No. 18-10536

IN THE UNTED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SELSO PALMA ULLOA, ORLIN NAHUM SANCHEZ, MANUEL EDGARDO MEJIA, JOSE GUADALUPE, NATAN JOEL ORELLANA, JULIO CESAR GUTIERREZ, JORGE HUMBERTO VASQUEZ, JORGE ALBERTO DOMINGUEZ MADRID, FAREN OBED URRUTIN RAMIREZ, ERICK JOEL ULLOA AMAYA, MARVIN ALEXANDER BUEZO CABALLERO, BAYRON ALBERTO CHAVEZ MUNGUIA, CRISTIAN EDGARDO TINOCO BUESO,

(For Continuation of Caption See Inside Cover)

On appeal from the U.S. District Court
for the Southern District of Florida

BRIEF OF *AMICI CURIAE* CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., BORDER WORKERS UNITED, FARMWORKER JUSTICE, FARMWORKER LEGAL SERVICES OF MICHIGAN, FRIENDS OF FARMWORKERS, JUSTICE IN MOTION, LEGAL ACTION OF WISCONSIN, LEGAL AID JUSTICE CENTER, LEGAL AID OF NORTH CAROLINA, MICHIGAN IMMIGRANT RIGHTS CENTER, MICHIGAN MIGRANT LEGAL ASSISTANCE PROJECT, NORTHWEST FOREST WORKER CENTER, NORTHWEST WORKERS' JUSTICE PROJECT & WORKER JUSTICE CENTER OF NEW YORK, INC., IN SUPPORT OF PLAINTIFFS-APPELLANTS SEEKING REVERSAL

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Plaintiffs-Appellants,

v.

FANCY FARMS, INC.,

Defendant-Appellee.

CERTIFICATE OF INTERESTED PERSONS & CORPORATE DISCLOSURE STATEMENT

Pursuant to the Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1, Centro de los Derechos del Migrante, Inc. (CDM, or the Center for Migrant Rights) hereby certifies that the following is a list of all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case or appeal, including subsidiaries, conglomerates, affiliates, parent corporations, any publicly held corporation that owns 10% or more of the party's stock and other identifiable legal entities related to a party:

Acosta Ruiz, Henry Bladimir, Appellant/Plaintiff

Alderman, Denise, Office Manager, Fancy Farms, Inc.

Allen Norton & Blue, P.A., Counsel of record for Appellee/Defendant

All Nations Staffing, staffing agency of food services to which Nestor Molina is the principal

Alvarado Dubon, Jose Lucio, Appellant/Plaintiff

Alvarado Medrano, Merlin Noe, Appellant/Plaintiff

Amaya Benitez, Jonatan Felipe, Appellant/Plaintiff

Amilca Guerra, Oscar, Appellant/Plaintiff

Anariba Ulloa, Oscar Renato, Appellant/Plaintiff

Ardon Villeda, Rene, Appellant/Plaintiff

Benitez Portillo, Wilber Lisandro, Appellant/Plaintiff

Border Workers United, Amicus

Botts, Benjamin R., Counsel for Amici

Brizuela Garcia, Walter Antonio Appellant/Plaintiff

Bucklew, Honorable Susan C., Senior Judge, United States District Court, Middle District of Florida

Buezo Caballero, Marvin Alexander, Appellant/Plaintiff

Burns, Patrick, business partner to Nestor Molina

Cano, Eduardo Antonio, Appellant/Plaintiff

Cano, Nery Joel, Appellant/Plaintiff

Cantero, Raoul G., Counsel for Amicus

Castillo Blanco, Renso Renerie, Appellant/Plaintiff

Castro Alvarez, Marvin Alexander, Appellant/Plaintiff

Castro Castro, Ruben, Appellant/Plaintiff

Castro Diaz, Orlyn Gerardo, Appellant/Plaintiff

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Centro de los Derechos del Migrante, Inc., Amicus

Chavez Munguia, Bayron Alberto, Appellant/Plaintiff

Cruz Ponce, Alex, Appellant/Plaintiff

Cruz Vasquez, Dilio, Appellant/Plaintiff

Diaz, Noel Antonio, Appellant/Plaintiff

Dominguez Madrid, Jaime Enrique, Appellant/Plaintiff

Dominguez Madrid, Jorge Alberto, Appellant/Plaintiff

Fancy Farms, Inc., Appellee/Defendant

Farmworker Justice, Amicus

Farmworker Legal Services of Michigan, Amicus

Florida Rural Legal Services, Counsel of record for Appellant/Plaintiffs

Friends of Farmworkers, Amicus

Gamez Ramos, Osman Leonel, Appellant/Plaintiff

Garcia Zelaya, Gilberto, Appellant/Plaintiff

Gomez, Osmon Geraldo, Appellant/Plaintiff

Grooms, Carl, President/Owner, Fancy Farms, Inc.

Grooms, Dee Dee, Vice President/Secretary, Fancy Farms, Inc.

