

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 OF AMICI CURIAE AG INSTALLERS, INC.,
ALEWELT CONCRETE INC., ALTENBURG
CONSTRUCTION INC., BOADWINE FARMS, INC.,
DREW BRANDT CONSTRUCTION, INC., SUMMIT
HEARTLAND, LLC D/B/A HEARTLAND
BUILDERS CO., J N J CONSTRUCTION INC.,
KOHLEHOFER FARMS, INC., LIONHEART
CONSTRUCTION, LLC, LONGHORN CATTLE &
SWINE CONFINEMENT SYSTEMS, INC., R&R
CHRISTO CONSTRUCTION LLC, REICKS VIEW
FARMS, L.L.C., AND SPARTANS AGRICULTURAL
BUILDERS, INC. IN SUPPORT OF PETITIONER**

—◆—
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TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	6
ARGUMENT	9
I. On-farm construction of livestock confinement structures is a commonsense example of secondary agriculture under the FLSA.....	9
A. On-farm construction of livestock confinement structures is performed “as an incident to or in conjunction with” farming	10
B. On-farm construction of livestock confinement structures is dictated by farming timetables and is otherwise seasonal	15
II. The Seventh Circuit’s erroneous decision could have far-reaching and damaging consequences	19
A. The Seventh Circuit’s decision could subject agricultural construction companies to inappropriate overtime requirements.....	21
B. The Seventh Circuit’s decision could spawn litigation with needless and costly discovery.....	22

TABLE OF CONTENTS – Continued

	Page
C. Because the Seventh Circuit’s decision conflicts with the DOL’s longstanding view of agricultural construction as “agriculture,” it threatens the agricultural construction industry’s reliance on the H-2A visa program	23
CONCLUSION.....	27

TABLE OF AUTHORITIES

	Page
CASES	
<i>Bayside Enters., Inc. v. NLRB</i> , 429 U.S. 298 (1977)	9
<i>Bills v. Cactus Family Farms, LLC</i> , 5 F.4th 844 (8th Cir. 2021)	14
<i>Maneja v. Waialua Agric. Co.</i> , 349 U.S. 254 (1955)	11, 14
STATUTES	
8 U.S.C. § 1101	23
26 U.S.C. § 3121	23
29 U.S.C. § 203	7, 10, 18
29 U.S.C. § 213	9
REGULATIONS	
29 C.F.R. § 780.136	10
29 C.F.R. § 780.144	10
OTHER AUTHORITIES	
81 Cong. Rec. 7652 (1937).....	18
<i>Cash Receipts by Commodity State Ranking</i> , Econ. Rsch. Serv. U.S. Dep’t of Agric. (last visited Feb. 6, 2022)	21

TABLE OF AUTHORITIES—Continued

	Page
David J. Bier, <i>H-2A Visas for Agriculture: The Complex Process for Farmers to Hire Agricultural Guest Workers</i> (Mar. 10, 2020)	19
NPR, <i>Millions of Pigs Will Be Euthanized As Pandemic Cripples Meatpacking Plants</i> (May 14, 2020)	16
Skyler Simnitt & Marcelo Castillo, <i>Use of H-2A Guest Farm Worker Program More Than Triples in Past Decade</i> , Econ. Rsch. Serv. U.S. Dep't of Agric. (Sept. 7, 2021).....	20

STATEMENT OF INTEREST¹

The barn raising tradition of centuries past has given way to specialized construction by companies that farmers hire to build large, modern barns and other livestock confinement structures on farms. This case is about the necessary role that agricultural construction plays in “the agricultural enterprise” as it exists today.

Amici curiae are (1) companies that specialize in the construction, installation, and repair of modern hog and cattle barns, chicken houses, and other livestock confinement structures on farms; and (2) farmers who hire them. The Department of Labor (“DOL”) has long treated on-farm agricultural construction as “agriculture” under the Fair Labor Standards Act (“FLSA”) and the related H-2A statute that governs the guestworker visa program on which all *amici* rely.

