not properly allege a traditional failure to pay the federal minimum wage. They allege they were paid as little as $6.50 per hour. But they allege they began working for Defendant in February 2005, and the federal minimum wage has variously been $5.15, $5.85, $6.55, and $7.25 over this time period. The allegations are therefore consistent with liability for failing to pay the nominal minimum wage, but they do not make liability plausible.

Still, there is another theory of liability available. Specifically, Plaintiffs' federal and state minimum wage claims appear to rely on the theory that although Defendant paid Plaintiffs at or above the nominal federal and state minimum wages, when improperly unreimbursed job-related expenses are deducted, the effective wages paid were below the federal or state minimum wages. The Ninth Circuit has recognized with approval the Department of Labor's interpretation of the FLSA to prevent what it characterizes as "kick-backs" that effectively reduce a wage below the minimum wage:

> Whether in cash or other facilities, "wages" cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally or "free and clear." The wage requirements of the Act will not be met where the employee "kicks-back" directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee. This

> is true whether the "kick-back" is made in cash or in other than cash.

See Gordon v. City of Oakland, 627 F.3d 1092, 1095 (9th Cir. 2010) (quoting 29 C.F.R. § 531.35). In *Gordon*, the court rejected the kick-back claim because the employee's reimbursement to the employer for training costs was analogous to an unpaid loan where the employee failed to complete an agreed term of service. *See id.* at 1095–96 (citing *Heder v. City of Two Rivers, Wis.*, 295 F.3d 777 (7th Cir. 2002)). Here, there is no indication that Plaintiffs failed to complete their required terms of service such that failure to make certain reimbursements would be proper. Rather, the allegation is that the employees "kicked back" the value of the transportation costs, work gloves, and other fees that the employer was required by law to provide. Because Defendant was required by law to pay for these expenses but required Plaintiffs to pay for them, Defendant received a benefit from Plaintiffs potentially resulting in an illegally low wage rate.

Defendant correctly responds, however, that the applicable H-2A regulations only require payment of reasonable inbound travel and subsistence expenses, not any immigration expenses, and that the expenses need not be paid until 50% of the contract period is over. *See* 20 C.F.R. § 655.122(h)(1). Defendant notes that Plaintiffs have not alleged that Defendant failed to reimburse the workers for their inbound travel and subsistence, but have simply argued that because the expenses were not paid immediately upon arrival (which the regulation does not require) the first week was effectively worked at below the minimum wage. The Court rejects this argument. The "kick-back" theory is valid, but to properly invoke it in the

present case Plaintiffs would have to allege that after 50% of the work contract period was finished, Defendant had still not paid reimbursable expenses, and that when those expenses were deducted from the wages paid theretofore, the effective wage rate for the first half of the work contract period was below the minimum wage. Plaintiffs have not pled such facts. The Court will therefore dismiss this claim, with leave to amend.

Plaintiffs argue that under *Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228 (11th Cir. 2002), the kick-back theory is properly invoked whenever an employer fails to make the reimbursements during the first week of work. *See id.* at 1237 (citing 29 C.F.R. § 531.35). The Court respectfully disagrees with this interpretation of the regulations. Section 531.35 applies to workers generally, but it is a well accepted principle of statutory construction that "the specific controls the general," *see, e.g.*, *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007), and the regulations applicable specifically to H-2A guest workers require reimbursement only within the first half of the contract period, *see* 20 C.F.R. § 655.122(h)(1). Although the *Arriaga* court correctly noted that employers must comply with cumulative employment regulations that do not directly conflict, *see id.* at 1235 (citing *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 519 (1950)), this does not mean that the requirements of 655.122(h)(1) are incorporated into section 531.35's definition of kick-backs. Section 655.122(h)(1) specifically gives employers of H-2A workers half of the contract period to make the inbound travel and subsistence reimbursements it requires. Only kick-backs as defined under section 531.35 that are incurred before or during the first week of work are counted against the first week's pay

for the purposes of a minimum wage claim. The failure to reimburse inbound travel and subsistence during the first week is simply not a "kick-back" under section 531.35, because under section 655.122(h)(1) no reimbursement is due at that stage for H-2A workers, and section 531.35 does not itself include such requirements under its definition of kick-backs. It makes little sense to treat as a kick-back the failure to pay a reimbursement that is not yet due.