Gutierrez, Julio Cesar, Appellant/Plaintiff

Hernandez Aguilar, Evelio, Appellant/Plaintiff

Hernandez Amaya, Manuel De Jesus, Appellant/Plaintiff

Hernandez Enamorado, Jose Guadalupe, Appellant/Plaintiff

Justice In Motion, Amicus

Kasowitz Benson Torres LLP, Counsel of record for Appellant/Plaintiffs

Lara Rodriguez, Celso, Appellant/Plaintiff

Legal Action of Wisconsin, Amicus

Legal Aid Justice Center, Amicus

Legal Aid of North Carolina, Amicus

Lopez Hernandez, Deblin Ovidio, Appellant/Plaintiff

Lopez Vasquez, Oscar Danilo, Appellant/Plaintiff

Luther, Kelly Anne, Counsel of record for Appellants/Plaintiffs

Madrid Saavedra, Elder Domingo, Appellant/Plaintiff

Mangan, Sara, Counsel of record for Appellants/Plaintiffs

Martin, Moneyede M., counsel for Amicus

Martinez Lara, Wilman Noel, Appellant/Plaintiff

Mejia Mendez, Manuel Edgardo, Appellant/Plaintiff

Membreno Reyes, Alex Rene, Appellant/Plaintiff

Mencia Chaver, Dionicio, Appellant/Plaintiff

Michigan Immigrant Rights Center, Amicus

Michigan Migrant Legal Assistance, Amicus

Molina, Nestor, principal of All Nations Staffing

Nolasco Lopez, Gilberto Matias, Appellant/Plaintiff

Northwest Forest Worker Center, Amicus

Northwest Workers' Justice Project, Amicus

Orellana Mendez, Natan Joel, Appellant/Plaintiff

Orellana Mendez, Santiago Arnaldo, Appellant/Plaintiff

Ortega, Gladys Andrea, Counsel of record for Appellants/Plaintiffs

Palma Ulloa, Selso, Appellant/Plaintiff

Pineda Tinoco, Edvin, Appellant/Plaintiff

Quintero Amaya, Rufino, Appellant/Plaintiff

Ramos, Julio Cesar, Appellant/Plaintiff

Rodriguez Amaya, Merlyn Raul, Appellant/Plaintiff

Salmeron, Julio Cesar, Appellant/Plaintiff

Sanchez Hernriquez, Orlin Nahum, Appellant/Plaintiff

Sansone, Honorable Amanda Arnold, Magistrate Judge, United States District Court, Middle District of Florida

Santos Garcia, Marco Tulio, Appellant/Plaintiff

Stefany, David J., Counsel of record for Appellee/Defendant

Stefany, Matthew D., Counsel of record for Appellee/Defendant

Tinoco Bueso, Cristian Edgardo, Appellant/Plaintiff

Ulloa Amaya, Alex Daniel, Appellant/Plaintiff

Ulloa Amaya, Erick Joel, Appellant/Plaintiff

Urrutia Ramirez, Faren Obed, Appellant/Plaintiff

Vasquez, Jorge Humberto, Appellant/Plaintiff

Vasquez Dominguez, Jose Melvin, Appellant/Plaintiff

Worker Justice Center of New York, Inc., Amicus

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INTEREST OF *AMICI*

Proposed *amici* are a geographically diverse group of non-profit organizations in the United States that share the common goal of protecting and enforcing the employment rights of migrant workers and other low-wage communities. All *amici* advocate on behalf of workers who travel to the United States on H-2 temporary employment visas and have ample experience with the pernicious effects that unlawful recruitment fees have on both these workers and their domestic counterparts. The district court's decision in this case presents potentially insurmountable barriers to holding H-2 employers liable for illegal preemployment fees and thus provides employers with an incentive to use recruiters that charge them. Given the direct impact this decision will have on the communities *amici* serve, they have a substantial interest in the correction of this error.

All *amici* are listed below. Separate statements of the interest for each are included in the accompanying motion for leave to file.

Border Workers United

Centro de los Derechos del Migrante, Inc.

Farmworker Justice

Farmworker Legal Services of Michigan

Friends of Farmworkers

Justice in Motion

Legal Action of Wisconsin

The Legal Aid Justice Center

Legal Aid of North Carolina

Michigan Immigrant Rights Center

Michigan Migrant Legal Assistance

Northwest Workers' Justice Project

Northwest Forest Worker Center

Worker Justice Center of New York, Inc.

Amici have authority under Fed. R. App. P. 29(a)(2) to file this brief because the parties have consented to its filing.[1]

STATEMENT OF ISSUES

Amici agree with the Plaintiffs-Appellants' statement of the issues.

SUMMARY OF ARGUMENT

The district court's order on the workers' breach of contract claim imposes a legal standard that is both erroneous and unworkable. The decision is incorrect on the law because it ignores the applicable federal rule of decision. Unlike the purely state-law standard the court applied, the applicable H-2A regulation, 20 C.F.R. §

[1] No party's counsel drafted any part of this brief, nor did any party, party's counsel, or any other person contribute money intended to fund preparing or submitting the brief.

655.135(k), presumes causation when an employer fails to contractually prohibit its labor recruiter from charging workers unlawful fees and the recruiter in fact charges such fees. There is no requirement that the workers provide specific evidence that the employer's violation of this rule caused the recruiter to charge unlawful fees.

Worse still, the district court's decision makes proving a breach of contract claim premised on a violation of section 655.135(k) practically impossible. The order requires workers to provide evidence—presumably, testimony from the recruiter—that the recruiter would not have charged recruitment fees if only the employer had contractually prohibited them. But this testimony would almost certainly be inadmissible speculation. Further, many H-2A labor recruiters operate exclusively abroad, often making subpoenaing their testimony infeasible. Even when they have a domestic presence, these recruiters frequently disappear or otherwise evade service of process when workers attempt to locate them.

These serious legal and practical issues with the decision below create a host of adverse consequences that subvert well-established congressional policy. By allowing employers to evade their responsibility for their agents' illegal recruitment fees, the order encourages employers to hire scofflaw recruiters. Because disreputable recruiters invariably charge less than those that follow the

rules, employers can hire them at a cost savings, passing the costs of recruitment off on their future employees while facing little risk of liability.

By placing workers in debt or in the red at the outset of their employment, recruitment fees often compel them to endure serious workplace abuses. In many cases, the coercive effect of the fees can amount to forced labor, undermining Congress's goal of eliminating labor trafficking as a form of modern slavery.

