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 IN OPPOSITION

Jennifer Zimmermann
Sheila Sullivan
LEGAL ACTION OF WISCONSIN
744 Williamson St., Suite 200
Madison, WI 53703

Lorraine Gaynor
IOWA LEGAL AID
1700 S. 1st Ave., Suite 10
Iowa City, IA 52240

Kelsi Brown Corkran
Counsel of Record
Rupa Bhattacharyya*
Joseph W. Mead
INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION
600 New Jersey Ave., NW
Washington, DC 20001
(202) 661-6607
kbc74@georgetown.edu

Edward J. Tuddenham
42 Ave. Bosquet
75007 Paris, France

Counsel for Respondent

QUESTION PRESENTED

Respondent Jose Ageo Luna Vanegas filed a complaint against petitioner Signet Builders, a construction company that employed Luna Vanegas, seeking unpaid overtime compensation. Signet moved to dismiss the complaint pursuant to Rule 12(b)(6) based on Signet's affirmative defense that Luna Vanegas performed agricultural work that is excluded from the Fair Labor Standards Act's overtime protections.

The question presented is whether the court of appeals correctly held that Signet's affirmative defense could not be resolved on a Rule 12(b)(6) motion because it requires an evaluation of facts that Signet bears the burden of proving and that Luna Vanegas had no obligation to plead in his complaint.

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INTRODUCTION

Respondent Jose Ageo Luna Vanegas seeks unpaid overtime compensation from the construction company that employed him, petitioner Signet Builders. Signet moved to dismiss the complaint pursuant to Rule 12(b)(6) based on its affirmative defense that Luna Vanegas performed agricultural work that is excluded from the Fair Labor Standards Act. In the decision below, the Seventh Circuit held that Signet's affirmative defense could not be resolved on a Rule 12(b)(6) motion because it requires an evaluation of facts that Signet bears the burden of proving and that Luna Vanegas had no obligation to plead in his complaint.

Unable to identify any basis for the Court's review of that decision, Signet instead presents the Court with questions the Seventh Circuit did not reach, based on challenges Signet did not raise below. Signet asks the Court to determine whether Luna Vanegas "comes within the FLSA's broad agricultural exemption," Pet. ii, a question the Seventh Circuit expressly left for the district court to resolve once the parties have sufficiently developed the record to permit the fact-driven, totality-of-the-circumstances inquiry set forth in the Labor Department's longstanding interpretive regulations and this Court's precedent. The petition offers no rebuttal to the Seventh Circuit's determination that the regulatory scheme requires consideration of facts not addressed in the complaint, and as such, Signet has forfeited the only issue the Seventh Circuit reached.

Signet also asks the Court to review "[w]hether there is any room for a rule interpreting the FLSA's exemptions narrowly" after *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134 (2018), Pet. i, based on a single sentence in the Seventh Circuit's opinion that had no relevance to its holding that Signet could not prove its affirmative defense at the pleading stage. Signet does not and cannot identify any way in which the narrow construction rule impacted that holding; to the contrary, the petition *does not contest* that the regulatory scheme requires consideration of facts that Signet has the burden of proving and that are not addressed in the complaint.

To the extent the petition questions the validity of the regulatory scheme after *Encino*, Signet forfeited that challenge by embracing the regulations below. In any event, *Encino* casts no doubt on the regulations at issue here, which have remained unchanged for over 50 years and precisely track this Court's precedent dating back over 70 years, without a whiff of congressional disapproval.

The Seventh Circuit's holding that Signet's affirmative defense failed at the Rule 12(b)(6) stage is not only consistent with the law of every circuit, but compelled by this Court's precedent. Signet's purported circuit split consists mostly of summary judgment decisions that simply restate *Encino*'s holding that courts should read the FLSA's exemptions fairly. Not one supports either Signet's attempt to assert the agricultural exemption at the pleading stage or its (in any event forfeited) suggestion that *Encino* implicitly abrogated the longstanding regulatory scheme guiding application of the exemption.

Signet's claimed "collision course" between the FLSA and the H-2A visa program is illusory. An H-2A visa may be issued based on either the FLSA definition of "agricultural labor" *or* a definition in the Internal Revenue Code that this Court has recognized as broader than the FLSA definition. Moreover, any purported tension between Signet's H-2A approval and Luna Vanegas's overtime claim has now evaporated with the discovery of evidence that Signet falsely represented in its applications that its laborers would work directly for a "Farm Company" rather than a general construction contractor. Luna Vanegas has already moved for leave to file an amended complaint incorporating this evidence.

The parties have also now exchanged additional discovery relating to the agricultural exemption, including evidence regarding the scope of Signet's operations and the specific nature of the construction projects on which Luna Vanegas worked. In all likelihood, then, the complaint Signet asks this Court to review will soon be inoperative, and Signet will have an opportunity to renew its affirmative defense in a summary judgment motion before this Court would even hear argument in this case.

The Court should deny the petition.

STATEMENT OF THE CASE

I. Legal Background

"The principal congressional purpose" of the Fair Labor Standards Act is "to protect all covered workers from substandard wages and oppressive working hours, 'labor conditions [that are] detrimental to the

maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers.'" *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (quoting 29 U.S.C. § 202(a)). The Act reflects Congress's recognition that the "unequal bargaining power as between employer and employee," *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706 (1945), often prevents workers from receiving a "'fair day's pay for a fair day's work,'" *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) (quoting President Franklin D. Roosevelt, Message to Congress on Establishing Minimum Wages and Maximum Hours (May 24, 1937)).

To accomplish its goals, the FLSA requires employers to pay covered workers a minimum hourly wage, 29 U.S.C. § 206, and a higher overtime rate for work in excess of 40 hours per week, *id.* § 207. The overtime provision's purpose is not only to ensure a fair wage, but also to encourage "a reduction in hours to spread employment as well as to maintain health." *Southland Gasoline Co. v. Bayley*, 319 U.S. 44, 48 (1943).

The Act's sweeping coverage includes every "employee"—an "exceedingly broad" scope, *Tony & Susan Alamo Found. v. Sec'y of Lab.*, 471 U.S. 290, 295 (1985)—unless the employee falls within one of the Act's numerated exemptions. The agricultural exemption raised by Signet covers "any practices … performed by a farmer or on a farm as an incident to or in conjunction with such farming operations." 29 U.S.C. § 203(f). Congress originally excluded agricultural labor from both the minimum wage and overtime provisions, but today agricultural workers are

excluded only from the overtime provisions. *See* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, sec. 4, § 6(a)(5), 88 Stat. 55, 56; Fair Labor Standards Amendments of 1966, Pub. L. No 89-601, sec. 203, § 13, 80 Stat. 830, 833-34.