Starting with the farmers, **Kohlhofer Farms** is a family-owned 5,500-head hog farm in Goodhue, Minnesota (a town of approximately 1,000 people). It depends on agricultural construction companies to supply the labor, expertise, and skills required to expand the farm’s operations and stay competitive. For

¹ Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, *amici curiae* state that counsel of record for all parties received timely notice of their intention to file this *amicus curiae* brief 10 days prior to the deadline.

example, in 2021, it hired an agricultural construction company to construct a new hog barn that would comply with the animal welfare standards of California's Proposition 12. Kohlhofer Farms could never have constructed this state-of-the-art building on its own, with the help of neighbors, or even with the help of a "typical" residential or commercial construction company unfamiliar with the regulations and requirements unique to the agricultural industry. But it needed a Proposition 12 facility to meet the evolving requirements of the pork packers to which it supplies hogs. In the words of one Kohlhofer family member: "If you don't grow, you don't survive."

Boadwine Farms in Baltic, South Dakota, is a fourth-generation family farm originally homesteaded in 1874. An innovative dairy, Boadwine received the 2020 national Beef Quality Assurance Farmers Assuring Responsible Management Dairy Award recognizing its commitment to excellence in cow care, and it was recently awarded a 2022 U.S. Dairy Sustainability Award for its sustainable farming practices. Boadwine has grown in terms of its herd size (from 40 milking cows in the 1980s to 5,000 Holstein dairy cows today) and its facilities. Today, Boadwine's cows are housed in barns equipped with ventilation, sprinkler systems, and lighting at udder level in the milking parlor.

Reicks View Farms is a family farm in Lawler, Iowa, founded in 1979. Founders Dale and Laura Reicks work alongside their two children to farm corn and raise hogs. The Reicks family also owns an agricultural construction business called Jerico

Construction, which builds hog barns. Jerico provides construction services that support the smaller hog farms that work in conjunction with Reicks View Farms to raise hogs. With only six employees, Jerico subcontracts to other agricultural construction companies certain specialized aspects of the work, including concrete, heat recovery, ventilation, and filtration. Owner and CEO Dale Reicks explained, “We can’t do that skilled work locally, so we hire it out.”

Turning to the *amici* who specialize in on-farm agricultural construction work, each of them works hand in hand with the farmers who hire them. They have spent decades developing specialized skills for working on farms and meeting the demanding timelines that farmers—and their animals’ life cycles—impose.

First, in the poultry and egg industry, **Ag Installers**, based in Sugar Land, Texas, works with cage-free egg farms to install the complex aviary equipment that egg-free systems require, complete with mesh flooring, ramps, feed troughs, water lines, manure belts, fans, inlets, heaters, and other ventilation components—all equipment that farmers simply cannot effectively install themselves. Ag Installers prides itself on its ability to “take the stress away from the farmer.” The company has completed jobs on farms across the country.

Lionheart Construction, based in Royston, Georgia, specializes in poultry house construction, primarily serving Georgia and South Carolina. Lionheart’s work is driven by “bird dates”: when the pullets

(young hens) are ready, when the eggs are laid, when the broilers are ready to go out. Lionheart draws on the farming background of its owner Julia Lunn—a child of southern Indiana farm country—and tailors its construction projects to farmers’ needs.

In the hog and cattle farming industries, **Altenburg Construction** specializes in replacing hog slats and cattle slats, *i.e.*, the flooring that animals stand on that allows manure to drop to a level below. Andy Altenburg started the business in 1994 in his garage in Lewisville, Minnesota (pop. 115)—a struggling town so small that it now has no grocery store, and “even the liquor store is failing.” But Altenburg Construction has survived. Today, it remains a family business and travels throughout the Midwest, responding to emergency calls for repairs and working with farmers on strategic planning for the future by identifying barns that will need repair. The equipment that Altenburg uses in working on concrete, metal, and plastic flooring systems in barns is highly specialized and is built to specifications for animal safety and manure removal.

Other *amici* also build on-farm structures for hogs, cattle, and chickens. **R&R Christo Construction**, based in Fremont, Nebraska, installs agriculture equipment—manure drives, feeders, waterers, ventilation, and the like—on dairy, hog, and poultry farms in Indiana, Nebraska, Iowa, and elsewhere. **Spartans Agricultural Builders**, based in Rockford, Illinois, builds hog and cattle barns and installs equipment on dairy, hog, and cattle farms. It recently began work on a large construction project featuring an

innovative barn that offers a more energy-efficient and biosecure environment for hogs. In Pittsfield, Illinois, **Longhorn Cattle & Swine Confinement Systems** provides a wide range of services on farms, from concrete pouring to equipment installation to site planning to framing. It was founded by a farm owner over forty years ago.