Exploitative employment conditions for H-2A workers also undercut the U.S.-worker protective purpose of the H-2A statute. If employers can underpay and exert total control over their temporary foreign workers, they will prefer these workers over domestic ones as a matter of dollars and cents.

Conversely, imposing liability on employers when they violate rules designed to engage them in the prevention of recruitment fees gives them an incentive to ensure compliance. Employers have a host of tools at their disposal to prevent their agents from breaking the law. They will use these tools, however, only if they have some chance of being held liable for their recruiters' violations.

ARGUMENT

A. Section 655.135(k) holds employers presumptively liable for back wages when they fail to contractually prohibit illegal recruitment fees.

1. The district court erred in applying purely state substantive law.

A decision on the breach of contract claim in this case must be informed by substantive federal law provided by the applicable H-2A rules. *Cf. United Ass'n of*

Journeymen & Apprentices v. Ga. Power Co., 684 F.2d 721, 725 (11th Cir. 1982) (federal—not state—law governs breach of contract and tortious interference with contractual relations claims under Labor-Management Relations Act because of "[t]he national interest in a uniform body of labor relations law"). Indeed, the district court correctly held that it had subject matter jurisdiction over the breach of contract claim because the claim "raise[d] substantial issues of federal law regarding the proper interpretation of 20 C.F.R. § 655.135." *Palma Ulloa v. Fancy Farms, Inc.*, 274 F. Supp. 3d 1287, 1289 (M.D. Fla. 2017). Nevertheless, the court's later decision on the merits lacked any consideration of how this federal regulation affected its breach of contract analysis. *See Palma Ulloa v. Fancy Farms, Inc.*, 285 F. Supp. 3d 1326, 1336-1341 (M.D. Fla. 2018). By instead applying purely Florida state-law principles, the court imposed an incorrect standard and created the risk of inconsistent rules in a context that decidedly calls for consistency across states. *See id.*

Section 655.135(k) provides a presumption of causation that the district court failed to consider. *See* 20 C.F.R. § 655.135(k). As the U.S. Department of Labor, the agency congressionally charged with promulgating the H-2A statute's implementing rules, explains, section 655.135(k) imposes back-wage liability on an employer when it fails to contractually prohibit its recruiter from charging illegal fees:

> violations of the assurances in 20 C.F.R. § 655.135 . . . (k) are subject to the full range of sanctions and remedies discussed in 29 C.F.R. § 501.16, including but not limited to assessment of civil money penalties and recovery of unpaid wages. . . . [T]his includes recovery of recruitment fees paid in the absence of contract clauses required by 20 C.F.R. § 655.135(k).

U.S. DEP'T OF LABOR, WAGE AND HOUR DIV., FIELD ASSISTANCE BULL. NO. 2011-2, H-2A "PROHIBITED FEES" AND EMPLOYER'S OBLIGATION TO PROHIBIT FEES 4 (May 6, 2011).[2] No particularized showing that the violation caused the recruiter to charge fees is necessary. *See id*.[3] Because the Department's interpretation of its regulation is not "plainly erroneous" or inconsistent with the regulation, it is entitled to controlling deference. *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

The district court therefore erred in holding that the workers failed to establish that Fancy Farms' violation of section 655.135(k) was the proximate cause of the workers' damages. While Florida contract law generally requires a

[2] https://www.dol.gov/whd/FieldBulletins/fab2011_2.pdf.

[3] An employer's compliance with section 655.135(k)'s contractual prohibition requirement alone does not insulate it from liability for back wages. If the "employer knew or reasonably should have known that the H-2A worker paid or agreed to pay a prohibited fee (i.e., a fee that is a cost that should have been borne by the employer) to a foreign labor contractor or recruiter, the employer can still be in violation of 20 C.F.R. § 655.135(j)." *Id.* at 4.

showing of proximate cause, the regulation—which provides the rule of decision here—presumes that the breach caused the damages.[4]

2. The district court's decision nullifies section 655.135(k) by creating an infeasible standard of proof.

The legal standard the district court applied also makes holding an employer liable on a contract theory for a violation of section 655.135(k) functionally impossible. The order requires workers to provide evidence that "had [their employer] contractually forbidden [the recruiters] from seeking or receiving recruitment fees from prospective workers, [they] would not have charged the [workers] a recruitment fee." 265 F. Supp. 3d at 1337. This standard, however, is entirely unworkable from both an evidentiary and practical perspective.

First, the testimony the district court's order requires—i.e., what the recruiter would have done had the employer contractually prohibited fees—almost certainly would be inadmissible speculation. Fed. R. Evid. 602 (lay witnesses may testify only based on personal knowledge), 701 (lay opinions must be "rationally based on the witness's perception"). Federal courts regularly exclude this type of "what I would have done" testimony as not based on personal knowledge or

[4] In any event, as explained in the workers' opening brief, there is ample evidence in this record to prove that the damages were reasonably foreseeable and arose naturally from Fancy Farms' breach. Plaintiffs-Appellants' Opening Br. at 19-26. The workers therefore would have proven causation even absent the regulatory presumption discussed here.

perception. *See, e.g.*, *Washington v. Dep't of Transp.*, 8 F.3d 296, 300 (5th Cir. 1993) (witness's testimony about what he "would have done" had he seen a warning label on a vacuum properly held inadmissible because it "would not have been based upon [the witness]'s perception, but upon his self-serving speculation"); *Kloepfer v. Honda Motor Co., Ltd.*, 898 F.2d 1452, 1459 (10th Cir. 1990) (plaintiff's testimony regarding whether she would have obeyed a warning correctly excluded because it would not have been based on her perception); *Elyria-Lorain Broad. Co. v. Lorain Journal Co.*, 298 F.2d 356, 360 (6th Cir. 1961) ("a witness may not testify to what he would have done had the situation been different from what it actually was. Such an answer is too speculative to be admissible.").

