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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND NATIONAL MINING ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

Many American businesses could not function without the H-2A and H-2B visa programs, which allow companies to hire a limited number of temporary guest workers when U.S. workers are not available. The Chamber and its members have a powerful interest in ensuring that these programs operate in an efficient and effective manner. If allowed to stand, the Ninth Circuit's decision in this case will impose substantial new burdens and costs on companies that hire guest workers. The Chamber believes that this Petition offers an ideal opportunity to resolve a well-documented circuit split over the application of the Fair Labor Standards Act to the H-

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici*, their members, and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. All counsel of record were timely notified of the intent to file this brief, and have consented to this filing.

2A and H-2B programs, and to clarify the appropriate scope of deference that is owed to an administrative agency's interpretation of its own regulations.

The National Mining Association ("NMA") is a national trade association whose members produce most of America's coal, metals, and industrial and agricultural minerals. Its membership also includes manufacturers of mining and mineral processing machinery and supplies, transporters, financial and engineering firms, and other businesses involved in the nation's mining industries. NMA works with Congress and federal and state regulatory officials to provide information and analyses on public policies of concern to its membership, and to promote policies and practices that foster the efficient and environmentally sound development and use of the country's mineral resources.

The mining industry is one of the most heavily regulated in the United States, with more than 15 federal environmental laws alone applicable to a major mining project. Therefore, NMA has a strong interest in the proper understanding and application of this Court's various doctrines according judicial deference to the decisions and determinations of expert agencies, particularly the "*Auer*" doctrine. The outcome of this case will have a significant impact on NMA's members.

SUMMARY OF ARGUMENT

This case involves allegations that Petitioner Peri & Sons Farms ("Peri") violated Department of Labor ("DOL") regulations regarding the deductions employers can make from employee pay, which DOL

calls "kickbacks." The Ninth Circuit allowed class-action claims to proceed against Peri even though the court made no finding that Peri's alleged misconduct violated the *actual text* of the relevant regulations. Instead, the Ninth Circuit gave controlling deference to a DOL "field assistance bulletin" and regulatory preamble that purport to interpret the regulations in question. The court treated those sources as having the full force of law even though they were a stark departure from previous positions taken by DOL.

The reason for that counterintuitive result is the so-called "*Auer*" doctrine (or "*Seminole Rock*" doctrine), under which courts defer to an agency's interpretation of its own regulations as long as that interpretation is not "plainly erroneous or inconsistent with the regulation." *See Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). This doctrine arose from a single sentence in the 1945 *Seminole Rock* decision, which was then cited and applied in subsequent cases without any examination of the rule's underlying merits.

This Court should grant certiorari to squarely address the ongoing validity of the *Auer* doctrine. In recent years, several Justices have questioned whether courts should defer to an agency's interpretation of its own regulations, and have called for a reconsideration of *Auer* in an "appropriate case." *Decker v. Northwest Envtl. Defense Ctr.*, 133 S. Ct. 1326, 1338 (2013) (Roberts, C.J., and Alito, J., concurring); *Talk America, Inc. v. Michigan Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring) ("When we are [asked to reconsider

Auer], I will be receptive to doing so."). The scope of such deference is tremendously important to the business community, as administrative agencies have increasingly attempted to make policy through informal guidance rather than notice-and-comment rulemaking. And this is an ideal case in which to reconsider *Auer* because there is no question that the application of *Auer* deference was outcome-determinative in the decision below.

The *Auer* doctrine flouts the most basic principles of fair notice and the separation of powers. As long as there is some ambiguity at the margin of an existing regulation, an agency can obtain controlling deference based on *ad hoc* interpretations set forth in informal sources such as enforcement manuals, letters, policy statements, or (as in this case) a "field assistance bulletin." An agency has little incentive to amend or clarify a regulation through notice-and-comment rulemaking if it can achieve the same outcome without the headache of public participation.

Worse still, *Auer* deprives regulated parties of clear guidance about how to comply with the law. Under the *Auer* regime, it is not enough to consult the text of an agency's regulations. Instead, regulated entities must also parse the constant stream of other documents emanating from an agency—any one of which could be deemed to have the force of law by a federal court—to determine whether those materials place some additional gloss on the regulations. That is hard enough for companies with large legal and compliance

departments, but it is nearly impossible for small or newly formed businesses that lack such resources.