Summit Heartland LLC d/b/a Heartland Builders Co. (“Heartland Builders”) specializes in the erection of swine production facilities, including finishing barns, farrowing barns, and nurseries. Established in 1988 and based in Columbus, Nebraska, Heartland Builders works primarily in the Midwest region, but also works in Missouri, Arkansas, Texas, and Oklahoma.

Lastly, some *amici* are experts in the specialized concrete aspects of farm construction projects. A typical concrete project for these companies involves establishing footings and foundations around the perimeter of a barn and laying slotted concrete inside the barn that is specially designed to allow for manure removal to a pit below the flooring (work that often requires standing in manure pits in waders). **Alewelt Concrete** is a concrete subcontractor based in Alden, Iowa, that has worked on farms since 1997. It has helped over 3,500 farmers in the last decade alone. Throughout the Midwest, it works to provide concrete construction for pork facilities, dairy and cattle barns, and cage-free egg facilities. South Dakota-based **J N J Construction** specializes in pouring concrete on hog farms and in confinement barns for finishing cattle, working

in Iowa, Minnesota, Nebraska, North Dakota, and South Dakota. **Drew Brandt Construction**, based in Ackley, Iowa, exclusively pours concrete for egg laying facilities in Iowa, Nebraska, and Missouri.

Amici have a direct and substantial interest in the statutory interpretation question in this case. The DOL has long treated their work as “agriculture” within the broad definition of the FLSA, such that it is exempt from the FLSA’s overtime requirements. Overtime requirements would strain *amici* given the tight cashflows of farmers (with net farm income forecast only to decrease), the extra costs associated with hiring more H-2A workers, and the reality that the construction of livestock confinement structures requires working long hours for limited periods to meet the constraints of animal life cycles and weather patterns. And overtime aside, the prospect of litigating the “agriculture” classification over and over—with needless, lengthy, and expensive discovery—also looms. More broadly still, the classification at issue here has implications not only for overtime pay but also for the H-2A visa program—an essential source of labor for the agricultural construction industry.

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SUMMARY OF ARGUMENT

Workers who build specialized agricultural structures and equipment, on farms and at the direction of farmers, have been uniformly categorized for decades as agricultural workers exempt from overtime

requirements and eligible for the H-2A visa program. As Signet’s Petition notes, when an agricultural construction company like Signet applies to the DOL for an agricultural guestworker visa, the application is “open and notorious” about the nature of the work and the fact that no overtime will be paid. And these applications have been routinely approved by the DOL for a long time.

The Seventh Circuit’s decision risks disrupting longstanding DOL practice and the agricultural economy that has come to depend on it. The DOL’s proper classification of agricultural construction as “agriculture” is critical to agricultural construction companies and to the farmers who need modern structures for housing livestock and poultry, but who cannot complete that specialized work themselves.

Under the FLSA, “agriculture” includes not only “primary” agriculture such as “the raising of livestock” but also “secondary” agriculture. Secondary agriculture—the category at issue here—is defined as “any practices . . . performed . . . on a farm as an incident to or in conjunction with [primary] farming operations.” 29 U.S.C. § 203(f).

The on-farm construction practices of *amici* illustrate what it means to work “as an incident to or in conjunction with” farmers. *Amici* work alongside farmers to build the environments in which cows, pigs, and chickens live. They navigate agriculture-specific building codes and regulations to create fully integrated structures with flooring, ramps, feeders, waterers,

manure drives, fans, inlets, and climate control features that keep the animals alive and well. Their work is intertwined with the rhythms and seasons of farming. In the hog industry, for example, construction is dictated by the hogs' life cycle. Companies that build hog barns, like Heartland Builders, know that the gestation phase lasts 3 months, 3 weeks, and 3 days because that cycle dictates how long on-farm construction and maintenance projects can take. In short, on-farm construction is a quintessential example of secondary agriculture.

By construing the FLSA's definition of "agriculture" narrowly (instead of fairly), and by focusing on the employer's business (instead of the practice at issue), the Seventh Circuit erred. If the Seventh Circuit's decision were left undisturbed, agricultural construction companies could be subject to inappropriate overtime requirements and needless, costly discovery that they often cannot afford.

