No. 13-950

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

BRIEF OF THE NATIONAL COUNCIL OF AGRICULTURAL EMPLOYERS, AMERICAN HORTICULTURE INDUSTRY ASSOCIATION, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE* [1]

All of following organizations listed as *amici curiae* represent employers throughout the United States that use the H-2A or H-2B programs. They operate businesses large and small throughout the country, including in states in the Fifth, Ninth, and Eleventh Circuits—the three circuits that have reached conflicting decisions with respect to the issue presented in this case. They face inconsistent interpretations of the requirements of the Fair Labor Standards Act ("FLSA") and ask this Court to provide a consistent rule of law to apply throughout the nation. They file this brief in support of Peri & Sons Farms, Inc.'s petition for a *writ of certiorari.*

The National Council of Agricultural Employers ("NCAE"), founded in 1964, is the only national association focusing exclusively on agricultural labor issues from the agricultural employer's viewpoint. NCAE's membership, including farmers represented by its association members, represents an estimated two-thirds of all U.S. agricultural employers directly engaged in the labor-intensive production of food and nursery crops in the United States. Many members use the H-2A program, and a substantial number of the H-2A employers in the U.S. are NCAE members. Approximately one-third of NCAE's members are

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[1] Pursuant to Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part. No person or entity other than *amici*, their members, and their counsel has made a monetary contribution to the preparation and submission of this brief. Pursuant to Rule 37.2(a), counsel of record for all parties received notice of the intention to file an *amicus curiae* brief at least ten days prior to the due date for the brief. The parties have consented to the filing of this brief and their letters of consent accompany this brief.

located in states under the jurisdiction of the Ninth Circuit, and nearly half of NCAE's members are located within the Fifth, Ninth, and Eleventh Circuits.

The American Horticulture Industry Association supports nearly 16,000 member companies throughout the United States, including breeders, greenhouse and nursery growers, garden retailers, distributors, landscapers, and florists. Many AmericanHort nursery and landscape members rely on the H-2A and/or H-2B visa programs. The U.S. Department of Labor (DOL) reports that landscaping employers are by far the largest users of the H-2B program, using more foreign workers than the next 10 largest occupations combined, and nearly 6 times as many foreign workers as the second largest occupation. *See* U.S. Dep't of Labor, *H-2B Temporary Non-Agricultural Labor Certification Program—Selected Statistics FY 2013 YTD*, http://tinyurl.com/H2BStats2013.

The American Farm Bureau Federation (AFBF) is a general farm organization formed in 1919 to protect, promote and represent the business, economic, social, and educational interests of more than 6 million member families in all 50 states and Puerto Rico. Many of AFBF's member families own and operate farms and ranches that produce every type of agricultural product grown and raised in the nation. Of those member families, many hire labor from outside the farm and rely on the H-2A and/or H-2B visa programs.

The National Council of Farmer Cooperatives (NCFC) has been the voice of America's farmer cooperatives since 1929. NCFC's members include regional and national farmer cooperatives, which are in turn composed of over 2,500 local farmer

cooperatives across the country, and 21 state and regional councils of cooperatives. Many farmer cooperatives and their farmer owners depend on the H-2A and H-2B visa programs to hire temporary workers to supplement their workforce and successfully run their operations.

Most of the other *amici* represent agricultural employers in a particular region of the United States: African-American Farmers of California; Florida Fruit and Vegetable Association; Georgia Fruit and Vegetable Growers Association; Grower-Shipper Association of Central California; the New England Apple Council; the Nisei Farmers League (California); Snake River Farmers Association (Idaho); Texas Citrus Mutual; Texas Vegetable Association; Ventura County Agricultural Association (California); and Western Growers Association (Arizona, California and 30 other states).

Other *amici* are national organizations representing a particular sector of American agriculture: the U.S. Apple Association; and U.S. Custom Harvesters, Inc. The remaining *amici* are employers (Ocean Breeze Ag Management, LLC) or agents that assist employers throughout the U.S. in the H-2A and H-2B application process: Agriculture Workforce Management Association, Inc.; Labor Consultants International; Mid-Atlantic Solutions/MAS Labor; and PLUTO, Inc./USA Farm Labor.