The lack of fair notice that results from *Auer* is especially troubling in cases, such as this one, in which plaintiffs seek to use the agency's interpretation to hold a regulated party liable for money damages for past conduct. Under *Auer*, even a highly questionable interpretation of an agency's regulation that would not be obvious even to an astute observer will receive controlling deference, so long as it is not *plainly erroneous*. But only the *best* interpretation of a regulation—not just one that rises above the level of "plainly erroneous"—should be able to serve as the basis for civil liability.

Moreover, review of the Ninth Circuit's application of *Auer* is particularly important given the economic consequences of the decision below to the thousands of employers that participate in the H-2A and H-2B guest worker programs. Small, medium-sized, and large employers in every region of the country depend on these programs to fill seasonal or temporary jobs that U.S. workers are unwilling to perform. The H-2A and H-2B programs already impose extensive requirements on employers that hire guest workers. Agricultural and other seasonal businesses often operate in industries with very thin margins, and any added costs can result in an unprofitable year or higher prices for consumers. Yet the Ninth Circuit—in direct conflict with the Fifth Circuit—has now construed the Fair Labor Standards Act ("FLSA") as imposing yet another layer of costly obligations on employers of guest workers. Whether the FLSA requires employers to

reimburse the *pre-employment* travel and immigration costs of temporary workers is a critical issue for the many companies that participate in the H-2A and H-2B programs, and is an issue worthy of this Court's review.

ARGUMENT

I. The Court Should Grant Certiorari To Address The Ongoing Validity Of The *Auer* Doctrine.

In recent years, several members of the Court have raised serious concerns about whether it is appropriate for courts to defer to an agency's interpretation of its own regulations. Three years ago, Justice Scalia noted that he had "in the past uncritically accepted" the *Auer* doctrine, but had "become increasingly doubtful" of the validity of the rule. *Talk America*, 131 S. Ct. at 2266 (Scalia, J., concurring). Last Term, The Chief Justice and Justice Alito emphasized that "it may be appropriate to reconsider [*Auer*] in an appropriate case." *Decker* 133 S. Ct. at 1338 (Roberts, C.J., concurring); *see id.* at 1339-44 (Scalia, J., concurring in part and dissenting in part) (encouraging Court to reconsider, and overrule, *Auer*).

A. This Case Presents An Ideal Vehicle In Which To Reconsider *Auer*.

There is no question that the application of *Auer* was outcome-determinative in the decision below. The DOL regulation at issue provides that "[t]he wage requirements of the [FLSA] 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. Another regulation provides illustrative examples of expenditures that are "primarily for the benefit of … the employer," including tools of the trade, construction costs, and the cost of employer-mandated uniforms. *Id.* § 531.3(d)(2).

The plaintiffs' complaint relies on the strained theory that various *pre-employment* travel and immigration expenditures incurred by H-2A and H-2B workers constitute "kickbacks" to the employer. Petitioner filed a motion to dismiss, which typically requires a court to evaluate whether the allegations in the complaint (if true) state a plausible claim for relief under governing law. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). But the Ninth Circuit skipped that analysis altogether. The court did not parse the text of the regulations to determine whether pre-employment travel expenses are analogous to the enumerated examples of "kickbacks." Nor did the court analyze whether such travel costs are "for the employer's benefit," as opposed to the employee's benefit.

Instead, the Ninth Circuit held—in a mere four sentences of analysis—that because there was some ambiguity in the relevant regulations, DOL's interpretation of the regulations was entitled to controlling deference. Pet.App.11a. The interpretation in question was set forth in a "field assistance bulletin" and a regulatory preamble. Pet.App.10a. It was not adopted through notice-and-comment rulemaking, nor was it codified in the Code of Federal Regulations. And the Ninth Circuit made no attempt to determine whether DOL's position

represented the *best* interpretation of the relevant regulations. The court merely asked if the agency had said *anything at all* about the relevant issue. *See* Pet.App.10a (noting that DOL has "expressly addressed the status of inbound travel expenses," without inquiring into whether that was the best interpretation of the regulations).

In short, once the court found ambiguity in the regulations, its analysis was over and DOL's interpretation was deemed to have the force of law. *See* Pet.App.11a ("In the face of regulatory ambiguity … we defer to the DOL's interpretation."). There is no question that the application of *Auer* deference was dispositive to the decision below. This case is accordingly an ideal vehicle in which to reconsider that doctrine.