Further, in the unlikely event this testimony could be held admissible, obtaining it would likely be very difficult because foreign labor recruiters often operate exclusively outside the U.S. or disappear once litigation is filed. *See Tazoe v. Airbus S.A.S.*, 631 F.3d 1321, 1331 (11th Cir. 2011) (federal courts lack authority to compel attendance of unwilling, foreign third-party witnesses abroad); Megan Twohey, et al., *Brokers Recruiting Foreign Workers for U.S. Firms Compound Abuses*, REUTERS (Feb. 19, 2016) (describing how foreign labor

recruiters frequently disappear when their practices are scrutinized).[5] It is unclear how a worker would show that the recruiter would not have charged illegal fees but for the employer's failure to contractually prohibit them absent the recruiter's testimony to this effect. Even assuming a worker can compel the recruiter to testify, it is exceedingly unlikely that the recruiter would ever admit to charging fees, let alone that he or she would not have charged such fees if only the employer had contractually prohibited them. Recruiters work for employers and have a vested interest in maintaining these relationships.

Section 655.135(k) works within these practical and evidentiary constraints to impose a rule that workers can actually use to hold the party that benefits from their labor accountable for unlawful recruitment fees. "The prophylactic rule adopted by the Department guards against worker exploitation in a manner that is enforceable. If a U.S. employer cannot find foreign workers without the help of a recruiter, then the U.S. employer must bear the cost of such recruitment efforts." Final Rule, Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement, 73 Fed. Reg. 77,110, 77,160 (Dec. 18, 2008). The Department intended its rule to be a useful tool for encouraging compliance, not empty words.

[5] https://www.reuters.com/article/us-workers-brokers/brokers-recruiting-foreign-workers-for-u-s-firms-compound-abuses-idUSKCN0VS1XU.

B. Insulating employers from liability for illegal preemployment fees encourages them to contract recruiters that charge these fees.

The district court's order promotes lawlessness by encouraging the very recruitment fees the Department of Labor designed the H-2A rules to prevent. If employers are presumed not liable for illegal fees their agents charge their workers—even, as in this case, when the agents are employees of the company—they will have a perverse incentive to hire disreputable recruiters. These recruiters underbid their competitors by charging their employer clients little or nothing and passing their costs onto prospective workers. *See, e.g.*, CENTRO DE LOS DERECHOS DEL MIGRANTE (CDM), RECRUITMENT REVEALED: FUNDAMENTAL FLAWS IN THE H-2 TEMPORARY WORKER PROGRAM AND RECOMMENDATIONS FOR CHANGE 15 (2013);[6] OPEN WORKING GRP. ON LABOUR MIGRATION & RECRUITMENT, RECRUITMENT FEES & MIGRANTS' RIGHTS VIOLATIONS 1 (2014).[7] The least reputable recruiters are often those most likely to disappear, and thus least likely to testify, if the workers ever seek to hold the employer responsible for the recruiter's transgressions. *See* Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 BERKELEY J. EMP. & LAB. 1, 20-21 (2010) (describing how "the most rational

[6] http://www.cdmigrante.org/wp-content/uploads/2018/02/Recruitment_Revealed.pdf.

[7] http://www.madenetwork.org/sites/default/files/Policy-Brief-Recruitment-Fees-Migrants-Rights-Violations.pdf.

course" for farm labor contractors that violate the law is often to "declare bankruptcy, or close up shop and vanish" when workers seek to hold them accountable). From an employer cost-savings and liability-exposure perspective, scofflaw recruiters thus fit an ideal profile. *See* Jennifer Gordon, *Regulating the Human Supply Chain*, 102 IOWA L. REV. 445, 487-88 (2017).

If the district court's order stands, it will therefore transparently be in economically rational employers' interest to contract recruiters that charge recruitment fees. Using them will save employers money. At the same time, workers will face potentially insurmountable barriers to holding their employers liable for the fees. Given the limited risk—described in Section D, below—that the recruiters will ever be held to account, they will act with liberty "to charge migrants whatever fees and bribes the market will bear, without concern for the limits set by law" and their employer clients will "not required to bear the risk of violations." Gordon, *supra*, at 487-88. Consequently, both employers and recruiters will charge workers illegal preemployment fees with impunity.

C. Recruitment fees are a gateway to a host of employment abuses.

At the crux of the H-2A rules' requirement that employers contractually prohibit their recruiters from charging fees is the effect that pre-employment debt and costs have on the entire working relationship. Migrants desiring H-2A employment in most cases have no choice but to pay their recruiters for the right to

work. Thus, from the beginning of the employment relationship, workers are faced with the potentially crippling effects of not being able to pay back their debts or recoup the money they paid to get the job. This frequently means that they have no realistic option other than to keep working even if the job is not what they were told during recruitment or they are subjected to serious workplace violations.