Many of the employers represented by these groups use both H-2A workers for field production of crops and H-2B workers for packing, handling, and shipping these crops after harvest. The two visa programs are of critical importance to these groups.

INTRODUCTION

This case presents a critical issue for employers using the H-2A and H-2B visa programs to secure an adequate and legal workforce. Since 2009, the Department of Labor has interpreted the FLSA's minimum wage provisions to require reimbursement of H-2A and H-2B employees for transportation expenses when that employee travels to take a job. The Ninth and Eleventh Circuits, in 2013 and 2002 respectively, took the same position for H-2A and H-2B workers. The Fifth Circuit reached a contrary result in 2010. As noted by Petitioner, there is now an acknowledged and clearly developed split among the courts of appeals as to whether the FLSA requires employers to reimburse H-2A and H-2B workers' pre-employment travel and immigration expenses. Pet. 15-22.

This uncertainty has a high cost for employers like those represented by *amici*, forcing small businesses to make difficult decisions without knowing what the law is or how it will be enforced against them by DOL or the plaintiffs' bar. The circuit conflict creates confusion for employers depending upon the location of their businesses and uncertainty about potential retroactive liability in those Circuits that have not addressed the issue. Moreover, interpreting the FLSA to require employers to reimburse pre-employment travel and immigration expenses in the first pay period would have a devastating effect on the continued viability of their businesses.

Each year, nearly 200,000 foreign workers travel from their home countries to accept employment in the United States in low-skilled seasonal jobs with employers who participate in the H-2A and H-2B visa programs. These programs offer employers the only

legal source of foreign labor where, year after year, sufficient U.S. workers are certified as not available. *Amici* represent employers throughout the U.S. that use the H-2A and H-2B visa programs to obtain foreign workers essential to operate their businesses. They are unable to attract sufficient U.S. workers and want to ensure that the workers they employ are legally authorized to work in the U.S. in compliance with the Immigration Reform and Control Act of 1986. The foreign workers seeking these jobs typically travel from small towns to larger cities, where they pay fees to obtain U.S. consular approval for their visas, as required under U.S. immigration law. After completing the consular process, the workers travel to prospective employers' U.S. worksites to begin employment.

Most of these employers are small businesses, in labor-intensive sectors of the economy. DOL has estimated that 98% of H-2A employers are "small farms," 75 Fed. Reg. 6883, 6953 (Feb. 12, 2010), and that "a majority of H-2B employers are small-sized firms whose workforces are comprised predominantly of H-2B workers." 77 Fed. Reg. 10038, 10041 (Feb. 21, 2012). These employers are generally family farms and small landscaping businesses, unable to hire enough U.S. workers to meet their seasonal labor needs and unable to pass along cost increases resulting from changes in the already burdensome visa program regulations.

In order to participate in the H-2A and H-2B programs, these employers bear heavy burdens under the regulations. The H-2A program regulations require employers to provide all nonimmigrant and U.S. workers employed in the same occupation (called

"corresponding" U.S. workers) the following wages and benefits:

- an offered wage rate that is the highest of the adverse effect wage rate set by DOL, prevailing hourly wage or piece rate, an applicable collectively bargained wage, or the federal or state minimum wage[2] (20 C.F.R. § 655.120);
- free housing (655.122(d));
- three meals a day or free kitchen facilities (655.122(g));
- free transportation between the workers' free living quarters and the worksite (655.122(h)(3));
- a guarantee to pay the worker three quarters of the hours offered in the work contract, whether they are worked or not (655.122(i));
- the transportation and daily subsistence cost of the H-2A and U.S. worker from the place from which the worker has come to work for the employer in the U.S. or abroad, paid once at least half of the job order is completed (655.122(h)(1)); and
- return transportation and daily subsistence cost at the end of the job order (655.122(h)(2)).