B. *Auer* Should Be Reconsidered.

1. This Court has never squarely addressed the *Auer* doctrine in light of first principles.

This Court first deferred to an agency's interpretation of its own regulations in 1945, but it did not articulate a rationale for that rule until several decades later. In *Seminole Rock*, the Court addressed whether the respondent's prices for crushed stone were consistent with the Office of Price Administration's "Maximum Price Regulation No. 188." 325 U.S. at 414. The Court stated (with no citation) that "the ultimate criterion" in interpreting a regulation is "the administrative interpretation," which "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.*; *see Decker*, 133 S. Ct. at 1340

(Scalia, J.) (describing *Seminole Rock* language as "*ipse dixit*"). Applying that rule, the Court ruled in favor of the agency based on an interpretation of the regulation set forth in a "bulletin" entitled "What Every Retailer Should Know About the General Maximum Price Regulation." 325 U.S. at 417.

Over the next few decades, the Court frequently quoted and applied *Seminole Rock*, without further elucidating the rationale for that rule. *See*, *e.g.*, *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965); *United States v. Larionoff*, 431 U.S. 864, 872 (1977); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989); *Auer*, 519 U.S. at 461.

More recently, the Court has offered only brief rationales for this deference. For example, in *Martin v. Occupational Safety & Health Review Commission*, 499 U.S. 144, 152 (1991), the Court suggested in passing that "[b]ecause the Secretary promulgates these standards, the Secretary is in a better position … to reconstruct the purpose of the regulations in question." But the Court did not acknowledge the descriptive limits of this theory—*i.e.*, whether deference would still be owed when an agency offers an interpretation of a regulation that was promulgated decades earlier. Nor did the Court attempt to reconcile this theory with other decisions that required courts to focus on the *text* of a statute or regulation rather than the often-illusory intent of its drafters. *See Decker*, 133 S. Ct. at 1340 (Scalia, J.) ("Whether governing rules are made by the national legislature or an administrative agency, we are bound by *what they say*, not by the unexpressed intention of those who made them."); *West Virginia*

Univ. Hosps. v. Casey, 499 U.S. 83, 98 (1991) ("best evidence" of drafter's purpose is "the statutory text").

The Court has also suggested that deference to an agency's interpretation of its own regulation is warranted where the regulation addresses "complex and highly technical'" subject matter that "require[s] significant expertise and entail[s] the exercise of judgment grounded in policy concerns.'" *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (quoting *Pauley v. BethEnergy Mines*, 501 U.S. 680, 697 (1991)). But that is, at best, an incomplete justification for the *Auer* rule; many regulations are not "complex and highly technical," and can be readily interpreted and applied by a court without the need for specialized "expertise."

* * *

In sum, although the *Auer* doctrine has become a frequently cited rule of administrative law, it lacks the comprehensive and careful analysis required for such an important canon of construction. As explained below, the best course would be for this Court to require agency interpretations of regulations to stand or fall based on their own legal merits, without any thumb on the scale in favor of the agency.

2. *Auer* distorts the interpretive incentives facing administrative agencies, thus undermining fair notice and the separation of powers.

The Administrative Procedure Act ("APA") reflects a congressional judgment that "notions of fairness and informed administrative decisionmaking

require that agency decisions be made only after affording interested persons notice and an opportunity to comment." *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979). The APA thus provides that a "[g]eneral notice of proposed rule making shall be published in the Federal Register," and "the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(b)-(c).

These are not simply "arbitrary hoops through which federal agencies must jump without reason." *Sprint Corp. v. FCC*, 315 F.3d 369, 373 (D.C. Cir. 2003). Rather, the APA's notice and comment requirements "improve[] the quality of agency rulemaking" by exposing regulations to "diverse public comment." *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983). They also ensure "fairness to affected parties" and provide a well-developed record that "enhances the quality of judicial review." *Id.*[2]

The *Auer* doctrine, however, gives agencies a strong incentive to bypass the rulemaking process altogether, thus undermining the APA's requirements of notice and the opportunity for comment. As long as there is a legislative regulation on the books with some degree of ambiguity at the margin, an agency has every incentive to flesh out

[2] *See also* Richard J. Pierce, Jr., *Seven Ways To Deossify Agency Rulemaking*, 47 Admin. L. Rev. 59, 86 (1995) ("Agencies are more likely to make wise and well-informed policy decisions if they solicit, receive, and consider data and views from all citizens who are likely to be affected by a policy decision.").

the details of that regulation through *Auer*-deference-worthy interpretations that are issued "'without observance of notice and comment procedures.'" *Decker*, 133 S. Ct. at 1339-42 (Scalia, J.); *see* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 664 (1996) ("Manning") ("an agency has reason to draft regulations that leave it room to adjust its policies, where possible, through reinterpretation rather than through amendment").