Further, the Seventh Circuit's erroneous decision could also have ramifications for the H-2A visa program's classification of on-farm construction. Farmers and agricultural construction companies rely on the H-2A visa program to provide crucial labor that is in short supply. The H-2A visa program is limited to "agricultural labor or services," and its definition of "agricultural" is tied to the FLSA definition of "agriculture." As a result, the Seventh Circuit's decision could ultimately jeopardize the agricultural construction industry's access to the H-2A workforce upon which it relies.

This could, in turn, have ripple effects for farmers and food supply chains.

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ARGUMENT

The work of the agricultural construction *amici* is varied and specialized, but all of this work is properly classified as secondary agriculture. As the district court correctly held, respondent pled himself out of court by admitting that his work consists of “building livestock confinement structures” “on farms.” The Seventh Circuit’s contrary holding is wrong and may have far-reaching consequences if left undisturbed.

I. On-farm construction of livestock confinement structures is a commonsense example of secondary agriculture under the FLSA.

The Seventh Circuit’s opinion departs from the longstanding, and commonsense, classification of on-farm agricultural construction as incidental to primary agriculture.

The FLSA categorically exempts from overtime requirements “any employee employed in agriculture.” 29 U.S.C. § 213(b)(12). It defines “agriculture” broadly, “in both a primary and a secondary sense.” *Bayside Enters., Inc. v. NLRB*, 429 U.S. 298, 300 (1977). The primary sense “includes farming in all its branches . . . includ[ing] the cultivation and tillage of the soil, dairying, . . . [and] the raising of livestock, bees,

fur-bearing animals, or poultry.” 29 U.S.C. § 203(f). The secondary sense includes “any practices . . . performed . . . on a farm as an incident to or in conjunction with such farming operations.” *Id.* Interpretive regulations provide some examples of secondary agriculture, including—as relevant here—the “erection of silos and granaries” when performed on a farm by independent contractors. 29 C.F.R. § 780.136.

Although the line between practices that are and are not “incident to or in conjunction with” farming may not be “susceptible of precise definition” (29 C.F.R. § 780.144), the construction, installation, and repair of livestock barns, chicken houses, and other essential infrastructure on farms is not a borderline case. Rather, it falls squarely—intuitively—within secondary agriculture.

A. On-farm construction of livestock confinement structures is performed “as an incident to or in conjunction with” farming.

Long ago, an American farmer in need of a new barn might gather friends and neighbors and organize a barn raising. A typical farm family could not supply all the needed labor on its own, so a communal barn raising was how the job got done.

No more. Today, the sophisticated construction of large, modern barns bears little resemblance to the barn raising of days past. It requires the equipment, knowledge, and skill of specialized companies. It

requires separation between different farms under biosecurity protocols that prevent infectious disease among livestock. And it produces large livestock confinement structures—complete with climate control, mechanized equipment, and other features designed for animal welfare—that are a far cry from the simple wooden barns of days past. As farmers adapt to an evolving regulatory landscape and increasing consumer demand for humanely raised meat products, they increasingly need specialized agricultural construction companies to remain competitive.

Despite this evolution, on-farm agricultural construction is secondary agriculture, no less than its historical precursors. As this Court has explained: “If it is agriculture, albeit industrialized and involving highly specialized mechanical tasks, we must hold it to be within the agriculture exemption.” *Maneja v. Waialua Agric. Co.*, 349 U.S. 254, 265 (1955).

Take Kohlhofer Farms, for example. In the fall of 2021, it hired an agricultural construction company to come to its 5,500-head hog farm and build a new barn that would be compliant with Proposition 12, a California law that regulates the treatment of animals confined on farms, with specific standards including for freedom of movement and minimum floor space. Kohlhofer Farms did not have the manpower, equipment, or expertise to take on the project on its own, or it would have done so. Instead, it sought out “people who specialize in hog building” to get the job done. Its new Proposition 12 barn houses about 1,500 hogs—and allows Kohlhofer Farms to meet the current

consumer demand for meat production that satisfies animal welfare standards.

In recent decades, to stay competitive and meet growing demand, many farmers have sought economies of scale through larger and larger farming operations. The General Manager for Heartland Builders, Brian Palmer, has experienced this trend firsthand. In his experience, 1,200-head hog farms have given way to 6,000-head hog farms (a common size now), and Heartland is currently working on a 12,000-head hog farm. Large barns on a farm of this scale may stretch to 200 feet wide. Building a barn like that is no easy feat, and hog breeding cycles leave little room for error or delay. It requires large cranes and other specialized equipment and workers who “know exactly what they are doing.” Some of Heartland Builders’ customers are farmers who used to construct their own smaller livestock buildings and are amazed at the large, modern structures that Heartland Builders can construct in a fraction of the time.