Section 531.35 does not itself treat as a kick-back the failure to make reimbursement for inbound travel and subsistence, but only for the self-provision of "tools of the trade" by the employee and other such direct benefits to the employer. *Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393, 400–01 (5th Cir. 2010) (en banc). Although *Castellanos-Contreras* concerned H-2B workers, for whom inbound transportation and subsistence is not specifically required, the Fifth Circuit found that section 531.35 did not itself require these kinds of reimbursements because inbound travel and subsistence are simply not "tools of the trade" that primarily benefit the employer. Plaintiffs do more than read sections 531.35 and 655.122(h)(1) as cumulative requirements; they attempt to read section 531.35 as *incorporating* the travel and subsistence reimbursement requirements of section 655.122(h)(1) into section 531.35's definition of kick-backs. Although such a result is a theoretical possibility, the argument must rely on more than the basic doctrine of cumulative requirements. It must rely either on a statutory interpretation that the travel and subsistence here falls under section 531.35's definition of a kick-back (in which case there is no need to invoke section 655.122(h)(1) at all), or it must rely on a statutory construction

under which section 655.122(h)(1) is incorporated by section 531.35. Section 531.35 incorporates section 531.32(c), which in turn incorporates 29 C.F.R. § 778.217. *See Wass v. NPC Int'l, Inc.*, 688 F. Supp. 2d 1282, 1286 (D. Kan. 2010). But travel expenses under section 778.217(b)(3) and (b)(5) include only travel expenses incurred "over the road" *while* working for the employer, as well as the expenses incurred when an employer reassigns a worker to a new town after work has begun in another town. The travel expenses incurred for a worker to move to a town to begin work in the first instance, as here, are not covered. Therefore, the failure to pay the kinds of expenses at issue here are simply not "kickbacks" under section 531.35 itself. For example, an employer is not generally expected to pay inbound travel costs for a construction worker to get from Ohio to Nevada to work on a project. If a worker from Ohio desires to work in Nevada, he has to pay his own way to the state, and any reimbursement for that travel would be a gratuity. And section 531.35 does not otherwise incorporate 655.122(h)(1), directly or indirectly.

The Court believes the Eleventh Circuit incorrectly applied the doctrine of cumulative requirements not simply to pile requirements atop one another, but rather to incorporate provisions of one requirement into those of another in a way that the doctrine does not require and that ordinary principles of statutory construction and interpretation do not support under these circumstances. *See Arriaga*, 305 F.3d at 1235–36 ("If the FLSA mandates that employers reimburse certain expenses at an earlier time than the H-2A regulations, requiring employers to do so would satisfy both statutes."). The above-quoted statement assumes something that the *Arriaga* court failed to examine, i.e., that inbound travel and subsistence

falls under section 531.35's definition of kick-backs directly, or that section 531.35 directly or indirectly incorporates section 655.122(h)(1). The only court of appeals actually to address the first question has answered "no," *see Castellanos-Contreras*, 622 F.3d at 400–01, and is it clear that section 531.35 does not directly or indirectly incorporate section 655.122(h)(1).

B. Breach of Contract

The terms of DOLCO may be privately enforced by employees against employers who agree to them. *See Frederick Cnty. Fruit Growers Ass'n, Inc. v. Martin*, 968 F.2d 1265, 1268 (D.C. Cir. 1992). Under this claim, Plaintiffs mainly reiterate the wage claims. It is possible that Defendant breached specific terms of the DOLCO, but Plaintiffs must pled such facts. Defendant argues that the DOLCO in this case do not contemplate reimbursement for travel during the first week of employment, but only within the first half of the contract period, as required under the CFR. Defendant also argues that the DOLCO do not require any reimbursement for outbound travel at all. However, even after amendment, these determinations will require an examination of the DOLCO themselves. The Court will therefore dismiss the breach of contract claim, with leave to amend to plead specific breaches of the DOLCO.

C. State Wage and Hour Law Violations Under Section 16 of Article 15 of the Nevada Constitution and NRS Sections 608.040, 608.050, 608.140, 608.250, and 608.260

First, section 608.040 provides "waiting penalties" for employers who fail to pay all wages due to employees who resign, quit, or are discharged. Assuming for the sake of argument that this statute applies to employees who leave a job amicably, the

remedy should be available in this case if Plaintiffs can show they were owed wages they were never paid.

Second, section 608.050 appears to provide a similar, and perhaps redundant, remedy to employees who are involuntarily discharged.

