No. 22-869

IN THE

Supreme Court of the United States

SIGNET BUILDERS, INC.,

Petitioner,

v.

JOSE AGEO LUNA VANEGAS,

Respondent.

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

BRIEF *AMICUS CURIAE* OF THE TEXAS CATTLE FEEDERS ASSOCIATION IN SUPPORT OF PETITIONER

SHAWN D. TWING
Counsel of Record
MULLIN HOARD & BROWN, LLP
500 S. Taylor
Suite 800
Amarillo, TX 79120
(806) 372-5050
stwing@mhba.com

Counsel for Amicus Curiae

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

IDENTITY AND INTEREST AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Texas Cattle Feeders Association and its members (collectively referred to herein as TCFA) respectfully submit this brief amicus curiae in support of Petitioner, Signet Builders, Inc.[1] Petition for Writ of Certiorari.

TCFA is a grassroots commodity organization representing more than 4,500 cattle and pork producers in multiple states. TCFA includes members who own livestock and those who fatten livestock owned by others in preparation for market. Members utilize confinement structures necessary for the care and maintenance of their livestock such as barns, open air shelters, fencing and utility buildings. These structures vary depending on the animals being raised and specific needs of the location nonetheless, these structures are essential to their raising of livestock.

TCFA members employ H-2A visa holders to perform both primary and secondary agriculture work. TCFA members also utilize agriculture related maintenance and construction contractors such as

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[1] Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to this Court's Rule 37.2(a), Amicus Curiae affirms that the parties, through their respective counsel, have been provided with timely notice of intent to file this brief.

Petitioner. Contractors employ both non-immigrant and immigrant H-2A employees to perform agriculture construction on location.

The relief that the Respondent seeks in this lawsuit threatens the financial stability of cattle feeders and pork producers across multiple states. TCFA possesses a unique perspective and valuable information regarding animal care and the agricultural nature of the work employees such as the Respondent performed that will assist the Court in assessing the ramifications of any decision rendered by the Court of Appeals in this case.

SUMMARY OF ARGUMENT

The Court of Appeals failed to apply the proper standard when examining an exemption under the FLSA and as a result has included factors which are not material or relevant to the proper analysis.

The Court of Appeals "narrow" construction analysis improperly restricts the FLSA's secondary agriculture exemption.

The Court of Appeals' opinion creates a potential conflict in the application of the agriculture exemption as provided by the FLSA and the H-2A visa program. Lack of consistency and uncertainty that will arise is not justified in the relevant statutes or regulations.

ARGUMENT

1. Introduction

TCFA has a valid concern that confusion and the inconsistent application of the agriculture exemptions could result in significant potential liability that was heretofore unrecognized. TCFA has a considerable interest in this case due to the short and long-term implications of the Court of Appeals interpretation and application of the agriculture exemption provided by the Fair Labor Standards Act ("FLSA" or "Act"). Its interest is industry wide considering the Court of Appeals' unwarranted restriction of the agriculture exemption generally and the secondary agriculture in particular.

Since the inception of the FLSA, Congress has recognized the unique challenges to agriculture producers. In particular, the raising of livestock is not a set schedule working environment such as a factory or processing plant. The animals need maintenance, supervision and care twenty-four hours a day and seven days a week. Severely restricting the overtime exemption and adding the labor costs of the overtime premium to agriculture producers, who rely on the historical application of those exemptions, risks driving labor costs up to a point of being cost prohibited as well as driving up consumer prices.

Since 1938, Congress was and remains well aware of these issues and has provided an exemption to overtime hours for workers in agriculture. Any dramatic changes to the scope and breadth of the agriculture exemption is a public policy issue to be

decided by Congress rather than the Executive and Judicial branches of government. Congressional intent is determined by the language of the statutes passed by Congress. While administrative agencies have authority through an Act's enabling statute to issue regulations but it cannot do so at the expense of circumventing the language of the statute itself. *See e.g., Ragsdale v. Wolverine World Wide, Inc*., 535 U.S. 81 (2002) (Department of Labor regulation held invalid because its application would extend the number of weeks of FMLA leave beyond that authorized by Congress in the statute). It should be noted that the regulation struck down in *Ragsdale* remained in the code of federal regulations until 2013. *See* 78 FR 8902 (2013).