Longhorn Cattle & Swine Confinements has had similar experiences with its farmer customers. The Illinois-based company builds swine and cattle confinement systems and any other structures that a farmer may need, such as tractor sheds and composters. A few weeks ago, Longhorn got a call from one farmer who had been trying to install new gates on his hog barn, without success: “We got animals coming, and me and the boys have been at this for a couple of days. This is way harder than what I thought it would be.” In the experience of Longhorn’s Jonathon Ruzich,

farmers often try to save money by installing equipment or other structures themselves—like they could with less sophisticated structures in days past—but end up calling Longhorn when they realize they do not have the skill or time to complete the project themselves.

In the cage-free egg industry, R&R Christo Construction and Ag Installers work in parallel with farmers to install aviary equipment for cage-free egg facilities nationwide. Demand for cage-free eggs has soared, and it requires buildings adapted for the purpose. Specialized equipment, which includes manure drives, feeders, waterers, and ventilation, creates the environment in which the chickens live. The knowledge required to install it is “incredibly niche.” The CEO of Ag Installers explained that it can take years to become skilled at the job. Farmers today need sophisticated livestock barns and chicken houses, and they need a specialized agricultural construction industry to build those structures.

As part of operating in the farm context, agricultural construction companies—just like the farmers who hire them—are subject to farm-specific requirements. As R&R Christo Construction puts it: “Everything we do is for the farmers. Everything that affects the farmer affects us by default.” That includes biosecurity protocols. Biosecurity protocols—that is, practices that lower the risk of infectious disease among livestock and poultry—apply to all on-farm workers, including agricultural construction crews. For example, R&R Christo’s crews, which can range from 6 to 60

workers, are required to “shower in” and “shower out” of a site and must have a three- to five-day gap between their work on different farms. Heartland Builders, Drew Brandt Construction, J N J Construction, and Spartans Agricultural Builders follow similar rules and train their crews on biosecurity protocols. Like farmers, agricultural construction companies may be affected by a disease outbreak among the animals on a farm. Just a few months ago, Altenburg Construction had to postpone a job for seven months because of a disease outbreak at a farm.

Agricultural construction companies may offer other forms of specialized training as well. For example, Altenburg requires its workers to complete two weeks of safety training before a job, including training on confined space hazards and various gases that prepares workers for situations when they need to sift through pig or cow manure to address a problem.

As these examples illustrate, the on-farm construction, installation, and repair of livestock barns and chicken houses is a necessary and integral part of “the agricultural enterprise” in America today. *Maneja*, 349 U.S. at 262. The specialized structures that *amici* take pride in serve quintessentially agricultural functions and are vital to the welfare of farmers’ animals. *See, e.g., Bills v. Cactus Family Farms, LLC*, 5 F.4th 844, 847 (8th Cir. 2021) (pig loading assessments were “incidental” to pig-raising operations because they “contributed to the welfare of the pigs being loaded” onto trucks). This on-farm construction activity is secondary agriculture under the FLSA. *Id.*

B. On-farm construction of livestock confinement structures is dictated by farming timetables and is otherwise seasonal.

The seasonal, animal-centered rhythms of agriculture extend to agricultural construction as well. Because of immovable deadlines set by animal life cycles, on-farm construction projects often need to be completed quickly, and it is not uncommon for a project to involve an intensive burst of labor in a relatively short period of months or even weeks. Weather patterns matter, too. In winter, outdoor construction can be difficult or unsafe, so winter is an “off season” for many agricultural construction companies.

Agricultural construction projects are driven by agricultural timetables. For example, “pig dates”—that is, moments of transition in hog life cycles—drive the strictly scheduled projects of Heartland Builders and Altenburg Construction, just as they drive the farmers they work for. Heartland constructs three types of barns corresponding to the phases of raising hogs: (1) gilt development units, which house nursery pigs starting at 21 days old; (2) breeding gestation barns, where the breeding pigs reside for their gestation phase, lasting 3 months, 3 weeks, and 3 days; and (3) farrowing barns, where piglets are born. The cycle of hogs through these barns is known as the “turn of pigs.” For Heartland, it is typical for the first two barns to be stocked with pigs while Heartland is working to complete the third barn. Because the farrowing barn

will soon have to house the pigs coming from the gestation barn, there can be no delay in construction.