The FLSA's legislative history suggests varied motives for the agricultural exemption. Envisioning a small family farm, Senator Black defended the exemption as necessary because "businesses of a purely local type which serve a particular community, and which do not send their products into the streams of interstate commerce" were better regulated at the state level. 81 Cong. Rec. 7648 (1937) (Sen. Black). Other legislators emphasized the seasonal nature of farming: "The farmer['s] … job is subject to the changes in season and to changes in weather. He works longer hours during some seasons than he does in others." 82 Cong. Rec. 1476 (1937) (Rep. Culkin).

But the agricultural exemption primarily reflects the politics and prejudices of the time. Large farming operations—which were concentrated in the South and hired predominantly underpaid Black workers—were powerful lobbyists during debates over the Act. *See* Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 Tex. L. Rev. 1335, 1373-77 (1987). These special interests secured, for example, an exemption for cotton processing, Pub. L. No. 75-718, § 7(c), 52 Stat. 1060, 1063, based solely on political interests. 82 Cong. Rec. 1398 (1937) (Rep. Griswold) ("[T]here is no particular merit" in the special treatment of cotton. It happened solely "[b]ecause we had a lack of votes—that is all."). And Southern legislators were quick to

scoff at the idea of a minimum wage that applied equally across races:

> [T]here is another matter of great importance in the South, and that is the problem of our Negro labor. There has always been a difference in the wage scale of white and colored labor. … [The Act] will prescribe the same wage for the Negro that it prescribes for the white man. Now, such a plan might work in some sections of the United States but those of us who know the true situation know that it just will not work in the South. You cannot put the Negro and the white man on the same basis and get away with it.

82 Cong. Rec. 1404 (1937) (Rep. Wilcox); *see also* Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 Ohio St. L.J. 95, 114 (2011). Unsurprisingly, the Act's agricultural exemption fell disproportionately on workers of color when it was enacted, *see* Linder, *supra*, at 1343-46, a disparity that has worsened over time, *see* Mary Otoo, *Beyond Discriminatory Intent: Agriculture, Labor Rights, and the Shortcomings of Equal Protection Doctrine*, 55 Colum. J.L. & Soc. Probs. 237, 239 (2022).

This Court has long recognized that the agricultural exemption "is limited" and does not extend to all work done with an agricultural end. *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 766

(1949). In particular, *Farmers Reservoir* established over 70 years ago that the application of the agricultural exemption depends not on "the necessity of the activity to agriculture nor [on] the physical similarity of the activity to that done by farmers in other situations," but rather on "whether the activity in the particular case is carried on as part of the agricultural function or is separately organized as an independent productive activity." *Id.* at 761. Applying this test, the Court held that the exemption did not apply to employees of a separate company created by farmers to build and maintain irrigation ditches. *Id.* at 762-69.

A few years later, the Court twice confirmed that the critical query is whether the covered activity is, in modern times, the type of work that farmers would typically do "as an incident to" to their farming, or instead a task more often done by non-farmers. *See Mitchell v. Budd*, 350 U.S. 473, 481 (1956) (asking whether farmers "ordinarily perform" a function); *Maneja v. Waialua Agric. Co.*, 349 U.S. 254, 265 (1955) (asking "what is ordinarily done by farmers"). In determining whether a particular type of work is an incident to farming, it is "necessary to look to all the facts surrounding the process." *Mitchell*, 350 U.S. at 481. Applying this test, the Court has found the agricultural exemption inapplicable to such activities as processing crops after harvest, *Maneja*, 349 U.S. at 264-69, transporting feed to a farm, *Bayside Enters., Inc. v. NLRB*, 429 U.S. 298, 303 (1977), and catching chickens on a farm and hauling them to slaughter, *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 401 (1996).

The Labor Department has promulgated interpretive regulations incorporating this Court's teachings

on "[t]he line between practices that are and those that are not performed 'as an incident to or in conjunction with' … farming operations." 29 C.F.R. § 780.144. Generally speaking, "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." *Id.*; *cf. Maneja*, 349 U.S. at 263 (exemption applies to "subordinate and necessary task[s] incident to [the farm's] agricultural operations"); *Farmers Reservoir*, 337 U.S. at 761 ("The question is whether the activity in the particular case is carried on as part of the agricultural function or is separately organized as an independent productive activity.").

This determination is made "by examination and evaluation of all the relevant facts and circumstances," including "common understanding, competitive factors," "the prevalence of [the activity's] performance by farmers," "the size of the operations," "the extent to which the practice is performed by ordinary farm employees," and "the amount of interchange of employees between the operations." 29 C.F.R. § 780.145; *see id.* § 780.146 (the inquiry considers "the facts indicating whether performance of the practice is in competition with agricultural or with industrial operations, and of the extent to which such a practice is ordinarily performed by farmers incidentally to their farming operations"); *cf. Mitchell*, 350 U.S. at 481 (asking whether farmers "ordinarily perform" the activity in question); *Maneja*, 349 U.S. at 264-65 (considering, among other things, the "size of the ordinary farming operations," relative "time spent in [the activity in question] and in ordinary farming," "[t]he

extent to which ordinary farmworkers" perform the activity, and the "interchange of workmen").

These interpretive regulations have been in effect for over 50 years without any relevant change. *See* 37 Fed. Reg. 12084 (June 17, 1972). Although Congress has revised or amended the FLSA "nearly every session of Congress since its passage," and specifically provided enhanced minimum wage protections to agricultural workers in 1974, § 4, 88 Stat. at 56, Congress has never made any statutory change indicating disapproval of the Labor Department's implementation of the agricultural exemption. Autumn L. Canny, *Lost in a Loophole: The Fair Labor Standards Act's Exemption of Agricultural Workers from Overtime Compensation Protection*, 10 Drake J. Agric. L. 355, 356 n.7 (2005).

Employers carry "the burden of proving the existence of [such] conditions" that would establish an FLSA exemption applies. *Walling v. Gen. Indus. Co.*, 330 U.S. 545, 548 (1947). Accordingly, in a suit seeking unpaid wages under the FLSA, the application of an exemption "is a matter of affirmative defense." *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974).

II. Factual and Procedural Background

In the modern economy, when an agricultural operation has construction needs, it typically hires a general contractor that finds subcontractors like Signet to do the framing work. Dist.Ct.Dkt.28 ¶ 3. Signet markets itself as a construction company that employs hundreds of workers to build commercial, industrial, and agricultural projects. *See About*, Signet,

https://www.signet.us/ (last visited June 7, 2023). The industrial-scale buildings that Signet's employees construct on farms are enormous. *See id.* (noting a half-million square-foot building constructed by Signet); Dist.Ct.Dkt.84 at 13 n.4 (Signet constructs buildings of more than 100,000 square feet).