Third, section 608.140 provides for reasonable attorney's fees for a successful wage plaintiff where the plaintiff makes a written demand to the employer for an amount not exceeding the amount awarded by the court at least five days before filing suit. Plaintiffs make no allegation that they made such demands, and the Court will therefore dismiss the section 608.140 claim, with leave to amend.

Fourth, section 608.250 empowers the Labor Commissioner to set a minimum hourly wage. Nevada's current minimum wage is $8.25. The Nevada Administrative Code notes that the minimum wage is $6.15 per hour, *see* Nev. Admin. Code § 608.100(1)(b),[3] but notes that the Labor Commissioner may increase the rates for inflation in accordance with Section 16 of Article 15 of the Nevada Constitution, *see id.* at § 608.100(2). Section 16 provides for $6.15 per hour and notes:

> These rates of wages shall be adjusted by the amount of increases in the federal minimum wage over $5.15 per hour, or, if greater, by the cumulative increase in the cost of living. The cost of living increase shall be measured by the percentage increase as of December 31 in any year over the level as of December 31, 2004 of the Consumer Price Index (All Urban Consumers,

[3] Assuming Plaintiffs were not offered qualified health insurance.

> U.S. City Average) as published by the Bureau of Labor Statistics, U.S. Department of Labor or the successor index or federal agency. No CPI adjustment for any one-year period may be greater than 3%. The Governor or the State agency designated by the Governor shall publish a bulletin by April 1 of each year announcing the adjusted rates, which shall take effect the following July 1. Such bulletin will be made available to all employers and to any other person who has filed with the Governor or the designated agency a request to receive such notice but lack of notice shall not excuse noncompliance with this section. An employer shall provide written notification of the rate adjustments to each of its employees and make the necessary payroll adjustments by July 1 following the publication of the bulletin.

Nev. Const. art. 15, § 16(A). In other words, the NAC simply implements Section 16. The Section 16 claim is therefore redundant with (or supersedes) the section 608.250 claim. An aggrieved employee may bring a private action under Section 16 for back pay, damages, reinstatement, injunctive relief, and other legal and equitable remedies and may be awarded reasonable attorney's fees and costs if successful. *See id.* § 16(B). As with the federal minimum wage claims, Plaintiffs do not clearly allege that they were ever paid nominally at a rate below the state minimum wage. However, they appear to allege the same "kick-back" theory under state law. The Nevada Supreme Court does not appear to have considered the kick-back theory, but the Court believes that it would adopt it. The federal and state minimum wage laws exist for the same purpose: to ensure a minimum compensation for each hour worked. When an employee is required to provide a benefit to an

employer as a condition of employment, the hourly compensation is effectively reduced. Still, the Court will dismiss, with leave to amend, for the same reason it dismisses the federal wage claims with leave to amend: Plaintiffs have simply not pled facts making a minimum wage violation plausible.

Finally, section 608.260 provides for a civil action. This section has become redundant with (or has been superseded by) Section 16.

CONCLUSION

IT IS HEREBY ORDERED that the Motion for Leave to File Second Amended Complaint (ECF No. 34) is GRANTED.

IT IS FURTHER ORDERED that the Motion to Dismiss (ECF No. 27) is GRANTED as against the Second Amended Complaint, with leave to amend as to the breach of contract claims generally and as to the federal and state wage claims insofar as the latter arose on or after February 16, 2009.

IT IS FURTHER ORDERED that the Motion for Protective Order (ECF No. 36) is DENIED.

IT IS SO ORDERED.

Dated this 26th day of July, 2011.

/s/ Robert C. Jones
Robert C. Jones
United States District Judge

APPENDIX C

29 C.F.R. § 531.3 General determinations of "reasonable cost."

(a) The term *reasonable cost* as used in section 3(m) of the Act is hereby determined to be not more than the actual cost to the employer of the board, lodging, or other facilities customarily furnished by him to his employees.

(b) *Reasonable cost* does not include a profit to the employer or to any affiliated person.

(c) Except whenever any determination made under § 531.4 is applicable, the "reasonable cost" to the employer of furnishing the employee with board, lodging, or other facilities (including housing) is the cost of operation and maintenance including adequate depreciation plus a reasonable allowance (not more than 5 1/2 percent) for interest on the depreciated amount of capital invested by the employer: *Provided*, That if the total so computed is more than the fair rental value (or the fair price of the commodities or facilities offered for sale), the fair rental value (or the fair price of the commodities or facilities offered for sale) shall be the reasonable cost. The cost of operation and maintenance, the rate of depreciation, and the depreciated amount of capital invested by the employer shall be those arrived at under good accounting practices. As used in this paragraph, the term "good accounting practices" does not include accounting practices which have been rejected by the Internal Revenue Service for tax purposes, and the term "depreciation" includes obsolescence.