Disruption or delays in the “turn of pigs” can be disastrous. Indeed, pork producers have had to euthanize entire herds when they could not properly turn their pigs. For example, millions of pigs had to be euthanized when the COVID-19 pandemic devastated the country’s capacity for processing hogs into pork. See NPR, *Millions of Pigs Will Be Euthanized As Pandemic Cripples Meatpacking Plants* (May 14, 2020) (<https://www.npr.org/2020/05/14/855662494/millions-of-pigs-will-be-euthanized-as-pandemic-cripples-meatpacking-plants>). There is no flexibility in the production cycle. Accordingly, Heartland Builders’ projects are typically completed as quickly as possible, with 12-hour workdays during the workweek.

Similarly, Altenburg Construction serves pork producers by ramping up quickly and reliably on schedule, so as not to disrupt the finely tuned sequence of pork production. Altenburg specializes in replacing hog slats, which is the flooring that animals stand on that allows manure to drop to a level below. Sometimes—especially when called out for “emergency work”—the company has a matter of days or even a single day in which to clean and perform repairs between a group of pigs leaving and the next group coming in.

On poultry farms, “bird dates” drive the schedule of any on-farm construction project. In the egg sector, every two years, chickens are rotated from a pullet barn (for young hens) to a layering barn (for birds that

lay eggs). In the broiler context, an integrator delivers chicks to a farm on a specified date. Once those chicks have grown, they are transported off the farm for slaughter, and there is a short window of time—usually only two to three weeks—before the next group of chicks arrives. If the chicken house is in need of any construction work, repair, or maintenance, it has to be done in that window. Poultry house construction companies like Lionheart Construction work to these inflexible deadlines.

Like farming, on-farm construction work follows the seasons. December to February is the “off season” in many parts of the country, when agricultural construction companies typically go dormant because it is simply too cold to work on farms or to move animals safely between locations. In residential or commercial construction, companies can erect the shell of buildings in the fall, then enclose and heat the structure to complete interior construction during the winter. In the specialized field of agricultural construction, that is often not an option. Where agricultural equipment is built into the structure in an integral way, the entire project may need to be completed while exposed to the elements before it is enclosed and heated as a final step.

Consider a typical poultry construction project by R&R Christo Construction. The inside of the poultry house is built first, and, due to the nature and size of the equipment, the roof (and the ability to heat the structure) comes last. Thus, as a principal of R&R Christo explained, “if it is negative ten degrees

outside, it is a balmy negative seven degrees inside.” Unlike residential or commercial construction jobs, R&R Christo’s construction jobs—unprotected by exterior walls, roof, or insulation—are paused in the winter months. Longhorn’s cattle barns are similarly open to the elements during construction, such that Longhorn’s crews cannot work in wintry conditions. Even in the Southeastern States where Lionheart works, chicken house construction slows in the coldest winter months when Lionheart can’t pour concrete due to the low temperatures.

In sum, agricultural construction projects are wholly dictated by farming timetables and are dependent on weather conditions, requiring long hours for bursts of time to meet absolute deadlines dictated by animal life cycles and seasonal downcycles. This reality makes the standard FLSA model inapposite. *See* 81 Cong. Rec. 7652 (1937) (statement of Sen. Black).

Under the FLSA’s definition of secondary agriculture, what matters is whether the “practice[.]” is “performed” “on a farm as an incident to or in conjunction with [primary] farming operations.” 29 U.S.C. § 203(f). The Seventh Circuit strayed from the plain language of the statute. Under the proper test, workers who build livestock confinement structures on farms fall squarely within the FLSA’s definition of secondary agriculture. They stand in farmers’ shoes to complete necessary projects that farmers cannot complete themselves.

II. The Seventh Circuit’s erroneous decision could have far-reaching and damaging consequences.

The Seventh Circuit’s decision threatens to disrupt the productive agricultural system made up of farmers, agricultural construction companies, and the H-2A guestworkers who are essential to completing on-farm construction projects. Agricultural construction companies that have come to rely on the DOL’s longstanding treatment of their work as “agriculture”—a regulatory regime that should not be brushed aside lightly—are in the crosshairs in this litigation.