TCFA maintains that the Court of Appeals erred in its analysis and conclusions in the following particulars:

1. The Court of Appeals applied the wrong legal standard in its analysis of the Petitioner's claim that the Respondent's employment and work constituted secondary agriculture pursuant to the plain language of the Act. Rather than applying the just reading standard established and set forth in this Court's opinion in *Encino Motorcars, LLC v. Navarro*, 138 S.Ct.1134, 1142–43 (2018).

2. The Court of Appeals failure to address *Encino* coupled with its reliance on pre-*Encino* regulations to support its "narrow"

reading approach which directly contradicts the fair reading standard established by this Court. It also ignores the fact that the Court's opinion in *Encino* focused on interpreting the language of the statute. In light of this Court's decision on the proper manner of interpreting and applying statutory language contained in the FLSA any regulation or lower court decision to the contrary is supplanted and of no legal weight. In particular any reading or application of DOL regulations in contradiction of *Encino* constitutes legal error. Consequently, there is no purpose in having the District Court examine fact issues which are neither material or relevant. This point was highlighted by the District Court when it observed that factors being pressed by the Respondent involved matters completely absent from the operative statutory language. *See* Petitioner's Appendix p. 25 ("[The] elements [argued by Respondent] are found nowhere in § 203(f)"). As will be discussed below, the factors that the Court of Appeals based its remand to develop more facts in the case are not part of the FLSA statute. *See* Petitioner's Appendix pp. 10–12. Moreover, factual development of the factors to be examined remand would add nothing material or relevant to the current record regarding the applicability of the secondary agriculture exemption generally and as to Respondent.

3. The Court of Appeals opinion started down the wrong path with its focus on Respondent being a "nationwide construction company" without any reference to the fact that Respondent is a licensed "Farm Labor Contractor". The Court of Appeals ruling ignores the fact that an "employer" can be engaged in agricultural and non-agricultural businesses simultaneously and thereby hire H-2A workers.

4. The Court of Appeals analysis all but denies the agriculture exemption to third party independent contractors based on a contractor's non-agricultural business operations and enterprises regardless of the work *actually* being performed by the *employee* rather the Court of Appeals seeks to limit the exemption by virtue of the employer's percentages of business interests and profit of the employer. *See e.g., Halle v. Galliano Marine Services, LLC,* 855 F.3d 290 (5th Cir. 2017).

5. The admitted facts illustrate that the Respondent was (1) hired to perform agriculture work, (2) performed all of his work "on a farm" and (3) was engaged in the construction of "livestock containment structures" on farms in Wisconsin and Iowa. The Court of Appeals held that additional facts are necessary to determine whether the secondary agriculture

exemption applies; however, no other facts are necessary to analyze the secondary agriculture exemption.

6. Using either the fair reading standard or the narrow application standard, the Court of Appeals erred in focusing on the overall business activities of Petitioner. The analysis of FLSA exemptions has always focused on what work the employee was performing during the work weeks under consideration. The secondary agriculture exemption also requires knowledge of where the work was performed (on a farm) and what was the purpose of the work. It is undisputed in this case that Respondent worked exclusively on a farm for the purpose of building livestock enclosure structures.

7. The Court of Appeal further misapplied the "independent business" factor by focusing on the business activities of Petitioner rather than the farms upon which Respondent worked. Nothing in the pleadings or record indicates that these farms and the structures being built were for any purpose than raising livestock i.e. confining and sheltering live animals.

8. The Court of Appeals suggestion that employees hired under an H-2A visa would not be covered under the FLSA agriculture

> exemption would create an unjustified and intolerable conflict between the Acts.

2. Discussion

The Fair Labor Standards Act (FLSA) requires that all employers covered by the Act compensate employees at a minimum hourly rate and at a rate of one and one-half times their normal hourly rate for all hours worked in excess of a 40-hour week." 29 U.S.C. §§ 206 and 207.