(d)(1) The cost of furnishing "facilities" found by the Administrator to be primarily for the benefit or convenience of the employer will not be recognized as

reasonable and may not therefore be included in computing wages.

(2) The following is a list of facilities found by the Administrator to be primarily for the benefit of [sic] convenience of the employer. The list is intended to be illustrative rather than exclusive: (i) Tools of the trade and other materials and services incidental to carrying on the employer's business; (ii) the cost of any construction by and for the employer; (iii) the cost of uniforms and of their laundering, where the nature of the business requires the employee to wear a uniform.

29 C.F.R. § 531.32 "Other facilities."

(a) "Other facilities," as used in this section, must be something like board or lodging. The following items have been deemed to be within the meaning of the term: Meals furnished at company restaurants or cafeterias or by hospitals, hotels, or restaurants to their employees; meals, dormitory rooms, and tuition furnished by a college to its student employees; housing furnished for dwelling purposes; general merchandise furnished at company stores and commissaries (including articles of food, clothing, and household effects); fuel (including coal, kerosene, firewood, and lumber slabs), electricity, water, and gas furnished for the noncommercial personal use of the employee; transportation furnished employees between their homes and work where the travel time does not constitute hours worked compensable under the Act and the transportation is not an incident of and necessary to the employment.

(b) Shares of capital stock in an employer company, representing only a contingent proprietary right to participate in profits and losses or in the assets of the company at some future dissolution date, do not

appear to be "facilities" within the meaning of the section.

(c) It should also be noted that under § 531.3(d)(1), the cost of furnishing "facilities" which are primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages. Items in addition to those set forth in § 531.3 which have been held to be primarily for the benefit or convenience of the employer and are not therefore to be considered "facilities" within the meaning of section 3(m) include: Safety caps, explosives, and miners' lamps (in the mining industry); electric power (used for commercial production in the interest of the employer); company police and guard protection; taxes and insurance on the employer's buildings which are not used for lodgings furnished to the employee; "dues" to chambers of commerce and other organizations used, for example, to repay subsidies given to the employer to locate his factory in a particular community; transportation charges where such transportation is an incident of and necessary to the employment (as in the case of maintenance-of-way employees of a railroad); charges for rental of uniforms where the nature of the business requires the employee to wear a uniform; medical services and hospitalization which the employer is bound to furnish under workmen's compensation acts, or similar Federal, State, or local law. On the other hand, meals are always regarded as primarily for the benefit and convenience of the employee. For a discussion of reimbursement for expenses such as "supper money," "travel expenses," etc., see § 778.217 of this chapter.

29 C.F.R. § 531.35 "Free and clear" payment; "kickbacks."

Whether in cash or in facilities, "wages" cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally or "free and clear." The wage requirements of the Act will not be met where the employee "kicks-back" directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee. This is true whether the "kick-back" is made in cash or in other than cash. For example, if it is a requirement of the employer that the employee must provide tools of the trade which will be used in or are specifically required for the performance of the employer's particular work, there would be a violation of the Act in any workweek when the cost of such tools purchased by the employee cuts into the minimum or overtime wages required to be paid him under the Act. See also in this connection, § 531.32(c).

29 C.F.R. § 531.36 Nonovertime workweeks.

(a) When no overtime is worked by the employees, section 3(m) and this part apply only to the applicable minimum wage for all hours worked. To illustrate, where an employee works 40 hours a week at a cash wage rate of at least the applicable minimum wage and is paid that amount free and clear at the end of the workweek, and in addition is furnished facilities, no consideration need be given to the question of whether such facilities meet the requirements of section 3(m) and this part, since the employee has received in cash the applicable minimum wage for all hours worked. Similarly, where an employee is employed at a rate in excess of the applicable minimum wage and during a particular workweek works 40

hours for which the employee receives at least the minimum wage free and clear, the employer having deducted from wages for facilities furnished, whether such deduction meets the requirement of section 3(m) and subpart B of this part need not be considered, since the employee is still receiving, after the deduction has been made, a cash wage of at least the minimum wage for each hour worked. Deductions for board, lodging, or other facilities may be made in nonovertime workweeks even if they reduce the cash wage below the minimum wage, provided the prices charged do not exceed the "reasonable cost" of such facilities. When such items are furnished the employee at a profit, the deductions from wages in weeks in which no overtime is worked are considered to be illegal only to the extent that the profit reduces the wage (which includes the "reasonable cost" of the facilities) below the required minimum wage. Facilities must be measured by the requirements of section 3(m) and this part to determine if the employee has received the applicable minimum wage in cash or in facilities which may be legitimately included in "wages" payable under the Act.