In the wake of the 2008 recession, Signet and one of its amici, Alewelt Concrete, shifted their business strategy to focus on construction projects for agricultural clients, built by a migrant workforce hired through the H-2A visa program. *See* C.A. Amicus Br. of Mary Wilson 10-14. The H-2A program authorizes employers to hire migrant workers to perform "agricultural labor or services … of a temporary or seasonal nature," a term which incorporates both the FLSA's definition of "agricultural worker" and a definition found in the Internal Revenue Code, 26 U.S.C. § 3121(g). 8 U.S.C. § 1101(a)(15)(H)(ii)(a). The competitive advantage that Signet and Alewelt gained through this move was so profound that it forced smaller construction companies that hired local workers out of business. *See generally* C.A. Amicus Br. of Mary Wilson.

Signet hired respondent Jose Ageo Luna Vanegas, a Mexican citizen, through the H-2A program to perform construction work for Signet's agricultural clients. Pet. App. 2-3. Rather than limiting their hiring to particular seasons, Signet hires migrant workers during every month except February. Dist.Ct.Dkt.1 ¶ 15. In 2019, Luna Vanegas worked for Signet from April through December. Dist.Ct.Dkt.80-1 ¶ 35.

Although Luna Vanegas frequently worked more than 40 hours a week, Signet did not pay him the overtime rate required by the FLSA. Pet. App. 1. In 2021, he filed this suit seeking to recover the withheld wages. His complaint alleged that his duties took place "on farms" but consisted of typical construction work: "[U]nload materials, lay out lumber, tin sheets, trusses, and other components for building livestock confinement structures. Lift tin sheets to roof and sheet walls, install doors, and caulk structure. Clean up job sites. Occasional use of forklift upon employer provided certification." Dist.Ct.Dkt.1 ¶¶ 8, 19. Luna Vanegas also sought conditional certification of a collective action on behalf of all Signet H-2A employees who, like him, worked exclusively in construction. *Id.* ¶¶ 23-26.

As noted earlier, the application of an FLSA exemption to an unpaid wages claim is an affirmative defense, *supra* p. 9, and under Federal Rule of Civil Procedure 8, affirmative defenses "must be raised in the answer, not by motion," Pet. App. 4. Nonetheless, before filing an answer, Signet moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), on the ground that the complaint "include[d] no facts that would support finding" that Luna Vanegas fell outside the agricultural exemption. Dist.Ct.Dkt.29 at 10. Signet argued that under the Labor Department's interpretive regulations, the work Luna Vanegas described in the complaint necessarily qualified for the agricultural exemption, and it urged the court to defer to those regulations. *Id.* at 21-23. The district court agreed with Signet and dismissed the case. Pet. App. 29-30.

Luna Vanegas appealed, and the Seventh Circuit reversed. The court of appeals explained that a "real consequence" of Rule 8's structure is that "a plaintiff's complaint need not anticipate or refute potential affirmative defenses." *Id.* at 4. The agricultural exemption, the court observed, requires a "fact-driven, totality-of-the-circumstances" inquiry into whether Signet's construction business was an incident to farming or an independent, non-agricultural business. *Id.* at 8. Relevant factors include whether the work is "'ordinarily performed' by farmers themselves or by independent businesses hired by those farmers," *id.* at 10 (quoting 29 C.F.R. § 780.146); whether Signet's construction contracts "are 'in competition with agricultural or with industrial operations,'" *id.* at 11 (quoting 29 C.F.R. § 780.146); and "the division of labor and supervision between a contractor's employees and those of the farmer," *id.* (citing 29 C.F.R. § 780.145). Because "nothing in the complaint" supported Signet's affirmative defense on these factors, it "was not a candidate for disposition under Rule 12(b)(6)." *Id.* at 11-12, 16.

The Seventh Circuit thus remanded to the district court for further proceedings, *id.* at 17, including an opportunity for Signet to reassert its affirmative defense if it developed facts supporting the agricultural exemption's application. Signet petitioned for rehearing and rehearing en banc, but no judge voted in favor of rehearing. *Id.* at 18. Signet did not move to stay the mandate.

Over the eight months since the issuance of the mandate, the case has proceeded in district court. The parties have now exchanged discovery relating to the

application of the agricultural exemption, including the scope of Signet's operations and the specific nature of the construction projects on which Luna Vanegas worked. *See* Dist.Ct.Dkt. 85-1, 85-2, 85-3. This evidence demonstrates that the sheer size and complexity of Signet's construction projects are far beyond anything farmers might construct on their own, much less something they "ordinarily perform" for themselves. Dist.Ct.Dkt.84 at 13. Signet's discovery responses and contracts also indicate that farmers and farm employees neither assist Signet with its construction work nor directly supervise its workers. *Id.* at 13-14.

Meanwhile, Luna Vanegas has moved for leave to file an amended complaint, alleging more facts surrounding his recruitment and his job duties, and adding state law causes of action such as breach of contract. *See* Dist.Ct.Dkt.92-1. Notably, the amended complaint incorporates newly discovered evidence that Signet's H-2A applications falsely indicated that the employees would be working directly for a "Farm Company," when in fact they would, in most cases, be working for a general construction contractor, not a farm. *Id.* ¶ 26. As a result, the amended complaint alleges, the non-agricultural work Luna Vanegas performed also did not meet the definition of agriculture under the H-2A program. *Id.* ¶ 27.

REASONS FOR DENYING THE PETITION

I. Signet seeks this Court's review of determinations the Seventh Circuit did not make, based on challenges Signet did not raise below.

The petition fails at the outset from two fatal vehicle problems: The decision below does not reach either of the questions presented, and in any event, Signet forfeited the petition's primary arguments by not raising them below.

A. The Seventh Circuit did not decide whether the FLSA's agriculture exemption applies to Luna Vanegas's overtime claim.

Starting with the second question presented first: Signet asks the Court to determine "[w]hether a person admitted to the United States on an agricultural guestworker visa who is employed on farms but performs secondary functions, like building on-site livestock confinement structures, comes within the FLSA's broad agriculture exemption," Pet. ii,—i.e., whether the FLSA's agriculture exemption applies to Luna Vanegas's overtime claim.