1. **Most prospective H-2A workers have no choice but to pay exorbitant fees to a foreign labor recruiter and take on debt to cover their costs.**

Most H-2 employers use labor recruiters to locate and hire their migrant workers.[8] These intermediaries, because they often have no fixed location and sometimes operate entirely outside the U.S., can be difficult to hold accountable for violations of the law. Gordon, *supra*, at 489. Those operating domestically frequently elude service of process—as evidenced by the experience of the workers in this case—or are judgment proof. *See* Notice of Dismissal, *Buezo Caballero v. All Nations Staffing*, No. 14-cv-61497-KMW (S.D. Fla. Aug. 19, 2014), ECF No. 4

[8] While estimates range, studies relying on worker interviews report that 80-94.5 percent of workers are recruited through intermediaries. *See* Twohey, et al., *supra*; JORNALEROS SAFE, EXECUTIVE SUMMARY: MEXICAN H2A FARMWORKERS IN THE U.S.: THE INVISIBLE WORKFORCE 8 (2013), http://www.globalworkers.org/sites/default/files/EXECUTIVE%20SUMMARY%20Jornaleros%20SAFE.pdf. In 2013, at least 44 percent of employers hiring H-2A and H-2B workers reported to the Department of Homeland Security that they planned to use an intermediary recruiter, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 15-154, H-2A AND H-2B VISA PROGRAMS: INCREASED PROTECTIONS NEEDED FOR FOREIGN WORKERS 26 (2015), https://www.gao.gov/assets/690/684985.pdf. Actual percentages are likely higher than what employers report voluntarily.

(workers in this case voluntarily dismissed trafficking claims after they were unable to complete service on recruiters); Rogers, *supra*, at 20-21.

Moreover, recruiters primarily interact with potential workers in remote rural areas, which amplifies the coercive hiring dynamic. The recruiters are often the only source for H-2 visas in these communities and have near-total discretion over hiring, leaving workers with no alternative but to pay or lose their chance at a job. *See* Gordon, *supra*, at 460, 464; Annie Smith, *Imposing Injustice: the Prospect of Mandatory Arbitration for Guestworkers*, 40 N.Y.U. REV. L. & SOC. CHANGE 375, 389 (2016).

Consequently, recruitment fees are extremely common. They also represent an enormous financial hardship to many H-2 visa job applicants. Approximately half of migrant workers in the H-2 program pay a labor recruiter a preemployment fee to work for their future U.S. employers. *See, e.g.*, JORNALEROS SAFE, *supra*, at 12; CDM, *supra*, at 4. These fees can amount to as much as 62 percent of workers' anticipated wages. *See* OPEN WORKING GRP., *supra*, at 4. In many documented cases, workers have paid recruitment fees exceeding the annual per capita income in their countries of origin. *See* COLLEEN OWENS, ET AL., UNDERSTANDING THE

ORGANIZATION, OPERATION, AND VICTIMIZATION PROCESS OF LABOR TRAFFICKING IN THE UNITED STATES XI (2014).[9]

Because fees are so high, prospective H-2 employees often have no choice but to take out usurious loans from informal lenders, in some cases, from the recruiter itself. Gordon, *supra*, at 463-64; CDM, *supra*, at 18-19. Workers frequently use homes, land, cars, and other possessions as collateral. Gordon, *supra,* at 463; CDM, *supra*, at 18-19. Some 50 percent of workers take out loans to cover pre-employment costs, with interest as high as 10 percent monthly. JORNALEROS SAFE, *supra*, at 14; CDM, *supra*, at 5, 19.

2. Recruitment fees open the door to exploitative working conditions.

From the moment a prospective H-2A worker receives a job offer, fees create a coercive employment dynamic. By starting work in debt or with negative earnings, workers are financially compelled to endure exploitative conditions in order to recoup their losses. *See* INT'L LABOR RECRUITMENT WORKING GRP., THE AMERICAN DREAM UP FOR SALE: A BLUEPRINT FOR ENDING INTERNATIONAL LABOR RECRUITMENT ABUSE 23 (2013).[10] Workers must pay off their debt before sending money home, and thus stay in a job even if the work is dangerous, the

[9] https://www.urban.org/sites/default/files/publication/33821/413249-Understanding-the-Organization-Operation-and-Victimization-Process-of-Labor-Trafficking-in-the-United-States.PDF.

[10] https://www.aft.org/sites/default/files/news/ILRWGblueprint2013.pdf.

employer steals their wages, or they suffer other labor violations. *See* Gordon, *supra*, at 449; HLD: Migration Costs, 21 MIGRATION NEWS (Jan. 2014).[11] Because H-2A visas are not transferable from one employer to another, workers lack the luxury to leave their job if they are subjected to workplace abuse. If they quit, they lose the legal right to remain in the United States. 8 C.F.R. § 214.2(h)(5)(viii)(B); 20 C.F.R. § 655.135(i)(2). Recruitment fees therefore exacerbate the existing vulnerability of temporary foreign workers to illegal working conditions.

Fees also facilitate recruitment fraud. Recruiters often require workers to pay them before the workers see a written contract—if they ever see one at all; they often do not—and make false promises about jobs to justify charging exorbitant fees. *See* CDM, *supra*, at 4, 21 (reporting that over half of surveyed workers did not receive a copy of their contract). Workers who have already gone into debt to get a job "can feel compelled to sign unfavo[]rable contracts reflecting different terms than they had agreed to verbally," because they have no other economically feasible choice. OPEN WORKING GRP., *supra*, at 6.

Congress has explicitly acknowledged the pernicious effects of this dynamic by imposing criminal liability on anyone who "knowingly and with intent to defraud," recruits foreign workers for U.S. employment "by means of materially false or fraudulent pretenses, representations or promises regarding that

[11] https://migration.ucdavis.edu/mn/more.php?id=3892_0_5_0.

employment . . . ." 18 U.S.C. § 1351. "This statute is intended to capture situations in which exploitative employers and recruiters have lured heavily-indebted workers to the United States, ... in recognition that the victims of fraudulent labor recruiting are at high risk of being held in servitude . . . ." 154 CONG. REC. H. 10,888, 10,904 (daily ed. Dec. 10, 2008) (statement of Rep. Berman).