The FLSA provides certain exemptions from the overtime requirement for certain types of work. *See* 29 U.S.C. § 213(b). Among those listed in 29 U.S.C. 213(b) is an exemption for "any employee employed in agriculture." 29 U.S.C. § 213(b)(12). However, the statute does *not* require the employer to be "a farmer" or engaged in agriculture at any certain level or degree. The District Court pointed out this fact and focused on what work the Respondent was actually engaged in performing. *See* Petitioner Appendix pp. 25 – 26.

As noted in the Petitioner's Brief though the FLSA refers to "agriculture" the statute itself does not define "agriculture work" *per se*. 29 U.S.C. § 213(b)(12). Nonetheless, the term "agriculture" is statutorily defined as follows:

> "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of

> any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of Title 12), *the raising of livestock*, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

29 U.S.C. § 203(f) (emphasis added). The use of the non-limiting term "including" shows these are examples not exclusive activities. Among other things, this fact undermines the Court of Appeals suggestion that agriculture for purposes of H-2A is broader than the FLSA. In any event from this statutory definition reasonable determinations of what constitutes "agriculture work" may be determined through a fair reading of the statute. This fair reading must include the construction of livestock containment structures such as barns because such structures have been an interictal and historical part of agriculture regarding raising livestock and dairy operations. *See e.g.*, Kristen Lie-Nielson, *History of the American Barn, Discover the Interesting History of American Barn Styles,* https://www.grit.com/farm-and-garden/structures-and-outbuildings/american-barn-zm0z17maztri/ (Updated 2022); Paul F. Long and Gary Van Hoozer, *Barn Styles in American History,*

https://www.farmcollector.com/farm-life/proud-survivors/ (1999).

As to the specific application of the agriculture exemptions set forth in § 203(f), this Court has long recognized the statutory definition of agriculture has "two distinct branches." *See e.g., Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 763 (1949). The application of these distinct branches applies to practices that are a part of raising livestock which have held for decades. Considerable reliance is placed by the agriculture industry on a consistent and reliable application of these exemptions. Such consistency and reliability are crucial for agriculture producers and contractors to be able to reasonably apply to innovations and developments in operational complexity and technology which grow constantly, as well as, recruiting the employees necessary put those developments to productive use. Furthermore, given the tremendous growth of the H-2A program industry wide harmony between the FLSA and H-2A is imperative. *See e.g.,* Castillo et. al. August 21. *Examining the Growth in Seasonal H-2A Labor*, EIB-226, U.S. Department of Agriculture, Economic Research Service.

3. Application of the Agriculture Exemption

A practice must be performed by a farmer or on a farm to qualify for the agricultural exemption under the FLSA.[2] *Id.* There is not a clearcut

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[2] In defining the secondary meaning of "agriculture", the language of Section 3(f) of the FLSA indicates *that <u>any</u> activity*

definition as to what a farmer is or is not. However, an employer does not have to be a farmer for its employees to be engaged in agricultural work.

The concept of a "farmer" is an occupational title and the employer, as a farmer, must be engaged in activities traditionally thought of as something that a farmer would do in order to qualify for the exemption. According to this Court a "farmer" could include a partnership or a corporation which engages in farming operations. *See Mitchell v. Budd*, 350 U.S. 473 (1956). However, employees of employers other than "farmers" may still be engaged in agriculture work even if the employer is not primarily involved in the agriculture business. Stated another way there is not statutory prohibition in the FLSA requiring employers be "farmers" in order for their employees to be covered under the agriculture exemption. Employers may be engaged in several business venture and operations unrelated to agriculture but nonetheless provide employees who perform agriculture work for third parties. Complex organizations may have several business operations both within and outside the definition of Agriculture. For example, a cattle feeder may have a grain milling business for outside sale or cattle processing plant. Although milling grain for feed for sale to third parties and processing beef is not considered agriculture such activity does not remove the company's livestock raising operations out of the

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performed by a farmer or on a farm that is incident to or in conjunction with such farming operations are within the definition.

scope of the agriculture exemption. As an aside, if Respondent's construction work were related to such activities he would not have been engaged in agricultural work. Moreover, TCFA and other agriculture producers regularly rely upon third party contractors as a means of outsourcing work such as construction they would otherwise do themselves.