Although that question is indeed at the heart of this litigation, it has not been answered yet. The Seventh Circuit held only that Signet's affirmative defense could not be resolved on a Rule 12(b)(6) motion because it requires an evaluation of facts that Signet has the burden to prove and that Luna Vanegas had no obligation to plead. Pet. App. 15-16.

That holding is correct. As this Court has explained, "the application of an exemption under the Fair Labor Standards Act is a matter of affirmative defense on which the employer has the burden of proof." *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 & n.12 (1974). And under Federal Rule of Civil Procedure 8, "an affirmative defense must be raised in the answer, not by motion." Pet. App. 4.

Disregarding Rule 8, Signet immediately moved to dismiss the complaint based on its affirmative defense, without filing an answer. *Id.* at 3. Although the district court allowed the shortcut on the theory that the complaint unequivocally established the agricultural exemption's application to Luna Vanegas, *see id.* at 20-21, 29, the Seventh Circuit disagreed. A "real consequence" of Rule 8's structure, the court explained, is that "a plaintiff's complaint need not anticipate or refute potential affirmative defenses." *Id.* at 4. Here, Signet's affirmative defense required determining whether the work Luna Vanegas performed was "'an incident to or in conjunction with'" farming operations, *id.* at 6 (quoting 29 U.S.C. § 203(f)), which is a "fact-driven, totality-of-the-circumstances" inquiry under the Labor Department's longstanding regulations and this Court's precedent, *id.* at 8, 13-14.

Of particular importance, the regulations provide that where an activity is performed by an independent contractor, it is an incident to or in conjunction with farming operations only if, among other things, it does not amount to "an independent productive activity." 29 C.F.R. § 780.104; *see Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 761 (1949) (same). Determining whether contractor work is "part

of the agricultural activity" or instead "a distinct business activity" requires an "examination and evaluation of all the relevant facts and circumstances in the light of the pertinent language and intent of the Act." 29 C.F.R. § 780.145.

Relevant facts include whether the work is "ordinarily performed" by farmers themselves or by independent businesses hired by those farmers, *id.* § 780.146; whether the independent contractor competes primarily "with agricultural or with industrial operations," *id*; "the amount of interchange" between the farm's employees and the contractor's employees, *id.* § 780.145; "the amount of revenue derived from each activity," *id.*; "the degree of industrialization involved," *id.*; and "the degree of separation established between the activities," *id*. The ultimate determination does "not depend on any mechanical application of isolated factors or tests. Rather, the total situation will control." *Id.* (citing *Maneja v. Waialua Agric. Co.*, 349 U.S. 254 (1955), and *Mitchell v. Budd*, 350 U.S. 473 (1956)).

The Seventh Circuit concluded that nothing in Luna Vanegas's complaint supported Signet on any of these points, let alone conclusively established Signet's affirmative defense as required to shortcut Rule 8. *See* Pet. App. 10-12.

Signet argued that the regulations established its defense under 29 C.F.R. § 780.136, which states that "employees engaged in the erection of silos and granaries" are "examples of the types of employees of independent contractors who may be considered employed in practices performed 'on a farm.'" According

to Signet, the livestock buildings constructed by Luna Vanegas are analogous to silos and granaries, and thus definitively fall under the agricultural exemption.

As the Seventh Circuit recognized, this argument is contrary to § 780.136 itself, which states in the very next sentence that whether such employees (i.e., those erecting silos and granaries) are engaged in agricultural labor "depends, of course, on whether the practices are performed as an incident to or in conjunction with the farming operations on the particular farm, as discussed in §§ 780.141 through 780.147." In other words, even with respect to the construction of silos and granaries, the regulatory inquiry requires consideration of the factors identified in § 780.145 and § 780.146, which could not be assessed based solely on the complaint. *See* Pet. App. 9-10. This Court's precedents likewise belied Signet's singular focus on the work Luna Vanegas performed, "omitting consideration of questions such as whether his employer was engaged in a productive activity separately organized from farming." *Id.* at 13-14 (citing *Maneja*, 349 U.S. at 270; *Mitchell*, 350 U.S. at 481; *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 403-04 (1996)).

The petition offers no rebuttal to the Seventh Circuit's holding that the regulatory scheme requires consideration of facts and circumstances not addressed in the complaint. Signet has thus forfeited the only issue the Seventh Circuit reached.

B. Signet did not contest the validity of the fact-intensive regulatory inquiry below.

The closest the petition comes to engaging with the Seventh Circuit's substantive reasoning is on pp. 24-26, where Signet describes the Seventh Circuit as splitting from the Eighth Circuit when it "focused on 'whether Signet's construction business 'amount[s] to an independent business' apart from agriculture.'" Pet. 25 (quoting Pet. App. 8). According to Signet, the Eighth Circuit correctly "refused" in *Bills v. Cactus Family Farms, LLC*, 5 F.4th 844 (8th Cir. 2021), "to rely on regulations that made extraneous factors concerning the employer's practice the focal point [of] the analysis." Pet. 24-25.

As explained in Part II below, Signet's asserted circuit split is illusory. And to the extent Signet intends its discussion of *Bills* to obliquely challenge the validity of the multi-factor inquiry set forth in §§ 780.144-780.147, Signet forfeited the argument by not raising it below. *See Helix Energy Sols v. Hewitt*, 143 S. Ct. 677, 685 n.2 (2023) (declining to address Helix's argument that a regulation interpreting an FLSA exemption is "an impermissible extrapolation" from the statute because "Helix did not raise that argument in the courts below").

Far from disavowing the Labor Department's interpretive regulations, Signet embraced them below. In its motion to dismiss, Signet emphasized "the continued consistency of the Administrator's analysis and statements of applicability in 29 C.F.R. Part 780" and the regulatory framework's adherence to this

Court's case law. Dist.Ct.Dkt.29 at 23. In its reply, Signet disagreed with Luna Vanegas's interpretation of the regulations, but expressed no doubt they set forth the applicable law. *See* Dist.Ct.Dkt.48 at 8-12, 14, 23-24.

On appeal, Luna Vanegas's opening brief squarely argued that §§ 780.141-780.147 foreclosed resolution of Signet's affirmative defense at the pleading stage, *see* Appellant's C.A. Br. 22-40, yet Signet at no point suggested that the Seventh Circuit reject the regulatory scheme as inconsistent with the statute. Instead, Signet argued that Luna Vanegas misconstrued the regulations, which in Signet's view "support the exemption Signet asserts." Appellee's C.A. Br. 8-9; *see also id.* at 33 (arguing only that § 780.146 is "inapplicable"); *id.* at 35 ("the District Court correctly relied upon the implementing regulations of the FLSA"); *id.* at 36-37 (describing *Bills* as rejecting Luna Vanegas's reading of § 780.144, not as rejecting § 780.144's validity); C.A. Oral Argument at 15:55-16:00 (urging the court to "look at the regulations, the remainder of the regulations" when resolving the question before it); Rehearing En Banc Pet. 16-17 (arguing that the regulations "reinforce" Signet's position that the exemption applies).