Given the rural, seasonal, and time-sensitive nature of the work, agricultural construction companies including *amici* rely heavily on H-2A agricultural guestworkers. The H-2A visa program comes with administrative complexity and substantial costs, including visa filing fees, housing, transportation, and more. In addition, an employer of H-2A workers has wage requirements for each state as determined by the Adverse Effect Wage Rate, which is typically higher than the minimum wage. *See* David J. Bier, *H-2A Visas for Agriculture: The Complex Process for Farmers to Hire Agricultural Guest Workers* (Mar. 10, 2020) (<https://www.cato.org/publications/immigration-research-policy-brief/h-2a-visas-agriculture-complex-process-farmers-hire#h-2a-program-rules>) (noting that 2020 AEWR was higher than every state’s minimum wage by average of 57 percent).

Notwithstanding the cost and complexity of the H-2A visa program, the past decade has witnessed an exponential increase in the number of H-2A workers arriving each year due, in part, to the incredibly tight labor market and domestic workers' general unwillingness to engage in seasonal agricultural work. *See, e.g.,* Skyler Simnitt & Marcelo Castillo, *Use of H-2A Guest Farm Worker Program More Than Triples in Past Decade*, Econ. Rsch. Serv. U.S. Dep't of Agric. (Sept. 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/>). That trend is borne out by the agricultural construction industry, which has come to depend on H-2A guestworkers. The H-2A program imposes administrative burdens—and doesn't leave flexibility for *ad hoc* additions to the workforce—but it fills a gap that simply cannot be filled with domestic labor. The Seventh Circuit's decision has injected needless uncertainty into the agricultural construction industry's eligibility for the H-2A program.

This is a decision that may be keenly felt in the States within the Seventh Circuit. Illinois, Indiana, and Wisconsin are some of the most important agriculture States in the country:

- Wisconsin ranks #2 in dairy
- Indiana ranks # 3 in chicken eggs
- Illinois ranks #4, Indiana #5, and Wisconsin #16 in hogs

- Illinois, Indiana and Wisconsin rank in the top 25 for farm chickens
- Illinois, Indiana and Wisconsin all rank in the top 10 for corn

Cash Receipts by Commodity State Ranking, Econ. Rsch. Serv. U.S. Dep’t of Agric.(https://data.ers.usda.gov/reports.aspx?ID=17844#P9e06edba686446a8bcc1710090e4ebbf_10_251iT0R0x132) (last updated Feb. 7, 2023). Accordingly, disruption of the agricultural construction industry in those States may have far-reaching effects for the nation’s food supply. The potential impacts of the Seventh Circuit’s decision underscore the need for review by this Court.

A. The Seventh Circuit’s decision could subject agricultural construction companies to inappropriate overtime requirements.

The most immediate potential impact relates to overtime pay. Because on-farm construction of livestock barns and poultry houses has long been classified as “agriculture” under the FLSA, this work has been exempt from the FLSA’s overtime requirements (and eligible for the H-2A visa program, as discussed below). The prospect of potentially having to pay overtime—on top of the extra costs associated with the H-2A visa program itself—is daunting to agricultural construction companies and farmers like *amici*. Given the demanding seasonal schedules of on-farm construction projects, long workdays cannot be avoided. For that

very reason, the FLSA's overtime requirements were never intended to apply to agriculture.

Agricultural construction companies would likely have to make tough business decisions if faced with overtime requirements in certain jurisdictions. Extending the time it takes to complete a project is not an option. Additional workers are hard to come by, and hiring additional H-2A workers adds costs far above overtime pay due to the H-2A-specific costs discussed above. R&R Christo Construction estimated that it would simply be forced to abandon States that require overtime pay. And in the words of Altenburg Construction, "paying overtime would devastate us." This reduction in the availability of agricultural construction services could result in disruption for farmers and supply chains, negative impacts for animals, and more food inflation for customers.

B. The Seventh Circuit's decision could spawn litigation with needless and costly discovery.

The Seventh Circuit did not purport to classify agricultural construction as exempt or not exempt from the FLSA's overtime requirements. Instead, it took issue with the district court's categorical determination based on the pleadings that the on-farm construction of livestock confinement structures is secondary agriculture. The Seventh Circuit prescribed a "totality-of-the-circumstances test" that improperly includes consideration of whether the employer's construction

business “amounts to an independent business.” That test cannot be squared with the plain language of the operative statute. It threatens to subject agricultural construction companies to repeated litigation concerning the “agriculture” classification, with needless, drawn-out, and costly discovery processes that they often cannot afford.

