

**In the
Supreme Court of the United States**

JOSÉ E. CARRION,

Petitioner,

V.

AGFA CONSTRUCTION, INC.,

Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit**

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

None of respondent's reasons for denying certiorari has any substance.

1. Respondent's plea for further percolation ignores the fact that one of the three courts disagreeing with the Second Circuit is the New York Court of Appeals. The most important reason for preserving the uniformity of federal law is to prevent forum-shopping, a problem that is at its worst when the highest court of a state is in conflict with the federal circuit in which that state is located. *Cf. Yee v. City of Escondido*, 503 U.S. 519, 525-26 (1992) (explaining that certiorari was granted to resolve a conflict between California and two federal courts of appeals, one of which was the Ninth Circuit).

2. Petitioner has certainly not "waived the right to raise this issue with this Court." Br. in Opp. 6. The Second Circuit resolved the issue on the merits. Pet. App. 9a-10a. So did the District Court. Pet. App. 24a-25a. An issue is properly raised before this Court where "the Court of Appeals, like the District Court before it, decided the substantive issue presented." *Stevens v. Department of Treasury*, 500 U.S. 1, 8 (1991). "This is merely an application of the 'elementary rule that it is irrelevant to inquire ... when a Federal question was raised in a court below when it appears that such question was actually considered and decided.'" *Orr v. Orr*, 440 U.S. 268, 274-75 (1979) (quoting *Manhattan Life Ins. Co. v. Cohen*, 234 U.S. 123, 134 (1914)).

3. Finally, respondent defends the decision below as consistent with *Astra USA, Inc. v. Santa Clara County*, 131 S. Ct. 1342 (2011). But *Astra USA* had nothing to do with the preemption issue involved in our case, because *Astra USA* concerned *federal* common law, not state common law. *Id.* at 1348. The question in our case is whether Congress clearly intended the Davis-Bacon Act to cut off an employee's preexisting right under *state* common law to sue his employer for breach of contract. As every court to consider the question except the Second Circuit has concluded, the answer is no.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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