(b) Deductions for articles such as tools, miners' lamps, dynamite caps, and other items which do not constitute "board, lodging, or other facilities" may likewise be made in non-overtime workweeks if the employee nevertheless received the required minimum wage in cash free and clear; but to the extent that they reduce the wages of the employee in any such workweek below the minimum required by the Act, they are illegal.

APPENDIX D

U.S. DEPARTMENT OF LABOR
Secretary of Labor
Washington, D.C.

May 11, 1994

The Honorable Martin Lancaster
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Lancaster:

Given the seriousness of the concerns raised in the April 20 letter from you and your colleagues in the North Carolina Congressional delegation, I wish to clear the air immediately with respect to at least one issue.

Specifically, you asked about the Department of Labor's interpretation and enforcement of the Fair Labor Standards Act (FLSA) as it applies to worker-incurred transportation expenses when these costs reduce a worker's earnings below the Federal minimum wage. The Department has for many years been of the view that costs incurred by employees for the benefit of the employer may not properly be borne by employees if and to the extent that they reduce wages in a pay period below the statutory minimum. Questions regarding the application of this principle to transportation have been under examination by the Wage and Hour Administrator. This review responds to employers' requests—primarily from agricultural employers—that the Department's policy be clarified and more consistently applied across the country. The Administrator had contemplated issuing an opinion

letter to clarify the requirements, the established form for issuing interpretations of the FLSA.

We have been apprised about the possible negative impact of a policy interpretation which holds that worker-incurred transportation costs are always primarily for the benefit of the employer, and strict enforcement by the Department of such a policy on agricultural and other labor markets. According to agricultural producer representatives, these potential impacts may include both additional costs to the employer and the possible further destabilization of an already unstable agricultural work force. Yet, there is also the need to protect farmworkers' wages, already at a minimum level, as required by law. In this context, the Administrator has continued her examination and has not yet issued an opinion letter or other guidance.

Moreover, we are examining anew whether an opinion letter would be the proper mechanism for clarifying this matter, or whether formal rulemaking should be undertaken. In that regard, I understand that the Administrator and staff from the Department of Agriculture have been meeting to consider this particular issue.

Further, at this time we have not ascertained the specific facts relating to workers' travel arrangements to North Carolina that would allow us to determine if reimbursement of transportation expenses even might be an issue. Accordingly, pending resolution of the policy and procedural issues relating to the treatment of transportation expenses, we are not prepared to assert violations in this area under the FLSA.

We are preparing a more detailed response to the other matters raised in your April 20th letter, but we

share the view that the transportation expense issue needed to be addressed immediately.

I appreciate your interest in matters relating to agriculture. We will continue to work with you and your staff on the resolution of this particular matter and trust we can count on your active support and involvement as we continue our efforts to stabilize the agricultural labor market and improve the quality of life of the nation's farmworkers.

Again, thank you for your interest in this matter.

Sincerely,

/s/ Robert B. Reich
Robert B. Reich

U. S. Department of Labor [SEAL]
Employment Standards Administration
Wage and Hour Division
61 Forsyth St. SW
Atlanta, Georgia 30303

February 18, 2000

Honorable Lindsey Graham
House of Representatives
129 Federal Building
120 Main Street
Greenwood, South Carolina 29646

Re: Constituent Correspondence (Frock Forestry and Southeastern Forestry Association); Reply of Wage and Hour District Director Stuckey on subject of transportation expenses of workers

Dear Congressman Graham:

On October 21, 1999 you forwarded a "statement" received from your constituent, Mr. Scott Frock, a Saluda, SC reforestation contractor concerning transportation costs associated with workers travelling to a job site from a point of remote recruitment. Specifically, the statement you forwarded was what we might view as a disclosure statement indicating Mr. Frock's intent to require persons he hired from outside the United States to solely bear the cost of their transportation. The statement also indicates that Mr. Frock and/or his firm ". . . will not be held liable . . ." for such costs. Your October 21 letter requested an indication from our district office in South Carolina as to the Department's ". . . policy on who bears the cost of transportation in the H2B Program."