Employers know that their workers are beholden to their recruiters and their pre-employment debt, compounding workers' vulnerability. In some cases, employers directly encourage or instruct recruiters to charge fees. Owens, *supra*, at 53. Companies cognizant of their employees' reliance on recruiters for their jobs also use these agents to maintain control of their workers through threats of deportation, violence or repossession of collateral on loans. Gordon, *supra*, at 464. This discourages workers from reporting abuses in the workplace.

3. Recruitment fees promote labor trafficking.

The coercive dynamics described above place workers at serious risk for labor trafficking, "a contemporary manifestation of slavery . . . ." 22 U.S.C. § 7101(a). As a leading anti-trafficking organization explains, migrants "who have paid large recruitment and travel fees to labor recruiters often become highly indebted. Traffickers control and manipulate these individuals by leveraging the non-portability of many temporary visas as well as the victims' lack of familiarity

with surroundings, laws and rights, language fluency, and cultural understanding." POLARIS, LABOR TRAFFICKING IN THE U.S.: A CLOSER LOOK AT TEMPORARY WORK VISAS 1 (2015).[12] These "circumstances . . . lead individuals to become more susceptible to victimization." *Id.*

Congress has acted aggressively to combat the coercive effects of recruitment fees. Thus, for example, the Trafficking Victims Protection Act (TVPA) criminalizes forced labor, which includes obtaining a person's labor or services via threats of serious harm—including financial or reputational harm—or abuse of the legal process, i.e., use or threatened use "in any manner or for any purpose for which the law was not designed . . . ." 18 U.S.C. § 1589.[13] The fundamental purpose of section 1589 is "'to reach cases of servitude achieved through nonviolent coercion,'" precisely the type of psychological and economic control that can play out in cases oppressive preemployment fees. *See United States v. Dann*, 652 F.3d 1160, 1169 (9th Cir. 2011) (quoting Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 102(b)(13), 114 Stat. 1464, 1467 (2000)). Plaintiffs need not "be kept under literal lock and key" to establish a violation. *Franco v. Diaz*, 51 F. Supp. 3d 235, 247

[12] http://polarisproject.org/resources/labor-trafficking-us-closer-look-temporary-work-visas.

[13] The TVPA's civil remedy provision allows a victim of forced labor to recover damages and reasonable attorney's fees. 18 U.S.C. § 1595.

(E.D.N.Y. 2014). Rather, a plaintiff proves forced labor if she shows that her employer "intend[ed] to cause [her] to believe that if she does not continue to work, she will suffer the type of serious harm—physical or nonphysical, including psychological, financial, reputation harm—that would compel someone in her circumstances to continue working to avoid that harm." *Dann*, 652 F.3d at 1170. It requires no stretch of the imagination to see how the recruitment scheme described above fits this legal standard for trafficking.

Indeed, federal cases demonstrate how recruitment fees can lead directly to forced labor. In two notable cases involving H-2 workers who alleged they were compelled to keep working to pay off debts they incurred to cover recruitment fees, the courts held that workers could state a claim of forced labor under TVPA section 1589. *David v. Signal Int'l, LLC*, 37 F. Supp. 3d 822, 832 (E.D. La. 2014); *Joseph v. Signal Int'l*, No. 1:13-CV-324, 2015 U.S. Dist. LEXIS 33870, at *20-*24 (E.D. Tex. Feb. 4, 2015). The plaintiffs in both these cases claimed that the recruitment fees required them to take on debt with high interest rates, "typically mortgaging the family home and land and pawning personal possessions . . . . [T]he fees were the equivalent of two to three years' salary for a welder in India." SOUTHERN POVERTY LAW CENTER (SPLC), CLOSE TO SLAVERY: GUESTWORKER

PROGRAMS IN THE UNITED STATES 10 (2013).[14] One worker described his desperation, saying, "I couldn't go back to India, still carrying the massive amounts of debts I had incurred to come to the United States. If I was forced to go back, I planned to hang myself once I landed in India, at the airport." *Id.* In a California case, the court similarly allowed workers to proceed on their forced labor claim based on their recruiters' using fees as a means of coercion. *Mairi Nunag-Tanedo v. E. Baton Rouge Parish Sch. Bd.*, 790 F. Supp. 2d 1134 (C.D. Cal. 2011); *see also United States v. Kalu*, 791 F.3d 1194, 1198 (10th Cir. 2015) (defendant convicted of labor trafficking after charging plaintiffs over $6000 in fees and misleading them about employment conditions).

Other provisions of federal anti-trafficking law also demonstrate the Government's judgment that recruitment fees and forced labor are inextricably linked. Federal procurement law, for example, requires that federal agencies include a provision in grants, contracts and cooperative agreements with private entities allowing the agency to terminate the agreement, or take other remedial actions if the grantee or contractor "engages in, or uses labor recruiters, brokers, or other agents who engage in . . . acts that directly support or advance trafficking in persons[.]" 22 U.S.C. § 7104(g), (g)(iv). Acts that support trafficking include

[14]https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf.

"[c]harging recruited employees unreasonable placement or recruitment fees, such as fees equal to or greater than the employee's monthly salary, or recruitment fees that violate the laws of the country from which an employee is recruited." *Id.* at (g)(iv)(IV). The Federal Acquisition Regulations (FAR) likewise prohibit government contractors and their agents from charging recruitment fees, which the FAR identify as a "trafficking-related activit[y]" that violates Federal policy. 48 C.F.R. § 52.222-50(b).