Employers using the H-2B visa program face comparable burdens under that program's regulations: employers must pay the highest of the minimum wage, the prevailing wage rate as

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[2] The AEWR always exceeds the Federal minimum wage ($7.25/hr), and in the Ninth Circuit ranges from $9.97/hr in Arizona to $12.91/hr in Hawaii. 79 Fed. Reg. 664, 665 (Jan. 6, 2014).

determined by DOL, any applicable collectively bargained wage rate, or the Davis-Bacon Act or McNamara-O'Hara Service Contract Act wage (20 C.F.R. § 655.10); employers must advertise the position through the state workforce agency and must place multiple print advertisements, including at least one in a Sunday newspaper (655.15(d), (f); 655.17); return transportation and subsistence costs upon dismissal or at the end of the job order (655.22(m); 655.731(c)(9)(iii)(C); 8 U.S.C. § 1184(c)(5)(A)).

In order to gain government approval to hire H-2A and H-2B workers, most employers hire agents to help them navigate the labyrinth of regulations that govern those programs. Beyond the benefits and premium wages described above, the cost of simply filing an application can cost an employer hundreds or thousands of dollars each year. The "reward" at the end of the process is higher than market labor costs, an increased likelihood of audits by DOL or USCIS, and a confusing and uncertain regulatory landscape, as demonstrated in this case.

One regulatory requirement of H-2A employers had actually remained constant for decades. Since 1967, the H-2A regulations have required employers to reimburse the travel and subsistence costs incurred by H-2A visa workers in traveling from their home country to the U.S. worksite. 32 Fed. Reg. 4569, 4571 (Mar. 28, 1967); 20 C.F.R. § 655.122(h)(1). For nearly 50 years since then, the H-2A regulations have consistently required reimbursement to be paid once the H-2A worker has completed at least 50 percent of the contract period.[3] During the more than 60-year

[3] The policy goal of FLSA is thus easily met: maintaining "the minimum standard of living necessary for health, efficiency, and general well-being of workers.'" *Barrentine v. Arkansas-Best*

history of the H-2 program, an employer's FLSA obligations never included the reimbursement of workers' pre-employment travel, subsistence, or immigration expenses.

The regulated employer community fears that without this Court's clarification of whether pre-employment travel, both foreign and in the U.S., is primarily for the benefit of the employer under section 203(m), businesses will continue to face uncertainty, inequity and the prospect of enormous retroactive liability reaching back three years and enforceable through a flood of collective FLSA actions. This explosion in employer liability would resemble the uproar following the decision in *Tennessee C., I. & R. Co. v. Muscoda*, 321 U.S. 590 (1944), which "would have created 'wholly unexpected liabilities, immense in amount and retroactive in operation.'" *Steiner v. Mitchell*, 350 U.S. 247, 253 (1956) (discussing how Congress' reaction to *Muscoda* resulted in Portal-To-Portal Act of 1947).

Amici urge the Court to grant the writ of certiorari to provide certainty to the thousands of American employers who rely on the H-2A and H-2B programs and avoid these "wholly unexpected liabilities" that could threaten small businesses already pushed to the brink.

Freight System, Inc., 450 U.S. 728, 739 (1982), *overruled in part on other grounds by Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

I. The Court Should Grant Certiorari to Clarify H-2A and H-2B Employers' Obligations Under the FLSA and Remove the Costly Uncertainty Surrounding this Issue.

A. The Circuit Split Creates Uncertainty and Unpredictability That Are Particularly Costly to the Small Businesses that Use the H-2A and H-2B Visa Programs.

The circuit split described in the Petition related to employer obligations to reimburse foreign workers' pre-employment transportation, subsistence and visa-related expenses has generated uncertainty and unfairness to the regulated H-2A and H-2B employer community represented by *amici*.

It is impossible for H-2A and H-2B employers located outside of the Fifth, Ninth, and Eleventh Circuits to know whether they must pay such costs. Given the decision in *Peri*, where the Ninth Circuit found the employer's failure to pay the fees was a willful violation, regardless of a conflict in the Eleventh and Fifth Circuits and the Department of Labor's inconsistent positions, employers may unnecessarily feel compelled to pay such costs to avoid years of potential back pay liability and liquidated (double) damages under the FLSA. Employers in the Ninth and Eleventh Circuits must pay the transportation and visa costs in the first workweek, while those in the Fifth Circuit are not. Outside of those circuits, employers are left to speculate, based on a patchwork of district court decisions and DOL's shifting policy pronouncements. It is important that this Court consider this case in order to provide a

definitive statement of employer obligations under section 203(m).