Under *Auer*, an agency can seek controlling deference to positions set forth in highly informal sources, such as letters, enforcement manuals, circulars, policy statements, or—as in this case—a "field assistance bulletin." Those sources are typically crafted out of public view, with no notice to regulated entities that a new policy is being considered, and no opportunity for comment before that policy becomes effective.[3] Bypassing notice-and-comment procedures also allows the agency to avoid the public and political scrutiny that would inevitably result if it had actually made the hard policy choices in its legislative regulations.

Here, for example, DOL purported to set nationwide policy through a "field assistance bulletin," but interested parties had no opportunity

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[3] Under *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001), an agency's interpretation of a statute is eligible for *Chevron* deference only if it was promulgated through a "relatively formal administrative procedure," such as notice-and-comment rulemaking or formal adjudication. Yet, under *Auer*, far-less-authoritative interpretations often receive controlling deference from the courts.

to provide input during the development of that policy. The Chamber and its members have a powerful interest in ensuring that the H-2A and H-2B programs operate in an efficient and effective manner that is fair to both employers and employees. Had it been given the opportunity, the Chamber would have explained to DOL how its new policy harms the economy by imposing unnecessary and counter-productive burdens on employers that hire workers through the temporary visa programs. But DOL issued the "field assistance bulletin" *sua sponte*, without having considered the views of interested parties on all sides of the issue.[4]

Auer deference also skews the incentives facing an agency even when it *does* choose to engage in notice-and-comment rulemaking. Agency rules "should be clear and definite so that affected parties will have adequate notice concerning the agency's understanding of the law." *Thomas Jefferson Univ.*, 512 U.S. at 525 (Thomas, J., dissenting); *see also* Henry J. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 Harv. L. Rev. 863, 878 (1962) (noting that one reason to favor "definite standards . . . is the

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[4] In the course of promulgating regulations addressing *other* aspects of the H-2A program, DOL stated in a regulatory preamble that it was incorporating the position taken in the field assistance bulletin. *See* 75 Fed. Reg. 6,884, 6,915 (Feb. 12, 2010). But DOL did not codify that position in the *text* of the regulations. And the notice of proposed rulemaking did not state that DOL was considering changes to its policy regarding inbound travel expenses. *See* 74 Fed. Reg. 45,906 (Sept. 4, 2009).

social value in encouraging the security of transactions”).

Under *Auer*, however, an agency has a powerful incentive to promulgate *unclear* rules, and then seek controlling deference from the courts for subsequent interpretations of those rules. Deferring to an agency’s interpretation of its own regulations “creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby ‘frustrat[ing] the notice and predictability purposes of rulemaking.’” *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012). As Justice Thomas has explained (in an opinion joined by Justices Stevens, O’Connor, and Ginsburg), agencies often issue “vague regulations” because doing so “maximizes agency power and allows the agency greater latitude to make law” outside the confines of the “cumbersome rulemaking process.” *Thomas Jefferson Univ.*, 512 U.S. at 525 (Thomas, J., dissenting); *see also Talk America*, 131 S. Ct. at 2266 (Scalia, J. concurring) (“deferring to an agency’s interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases”).

The D.C. Circuit has similarly noted the “familiar” phenomenon in which agencies promulgate “regulations containing broad language, open-ended phrases, ambiguous standards and the like,” then “as years pass” give substantive content to those regulations “without notice and comment, without public participation, and without publication in the Federal Register.” *Appalachian Power Co. v. EPA*,

208 F.3d 1015, 1020 (D.C. Cir. 2000). The vague regulations promulgated by agencies are often "utterly worthless for all purposes except one"—namely, allowing the agency to claim deference to subsequent interpretations of those rules. Pierce, *supra*, at 85.[5]

Because *Auer* gives agencies a strong incentive to avoid rulemaking altogether—or to promulgate vague rules—regulated entities are often deprived of fair notice about what conduct is permitted or prohibited under the relevant regulations. *See* Manning at 670 (as a result of *Auer*, "regulated parties may find it more difficult to have a clear picture of relevant legal requirements until such parties have offended them"). It is hard enough for regulated entities—especially smaller or newly formed businesses—to make sense of the 175,000 pages of the Code of Federal Regulations. But it is wholly unreasonable to expect those companies to also monitor the constant stream of millions of pages of minutiae emanating from federal agencies to see whether and to what extent those materials place an additional gloss on the regulations in the CFR. Under *Auer*, however, that agency minutiae is converted by reviewing courts into actions having the full force of law.