The U.S. Government's efforts to combat recruitment fees because of their connection to forced labor aligns with an international consensus that workers who begin work indebted to agents of their employers or with negative income are vulnerable to trafficking. *See, e.g.*, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S ANNUAL REPORT TO CONGRESS AND ASSESSMENT OF U.S. GOVERNMENT ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS 122 (2015) (reporting on U.S. participation in Organization of American States Meeting of National Authorities on Trafficking in Persons and adoption of Second Work Plan Against Trafficking in Persons in the Western Hemisphere 2015-2018, which includes encouraging prohibition on recruitment fees).[15] The United Nations, for example, considers that "[b]uilding effective responses to abusive recruitment practices, including charging

[15] https://www.justice.gov/humantrafficking/attorney-generals-trafficking-persons-report.

excessive recruitment fees is . . . key to reducing workers' vulnerabilities and preventing the crime of trafficking in persons." UNITED NATIONS OFFICE ON DRUGS & CRIME, THE ROLE OF RECRUITMENT FEES AND ABUSIVE AND FRAUDULENT RECRUITMENT PRACTICES OF RECRUITMENT AGENCIES IN TRAFFICKING IN PERSONS 14 (2015).[16] The International Labor Organization similarly recommends "eliminating the charging of recruitment fees to workers" as critical to the prevention of forced labor. INT'L LABOUR ORG., REC. ON SUPPLEMENTARY MEASURES FOR THE EFFECTIVE SUPPRESSION OF FORCED LABOUR 8(a) (2014).[17]

Significant private sector actors have likewise taken important steps to eliminate recruitment fees in their supply chains because of fees' direct link to labor trafficking. The Leadership Group for Responsible Recruitment, for example—a group of comprised of some of the world's largest corporations, working in collaboration with non-governmental organizations—has adopted as its principal goal "the total eradication of fees being charged to workers to secure employment" as "fundamental to combatting exploitation, forced labo[]r and trafficking of migrant workers . . . ." LEADERSHIP GRP. FOR RESPONSIBLE

[16] https://www.unodc.org/documents/human-trafficking/2015/Recruitment_Fees_Report-Final-22_June_2015_AG_Final.pdf.

[17]http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:3174688.

RECRUITMENT, DRIVING POSITIVE CHANGE: ABOUT THE LEADERSHIP GROUP (2016).[18] The Interfaith Center on Corporate Responsibility, a coalition of global institutional investors, similarly advocates for the elimination of recruitment fees because "financial intimidation through withheld wages as a result of debts or loans from the charging of recruitment fees often forms [a] concealed gateway to conditions of forced labor." INTERFAITH CENTER ON CORPORATE RESPONSIBILITY (ICCR), BEST PRACTICE GUIDANCE ON ETHICAL RECRUITMENT OF MIGRANT WORKERS 6 (2017).[19]

4. Recruitment fees harm U.S. workers by giving employers an incentive to prefer H-2 workers.

Although recruitment fees most directly impact the temporary foreign workers compelled to pay them, these fees likewise adversely affect the working conditions of domestic workers, directly undermining the fundamental purposes of the H-2A program. The H-2A statute and regulations expressly serve to ensure that "the employment of the alien[s] in [temporary agricultural employment] will not adversely affect the wages and working conditions of workers in the United

[18] https://www.ihrb.org/uploads/member-uploads/About_the_Leadership_Group_-_Leadership_Group_for_Responsible_Recruitment.pdf. *See also* https://www.ihrb.org/employerpays/leadership-group-for-responsible-recruitment (describing goals of Leadership Group and its corporate membership).

[19]https://www.iccr.org/sites/default/files/iccrsbestpracticeguidanceethicalrecruitment05.09.17_final.pdf.

States similarly employed." 8 U.S.C. § 1188 (a)(1)(B). The H-2A rules impose a series of requirements on employers to achieve this end, including giving U.S. workers hiring preference and providing them identical benefits, wages, and working conditions to those of H-2A workers. 20 C.F.R. §§ 655.122, 655.135(a), (d).

The rules recognize, however, that achieving Congress's U.S.-worker protection goals is impossible without simultaneously protecting H-2A workers from exploitation. Preventing recruitment fees is the keystone of this regulatory regime. As the Department explained in the most recent H-2A rulemaking,

> the Department is adamant that recruitment of the foreign worker is an expense to be borne by the employer and not by the foreign worker. . . . The Department is concerned that workers who have heavily indebted themselves to secure a place in the H-2A program may be subject to exploitation in ways that would adversely affect the wages and working conditions of U.S. workers by creating conditions akin to indentured servitude, driving down wages and working conditions for all workers, foreign and domestic.

Final Rule, Temporary Agricultural Employment of H-2A Aliens in the United States, 75 Fed. Reg. 6884, 6925 (Feb. 12, 2010) (preamble to final 2010 H-2A rule). Without a realistic way for H-2A employees to hold their employers responsible for the cost of recruitment, the entire regulatory framework suffers. If employers have carte blanche to pass these costs on to H-2A workers, they place the workers in a state of heightened vulnerability from the outset of the employment relationship, which, as described above, facilitates a series of other

serious violations. This creates a downward force on market-wide labor standards. Allowing employers to "shift their costs in recruiting foreign labor to their temporary foreign worker recruits . . . allows those employers to effectively reduce temporary foreign workers' wages below the nationally established minimum wage floor and creates a competitive disadvantage for other employers who pay legitimate wages at or above that floor." *Castellanos-Contreras v. Decatur Hotels LLC*, 622 F.3d 393, 405 (5th Cir. 2010) (en banc) (Dennis, J., dissenting). It also provides employers an incentive to prefer H-2A over U.S. workers, directly subverting Congress's express goals. *See* 8 U.S.C. § 1188.