Having declined below to raise any concern with the regulatory scheme's implementation of the

agricultural exemption, Signet cannot do so for the first time now.[1]

C. The Seventh Circuit did not narrowly construe the agricultural exemption.

Turning back to Signet's first question presented: "Whether there is any room for a rule interpreting the FLSA's exemptions narrowly, rather than fairly, after this Court's decision in *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134 (2018)." Pet i. Signet premises this question on a single sentence in the Seventh Circuit's opinion quoting a Labor Department regulation for the proposition that the FLSA exemptions must be "narrowly construed against the employer." Pet. App. 7 (quoting 29 C.F.R. § 780.2).

The fatal vehicle problem here is that Signet does not and cannot show that the Seventh Circuit did anything with the narrow construction rule besides cite it. There is no indication anywhere in the court's analysis that the citation had the slightest impact on the court's holding, which was simply that Signet could not shortcut Rule 8 by asserting an affirmative defense before filing its answer. The court based that holding on its determination that the agricultural exemption's application to Luna Vanegas's claim requires an evaluation of facts and circumstances that

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[1] In accordance with the parties' arguments and the procedural posture of the appeal, the Seventh Circuit did not apply *Chevron* deference to the Department's regulations or even consider whether such deference would be appropriate. There is thus no basis for holding Signet's petition while the Court considers *Loper Bright Enterprises v. Raimondo*, S. Ct. No. 22-451.

Luna Vanegas had no obligation to plead in his complaint. That determination had nothing to do with whether the agricultural exemption is narrowly or broadly construed, but rather turned on the fact that the inquiry set forth in 29 C.F.R. §§ 780.141-780.147 could not be conducted based solely on the allegations in the complaint. Pet. App. 7-16.

The petition does not meaningfully argue otherwise. To the contrary, Signet *does not contest* before this Court that §§ 780.141-780.147 require consideration of facts that Signet has the burden of proving and that are not addressed in the complaint. Signet does suggest (in its background section) that those regulations are themselves invalid because they "reflect" the narrow construction rule. Pet. 11. But as explained above, Signet forfeited any challenge to the validity of §§ 780.141-780.147 by embracing those regulations below. *See supra* pp. 18-20.

Signet notes that it may invoke *Encino* before this Court despite not doing so in its panel briefing because Luna Vanegas did not rely on the narrow construction rule in his panel briefing. Pet. 19 n.3. Fair enough. But Luna Vanegas did rely on §§ 780.141-780.147 in his panel briefing, *see supra* p. 19, and if Signet believed *those* regulations were invalidated by *Encino*, it certainly could and should have said so in response. Having instead embraced those regulations, Signet cannot now raise the challenge for the first time before this Court.

Although the Court need go no further to deny review, it bears noting that the circumstances in which *Encino* rejected the narrow construction rule are

substantially different than the circumstances here. The Labor Department had abruptly changed its regulations interpreting the auto sales exemption at issue in *Encino*, abandoning a decades-old interpretation without any reasoned explanation, such that the Court gave the regulations no weight and instead relied solely on what it deemed to be the fairest reading of the statutory text. *See* 138 S. Ct. at 1139; *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 215-18 (2016).

There is no indication the Court intended its rejection of the narrow construction rule in that context to take down the entire regulatory scheme interpreting the FLSA's exemptions. At minimum, *Encino* says nothing casting doubt on the agricultural exemption regulations at issue here, which have remained unchanged for over 50 years and precisely track this Court's precedent dating back over 70 years. And although Congress has amended the FLSA almost every session since 1938, the only change it ever made to the agricultural exemption was to limit it to overtime compensation in 1974. *See supra* p. 9. "It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) (citation omitted).

II. The Seventh Circuit's decision does not implicate any circuit split.

The Seventh Circuit's only holding—that Signet's affirmative defense failed at the Rule 12(b)(6) stage because it requires Signet to prove facts beyond the allegations in the complaint—is not only consistent with the law of every circuit,[2] but also compelled by this Court's precedent. *See, e.g.*, *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 & n.12 (1974) (the FLSA exemptions are "a matter of affirmative defense on which the employer has the burden of proof"); *Jones v. Bock*, 549 U.S. 199, 215-16 (2007) (plaintiffs "are not required to specially plead or demonstrate [the invalidity of affirmative defenses] in their complaints"). Nothing in *Encino* casts doubt on that rule. Indeed, not one of the cases in Signet's purported

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[2] *See, e.g., Weatherly v. Ford Motor Co.*, 994 F.3d 940, 942-44 (8th Cir. 2021); *Isaiah v. JPMorgan Chase Bank, N.A.*, 960 F.3d 1296, 1304 (11th Cir. 2020); *CODA Dev. S.R.O. v. Goodyear Tire & Rubber Co.*, 916 F.3d 1350, 1361-62 (Fed Cir. 2019); *Kelly-Brown v. Winfrey*, 717 F.3d 295, 308 (2d Cir. 2013); *Cataldo v. U.S. Steel Corp.*, 676 F.3d 542, 547 (6th Cir. 2012); *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 690 (7th Cir. 2012); *Goodman v. Praxair, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007) (en banc); *Rodi v. S. New Eng. Sch. of L.*, 389 F.3d 5, 12 (1st Cir. 2004); *Advanced Cardiovascular Sys., Inc. v. SciMed Life Sys., Inc.*, 988 F.2d 1157, 1161 (Fed. Cir. 1993); *Scott v. Kuhlmann*, 746 F.2d 1377, 1378 (9th Cir. 1984); *Richards v. Mileski*, 662 F.2d 65, 73 (D.C. Cir. 1981); *Bethel v. Jendoco Constr. Corp.*, 570 F.2d 1168, 1174 (3d Cir. 1978); *Herron v. Herron*, 255 F.2d 589, 590 (5th Cir. 1958); *Rohner v. Union Pac. R.R. Co.*, 225 F.2d 272, 273-74 (10th Cir. 1955).

circuit split apply an FLSA exemption at the pleading stage, as Signet seeks to do here.[3]

Instead Signet simply cites lower court decisions that restate *Encino*'s holding that courts should read the FLSA's exemptions fairly, not narrowly, *see* Pet. 22-24; none support Signet's (in any event forfeited) assertion that *Encino* implicitly abrogated the regulatory scheme guiding application of the agricultural exemption, or any other exemption. To the contrary, of the three cases Signet cites involving the agricultural exemption, none question the validity of the regulatory scheme. *See Bills v. Cactus Family Farms, LLC*, 5 F.4th 844, 847-49 (8th Cir. 2021); *Ramirez v. Statewide Harvesting & Hauling, LLC*, 997 F.3d 1356, 1359-63 (11th Cir. 2021); *Barks v. Silver Bait, LLC*, 802 F.3d 856, 861-65 (6th Cir. 2015). And all three were decided either at summary judgment (*Ramirez*, *Bills*) or after trial (*Barks*).