As described above, H-2A and H-2B employers already pay premium wages, wages significantly higher than the minimum wage. They already bear burdensome costs for participating in these visa programs, both in the form of benefits that must be provided to workers and as administrative costs to be certified by government regulators for participation. This is especially true of early season, up-front costs that employers must invest before any work begins for the season. In addition, agricultural employers face having workers abandon employment during the season, risking the loss of the harvest and economic ruin.

There are limits to the amounts employers can pay and survive. A recent study by the American Farm Bureau Federation indicates that the labor costs of the labor-intensive sectors of agriculture, such as fruit, vegetable and horticulture, are on average 40 to 50 percent of total production costs. Patrick O'Brien *et al., Gauging the Farm Sector's Sensitivity to Immigration Reform via Changes in Labor Costs and Availability*, 5 (2014), http://tinyurl.com/AFBFstudy ("AFBF Study"). These sectors represent a large percentage of H-2A employers. The study further shows that there is limited potential for farmers to pass along production cost increases, especially in these sectors, because consumers are price sensitive and lower-cost imported products are readily available. *Id*. at 6.

This is consistent with testimony by Dr. Ronald D. Knutson of Texas A&M University before the Senate Judiciary Committee, Subcommittee on Immigration, Refugees and Border Security in October 2011.

America's Agricultural Labor Crisis: Enacting a Practical Solution: Subcomm. on Immigration, Refugees, and Border Security of the S. Comm. on the Judiciary, 112th Cong. 194 (2011) (statement of Ronald Knutson). In that testimony, Dr. Knutson referenced his July 2011 study with Dr. Dennis Fisher, *Impacts of Immigration Reform Proposals on the Agriculture Sector*, which found that agricultural producers are price-takers not price-setters and that increases in costs that push their prices above international market prices will result in immediate loss of market share. *Id.* at 196-97. The Knutson-Fisher study found that up to 40% of farms are in a "less than favorable financial position" which included farms that were "marginally solvent" or experienced negative net farm income for the year. *Id*. at 197.

These are seasonal employers, and the application process to participate in the H-2A and H-2B programs can last for weeks or months, and must be undertaken anew each year. Thus, these employers must make business decisions—committing to a certain workforce at a certain resulting labor cost—months before a crop is ever planted or the weather allows for landscaping work to begin. On the other side of the ledger, growers enter into contracts to sell their crops and landscapers enter into contracts to provide their services, contracts that may last for several years. As a result, changes in judicial or administrative interpretation of any of these employers' costs, particularly labor costs, can have a tremendously disruptive effect on this delicate balance. Imposing massive new up-front costs without any corresponding increase in revenue is a recipe for disaster for these small family businesses.

Because the ability to pass these program costs on to the consumer is limited, employers face the choice

of avoiding use of the H-2A or H-2B program, in order to reduce exorbitant operating costs, or confront potential labor shortages and the uncertainty as to whether their workers have proper legal status. AFBF Study, *supra*, at 7.

Employers in the regulated H-2A and H-2B community already face ongoing uncertainty and arbitrariness from DOL's administration of the programs. The costs associated with this are documented in a national survey of H-2A program users sponsored by NCAE. *See Workforce Challenges Facing the Agriculture Industry: Hearing before Subcomm. on Workforce Protections the H. Educ. & Workforce Comm.*, 112th Cong. 30 (2011) ("NCAE Survey"). That survey measured the losses for H-2A employers caused by governmental processing delays —having the workers arrive late, not getting enough workers, etc.—at $320,000,000 per year. *Id*. These delays are widespread, with 72% of employers reported receiving their workers after the start of their season, and where those workers arrived late, it was an average of 22 days late. *Id*. The contradictory and confusing requirements imposed by the various circuit courts only exacerbate this problem.