The type of operations executed by the farmer generally should be some type of distinct activity designed to yield a particular farm product such as raising livestock for market. 29 C.F.R. § 780.131 (1998). If the activity is not performed by a farmer, the exemption under the secondary meaning of agriculture still applies if the activity is performed "on a farm." *Id*. at § 780.134. The "on a farm" criteria includes employers who are not themselves "farmers". The FLSA regulations define a "farm" as a tract of land devoted to the actual farming activities (such as a feed yard) included in the first part of § 203 (f). *See* 29 C.F.R. § 780.135.[3]

Whether such employees work in "agriculture" for purposes of the FLSA depends on whether the employee's work activities are incident to or in conjunction with farming operations on a particular farm. *See* 29 C.F.R. § 780.136. In this case, Respondent's work building livestock confinement

[3] Activities include "farming and all of its branches." The FLSA lists these activities "among other things" as the cultivation and tillage of the soil, dairying the production, cultivation, growing and harvesting of any agricultural or horticultural commodities and the raising of livestock, bees, fur-bearing animals or poultry.

structures cannot reasonably be described as anything other than "incident to or in conjunction with" raising of livestock. This fact is not altered because the Respondent didn't have contact with animals. Modern agriculture operations routinely need services to support their facilities that do not involve any contact with the animals being raised.

One example can be found in the Supreme Court's opinion *Maneja* in which this Court found that employees who repair mechanical implements used in farming are included in the agriculture exemption. *See Maneja v. Waialua Agr. Co,*, 349 U.S. 254, 263–64 (1955); see also, *Barks v. Silver Bait,* LLC, 802 F.3d 856, 861 (6th Cir. 2015)("agriculture is defined to include non-farming activities that are closely related to farming"). Livestock enclosures are not just incidental they are crucial to cattle raising operations. In fact, it would be difficult to identify any time in western history in which livestock confinement structures have not been a central part of agriculture operations. Just as important are employees who work as welders, electricians, safety coordinators, feed truck drivers, inter-facility drivers, ground maintenance, plumbers and repair and others essential for the operation of the facility. These functions are routinely performed through contracts with independent contractors who perform the tasks that the producer would otherwise be required to do itself.

As noted, the Court of Appeals erred in failing to utilize the applicable legal standard when examining the agriculture exemption in this case.

Equally troubling is the Court of Appeals' unreasonable and legally unsupported exclusion from scope of secondary agriculture employees who do not have direct contact or interaction with the animals being raised.

The Department of Labor regulations provide that, "primary agriculture" includes "the raising of livestock." 29 C.F.R. § 105(b). The regulations interpret the term "livestock" in 29 C.F.R. § 780.120. In addition to involving a type of animal considered to be "livestock", in order to be "employed in the raising of livestock", [the employee's] operations [must] constitute the "raising of such animals." 29 C.F.R. § 780.119.

> The term 'raising' … includes such operations as the breeding, fattening, feeding, and general care of livestock. Thus, employees exclusively engaged in feeding and fattening livestock in stock pens where the livestock remains for a substantial period of time are engaged in the 'raising' of livestock. . . .

29 C.F.R. § 780.121.

The second branch of the FLSA's definition of "agriculture", which is at issues in this case, "includes any practices, whether or not they are themselves farming practices, which are performed either by a farmer or on a farm as an incident to or in conjunction with 'such' farming operations." 29 C.F.R. § 780.105(c); 29 C.F.R. § 780.137] "Generally, a practice performed in connection with farming

operations is within the statutory language only if it constitutes an established part of agriculture, is subordinate to the farming operations involved, and does not amount to an independent business." 29 C.F.R. § 780.144. The Court of Appeals has misapplied the "independent business" by focusing on Respondent's business. Prior case law makes a distinction between raising and processing. *See Maneja v. Waialua* Agr. Co., 349 U.S. 254 (1955); *Baldwin v. Iowa Select Farms, L.P.,* 6 F.Supp.2d 831 (N.D. Iowa 1998). However, neither are at issue in this case. Based on the facts alleged by Respondent the agriculture construction work would be an established part of raising livestock, dairying and similar operations. It should be noted that some agriculture construction has to be performed by third party contractors due to the structural and technical complexity.

