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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

The Ninth Circuit's decision widens an entrenched circuit conflict that spans the southern border and affects many thousands of U.S. employers and foreign workers annually. Workers incur pre-employment travel and immigration expenses abroad. Employers in the Ninth and Eleventh Circuits must reimburse these expenses in the first work-week under FLSA regulations. Employers in the Fifth Circuit need not. The Department of Labor, courts, and scholars recognize this split. Respondents do not contest that Fifth Circuit employers enjoy a competitive advantage. Nor do they dispute that employers and workers outside these circuits face intolerable uncertainty, or that severe pressures on employers to settle FLSA suits make it unlikely another circuit will decide this issue anytime soon. *Twenty-two* employer *amici* groups confirm the urgent need for this Court to clarify employers' obligations.

Further, DOL's flip-flopping interpretations of the FLSA regulations give rise to a clean split over *Auer* deference, a recurring and undisputedly important issue that only this Court can resolve. In 2008, DOL issued informal guidance endorsing the Fifth Circuit's view of the FLSA regulations. In 2009, in an informal bulletin DOL reversed itself and embraced the Eleventh Circuit's contrary interpretation. DOL reiterated that interpretation in a 2010 preamble to an unrelated regulation and in *amicus* briefs. The Ninth Circuit deemed DOL's inconsistency irrelevant, holding that *Auer v. Robbins*, 519 U.S. 452 (1997), compelled dispositive deference to DOL's current interpretation. In direct conflict, this Court and six circuits refuse *Auer* deference to inconsistent interpretations. Moreover, the Fifth Circuit refused deference to the same DOL interpretation the Ninth Circuit

blindly accepted. Respondents do not dispute that *Auer* was outcome-determinative—making this an "ideal vehicle" for resolving *Auer*'s scope and viability. Chamber Br. 6-8.

Respondents' scattershot opposition throws up non-existent vehicle problems and meritless grounds for questioning these splits. Respondents emphasize irrelevant intricacies of the H-2A and H-2B visa program regulations. But the critical issue here is employers' FLSA *minimum-wage* obligations—which apply independently of and in addition to visa program rules. Respondents also misleadingly suggest that review is unwarranted because the regulatory landscape purportedly changed. The only relevant landscape is DOL's consistent failure to promulgate rules on the FLSA issue—and DOL's demands for controlling deference to informal regulatory interpretations that impose liability without the safeguards of notice-and-comment rulemaking.

I. THE FLSA ISSUE WARRANTS REVIEW

The FLSA issue presents a crisp, widely-recognized split between the Fifth and the Ninth and Eleventh Circuits over whether employers must reimburse H-2A and H-2B workers' pre-employment expenses in the first work-week. Geography determines who bears these costs, transforming what should be a uniform federal law into an arbitrary patchwork of obligations. Pet. 17-20.

1. Contrary to respondents' assertion (Opp. 8), the Fifth Circuit's analysis extends equally to H-2A and H-2B workers. The court held that FLSA regulations do not require reimbursement of H-2B workers' travel and visa expenses because "[a] visa and physical presence at the job site are not 'tools' particular to

this 'trade' within the meaning of the applicable regulations." *Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393, 401 (5th Cir. 2010) (en banc). That same analysis applies to H-2A workers, who incur identical expenses. Those expenses cannot primarily benefit employees in one context but not the other.

The court stressed that "no statute or regulation expressly requires reimbursement" for H-2B pre-employment expenses, which "would seem to end the matter." *Id.* at 400. Respondents observe that H-2A regulations require reimbursement of workers' travel expenses once they complete 50% of their contracts. Opp. 8. But that simply highlights the lack of any law expressly requiring *immediate* reimbursement. Congress and DOL comprehensively specified H-2A and H-2B reimbursement obligations. Their failure to require immediate reimbursement of H-2A travel expenses and *any* reimbursement of visa expenses shows that no such requirement was intended. Respondents thus have no basis for speculating that the Fifth Circuit might reverse course because DOL in 2012 issued H-2B program rules imposing the H-2A 50% rule on H-2B employers. *Id.* 8 n.8. Those 2012 rules are especially irrelevant because they were enjoined indefinitely for exceeding DOL's rulemaking authority. *Bayou Lawn & Landscape Servs. v. Sec'y of Labor*, 713 F.3d 1080, 1084-85 (11th Cir. 2013).

DOL confirms that the Fifth Circuit's decision conflicts with H-2A cases. Like the *en banc* decision, the panel purportedly limited its decision to H-2B workers. *Castellanos-Contreras*, 576 F.3d 274, 282 (5th Cir. 2009). DOL still urged rehearing because the panel decision "conflicts with decisions of the Eleventh Circuit." *DOL Castellanos-Contreras Reh'g Br.* 2. DOL likewise explained that courts reject any H-2A

versus H-2B distinction "because of the similarities between the two visa programs." *DOL Peri & Sons Amicus Br.* 25.