The circuit split also yields winners and losers based on the geographic accident of a business' location in a state within one of the relevant circuits. Employers in the states with the highest usage of the H-2A program located in the Eleventh and Ninth Circuits have to pay visa-related costs and reimburse pre-employment transportation costs within the first week of work, while those located in the Fifth Circuit do not. Agricultural consumers rarely know the state of origin of their food, and typically make purchasing decisions based on price. Since an acre of agricultural land

cannot be moved to a more convenient jurisdiction, fruits and vegetables grown in states with one interpretation of the FLSA's requirements could be much more or less expensive to grow than those in a state within a different circuit.

Even if growers were able to pass along these costs to the consumer, which they cannot (see AFBF Study, *supra*, at 7), employers in other circuits will tend to follow the stricter rule from the Ninth and Eleventh Circuit out of an abundance of caution; forcing them out of fear to incur liability beyond what is required by law. The uncertainty itself and the possibility of further changes in labor costs make planning decisions exponentially more difficult and more expensive for these employers. *Amici* represent employers in all three of the relevant circuits, as well as every other circuit. These employers seek certainty and wish to compete on a level playing field under a single set of rules that do not change based upon on which side of a state border their business is located.

B. H-2A and H-2B Employers Are Particularly Ill-Suited to Paying Travel Reimbursements in the First Work Week of the Season.

No business wishes to incur additional operating costs, but the requirement to reimburse travel and visa costs in the first work week is uniquely problematic, and H-2A and H-2B employers are particularly ill-suited to paying such costs at that time. For H-2B employers, they would be unable to pass along costs like these, costs that they have never been required to pay in the past. *See, e.g., Bayou Lawn & Landscape Servs. v. Solis*, 2012 U.S. Dist. LEXIS 69297 (N.D. Fl. 2012), at *8-10 (H-2B employers enter into long-term service contracts and cannot pass along

new labor costs to customers; proposed change in H-2B rules would cause irreparable harm), *aff'd sub nom. Bayou Lawn & Landscape Servs. v. Oates*, 713 F.3d 1080 (11th Cir. 2013).

In 2012, DOL proposed new H-2B rules that would have required H-2B employers (like H-2A employers) to reimburse pre-employment travel and visa expenses after 50% of the contract had been completed. 77 Fed. Reg. 10038 (Feb. 21, 2012). DOL estimated that these additional expenses would cost employers more than $75 million per year, every year. *Id*. at 10039. DOL's 2012 H-2B program rule was enjoined in federal court, with the Eleventh Circuit upholding the injunction and holding that the rule was beyond DOL's legal authority. *Bayou*, 713 F.3d at 1084-85. However, DOL's estimate suggests that the potential increased exposure for H-2B employers required to make *first-week* reimbursements under the rule for foreign workers under the FLSA set forth in the Ninth and Eleventh Circuits would be substantially higher than the projected $75 million per year.

Beyond the unfairness to H-2B employers of applying a reimbursement requirement that had never previously existed, the first-week reimbursement rule would cause significant damage to H-2A and H-2B employers because of the nature of their businesses. As described above, users of the H-2A and H-2B visa programs are overwhelmingly small family businesses, engaged in inherently seasonal business activities. Whether growing apples or performing landscaping, all of these employers have distinct "on" and "off" seasons, when they do and do not generate revenue. Landscaping companies are paid when they perform their services. Agricultural employers are

paid when they sell their crops after harvest, often running on credit to purchase seed and make payroll during the growing season.

Labor costs are already the dominant cost factor for H-2A and H-2B employers. Since 1990, hourly wages of U.S. farm workers increased by 72%, faster than the wage increase of non-farm workers (64%). NCAE Comments to 2009 H-2A NPRM, ETA-2009-0004-0372 (Oct. 21, 2009). As described above, the wages that must be paid to H-2A and H-2B workers are already above the market average in the area, as required by DOL. Further increases in labor costs that are not connected to increases in revenue and precede any revenue by weeks or months makes this new interpretation even more painful to employers.