Respondent's argument which was accepted in the Court of Appeals' opinion turns the exemption analysis on its head by focusing on the business operation and enterprises of Signet rather than the actual work performed by Respondent. Whether an employee is or is not covered under an overtime exemption is determined on the actual work performed by the employee and in the case of secondary agriculture where the work was performed and for what purpose. "Livestock containment structures" such as barns and shelters have a self identifying purpose – namely to maintain, control and shelter livestock. In this case it is undisputed that Respondent works exclusively on farms and building livestock enclosure structures. As note,

livestock enclosure structures have been a part of agriculture in the United States before the country's founding see *e.g. See e.g.*, Kristen Lie-Nielson, *History of the American Barn, Discover the Interesting History of American Barn Styles,* https://www.grit.com/farm-and-garden/structures-and-outbuildings/american-barn-zm0z17maztri/ (Updated 2022); Paul F. Long and Gary Van Hoozer, *Barn Styles in American History,* https://www.farmcollector.com/farm-life/proud-survivors/ (1999).

Moreover, the Court of Appeals has strongly signaled its opinion that third party contractors with both agriculture and non-agriculture business operations cannot by virtue of that diversity supply employees engaged in otherwise exempt agriculture work including temporary employees working under a H-2A visa. This suggestion is nonsensical given that the H-2A program is specifically designed for agriculture work. In order to make the Court of Appeals position to make sense the definitions of agriculture work under the FLSA and H-2A must be separate and inconsistent. While Congress could have written the operative statutory language to illustrate its desire and intention to have separate, it has never done so. Quite the opposite, Congress clearly wanted consistent application of the definition of agriculture for purposes of the FLSA and H-2A much the same way that the exemption is consistently applied to cases involving the National Labor Relations Act (NLRA). The consistency in application between the NLRA and FLSA are such that opinions of this Court are routinely

[interchanged] when analyzing the agriculture exemption. *See e.g.*, *Holly Farms Corporation v. N.L.R.B.*, 116 S. Ct 1396 (1996).

As noted, employees H-2A or otherwise may still be engaged in secondary agriculture regardless of their employer's status as "a farmer." The "on a farm" prong of secondary agriculture was specifically added to address concerns that without it the exemption would not cover "other functions necessary to the farmer if those functions were not performed by the farmer and his hands[.]" *See Jimenez v. Duran*, 287 F.Supp.2d 979 at pp 988, 991 (N.D. Iowa 2003) (citing 29 C.F.R. § 780.128). The express legislative history in Section 780.128, the "general statement on secondary agriculture," supports this premise:

> The discussion in §§ 780.106 through 780.127 relates to the direct farming operations which come within the "primary" meaning of the definition of "agriculture." As defined in section 3(f) "agriculture" includes not only the farming activities described in the "primary" meaning but also includes, in its "secondary" meaning, "any practices (including any forestry or lumbering operations) performed by a farmer *or* on a farm as an incident to or in conjunction with such farming operations, including preparation for market delivery to storage or to market or to carriers for transportation to

> market." *The legislative history makes it plain that this language was particularly included to make certain that independent contractors . . . should be included within the definition of agricultural employees* (see *Bowie* v. *Gonzalez,* 117 F. 2d 11; 81 Cong. Rec. 7876, 7888).

(emphasis added).

Construction work performed on a farm in connection with the farming operations qualifies even if the employer itself is not engaged in operating a farm. This fact is important given the reliance agriculture producers across several industries such as cattle, pork, dairy and poultry rely on third parties to perform building, repair and maintenance at their facility. For example, section 780.137's application is appropriate under the "by a farmer" analysis while the regulations discussing "such farming operations" – on the farm at 29 C.F.R §§ 780.141-143 are the more appropriate regulations in this context.