Faced with analogous circumstances, this Court held that broad application of federal worker-protection law was necessary to avert similarly perverse employer incentives. *Patel v. Quality Inn S.*, 846 F.2d 700, 704 (11th Cir. 1988). In *Patel*, this Court held that, despite the "seeming anomaly of discouraging illegal immigration by allowing undocumented aliens to recover in an action under the FLSA," the statute covered undocumented workers. *Id.* If the FLSA were not to apply to undocumented workers, this Court explained, "employers would have an *incentive* to hire them." *Id.* Likewise here, interpreting section 655.135(k) to presumptively impose liability on employers helps remove employer incentives to prefer H-2A workers. Absent this interpretation, "[e]mployers might find it

economically advantageous to hire and underpay [foreign] workers and run the risk of sanctions" for their recruiters' violations. *See id.*

D. Holding employers responsible for their recruiters' violations is the only feasible way to prevent recruitment abuses under existing law.

The Department's decision to place responsibility for recruitment fees squarely on H-2A employers reflects the agency's expert understanding of how H-2A recruitment and employment function. As described above, workers generally have no choice but to pay recruiters' fees if they want the job because the recruiters decide for the agricultural employer whom to hire. *See* Section C.1, *supra*. Further, workers often have little practical hope of holding a recruiter liable for illegal fees. These actors frequently operate wholly outside the U.S. or are impossible to locate. *See* Section A.2, *supra*. Even when workers can locate their recruiter, they face potentially significant barriers to holding the recruiter liable under wage statutes. *See, e.g.*, *Ramos-Barrientos v. Bland*, 728 F. Supp. 2d 1360, 1381 (S.D. Ga. 2010) (holding that recruiter did not qualify as workers' joint employer), *aff'd in part and rev'd in part on other grounds*, 661 F.3d 587 (11th Cir. 2011). Where workers have presented viable claims against their recruiters—for violating labor trafficking statutes, for example—the recruiters are frequently judgment proof. *See* SPLC, *supra*, at 28.

For similar reasons, Congress has long recognized that agricultural worker protections that focus on recruiters, rather than fixed-site employers, as the primary

targets for compliance are ineffective. *See Antenor v. D & S Farms*, 88 F.3d 925, 930 (11th Cir. 1996) (describing Congress's effort under Migrant and Seasonal Agricultural Worker Protection Act, AWPA, to hold employers liable for the violations of their farm labor contractors because the contractors—like foreign labor recruiters—are "transient and often insolvent"). As in the AWPA context, myopically focusing on recruiters as solely responsible for illegal preemployment fees ensures that pervasive noncompliance in recruitment will continue unchecked. By contrast, holding employers presumptively liable for their recruiters' unlawful fees advances Congress's policy of placing responsibility for recruitment violations on the entities that have the power and assets to affect recruitment conditions: agricultural employers.

Employers' liability for recruitment abuses is also a matter of equity. Employers have several straightforward tools at their disposal to ensure that their recruiters comply with the law. These include obvious steps like engaging due diligence, *e.g.*, checking references and determining whether the recruiter is registered with any applicable national authority;[20] paying recruiters a reasonable

[20] Mexican law, for example, requires that all for-profit labor recruiters that place workers abroad register with the government, obtain a license, and verify the terms and conditions of employment. BEATE ANDRES, ET AL., REGULATING LABOUR RECRUITMENT TO PREVENT HUMAN TRAFFICKING AND TO FOSTER FAIR MIGRATION: MODELS, CHALLENGES AND OPPORTUNITIES 52 (2015) (citing Reglamento de Agencias de Colocación de Trabajadores of Feb. 28, 2006, as amended (May 21,

sum so that the recruiters are not forced to pass their costs off on the workers; and taking reasonable steps, including but not limited to contractually prohibiting fees, to unequivocally communicate to recruiters that the employer will not tolerate charging workers for the opportunity to work. The Department of Labor contemplates that employers must take similar actions to avoid liability under section 655.135(k):

> when employers use recruiters, they must make it abundantly clear that the recruiter and its agents are not to receive remuneration from the alien recruited in exchange for access to a job opportunity. For example, evidence showing that the employer paid the recruiter no fee or an extraordinarily low fee, or continued to use a recruiter about whom the employer had received numerous credible complaints, could be an indication that the contractual prohibition was not bona fide.

75 Fed. Reg. 6884, 6926 (preamble to 2010 final rule); *see also* ICCR, *supra*, at 4-5 (outlining best practices to eliminate forced labor from global supply chains, several focused on eliminating recruitment fees).

Without any realistic possibility that they will be held liable if their recruiters charge illegal fees, however, employers have little incentive to take steps to prevent the fees in the first instance. *See* Rogers, *supra*, at 20-22 (employers "operating under a regime of standard first party liability face few incentives to induce compliance" by their often judgment-proof labor contractors). Recruiters

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2014)), http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_377813.pdf.

working for employers that make no effort to prevent illegal recruitment fees will have little reason not to charge them. This is precisely the problem that section 655.135(k) was designed to prevent.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below, hold that the workers provided sufficient evidence to establish that Fancy Farms' breach of contract caused the workers' monetary damages and remand for further proceedings consistent with this Court's decision.

Respectfully submitted,

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By: /s/Benjamin R. Botts

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 5,956 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared using Microsoft Word for Mac version 16.12 in 14-point Times New Roman font, a proportionally spaced typeface.

Dated: May 9, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of May 2018, I filed the attached Brief of Amici Curiae using the Court's ECF system, which constitutes service on the attorneys of record for all parties to this appeal, and had paper copies served on counsel for Plaintiff-Appellants and Defendant-Appellee via Federal Express, as follows:

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