Subsequently, by letter dated October 26, 1999, District Director Jerry Stuckey responded to your request. In his letter Director Stuckey indicated that the referenced ". . . H2B program does not require an employer to bear the cost of transportation (but that) . . . under another applicable stature, the Migrant and Seasonal Agricultural Workers Protection Act (MSPA)" that there were circumstances under which the employer might be held responsible for such costs. Director Stuckey said this might be true, under MSPA, for example where the employer promised to pay such costs—i.e., that this would create a contract promise of the employer which would be enforceable under MSPA. The positions outlined by Director Stuckey are correct, though more might have been said in regard to the FLSA and MSPA and how liability for such costs could accrue to the employer.

Then, by letter you sent dated November 4, 1999, you forwarded to Director Stuckey other correspondence received in your Greenwood office from a Mr. Michael Economopoulos of the South Eastern Forestry Contractors Association, an Arkansas-based association of reforestation contractors such as Mr. Frock. The Economopoulos letter to you referenced Director Stuckey's October 26 response and, incorrectly I believe, represented that Director Stuckey's reply ". . . does not really answer the question, is misleading and contradictory to stated Wage and Hour policy." I disagree.

I hope by this letter to outline for you, and the other interested parties, what policy statements have been made by our agency and to clarify any past misunderstanding of this by Mr. Economopoulos, or others. I feel especially qualified to discuss what has been stated by agency personnel in meetings held with the industry

in Atlanta, GA, in Portland, OR and in Bangor, ME as I attended and was a co-presenter at each of those meetings. Mr. Economopoulos attended the meeting in Atlanta.

First, Director Stuckey's comments to the effect that there are no specific H2B rules requiring transportation reimbursement and that the MSPA might under specific circumstances require the employer to pay such expenses, are entirely accurate. The H2B, unlike provisions of the H2A rules, has no direct enforcement mechanism or regulatory provisions setting forth rules for the employer. What does exist is the worker contract—which can be enforced by the worker as a matter of contract law; can be administered by the Employment and Training Administration of the Department of Labor via that agency's ability to certify/decertify an employer from the program; and portions of the law (such as the rate of pay, etc.) are potentially enforceable under provisions of the FLSA and the MSPA. Thus, if the employer initially agrees to pay transportation for a foreign H2B worker—or any other migrant, and if such worker(s) were employed in an occupation determined to be MSPA covered, then the employer would be required to carry through on that promise. Further, the MSPA also requires that an employer advise all covered employees of every material term/condition of employment—that the employer "disclose" all pertinent working conditions. Failure on the part of an employer to properly disclose something such as who bears the costs associated with the worker's transportation costs could result in the employer being held liable for such costs. It is thus essential that all MSPA covered employers ensure that every worker be provided a proper disclosure and, in the case of a migrant worker (such as H2B workers from Mexico or

other foreign sites), this disclosure be given such worker at the time of recruitment.

Another important Wage and Hour Division administered statue, not mentioned by Director Stuckey since your request inquired only re: the H2B, is the Fair Labor Standards Act (FLSA). The FLSA is the law of most general application to all employment—covering virtually all industries and most workers in U.S. employment. Among other things the FLSA contains the federal minimum wage and overtime pay provisions and the Act includes regulations governing deductions from workers' wages. This law must always be given consideration in any such pay or deduction situation since it requires that deductions from workers' pay must never exceed actual costs, that amounts deducted must be reasonable, and that there must exist prior to the fact of any deduction being made, an agreement or understanding between the worker and the employer as to the amounts/basis for any and all deductions—that this must be done prior to a worker being employed.

Aside from expanding on Director Stuckey's prior guidance, I must also speak to Mr. Economopoulos' allegations that the guidance given Mr. Frock was . . . "misleading and contradictory to state Wage and Hour policy." As I earlier noted, Director Stuckey might have said more but, what he did state is accurate and is certainly not contradictory to agency policy. I must therefore presume that Mr. Econompolous has not received guidance sufficiently clear or that he has simply misunderstood what we have stated.

It is, and has been, the policy of our agency that any costs borne by an employee for something which "primarily benefits the employer" is a cost which

cannot be passed along to a worker. Thus in any case wherein a cost has been shifted to a worker we must first determine who is the primary beneficiary—the employer or the employee.