Respondents wrongly limit the Fifth Circuit's decision to pre-2009 facts. Far from "explicitly declin[ing] to consider the impact of DOL's 2009 Bulletin," Opp. 9, the court considered it and declined to defer. 622 F.3d at 401-02 & n.9. The court also signaled that the FLSA regulations *foreclose* DOL's present interpretation, which "stretches" the regulations "too far." *Id.* at 400-01. Nor did the court consider DOL's post-2009 FLSA interpretations a "new regulatory framework." Opp. 9. Rather, "the regulatory landscape is now very different" because of 2008 *H-2B rules*. 622 F.3d at 401 n.9. Those rules reinforce that the expenses here do not primarily benefit employers: they provide, *e.g.*, that "visa fees" are "the responsibility of the worker." 20 C.F.R. § 655.22(g)(2) (promulgated at 73 Fed. Reg. 78,020, 78,059 (Dec. 19, 2008)); *accord* 77 Fed. Reg. 28,764, 28,765 (May 16, 2012). Moreover, respondents' argument acknowledges a conflict over pre-2009 expenses. Fifth Circuit employers are not liable for such expenses—but the Ninth Circuit held that Peri could be liable back to 2008. App. 19a-20a.

Courts and scholars recognize an ongoing split. Pet. 18-19. Respondents assert that DOL acknowledges a split only under the "pre-2009 regulatory landscape." Opp. 10. But DOL clearly conveyed that the split endures post-2009. DOL stated that *prospective* obligations to "pay [pre-employment] expenses . . . in the first workweek" apply "outside the Fifth Circuit." 77 Fed. Reg. 10,038, 10,077 (Feb. 21, 2012). Rather than cabining the Fifth Circuit's holding to H-2B or pre-2009 facts, DOL contrasted the Eleventh and Fifth

Circuits' regulatory interpretations and rejected the latter on the merits. *DOL Peri & Sons Amicus Br.* 6, 10-14, 18-20, 25-26, 29-30. DOL denied that the regulatory landscape changed, insisting that its 2009 bulletin "simply clarifies what the law has always meant." *Id.* 24-25. DOL never mentioned "outdated regulations" (Opp. 10), and respondents rely on never-implemented 2012 H-2B regulations.

2. No impediments to certiorari exist. Respondents speculate that Congress could "obviate" the split through legislation (Opp. 10), but do not even cite a pending bill. As the United States has observed, even "pending immigration-reform bills . . . provide[] no basis for denying certiorari." Reply Br. for Pet'r, *Gonzales v. Duenas-Alvarez*, 2006 WL 2581844, at *10 n.8 (Sept. 6, 2006).

Respondents contend that state contract claims tied to Peri's FLSA obligations could survive if this Court reversed. Opp. 14. That does not eliminate the need for this Court to address the Ninth Circuit's published decision, which imposes FLSA liability throughout the nation's largest circuit. And the best reading of a contract keyed to federal law surely involves following this Court's interpretation of federal law. Respondents' assertion that more factual development is needed to determine if the FLSA issue matters to employers, *id.*, absurdly suggests that lower courts should engage in fact-finding on whether an issue is cert-worthy. Finally, Peri's voluntary settlement with DOL, *id.*, concerned H-2A regulatory compliance, not FLSA liability.

3. Respondents' merits arguments are unpersuasive and would open the floodgates to employer liability for virtually any pre-employment expenses. The only FLSA regulation addressing worker-incurred

expenses prohibits "kickbacks" of "wage[s] delivered to" employees. 29 C.F.R. § 531.35. That regulation assumes the kickback occurs during employment. Respondents do not dispute that they incurred many expenses before they were eligible for employment, and incurred all expenses before beginning employment. Pet. 20-21. These expenses fundamentally differ from expenses that employers make employees incur after accepting jobs. Opp. 16.

These expenses also do not primarily benefit employers. H-2A and H-2B jobs benefit workers immensely. Pet. 21. Respondents (at 17) invoke 29 C.F.R. § 531.32(c), under which "transportation charges" are reimbursable if "an incident of and necessary to the employment (as in the case of maintenance-of-way employees of a railroad)." But that regulation refers to employees' travel *on the job*.

Respondents' interpretation of the FLSA eviscerates the purpose of the H-2A 50% rule, which exists to guarantee a stable labor force. Pet. 22; *cf.* Opp. 17-18. Employers reimburse H-2A workers' travel only if they remain on the job. Requiring employers to reimburse most expenses in the first work-week negates that incentive.