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[3] In addition to the cases discussed above the line, Signet cites *McKay v. Miami-Dade Cnty.*, 36 F.4th 1128 (11th Cir. 2022) (summary judgment); *Clarke v. AMN Servs., LLC*, 987 F.3d 848 (9th Cir. 2021) (same); *Isett v. Aetna Life Ins. Co.*, 947 F.3d 122 (2d Cir. 2020) (same); *Coates v. Dassault Falcon Jet Corp.*, 961 F.3d 1039 (8th Cir. 2020) (same); *Jordan v. Maxim Healthcare Servs., Inc.*, 950 F.3d 724 (10th Cir. 2020) (same); *Sec'y U.S. Dep't of Lab. v. Bristol Excavating, Inc.*, 935 F.3d 122 (3d Cir. 2019) (same); *Sec'y of Lab. v. Timberline S., LLC*, 925 F.3d 838 (6th Cir. 2019) (same); *Munoz-Gonzalez v. D.L.C. Limousine Serv., Inc.*, 904 F.3d 208 (2d Cir. 2018) (same); *Carley v. Crest Pumping Techs., L.L.C.*, 890 F.3d 575 (5th Cir. 2018) (post-trial judgment as a matter of law); and *Sariol v. Fla. Crystals Corp.*, 490 F.3d 1277 (11th Cir. 2007) (summary judgment).

Signet focuses primarily on *Bills*, an Eighth Circuit decision affirming the district court's summary judgment determination that the agricultural exemption applied to the plaintiff's work as an "animal care auditor" on a pig farm because the record established that the plaintiff's work occurred "simultaneous to and concomitant with" the raising of pigs on a farm. *Bills*, 5 F.4th at 849. The court of appeals explained that "Bills's tasks were performed while the []growers were still raising the pigs for Cactus Farms," *id.*, and that the plaintiff's work included substantial direct interaction with the pigs. *See id.* at 846. The court found that these facts not only established that the plaintiff engaged in agricultural labor under the regulatory scheme, but also unambiguously satisfied the statutory language. *Id.* at 849.

Nothing about this case resembles *Bills*. Luna Vanegas's work was not "simultaneous to" or "concomitant with" the raising of livestock, but rather consisted "entirely of construction of buildings that would *later* house livestock"; Luna Vanegas "never had any contact with animals." Pet. App. 3 (emphasis added). The Eighth Circuit recognized this distinction as controlling, observing that the agricultural exemption had not applied to the ("live-haul") chicken catchers in *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 403 (1996), because the "[chicken] raising activities … were completed before the live-haul crews arrived." *Bills*, 5 F.4th at 848 (quotation omitted).

Moreover, the Eighth Circuit stressed that Bills erred by "fail[ing] to address 28 C.F.R. § 790.145, which states that 'mechanical application of isolated factors or tests' does not control the determination of

whether an on-the-farm activity is 'part of the agricultural activity'" and that, instead "the total situation will control." *Id.* at 848-49 (quoting 29 C.F.R. § 780.145). This is the same provision and reasoning relied upon by the Seventh Circuit in ruling against Signet: In seeking dismissal under Rule 12(b)(6), Signet had "ignored the fact-driven, totality-of-the-circumstances test set forth in section 780.145." Pet. App. 8; *see also Bills*, 5 F.4th at 847 ("Whether on-the-farm practices are 'an incident to or in conjunction with such farming operations' is necessarily a fact intensive inquiry." (citing 29 C.F.R. §§ 780.144, 780.145 (2020))).

Finally, as Signet acknowledges, the Seventh Circuit's decision aligns with the Ninth Circuit's decision in *NLRB v. Monterey County Building & Construction Trades Council*, 335 F.2d 927 (9th Cir. 1964). According to Signet, however, *Monterey County* is too old to be correct. *See* Pet. 26.

Monterey County is indeed so old that it predates the over half century in which the agricultural exemption's interpretive regulations have been in effect, and thus relies instead on the Supreme Court precedent that later guided the Labor Department in promulgating the regulations: *Mitchell v. Budd*, 350 U.S. 473 (1956), *Maneja v. Waialua Agric. Co.*, 349 U.S. 254 (1955), and *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755 (1949). *See Monterey County*, 335 F.2d at 930-31; *supra* pp. 7-9 (describing how the Department incorporated these decisions into its regulations).

Signet does not argue that the Ninth Circuit misapplied those precedents; it simply asserts that *Monterey County* is "a product of the pre-*Encino* regime." Pet. 26. If Signet means to say that *Mitchell*, *Maneja*, and *Farmers Reservoir*—along with *Monterey County* and the hundreds of other federal court cases that have relied on them over the last seven decades—were overruled *sub silento* by *Encino*, that would be yet another extraordinary argument that Signet forfeited below.

In any event, even on a return to first principles, *Monterey County* is correct. The facts are materially indistinguishable from this case: A chicken farmer had engaged an independent contractor, Buckeye Incubator Company, to construct buildings for raising chickens on the farm's property. Buckeye was "primarily engaged in the manufacture of poultry equipment," and subcontracted the construction work to Whiteside Construction. 335 F.2d at 929. Once the buildings were completed, Buckeye installed the necessary poultry raising equipment. *Id*.

The Ninth Circuit assessed the agricultural exemption's application to the contractors' construction work using the commonsense framework set forth in *Farmers Reservoir*: In order for a practice performed by a non-farmer to be "performed … as an incident to or in conjunction with such farming operations," 29 U.S.C. § 203(f), the practice must itself be "carried on as part of the agricultural function" of the farm, not "separately organized as an independent productive activity," 337 U.S. at 760-61.