In the case of transportation costs there has been some disagreement. The conflict involves a conversation about the employer primarily being the beneficiary due to that employer being unable to find local/domestic workers and thus going great distances into foreign countries to bring in necessary help—thus greatly benefitting. The other side of the conversation argues that foreign workers, whose home country economies might be very poor and result in high unemployment, creates a circumstance under which those workers might greatly benefit via employment in the United States. As a result of this our agency, by Congressional correspondence from former Secretary Reich on May 11, 1994 and a letter to an agricultural association from former Wage and Hour Administrator Echaveste on June 30, 1994, each stated that: **"Accordingly, pending resolution of the policy and procedural issues relating to the treatment of transportation expenses, we are not prepared to assert violations in this area under the FLSA."**

The above policy position was stated in light of circumstances wherein the employer was in no manner involved in transportation costs—either via advancing funds to the workers or purchasing their tickets, etc., and then recouping those costs by payroll deductions. It remains our policy, under both FLSA and MSPA, that the intent to require such a deduction must be disclosed in detail prior to employment. It is further our policy that if the employer is involved in the recouping of costs via payroll deductions from the wages of workers, such deductions may not reduce a

worker's pay below the applicable and appropriate minimum wage. That "minimum wage" level may be the federal minimum of $5.15 per hour; the worker's "regular rate" in an overtime workweek; it could be a higher contract wage under a contract with the Forestry Service—this via the McNamara-O'Hara Service Contracts Act; or a higher state minimum; or it could also be the wage determined to be the Prevailing Wage per the worker's H2B contract.

So, in summary, as stated by the former Secretary and former Wage and Hour Administrator, our agency "is not prepared (under the FLSA) to assert violations" regarding transportation costs if the employer is in no manner involved, if the worker makes his own arrangements and pays all costs and there are no payroll deductions. There are though other rules which must be followed—these extending beyond simply the FLSA. For example, if the contract is a Service Contract with a wage determination, no deduction could bring a worker's pay below that determined wage level—a level possibly higher than the FLSA minimum. Further, an employer who failed to properly disclose to a MSPA covered worker, would not be permitted to allow any such cost to accrue to a worker—and that would be enforced under MSPA wage provisions which would not permit intrusion on wages below the wage level promised, quite likely higher than the FLSA; not ever less than the greater of the FLSA minimum or any Prevailing Wage stated in the H2B contract. Further, as many of the reforestation contractors travel among several states, each of these employers would be well advised to learn the state law on deductions as many such jurisdictions do not permit any form of deduction. Such state statute would be concurrently enforceable under MSPA, if not the FLSA.

Mr. Frock's "statement" of his intent to require workers to pay their own costs getting from their home country to the United States would meet the obligation he would have under MSPA to disclose this condition of employment and is a very necessary protection for him, as well as knowledge critical to any potential worker. He would be well advised to continue to use some such document and ensure that every remotely recruited worker was provided such a statement at the time they were recruited in their home country. Otherwise, at least under MSPA, he would face potential liability for such costs. If he does the proper disclosure, and if he is in no way involved in recovery of costs he might have—e.g., if the worker entirely handles their own arrangements with their own funds—and if there is no other contractual obligation under a state law, or H2B or the Service Contracts Act—then the only remaining statutory obligation which an employer might have would be via FLSA. So far as that statute is concerned we have, per statements quoted above, earlier indicated a non-enforcement position as regards transportation related costs. I would add that while we are not presently taking a position—per statements of the former Secretary and Administrator in 1994, a worker might still file a private action against an employer to recover such costs. The right of a worker to pursue such private action was not negated by our agency's decision to take a non-enforcement posture on this issue. Certain courts have ruled that these costs are primarily an employer benefit and have ordered employers to pay workers for costs the workers have incurred re: travel from a foreign country to a place of employment.

I trust the above, along with copies of referenced 1994 correspondence I am enclosing, will be responsive

to concerns raised by your constituents. I also apologize for the length of time for this response and appreciate your patience and that of your staff member, Van Cato. Please advise me if I can be of further assistance in this matter.