II. THE *AUER* ISSUE WARRANTS REVIEW

This case presents a second clean conflict and an ideal opportunity to clarify or reconsider *Auer*. This Court and many circuits would refuse controlling deference to DOL's current interpretation of the FLSA regulations because DOL previously took the opposite view. Yet the Ninth Circuit deemed the change irrelevant. Only one fact mattered: DOL's present interpretation makes employers liable. *Auer* "required" deference—even for costs that arose in

2008, when DOL *rejected* employer liability. Agencies should not be able to transform parties' obligations without notice-and-comment rulemaking. Pet. 23-28.

1. The decision below conflicts with this Court's decisions indicating that inconsistency alone deprives agency interpretations of *Auer* deference. Respondents dispute this. Opp. 19. But respondents mischaracterize *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012), which deemed *Auer* deference "unwarranted" *either*—as here—when an "interpretation conflicts with a prior interpretation," *or* is a "*post hoc* rationalizatio[n]." *Id.* at 2166. Respondents ignore this Court's similar admonitions in other cases. Pet. 25. Respondents note that *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007), endorsed *Auer* deference even for changed interpretations. Opp. 19. That just illustrates why this Court should provide guidance and resolve tensions within its precedents.

Such guidance is especially needed because circuits are unsure how to interpret this Court's conflicting language, and are split over whether inconsistent interpretations deserve controlling deference. Pet. 25-26. Respondents focus on why courts deferred (or not) to particular interpretations. Opp. 20 & nn. 20-21. But courts may apply or reject deference for many independent reasons. What matters are the threshold criteria that determine whether *Auer* applies. Outside the Ninth Circuit, when an interpretation "conflict[s] with [a] prior interpretation of the same regulation," it "fall[s] into [one] of the enunciated categories where [courts] would withhold such deference." *Union Carbide Corp. & Subsidiaries v. C.I.R.*, 697 F.3d 104, 109 (2d Cir. 2012); Pet. 25-26. In the Ninth Circuit, inconsistency alone is *not* enough reason to refuse dispositive deference. App. 8a-9a; Opp. 21. The Ninth

Circuit unthinkingly deferred to DOL, but had Peri been sued elsewhere, courts would have parsed the FLSA regulations before exposing Peri to double damages.

This case also presents the clearest split possible over what deference DOL's interpretations should receive. Pet. 23-24. The Ninth Circuit held that *Auer* "required" it to defer to DOL's 2009 bulletin and subject Peri to liability from 2008 onwards. App. 9a, 20a. The Fifth Circuit refused deference to that bulletin. Respondents' only answer is to assert that the Fifth Circuit "explicitly declined to consider the impact of DOL's 2009 Bulletin." Opp. 9. But the court expressly noted that the bulletin "was issued long after the events in question" and that DOL's interpretations were "inconsisten[t]." *Castellanos-Contreras*, 622 F.3d at 401-02 & n.9. The court declined to "impos[e] . . . new duties that did not clearly exist at the time . . . under the guise of *Auer* deference." *Id.* Hence, DOL represented below that "the Fifth Circuit erred in declining to give any deference to [the] Bulletin." *DOL Peri Amicus Br.* 24.

Respondents claim Peri inadequately raised retroactivity concerns. Opp. 9 n.9 & 19 n.19. But the petition repeatedly raises whether *post hoc* interpretations imposing retroactive liability deserve deference. Pet. 4, 12-15, 27-28. Below, Peri noted that, because DOL previously endorsed Peri's view, Peri should not face *any* liability just on DOL's say-so. Def.'s CA9 Br. 23, 33. The Ninth Circuit reached the issue and retroactively applied DOL's current interpretation from 2008 onwards. App. 20a. And respondents' conjecture that discovery might show no relevant 2008 expenses (Opp. 9 n.9) contradicts their complaint's request for damages since 2005.

2. This case is an excellent vehicle for revisiting *Auer*, and respondents' objections are meritless. Respondents contend that the *Auer* issue is avoidable because DOL has the "best reading" of the regulations. Opp. 22. Yet in 2008, DOL asserted that the "better reading" of the regulations was that employers are *not* liable, and the *en banc* Fifth Circuit views the regulations as foreclosing DOL's current reading. Pet. 8; *supra* p. 4.

Respondents claim that revisiting *Auer* is unnecessary because the 2010 preamble might merit *Chevron* deference. Opp. 23-24. But *Chevron* applies only to an agency's "reasonable interpretation of an ambiguous statute." *Christensen v. Harris Cnty.*, 529 U.S. 576, 586-87 (2000). The 2010 preamble involves no statutory interpretation; it parrots DOL's 2009 bulletin interpreting FLSA regulations. 75 Fed. Reg. 6884, 6915 (Feb. 12, 2010). Nor has DOL ever invoked *Chevron*. Below, DOL requested *Auer* or *Skidmore* deference for its "interpretation of its regulations." *DOL Peri Amicus Br*. 29-30.