Auer deference thus raises serious questions with respect to fair notice, especially in cases—such as this one—in which plaintiffs seek to hold a

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[5] *See also* Manning at 655, 670 (*Auer* deference has "an untoward effect upon [an agency's] incentive to speak precisely and transparently when it promulgates regulations," and is likely to "make[] agency regulations more unpredictable").

regulated party liable for money damages based on an alleged violation of the regulations in question. Here, a putative class of thousands of former workers has sued Petitioner for back pay and liquidated damages for alleged violations of regulations promulgated under the FLSA. Under *Auer*, the plaintiffs can recover those massive damages based on an agency interpretation that merely rises above the level of "plainly erroneous," even if it is not the *best* reading of the regulations.

The D.C. Circuit has candidly acknowledged that, under *Auer*, courts must defer to "permissible" interpretations even if they "diverge significantly from what a first-time reader of the regulations might conclude was the 'best' interpretation of their language." *General Electric Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995). Indeed, the D.C. Circuit has noted that *Auer* deference remains appropriate even if the interpretation "*would not be obvious to* '*the most astute reader*.'" *Id.* (emphasis added). Needless to say, the constitutional guarantee of fair notice is undermined when a company can be held liable for money damages based on an interpretation of a regulation that would not be obvious even to an "astute reader."

Finally, deference to an agency's interpretation of its own regulations also lacks the structural safeguards that are present in other administrative law doctrines. *Chevron* deference makes sense because there are built-in structural limits on the Congress's willingness to grant authority to administrative agencies. When Congress "enacts an imprecise statute that it commits to the

implementation of an executive agency, [Congress] has no control over that implementation." *Talk America*, 131 S. Ct. at 2266 (Scalia, J., concurring). Thus, "[d]eferring to an agency's interpretation of a statute does not encourage Congress, out of a desire to expand its power, to enact vague statutes." *Id.* Especially in times of divided government, Congress has every incentive to be specific and precise in its statutory language, to ensure that the executive branch will implement the statute as Congress intended.

In contrast, "when an agency promulgates an imprecise rule, it leaves *to itself* the implementation of that rule, and thus the initial determination of the rule's meaning." *Id.* As Justice Scalia has explained, "[i]t seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well." *Id.*; *see also Decker*, 133 S. Ct. at 1341 (Scalia, J.) (a "fundamental principle of the separation of powers" is that "the power to write a law and the power to interpret it cannot rest in the same hands"). In short, deference to an agency's interpretation of its own regulations "leaves in place *no* independent interpretive check on lawmaking by an administrative agency." Manning at 639.

* * *

In the absence of *Auer* deference, cases alleging a violation of a regulation would be adjudicated "by using the familiar tools of textual interpretation to decide: Is what the petitioners did [] proscribed by the fairest reading of the regulations?" *Decker*, 133 S. Ct. at 1342 (Scalia, J.). An agency would, of

course, remain free to explain—in whatever form it chooses—why its preferred interpretation of the regulation is the right one. But such arguments should be considered based solely on the "the validity of [their] reasoning, [their] consistency with earlier and later pronouncements," and any other factors that have the "power to persuade." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Any additional thumb on the scale in favor of the agency comes at too great of a cost to the principles underlying the APA and this Court's administrative law jurisprudence.

C. At The Very Least, This Court Should Make Clear That Inconsistent Interpretations Of A Regulation Are Not Entitled To Deference.

If a regulation is so open-ended that even the "expert" agency cannot decide what it means, it is wholly inappropriate to allow the agency's ever-shifting interpretations to carry the force of law when they are cited against a regulated party in federal court. Two Terms ago, this Court held that *Auer* deference should not apply if "the agency's interpretation conflicts with a prior interpretation." *Christopher*, 132 S. Ct. at 2166. But earlier decisions seemed to suggest otherwise. *See Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 296 n.7 (2009) (deferring to agency under *Auer* even though its position had "fluctuated"); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170-71 (2007) (deferring even though the agency "may have interpreted these regulations differently at different times in their history").

