No. 15-10623-EE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BAYOU LAWN AND LANDSCAPE SERVICES, et al.,

Plaintiffs-Appellees,

v.

THOMAS E. PEREZ, SECRETARY OF LABOR, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Florida
3:12-cv-183-MCR-CJK, Chief Judge M. Casey Rodgers

DEFENDANTS-APPELLANTS' BRIEF

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26-1, undersigned counsel believes that the certificate of interested persons contained in Defendants-Appellants' motion for enlargement of time to file is complete and does not require supplementing at this time, except for the addition of the following interested person:

Leon Fresco, Deputy Assistant Attorney General

s/ Geoffrey Forney
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STATEMENT REGARDING ORAL ARGUMENT

Because of the importance of the legal issues raised in this appeal for the administration of the H-2B program, Defendants-Appellants request oral argument.

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STATEMENT OF JURISDICTION

Appellants Thomas E. Perez and Portia Wu appeal the order of the United States District Court for the Northern District of Florida granting Appellees' (collectively "Bayou's") motion for summary judgment and denying the United States Department of Labor's ("DOL's") motion for summary judgment. The district court held that DOL lacks rulemaking authority under the Immigration and Nationality Act, as amended, to structure the agency's labor market determinations

when providing advice to the Department of Homeland Security ("DHS") regarding petitions for the importation of temporary, nonimmigrant, non-agricultural (H-2B) workers into the United States. The district court had jurisdiction under 28 U.S.C. § 1331, and this Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether DOL has authority to issue rules of general applicability concerning the temporary labor certifications it issues under the H-2B program where DHS's regulations condition the approval of H-2B petitions on DOL's grant of those temporary labor certifications.

2. Whether DOL has authority to issue rules of general applicability concerning the temporary labor certifications it provides in response to DHS's request for a consultation in the H-2B program where Congress impliedly granted DOL that rulemaking authority under the Immigration and Nationality Act, as amended.

3. Whether the district court abused its discretion in granting a nationwide injunction where the broad scope of the injunction is not necessary to afford relief to Bayou, and where a nationwide injunction is inconsistent with the principle that non-mutual collateral estoppel does not apply against the United States or its agencies.

STATEMENT OF THE CASE

Before 1986, the H-2 program included agricultural and non-agricultural temporary foreign workers, and was administered under regulations published by the Attorney General and the Secretary of Labor. *See* Immigration and Nationality Act of 1952 (INA) § 101(a)(15)(H)(ii), 66 Stat. 163 (June 27, 1952); H.R. Rep. No. 99-682, pt. 1, at 80-81 (July 16, 1986); 33 Fed. Reg. 7570-71 (DOL) (May 22, 1968). Historically, the Immigration and Naturalization Service (INS) consulted with DOL to determine whether employers may import H-2 workers into the United States without adversely affecting the domestic labor market. *See Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. 592, 595-96 (1982); *see also* 18 Fed. Reg. 4925 (INS) (Aug. 19, 1953) (requiring employers to obtain certification from the United States Employment Service). At least since 1968, DOL has structured its advice to INS in the H-2 program through regulations. *See* 33 Fed. Reg. at 7571. DOL has also used regulations to set the substantive wage requirements for employers seeking to import H-2 workers. *See Fla. Fruit & Vegetable Ass'n v. Brock*, 771 F.2d 1455, 1458-59 (11th Cir. 1985).

Because Congress concluded that DOL's regulations did not fully meet the need for a manageable temporary *agricultural* worker program, Congress amended the statute in 1986 to provide for two separate programs: one for agricultural workers and another for non-agricultural workers. *See* Immigration Reform and

Control Act of 1986 (IRCA), Pub. Law No. 99-603, § 301(a) (Nov. 6, 1986); H.R. Rep. No. 99-682, pt. 1 at 80. Congress significantly altered the statutory requirements for the agricultural (H-2A) worker program, but left untouched the requirements governing the non-agricultural (H-2B) worker program. *See* H.R. Rep. No. 99-682, pt. 1, at 80 ("The bill makes no changes to the statutory language concerning non-agricultural H-2's"). As a result, Congress retained under the IRCA amendments the definition of a non-agricultural (H-2B) nonimmigrant worker as an alien:

> having residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country . . .

INA § 101(a)(15)(H), as amended by IRCA § 301(a) (8 U.S.C. § 1101(a)(15)(H)(ii)(b)). In addition, Congress left untouched INS's original authority under the INA to determine the terms and conditions for admitting H-2B nonimmigrants, provided it consult with appropriate agencies of the government regarding any proposed importation of temporary foreign labor. *See* INA § 204(c), as amended by IRCA § 301(b) (8 U.S.C. § 1184(c)(1)). By preserving unaltered the non-agricultural worker program under IRCA, Congress did not limit or abrogate DOL's

longstanding role of providing advice to INS under DOL's regulations governing non-agricultural temporary labor certifications. *Id*.