Respondents suggest that *Auer* is "typically associated" with interpretations first announced in *amicus* briefs. Opp. 24. *Auer*, however, is a general rule requiring "deference to an agency's interpretation . . . even when that interpretation is advanced in a legal brief." *Christopher*, 132 S. Ct. at 2166. This case vividly exemplifies the breadth of informal guidance agencies use to surreptitiously create new obligations. DOL demands "controlling deference" to regulatory interpretations in a bulletin, regulatory preambles, and its *amicus* brief. *DOL Peri Amicus Br*. 29.

Respondents contend that "this case concerns a clarification of regulations that DOL issued after notice and comment." Opp. 25. Not so. DOL's 2009

bulletin significantly reinterpreted the FLSA regulations via internal staff memorandum. DOL cursorily extended that analysis to H-2A workers in the 2010 preamble to an *unrelated* H-2A final rule. That preamble was not subject to notice and comment. DOL's notice of proposed rulemaking for that rule nowhere revealed DOL's plans to interpret FLSA regulations to require reimbursement of pre-employment expenses. 74 Fed. Reg. 45,906, 45,915, 45,944 (Sept. 4, 2009).

Respondents invoke *stare decisis*. Opp. 25. But Members of this Court already have called to reconsider *Auer*. *Decker v. Nw. Envtl. Defense Ctr.*, 133 S. Ct. 1326, 1338 (2013) (Roberts, C.J., and Alito, J., concurring); *id.* at 1339 (Scalia, J., concurring in part and dissenting in part). Allowing agencies to assume that a rule means whatever the agency says it means invites abuse and violates the separation of powers. Chamber Br. 10-18; CCJ Br. 4-16. Members of this Court have dedicated more analysis to establishing *Auer*'s invalidity than to justifying its existence. This Court invented *Auer* deference; only this Court can overrule it, and a better vehicle is hard to imagine.

III. THE ISSUES ARE IMPORTANT AND RECURRING

Thousands of employers hire some 200,000 H-2A and H-2B workers annually. The decision below substantially burdens Ninth Circuit employers, who must now immediately reimburse pre-employment travel and immigration expenses. Because of the circuit split, competitive conditions differ among the States that attract the most H-2A and H-2B workers. Uncertainty persists in other circuits. Workers do not know whether their expenses will be reimbursed.

Employers also must speculate as to their obligations, and choose between incurring burdensome expenses or risking potentially ruinous FLSA lawsuits. Pet. 30-34.

The FLSA issue is "critical" for these employers. Chamber Br. 5-6. *Twenty-two* H-2A and H-2B groups explain:

- These employers overwhelmingly are small businesses with razor-thin margins. Many are "marginally solvent." Added expenses are "a recipe for disaster." NCAE Br. 5, 11.
- H-2B employers would pay *over $75 million annually* to reimburse pre-employment expenses in the first work-week. *Id.* 14.
- H-2A and H-2B employers start the season without "significant cash-on-hand." "Forcing these employers to make massive payments during the first workweek . . . would have an exceptionally harsh impact." *Id.* 15.

Respondents claim that because H-2A rules require reimbursement of travel expenses at the 50% mark, "all that is at stake is *when*, not *whether*" reimbursement occurs. Opp. 11. But H-2A rules do not require reimbursement of *any* visa expenses. The Ninth and Eleventh Circuits' FLSA interpretations create that obligation, and first-week reimbursement disproportionately burdens H-2A employers. Respondents also ignore that H-2B employers have no 50% obligation. For them, the question *is* whether pre-employment expenses are reimbursable.[1]

[1] Although respondents construe their complaint differently, Opp. 5 n.6, the district court held respondents did not plead that Peri violated the 50% rule. App. 28a-29a. On appeal,

Respondents characterize the petition's 2010 DHS statistics as "old." Opp. 13. But their source shows that in 2012, the Fifth, Ninth, and Eleventh Circuits attracted 48% of all H-2A workers and 40% of H-2B workers, and that different conditions prevail in the top States employing those workers. DOL, *Annual Report* 37 & App. A. By any metric, this split affects many thousands of workers and employers—and this is the best opportunity to resolve it.[2]

CONCLUSION

Inviting the United States' views is unnecessary. DOL considers the FLSA issue a "question of exceptional importance." *DOL Castellanos-Contreras Reh'g Br.* 2. DOL has taken every opportunity to stress the circuit split on this issue, to insist that the FLSA requires employer reimbursement, and to demand controlling deference for this view. The government's positions are unmistakable; the government should not get to strategically revisit them to avoid scrutiny. This Court should grant this petition now, and spare employers and workers another season of costly uncertainty.

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respondents' challenge focused on first-week reimbursement. Pls.' CA9 Br. 18-45.

[2] DHS figures (Pet. 3-5, 32) show the same trends, but may inflate statistics for some border States. DHS tracks admissions into the U.S., not people, and workers who live across the border may cross multiple times.

Respectfully submitted,

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