Pertinent regulations contemplate and address precisely the arrangement under analysis in this case:

> [f]eed dealers and processors [i.e. non-farmers] sometimes enter into contractual arrangements with farmers under which the latter agree to raise to marketable size baby chicks supplied by the former who also undertake to furnish all the required feed and

> possibly additional items. Typically, the feed dealer or processor retains title to the chickens until they are sold. Under such an arrangement, the activities of the farmers and their employees in raising the poultry are clearly within section 3(f). The activities of the feed dealer or processor, on the other hand, are not "raising of poultry" and employees engaged in them cannot be considered agricultural employees on that ground – [primary agriculture]. [However] e*mployees of the feed dealer or processor who perform work on a farm as an incident to or in conjunction with the raising of [livestock] on the farm are employed in "secondary" agriculture[.]*

Jimenez, 287 F.Supp.2d at 991 (citing 29 C.F.R. § 780.126) (emphasis added); *see also* 29 C.F.R. § 780.131 ("Thus, one who merely harvests a crop of agricultural commodities is not a 'farmer' although his *employees who actually do the harvesting are employed in 'agriculture' in those weeks when exclusively so engaged*."). Once again, the pertinent facts for determining the application of the agriculture exemption is what work was the employee performing and where was the work being performed.

In order for activities other than actual farming to be eligible for the agricultural exemption under the FLSA, the activity must be performed "as

an incident to or in conjunction with" the farming operations in question. One example can be found in the Supreme Court's opinion in *Maneja* where the Court found that employees who *repair mechanical implements* used in farming are included in the agriculture exemption. *See e.g, Barks v. Silver Bait, LLC,* 802 F.3d 856, 861 (6th Cir. 2015)("*agriculture is defined to include non-farming activities that are closely related to farming*").

Specifically listed within the definition of "agriculture" is the "*raising of livestock*, bees, fur-bearing animals, or poultry." Employees are engaged in these types of operations if their operations "relate to the animals of the type named and constitute the 'raising' of such animals." 29 C.F.R. § 780.119 (1998). Even if there is not direct contact with the livestock. *See e.g. Bills v. Cactus Family Farms* 5 F.4th 844 (8th Cir. 2021). If these two requirements are met, it makes no difference for what purpose the animals are raised or where the operations are performed. *Id*. For example, the fact that cattle are raised to obtain serum or virus or that chickens are hatched in a commercial hatchery as opposed to a farm in the country does not affect the status of the operations under Section 3(f).

Signet employed Respondent for the sole purpose of constructing [livestock shelters] on farms. It would be difficult to identify work more completely meeting the definition of "as an incident to or in conjunction with the raising of livestock. The District Court was correct in concluding the application of the agriculture exemption by simply

reviewing the facts in Respondent's pleadings. Again, the District Court had the facts necessary to reach the conclusion. No other factual development was necessary.

4. H-2A

Utilization of the H-2A program have been increasing substantially over the past decade. *See e.g.*, Veronica Nigh, *H-2A Sees Explosive Growth*, American Farm Bureau Federation, (November 23, 2022) https://www.agupdate.com/agriview/markets/livestock/h-2a-sees-explosive-growth/article_ab8bf985-b964-5da3-8241-5ba83840cdfe.html; Skyler Simmtt, Use of the H-2A Guest Worker Program More than Triples in Past Decade, United State Department of Agriculture Economic Research Service (September 7, 2021) https://www.ers.usda.gov/amber-waves/2021/september/use-of-h-2a-guest-farm-worker-program-more-than-triples-in-past-decade/. A primary reason for this growth is the constant need of agriculture workers caused by shortages of labor. *See e.g.,* The U.S. Farm Labor Shortage (June 28, 2022), Justin Ferguson, Labor Shortages Continue to Impact Farmers, American Farm Bureau Federation. The increase utilization of the H-2A program by agriculture producers and contractors alike illustrates the need for the FLSA and H-2A programs to operate consistently regarding who and who is not employed in agriculture.