Sincerely,

/s/ Alfred H. Perry
Alfred H. Perry
Regional Administrator

Enclosures

ccs: Michael Kerr, Administrator; Michael Hancock, Director Farm Programs; Jerry Stuckey, District Director/South Carolina

U.S. DEPARTMENT OF LABOR
Assistant Secretary for Congressional and
Intergovernmental Affairs
Washington, D.C. 20210

May 30, 2001 [SEAL]

The Honorable John W. Warner
United States Senate
Washington, D.C. 20510

Dear Senator Warner:

Thank you and your colleagues for your letter to Secretary Chao on behalf of agricultural employers in the Commonwealth of Virginia. We appreciate the importance of agriculture to Virginia's economy and the historical role of temporary foreign labor in that industry and regret the delay in responding to your concerns. While we have carefully considered the points you raise, to the extent that your inquiry touches upon any ongoing law enforcement, we must respectfully decline to discuss specifics related to those cases.

Let me first summarize the Department of Labor's existing policy with regard to enforcing the general Fair Labor Standards Act (FLSA) interpretation on worker-incurred transportation costs. Employers are liable for worker-incurred transportation costs for remotely-hired workers from their point of hire to the employer's worksite. In 1994, in letters to Members of Congress and the North Carolina Growers Association (NCGA), the Department stated that it was not prepared to assert FLSA violations for such transportation costs while various policy and procedural issues related to the interpretation were being reviewed. A 1996 follow-up letter to the NCGA

(copy enclosed) re-affirmed this position, but clarified that it applied only where there was no advance or direct involvement of the employer or its agent. However, the follow-up letter stressed that the FLSA general standard would continue to be applied when the employer (or its agent) advanced the cost of transportation to the worker, and then recovered the cost through payroll deductions or other means, or when the employer provided the transportation and the worker paid transportation expenses directly to the employer (or its agent). This position on transportation costs seems to have been generally understood and acknowledged throughout the agricultural industry, which has not actively pursued final resolution of the proposed policy review or contested the position set forth in the 1994 and 1996 letters. Therefore, the Department will continue to take this enforcement position on transportation until, as indicated in the 1994 correspondence, the employer community is fully notified, either through opinion letter or formal rulemaking, of the Department's findings after a full policy review of this issue.

As you noted in your letter, foreign agricultural workers under the H-2A program may have to pay the cost of their transportation and subsistence from the place of recruitment to the employer's job site. And as you also point out, the employer is not required to reimburse its employees for those in-bound transportation costs until the employees have completed 50 percent of their contract work period. Employers' FLSA obligations operate—as a matter of law—separately and independently from the H-2A's standards. However, in enforcing the FLSA for H-2A workers, the Department's general policy is to ensure that workers receive transportation reimbursement by the time they complete 50 percent of their contract

work period (or shortly thereafter) rather than insisting upon reimbursement at the first pay period.

Let me also assure you that there has been no change in the Department's enforcement concerning who must register as a farm labor contractor. The Migrant and Seasonal Agricultural Worker Protection Act specifically states that neither an agricultural employer (or his/her employees) nor an agricultural association (or its employees) is a farm labor contractor under the statute. However, a third party who is not an employee of but is used by an agricultural employer or agricultural association to perform farm labor contracting activities is not excluded and may be required to register as a farm labor contractor.

As a labor-intensive industry, agriculture is particularly sensitive to economic factors such as fluctuations in employment markets, immigration trends, and migration patterns. These fluctuations in turn trigger new and varying employment practices among agricultural employers as they seek to ensure an adequate supply of labor. In such cases, the Department must assess the application of existing regulations and policies to new and growing industry practices or to different factual situations than ones previously encountered. In your letter, you refer to various additional costs and fees like passport and visa costs, recruitment fees, and border crossing charges. We understand that in the past these were costs for which the industry assumed responsibility. They were not raised by the industry in its prior correspondence, and therefore not addressed in the 1994 and 1996 opinions. The National Council of Agricultural Employers (NCAE), however, has recently asked the Department about the application of the FLSA policy

to what we believe are these novel fact situations, including the payment of so-called "recruitment costs" by farmworkers. Staff from the Department's Wage and Hour Division and Office of the Solicitor are examining this request and will respond directly to the NCAE in the near future. We would be pleased to provide you a copy of that response as soon as it is available.

Please know that the Department is committed to ensuring that all employers are fully informed on the requirements of the various laws and have access to technical compliance assistance. Likewise, we are obligated to ensure fair treatment for farmworkers under our wage and hour laws. As always, my staff is willing to discuss these policies with your and your colleagues' staffs if that would be of assistance.

Thank you, again, for bringing this matter to our attention, and I apologize for such a delayed response.

Sincerely,

/s/ Kristine A. Iverson
Kristine A. Iverson

Enclosure