Neither H-2A nor H-2B employers generally operate with significant cash-on-hand, especially at the very beginning of their operating season. Forcing these employers to make massive payments during the first workweek of the season would have an exceptionally harsh impact on them.

C. Payment of Pre-Employment Travel Costs at the 50% Point of the H-2A Job Order Serves an Important Policy Concern and Provides Essential Stability in the Workforce.

There are essential policy reasons supporting the long-standing regulatory provision calling for reimbursement of transportation, subsistence and visa costs at the 50% point of the contract for H-2A workers. This 50% reimbursement rule first arose in 1967, nearly 30 years after enactment of the FLSA. See 32 Fed. Reg. 4569, 4571 (Mar. 28, 1967), creating 20 C.F.R. § 602.10a(g). This requirement results from

a policy decision—repeated through each iteration of the H-2A regulations since 1967—that H-2A workers should be reimbursed for their pre-employment travel expenses not at the time of arrival but once they have completed at least 50% of the job contract.

Since these workers receive free housing at the outset of employment and are paid a premium wage, there has never been a concern that they would not be "made whole" when they are later reimbursed for these travel costs. Instead, this represented DOL's response to employer concerns of foreign agricultural workers receiving an all-expenses-paid trip to the U.S., and then abandoning employment (in violation of their visa) and leaving to pursue other (unlawful) employment within the United States. Requiring completion of at least half the job period addresses this problem—encouraging the employment of authorized workers and providing agricultural employers a viable means of doing so through the H-2A program, while encouraging foreign workers to honor their visas by working through the duration of the employer's job order.

While H-2A workers are not permitted to change employers or seek different employment after they arrive, U.S. workers are under no such limitation. Yet, they are entitled to the same protections and benefits as H-2A workers. The H-2A regulations specifically prohibit treating visa workers more advantageously than U.S. workers in "corresponding employment."[4] 29 C.F.R. §§ 655.103 (defining "corresponding employ-

[4] As discussed *supra,* DOL attempted to impose the corresponding employment obligation on H-2B employers, along with a large number of other H-2A program requirements in its proposed H-2B program rule. 77 Fed. Reg. 10038. The rule has been enjoined by the Eleventh Circuit. *Bayou*, 713 F.3d 1080.

ment"); 655.122(a) (prohibition on "preferential treatment of aliens" as to "benefits, wages, and working conditions"). Employers must provide U.S. workers in corresponding employment transportation expenses and subsistence costs incurred in traveling to the H-2A job if they are not local workers. As with H-2A workers, under *Peri*, reimbursement must be made within the first week to comply with section 203(m). U.S. workers traveling to take jobs with H-2A employers would be entitled to immediate payment of their travel expenses, even if they worked for only a single day and then quit.

Experience has shown that U.S. workers seldom work more than a few days in H-2A occupations. In a 2010 survey of H-2A employers that was sponsored by *amicus curiae* NCAE, it was revealed that only 5.3% of the U.S. workers referred by state workforce agencies actually worked through the entire contract period. NCAE Survey, *supra.* Of the referred workers, only 32% even accepted a job and 50% of those hired quit or failed to show up for work. *Id*. Of the workers referred by a state workforce agency, the average time worked by each worker who actually began employment was 25.7 hours, approximately 3 days of work. *Id*. Thus, the concern of employers being required to reimburse travel costs for U.S. workers traveling great distances and then working only a few days is real and significant.

The danger of worker abandonment presents particular concern for H-2A agricultural employers. These businesses make planting decisions, take on loans, and make their investments at the beginning of the season, and only earn money based on what they can harvest and sell. Thus, it is critical for these employers to retain their workforce as the growing

season shifts to harvest time. Given the high turnover rate for U.S. workers described above, losing H-2A workers early in the season could be disastrous for an agricultural employer.

Abandoning the 50% reimbursement rule would destroy the policy benefit of having a consistent and dependable workforce—a benefit that has been borne out for the past 60 years. Employers would face increased turnover in their workforce in addition to the massive unanticipated wage liability from this new interpretation of the FLSA in this context.