The DOL's regulations at 20 C.F.R. § 655.103(c) set forth the definition of agriculture labor for purposes of an H-2A temporary labor

certification such as the one obtained for the Respondent. According to the agency, "agricultural labor or services" include: 1) Agricultural labor as defined and applied in sec. 3121(g) of the Internal Revenue Code of 1986 at 26 U.S.C. § 3121(g) (Tax Code); 2) Agriculture as defined and applied in § 203(f) of the Fair Labor Standards Act. *See U.S. Department of Labor Employment and Training Administration Office of Foreign Labor Certification 2010 H-2A Final Rule FAQ* (October 23, 2019).

According to the DOL "an H-2A temporary labor certification is *limited by statute* to agricultural labor or services, for which an employer seeks to employ one or more foreign nationals as an H-2A worker, pursuant to the Immigration and Nationality Act at 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(a) and (c), and 1188. See 75 FR 6887-6889 (Feb. 12, 2010) (preamble discussion of 20 CFR 655.103(c) in the 2010 H-2A Final Rule)" *Id.* (emphasis added.) Consequently, only work meeting the definition of agricultural labor or services at 20 C.F.R. § 655.103(c) may be included on an H-2A application.[4]

Court of Appeals noted that the DOL has been tasked with defining "agricultural labor or services" for purposes of the H-2A program. Its most recent definition of "agricultural labor or services" is consistent to the definition of "agriculture" for purposes of the FLSA. *Id.*

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[4] The Internal Revenue Code's (IRC) statutory provision in its H-2A regulations is at 20 C.F.R. § 655.103(c)(1) and the FLSA statutory provision is at 655.103(c)(2).

However, the Court of Appeals has injected confusion and potential conflict regarding how H-2A employees are treated for purposes of the FLSA exemption. This is both unwise and unnecessary.

Utilization of the H-2A program is necessary for agriculture producers to meet their labor needs in a time of shortages. Having at best conflicting standards on one hand and worse two sets of rules for agriculture workers doing the same job but having significant differences in pay due to immigration status can only cause conflict between these two groups.

This case is a clear example of the problem which can be summarized in the following particulars:

a. By definition, an H-2A worker works in agriculture. The FLSA is clear that the agriculture exemption applies to anyone employed in agriculture. No conflict between H-2A and FLSA to the extent they overlap.

b. If Congress desired to have two sets of rules regarding the overtime exemption, the statutory language of the FLSA and that applicable to H-2A would be clearly set out. No suggestion is found in either statute that Congress intended them to be treated separately.

c. The Court of Appeals opined that "the criteria for receiving an H-2A visa are

broader than the FLSA agriculture exemption". *See* Petitioner's Appendix p. 16. However, the Court's observation that "agriculture labor" defined in the Tax Code is broader (logging and pressing apples for cider) than the definition in the FLSA (is a non sequitur). *See* 29 C.F.R. § 501.3(b). While this proposition is debatable. The record as it stands illustrates beyond doubt that the work Respondent performed met all definitions of agriculture labor. This case does not involve logging or apple pressing and there are no other allegations that would move Respondent into the broader definition of the Tax Code.

d. Finally, the Court of Appeals manufactures conflict in this case by observing that because the Tax Code includes references to logging and pressing apples for cider, Respondent is not "automatically" covered by the FLSA exemption by virtue of his H-2A application. However, no one is taking such a position in this case. Rather, the fact that an H-2A application was granted for agriculture labor and Respondent, in fact, exclusively performed work described in the H-2A application simply illustrates the applicability of the agriculture exemption based upon the facts alleged in his complaint.

CONCLUSION

For these reasons stated above, the Texas Cattle Feeders Association respectfully pray that this honorable Court grant the Petition of Writ of Certiorari.

Respectfully submitted,

SHAWN D. TWING
Counsel of Record
MULLIN HOARD & BROWN, LLP
500 S. Taylor
Suite 800
Amarillo, TX 79120
(806) 372-5050
stwing@mhba.com

Counsel for Amicus Curiae

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