Neither this Court nor Congress nor the Labor Department has wavered on *Farmers Reservoir*'s delineation of the agricultural exemption over the last seven decades, and for good reason: It is the most fair and sensible reading of the statutory text. Shearing, milking, feeding, and caring for animals are agricultural activities subordinate to the primary agricultural function of raising livestock, and are accordingly exempt even when performed by independent businesses. Practices that are antecedent or subsequent to the agricultural function and that are performed by independent businesses with no involvement by farm workers, on the other hand, are an incident to or in conjunction with the independent business's operations, not the farm's.

The Ninth Circuit thus held that because the independent contractors in *Monterey County* were "organized separately from any farming or poultry operation" and their construction work constituted "a productive activity which is independent from any farming or poultry operations," 335 F.2d at 931, it was not "an incident to or in conjunction with … farming operations" for the purposes of the exemption. This holding is correct. A construction project by an independent contractor is a manufacturing activity that necessarily precedes any agricultural function because no agricultural use can be made of a construction project until it is completed and turned over to the farmer. The fact that the enclosure will, once constructed, be used as part of a farm's operations does not make the construction of the enclosure agricultural any more than manufacturing a wheat thresher or a tractor is agricultural simply because, once manufactured, such equipment is used to perform agricultural work.

III. The Seventh Circuit correctly held that the approval of Signet's H-2A application does not foreclose Luna Vanegas's claim.

Signet next asserts that the approval of its H-2A visa application proves that the FLSA's agricultural exemption applies to Luna Vanegas. Pet. 27-30. This argument fails for three independent reasons.

First, only the Administrator of the Wage and Hour Division has authority to interpret the FLSA on behalf of the Labor Department. *See Sec'y U.S. Dep't of Lab. v. Am. Future Sys., Inc.*, 873 F.3d 420, 424 n.13 (3d. Cir. 2017) ("Congress delegated authority to WHD to administer the FLSA."); *Cole v. Farm Fresh Poultry, Inc.*, 824 F.2d 923, 926 (11th Cir. 1987) ("The agency designated to provide interpretations of the FLSA is the Administrator of the Wage and Hour Division …."). Neither the Wage and Hour Administrator nor any of his or her subordinates is involved in the H-2A certification process; the Employment and Training Administration's Office of Foreign Labor Certification (OFLC), which handles H-2A certifications, is a separate part of the Department. 20 C.F.R. § 655.00. As a result, labor certification decisions do not represent the Department's views of the FLSA.

This is particularly true where, as here, the OFLC certifying officer who approved Signet's H-2A applications could not possibly have conducted the inquiry set forth in 29 C.F.R. §§ 780.141-780.147 based on the information Signet provided. Signet's 43-word job

description[4] makes no mention of "the size of the operations," "the extent to which the practice is performed by ordinary farm employees," "the amount of interchange of employees between the operations," "whether performance of the practice is in competition with agricultural or with industrial operations," or "the extent to which such a practice is ordinarily performed by farmers incidentally to their farming operations," *id.* § 780.145-780.146. In short, whatever assessment the OFLC certifying officer conducted when reviewing Signet's application, it was not the regulatory inquiry that has guided the FLSA agricultural exemption's application for over 50 years.[5]

Second, all that Signet's application approval establishes is that the certifying officer determined that the work Signet described is "agricultural labor or services" for the purposes of the H-2A program, a term which includes: (1) "agricultural labor as defined in section 3121(g) of title 26" (the IRS definition); "agriculture as defined in section 203(f) of title 29" (the FLSA definition); and (3) "the pressing of apples for

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[4] "On farms, unload materials, lay out lumber, tin sheets, trusses, and other components for building livestock confinement structures. Lift tin sheets to roof and sheet walls, install doors, and caulk structures. Clean up job sites. Occasional use of forklift upon employer provided certification." Dist.Ct.Dkt.1 ¶ 8; *see also* Dist.Ct.Dkt.61 ¶ 8 (admitting this was job description).

[5] Although Signet also asserts that its H-2A applications stated that it would not pay overtime, Pet. 9, 28, its 2019 application makes no mention of overtime, *see* Dist.Ct.Dkt.17-1, and its 2020 application committed to overtime time pay under local, state, *or federal* law if Signet's assertion that overtime rates were "not applicable" proved wrong, *see* Dist.Ct.Dkt.17-2 at 43.

cider on a farm." 8 U.S.C. § 1101(a)(15)(H)(ii)(a). The Labor Department regulations implementing § 1101 cite both the IRS and FLSA definitions, and then explain that, for purposes of H-2A visa processing, "[a]n occupation included in either statutory definition"—the FLSA definition *or* the IRS definition—"is agricultural labor or services, notwithstanding the exclusion of that occupation from the other statutory definition." 20 C.F.R. § 655.103(c).

This Court has recognized that the IRS definition is "very broad" compared to the "much narrower" FLSA definition. *Holly Farms v. NLRB*, 517 U.S. 392, 399 n.6 (1996).[6] Indeed, one of Signet's amici, Alewelt Concrete, emphasized the IRS definition's "in connection with" language in its communications with OFLC relating to the initial denial of H-2A visa status for its construction workers in 2008.[7] *See* Alewelt, Inc., 2008-TLC-00013 (Dep't of Lab. 26 Feb. 2008) (order of

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[6] *Holly Farms* describes Congress's decision in the National Labor Relations Act to "substitute" the "much narrower" FLSA definition of agricultural labor for the "very broad" definition in the Social Security Act Amendments of 1939, which is the same as the IRS definition); *cf.* Social Security Act Amendments of 1939, Pub. L. No. 76-379, tit. II, § 209(l)(1), 53 Stat. 1360, 1377, *with* 26 U.S.C. § 3121(g)(1).

[7] These communications were obtained pursuant to a FOIA request and have not yet been submitted into evidence in the district court, given Signet's invocation of the agricultural exemption at the pleading stage. *See supra* pp. 14-17. Pursuant to Supreme Court Rule 32.3, we have filed a letter with the Clerk's office seeking to lodge the documents should the Court wish to review them, and identifying the relevant pages of those documents.

dismissal after the parties reached a dispositive agreement); *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 241 (2004) (noting that where Congress intends a broader reading, it uses "in connection with" rather than "incident to or in conjunction with"). It thus appears that the certifying officer may have been applying the IRS definition when granting Signet's application for H-2A workers.

Third, any purported tension between Signet's H-2A approval and Luna Vanegas's overtime claim has now evaporated with the discovery of evidence that Signet falsely represented that its visa holders would be working directly for a "Farm Company" rather than a general construction contractor. *See supra* p. 13. Based on this and other evidence that Luna Vanegas performed non-agricultural work, Luna Vanegas alleges that Signet should have applied for the H-2B program, which allows employers to hire foreign workers to perform seasonal non-agricultural jobs. *Id.*; *see* 8 U.S.C. § 1101(a)(15)(H)(ii)(b).