D. DOL's Justification for its Current FLSA Interpretation Brings the Potential for Untold Further Employer Liability.

DOL's *amicus* brief before the Ninth Circuit in *Peri* attempted to distinguish remote travel from a foreign country to begin employment in the U.S. from an Ohio construction worker moving to Nevada to take a job. *See* Br. for the Sec'y of Labor as *Amicus Curiae* in Supp. of Plaintiffs-Appellants at 18, *Rivera v. Peri & Sons Farms, Inc*., 735 F.3d 892 (9th Cir. 2013), http://tinyurl.com/DOLPeri. DOL implied that its interpretation only applies to nonimmigrant foreign workers, but ignored whether U.S. workers who remotely travel to take a job within the U.S. must be reimbursed. *Id*. at 18.

DOL, itself, has warned that there is no limiting principle to this interpretation that requires such a distinction. In the preamble to the 2008 H-2A rules, DOL cautioned that the *Arriaga* court's reasoning could lead to a slippery slope that would place DOL, courts, and employers in an untenable position:

> Moreover, the employer's need for non-local workers does nothing to transform the relocation costs into an "incident" of the job opportunity in a way that would render the employee's payment of the relocation expenses a "kick-back" to the employer. If it did, courts would soon be called upon every time an employer hired an out-of-state worker to assess just how great the employer's need for the out-of-state worker employee was in light of local labor market conditions. Conversely, the court would also have to inquire into the employee's circumstances, and whether the employee had reasonable comparable job prospects in the area from which the employee located.

73 Fed. Reg. 77110, 77151 (Dec. 18, 2008). Left unchecked, an extension of DOL's interpretation could potentially open the floodgates of liability for U.S. employers, far beyond the thousands participating in the H-2A and H-2B programs.

The district court's decision in *Peri* discussed a relocation cost hypothetical based on DOL's interpretation of the FLSA. The court posed the question whether an employer is expected to pay pre-employment transportation costs for a construction worker to get from Ohio to Nevada to work on a project. The court concluded that travel expenses incurred in the U.S. to move to a new location to begin work in the first instance are not covered by the FLSA. Pet. App. 31a.

Extending Section 203(m) to a place that it had never gone in decades of its existence poses grave concerns for U.S. employers. While *amici* would argue that extension of the FLSA interpretation to require employers to reimburse employees for remote travel

within the U.S. is an incorrect interpretation of the FLSA, the Department's explanation in its *amicus* brief before the Ninth Circuit raises concerns that lead down the path the Department warned of in its 2008 preamble.

Under an erroneous and expansive reading of Section 203(m), where a U.S. employer would now be responsible for the transportation costs of a Mexican H-2A worker commuting 5 miles or less daily from their home along the U.S.-Mexico border to a job in Yuma, Arizona, an employer in Washington State might later be required to reimburse travel costs for a U.S. worker in Yuma traveling 1,500 miles to pick apples in Washington State. The potential for windfall liability could be substantial, with workers taking jobs and then promptly abandoning employment after being paid for their travel costs. This is a genuine threat to these industries, where the average U.S. worker only stays for 3 days, as described above.

The cost of traveling to an employer's worksite and paying visa expenses might be a few hundred dollars for each prospective employee. But with hundreds of thousands workers travelling to take work each year in America, the total impact on small businesses would be devastating. This is particularly so for low-margin businesses with labor costs representing a significant portion of total expenses—industries like agriculture and landscaping. These also tend to be seasonal industries, in which workers travel from foreign countries or other parts of the United States to accept employment for a limited amount of time each year, before returning to their homes.

This uncertainty as to future DOL interpretation compounds the existing uncertainty created by the split in circuit authority. U.S. small businesses like

those represented by *amici* find it ever more difficult to plan for the future.

CONCLUSION

Amici curiae respectfully submit that this Court should grant the *writ of certiorari* in this case in order to address this confusion and uncertainty for the thousands of American employers who rely on the H-2A and H-2B visa programs. Left unchecked, this uncertainty and unanticipated liability could have devastating effects for these employers.

Respectfully submitted,

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