Here, the Ninth Circuit acknowledged that the "field assistance bulletin" and regulatory preamble were a departure from DOL's previous policy, but it nonetheless granted controlling deference to those interpretations. Pet.App.11a. As Petitioner explains, that holding conflicts with this Court's decision in *Christopher*, and with six other court of appeals' decisions that refuse to grant *Auer* deference to an interpretation of a regulation which conflicts with earlier interpretations. *See* Pet.25-26.

That position—which is also the one adopted by this Court in *Christopher*, 132 S. Ct. at 2166—is the better view. When an agency "flip-flops" among multiple interpretations of the same regulatory text, this is a strong indication that the latest interpretation reflects a "*post hoc* rationalization" rather than a "considered judgment" that deserves deference. *Akzo Nobel Salt, Inc. v. Federal Mine Safety & Health Review Comm'n*, 212 F.3d 1301, 1304-05 (D.C. Cir. 2000).

II. The FLSA's Applicability To Guest Workers' Pre-Employment Travel And Immigration Expenses Is A Question Of Significant Importance For The Business Community.

This case is also worthy of the Court's plenary review because of its significant implications for the H-2A and H-2B visa programs. Those programs serve as a critical safety valve for employers that need workers on a temporary basis when U.S. workers are not available. The H-2A and H-2B programs offer significant benefits for both workers and employers. Guest workers are able to earn much higher wages than are typically available in their

home countries. And, without the H-2A and H-2B programs, many employers would be forced to cut back operations or turn away business.[6] Each year, more than 200,000 guest workers participate in the H-2A and H-2B programs to fill temporary or seasonal jobs in agriculture, hospitality, landscaping, construction, and many other industries.

Companies participating in the H-2A and H-2B programs must satisfy an exhausting series of regulatory requirements before they can hire guest workers. Among other requirements, companies must: make extensive efforts to recruit U.S. workers; file hundreds of pages of paperwork with four different federal agencies; obtain certifications from DOL and the U.S. Customs and Immigration Service; and promise to pay the prevailing wage. *See* 2010 Chamber Report at 5. The application procedures are complex and time-consuming, and a single misstep can lead to delayed or denied visas, thus leaving employers without workers at a critical time for the business. *Id.* at 20-21. And many companies that depend on seasonal or temporary workers are in industries that have very thin profit margins, which means that they are especially sensitive to additional regulatory burdens or increased costs. *Id.* at 22.

The requirements of the H-2A and H-2B programs are therefore complicated and costly enough under the best of circumstances. But the Ninth Circuit's decision in this case adds yet another layer of complexity by deepening an entrenched

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[6] *See* U.S. Chamber of Commerce & ImmigrationWorks USA, *The Economic Impact of H-2B Workers* at 11 (Oct. 28, 2010), http://tinyurl.com/luky23f ("2010 Chamber Report").

circuit split over whether the FLSA requires employers to reimburse temporary workers—in their first paycheck—for *pre-employment* travel and immigration costs.

Relying on the plain text of the regulations in question, the Fifth Circuit correctly held that such expenses are not covered by the FLSA. *See Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393 (2010) (*en banc*). As the court explained, the relevant regulations "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 401. The Fifth Circuit concluded that pre-employment travel and immigration costs are categorically different from expenses that must be paid by an employer, such as uniforms and "[t]ools of the trade," 29 C.F.R. § 531.3(d)(2).

The Ninth and Eleventh Circuits have reached the opposite conclusion, holding that the FLSA requires employers to reimburse temporary workers' pre-employment travel and immigration expenses within the first work-week. *See* Pet.App.11a; *Arriaga v. Florida Pacific Farms, LLC*, 305 F.3d 1228 (11th Cir. 2002). DOL and a number of lower courts have readily acknowledged the existence of a circuit split on this issue. *See* Pet.17-18.

Many employers already need to hire lawyers, consultants, and recruiters to navigate the H-2A and H-2B process, *see* 2010 Chamber Report at 21, and the confusion resulting from the Ninth Circuit's decision will only worsen that uncertainty. The vast majority of H-2A and H-2B workers are employed in States within the Fifth, Ninth, and Eleventh

Circuits, and it is wholly unacceptable for one rule to apply in Texas and Louisiana but another to apply in California, Arizona, and Florida. This Court should grant certiorari and hold that the FLSA does not apply to pre-employment travel and immigration expenses incurred by H-2A and H-2B workers.

CONCLUSION

For the reasons set forth above, this Court should grant the petition for certiorari.

Respectfully submitted,

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