C. Because the Seventh Circuit’s decision conflicts with the DOL’s longstanding view of agricultural construction as “agriculture,” it threatens the agricultural construction industry’s reliance on the H-2A visa program.

Although H-2A eligibility is not directly at issue in this case, the Court should not overlook the potential ramifications for the H-2A visa program.

The H-2A program is limited to “temporary or seasonal” “agricultural labor or services.” 8 U.S.C. § 1101(a)(15)(H)(ii)(a). In other words, a job cannot be done by an H-2A guestworker unless it is “agricultural.” The H-2A statute defines “agricultural labor or services” to include (1) “agriculture” as defined by the FLSA; (2) “agricultural labor” as defined in 8 U.S.C. § 3121(g); and (3) “the pressing of apples for cider on a farm.” *Id.* Because the FLSA definition is materially similar to or broader than the other two definitions that inform the H-2A definition, the Seventh Circuit’s opinion injects uncertainties into the H-2A visa program despite decades of consistent DOL guidance and

interpretation that agricultural construction workers building on-farm structures are “agricultural.” As Signet’s Petition notes, the Seventh Circuit’s decision “sets the FLSA on a collision course with the H-2A visa program.” Petition at 27.

If the on-farm construction of livestock confinement structures is no longer deemed “agricultural”—or if it becomes too costly to litigate the classification—then would-be H-2A workers may no longer be admitted to do this work. That would be disastrous for the agricultural construction industry and the farmers it serves.

The H-2A visa program has served as a virtual lifeline for *amici*. *Amici* have found it increasingly difficult to recruit domestic workers for the rural jobs that farmers need done. These jobs are needed in remote locations. It is manual labor that requires long journeys and time away from family—a hard lifestyle that seems to appeal to fewer and fewer U.S. workers. Multiple agricultural construction companies describe H-2A workers as “a pillar” of their businesses. Without it, these companies would be unable to staff construction projects, and the farming operations they support would be directly affected.²

² The H-2B program would not provide a solution to the problem because it has a cap and is already oversubscribed. Consequently, the number of workers currently hired under the H-2A program could not be hired under the H-2B program in a timely manner, if at all.

For example, Ag Installers has advertised hundreds of labor positions in various States yet struggles to fill even a small number of openings with domestic workers. It therefore relies on the H-2A program, currently working with about a hundred H-2A guestworkers per year, including many who have worked with Ag Installers for seven or eight years and become skilled in its “super niche specialty.” To lose its H-2A workforce would be a “disaster” for Ag Installers and the farmers it supports. Similarly, R&R Christo struggles to attract U.S. workers who can meet farmers’ firm deadlines, which are designed to ensure appropriate infrastructure for the care of hogs and chickens. R&R Christo works with hundreds of H-2A workers each year. These companies, along with other *amici*, might have closed their doors by now but for the H-2A program.

The same goes for Spartans Agricultural Builders. In Spartans’ experience, “as soon as local workers come out on the farm and smell the job, they don’t come back the next day.” Spartans hires over a hundred H-2A workers every year. It recently began work on an innovative new 12,000-sow complex in South Dakota. The development, which covers 55 acres, offers a more energy-efficient and biosecure environment for hogs. The project relies so heavily on H-2A workers that it had to be paused when the workers’ visas lapsed.

Amici prize the specialized experience and reliability of the H-2A crews they work with. For example, Longhorn Cattle & Swine Confinements has been working with the same H-2A guestworkers for over a decade through its subcontractor Alewelt, resulting in a knowledgeable and efficient construction process that residential and commercial contractors could not match—a process that “works like a well-greased machine.”

Longhorn’s well-greased machine would grind to a halt without its H-2A workforce. The Seventh Circuit’s narrow interpretation of “agriculture” under the FLSA sets up a conflict with the DOL’s treatment of agricultural construction jobs as “agricultural.” If these jobs were to become ineligible for the H-2A visa program as a result of confusion created by the Seventh Circuit’s opinion, that would impair the operations of the agricultural construction *amici* and their farmer customers. And it would undoubtedly have damaging ripple effects for the food supply chains needed to feed a growing population.



CONCLUSION

For the foregoing reasons, the Court should grant Signet's petition for certiorari and reverse the decision of the United States Court of Appeals for the Seventh Circuit.

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