Construction labor is one of the largest categories of occupation under the H-2B program. *See* U.S. Gov't Accountability Off., GAO-20-230, *H-2B Visas: Additional Steps Needed to Meet Employers' Hiring Needs and Protect U.S. Workers* 12 tbl.1 (2020), https://www.gao.gov/assets/gao-20-230.pdf. And the Labor Department has specifically determined that construction laborers employed on farms through a third-party contractor qualify for the H-2B program. *MRL Fencing & Constr.*, Case No. 2012-TLN-00042 (Bd. of Alien Lab. Certification Appeals Aug. 8, 2012), at 2, 6; *MRL Fencing & Constr.*, Case No. 2013-TLN-

00054 (Bd. of Alien Lab. Certification Appeals June 21, 2013), at 2, 5.

But because construction workers undoubtedly are entitled to overtime under the H-2B program, Signet has a financial incentive to instead seek H-2A classification and then improperly invoke the FLSA agricultural exemption to undercut their wages. This subterfuge is made easy by the Labor Department's lack of resources to police employer violations. The Department issues H-2A and H-2B visas based on the certification and limited information provided by the employer. *See* 20 C.F.R. §§ 655.15, 655.30, 655.130, 655.140. The number of H-2A certification requests has skyrocketed, increasing from around 75,000 in fiscal year 2010[8] to 317,000 in fiscal year 2021.[9] A Government Accountability Office investigation found that the Department has limited enforcement tools

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[8] Marcello Castillo et al., *The H-2A Temporary Agricultural Worker Program in 2020*, EIB-238, U.S. Dep't of Agric. Econ. Rsch. Serv., (Aug. 2022), https://www.ers.usda.gov/publications/pub-details/?pubid=104605.

[9] *H-2A Seasonal Worker Program Has Expanded Over Time*, U.S. Dep't of Agric. Econ. Rsch. Serv. (Oct. 3, 2022), https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=104874. Although H-2B visas are statutorily capped at 66,000, Congress has responded to increasing demand by temporarily authorizing the availability of supplemental visas and, for fiscal year 2023, the Labor and Homeland Security Departments have jointly approved the issuance of more than 64,000 additional H-2B visas. *See Exercise of Time-Limited Authority to Increase the Numerical Limitation for FY 2023 for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking to Change Employers*, 87 Fed. Reg. 76,816-76,879 (Dec. 15, 2022),

and capacity to investigate unlawful behavior. U.S. Gov't Accountability Off., GAO-15-154, *H-2A and H-2B Visa Programs: Increased Protections Needed for Foreign Workers* 47-53 (2015), https://www.gao.gov/assets/gao-15-154.pdf.

Added to that, the "structure of the H-2A and H-2B programs may create disincentives for workers to report abuse," as workers are concerned about retaliation and their fragile immigration status. *Id.* at 37-38. The result is that unscrupulous employers can exploit limited oversight and ignore their obligations under federal law. *See generally* Stephen Franklin et al., *The Visa Loophole That Big Ag Construction Firms Love To Exploit*, In These Times (Apr. 30, 2018) https://inthesetimes.com/features/farm_industry_migrant_workers_h2a_visa_exploitation.html.

A final note on Signet's H-2A argument: The petition repeatedly suggests that Luna Vanegas's overtime claim is an exercise in self-sabotage because, if successful, it will "jeopardize[] the ability of workers like Luna Vanegas to continue to benefit from [the H-2A] program." Pet. 27; *see also* Pet. i, 9, 15. As explained above, Signet's dichotomy is false. Construction companies can and do successfully obtain H-2B visas for precisely the same work that Signet hired Luna Vanegas to do. *See supra* p. 32.

Perhaps what Signet means is that if it did not underpay its employees, local workers would be more interested in its jobs; indeed, Signet's improper invocation of the agricultural exemption means that it refuses to pay overtime to *any* of its construction workers who build livestock structures, foreign or

American. While this race to the bottom of the wage ladder has been profitable for Signet, it has been economically devastating for everyone else—pushing smaller, law-abiding construction companies out of business and depressing wages for *all* construction laborers. *See* C.A. Amicus Br. of Mary Wilson 2; C.A. Amicus Br. of Iowa State Building & Construction Trades Council 11-12. In short, Signet's efforts to undercut its competitors and underpay its workers serve no one but Signet.

IV. Ongoing district court proceedings have largely mooted the petition.

A final reason to deny review is that Signet's petition is largely a ship that has already sailed. As the litigation has proceeded in the district court over the last eight months, the parties have exchanged discovery relating to the agricultural exemption, including evidence regarding the scope of Signet's operations and the specific nature of the construction projects on which Luna Vanegas worked—evidence demonstrating that the sheer size and complexity of Signet's construction projects are far beyond anything farmers might "ordinarily perform" for themselves. *See* Dist.Ct.Dkt.84 at 13. Signet's discovery responses and contracts likewise indicate that farmers and farm employees neither assist Signet with its construction work nor directly supervise its workers. *Id.* at 13-14.

Luna Vanegas has also moved for leave to file an amended complaint incorporating newly discovered evidence that Signet's H-2A applications falsely indicated that the workers would be working directly for a "Farm Company," when in fact they would, in most

cases, be working for a general construction contractor, not a farm. Dist.Ct.Dkt.92-1 ¶ 26. As a result, the amended complaint alleges, the non-agricultural work Luna Vanegas performed did not meet the definition of agriculture under the H-2A regulations. *Id.* ¶¶ 27-30.

In all likelihood, then, the complaint Signet asks this Court to review will soon be inoperative, and Signet will have an opportunity to renew its affirmative defense in a summary judgment motion before this Court would even hear argument in this case. The petition thus accomplishes the rare hat trick of being premature, forfeited, and moot.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Jennifer Zimmermann
Sheila Sullivan
LEGAL ACTION OF WISCONSIN
744 Williamson St., Suite 200
Madison, WI 53703

Lorraine Gaynor
IOWA LEGAL AID
1700 S. 1st Ave., Suite 10
Iowa City, IA 52240

Kelsi Brown Corkran
Counsel of Record
Rupa Bhattacharyya*
Joseph W. Mead
INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION,
600 New Jersey Ave., NW
Washington, DC 20001
(202) 661-6607
kbc74@georgetown.edu

Edward J. Tuddenham
42 Ave. Bosquet
75007 Paris, France

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* Not admitted in the District of Columbia. Providing legal services pursuant to D.C. Ct. of Appeals Rule 49(c)(3).