A. DOL's Role in the H-2B Program After IRCA

Under the regulations implementing the IRCA amendments, INS continued to consult with DOL for the purpose of obtaining labor market determinations in the H-2B program. *See* 55 Fed. Reg. 2606, 2617 (INS) (Jan. 26, 1990). INS maintained its historical practice of requiring employers to seek certification from DOL as a precondition for filing petitions to import H-2B workers. *Id*. at 2626. In the preamble to INS's regulations, the agency explained that it "must seek advice from the Department of Labor under the H-2B classification because the statute requires a showing that unemployed U.S. workers are not available to perform the services before a petition can be approved." *Id*. at 2617.[1] Thus, INS's regulations provided that "[t]he labor certification shall be advice to the director on whether or not United States workers capable of performing the temporary services or labor are available and whether or not the alien's employment will adversely affect the wages and working conditions of similarly employed United States workers." *Id*. at 2626.

[1] None of the commenters to the proposed rule raised substantive objections to INS's reliance on DOL's advice, other than to assert that the consultation process was too time consuming. *See* 55 Fed. Reg. at 2617.

After INS reaffirmed its reliance on DOL's regulations for issuing labor certifications to provide advice in H-2B cases, Congress provided that INS has "sole discretion" to determine the weight assigned to advisory opinions provided as part of the consultation process for the importation of temporary foreign workers under 8 U.S.C. § 1184(c). *See* Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. Law No. 102-232, § 204 (Dec. 12, 1991) (codified at 8 U.S.C. § 1184(c)(6)(F)). Congress did not question or abrogate DOL's established role in providing advice to INS in the H-2B program through the use of DOL's regulations governing the labor certification process. *Id*.

In 2002, Congress abolished the INS and transferred its functions to the Department of Homeland Security (DHS). *See* Homeland Security Act of 2002, Pub. Law No. 107-296, §§ 451(b), 471 (Nov. 25, 2002). But just as INS had done since 1968, DHS continues to rely on DOL's advice issued under DOL's regulations governing H-2B labor certifications. *See* 73 Fed. Reg. 78,104; 78,107; 78,110. In 2008, DHS reaffirmed DOL's ability to structure the H-2B labor certification process through DOL's use of regulations by issuing companion rules with DOL to revise the H-2B program. *Compare* 73 Fed. Reg. 29,942 (DOL) *with* 73 Fed. Reg. 49,109 (DHS).

During the companion rulemaking in 2008, DHS acknowledged that it lacked sufficient expertise to make labor market determinations in the H-2B program, and it accordingly indicated that DOL would continue to determine whether an employer's proposal to import H-2B workers will adversely affect the wages and working conditions of United States workers. *See* 73 Fed. Reg. at 78,110. DHS stated in the preamble to its final rule in 2008 that "this rule eliminates DHS's current practice of adjudicating H-2B petitions where the Secretary of Labor or the Governor of Guam has not granted a temporary labor certification." *Id*. at 78,104. DHS stated in the preamble in another section that its rule "[p]reclude[s] DHS from approving H-2B petitions filed without an approved temporary labor certification issued by DOL." *Id*. at 78,107. These statements are consistent with the plain text of DHS's regulation requiring employers to file an approved temporary labor certification as a precondition for the United States Citizenship and Immigration Services ("USCIS") adjudicating an H-2B petition. *Id*. at 78,129; 8 C.F.R. §§ 214.2(h)(6)(iii)(A), (C), (iv)(A). DHS confirmed this requirement again in 2013 in a joint rule with DOL: "an employer may not file a petition with USCIS for an H-2B temporary worker unless it has received a labor certification from the Secretary of Labor." 78 Fed. Reg. at 24,049.

DOL's 2008 H-2B regulations provide rules governing, among other things, the wages that employers are required to pay and the standardized recruitment

employers are required to complete in order to test the domestic labor market. 73 Fed. Reg. at 78,056-57.[2] The 2008 rule also established an attestation system where employers are required to certify that they complied with program requirements. *Id*. at 78,059. DOL enforces the substantive terms of the program through post-certification audits and enforcement actions. *Id*. at 78,060, 78,063-66.

In 2011, DOL attempted to revise the prevailing wage portion of the 2008 H-2B rule, but Congress withheld appropriations to implement the replacement rule, while leaving the 2008 rule intact. *See* Public Law No. 112-55, Div. B., Title V, § 546 (Nov. 18, 2011); Public Law No. 112-74, Title I, Div. F, § 110 (Dec. 23, 2011). The conference report accompanying the "minibus" appropriations bill explained that the drafters expected DOL to continue using the 2008 rule to administer the H-2B program. *See* H.R. Rep. No. 112-284 (Conf. Rep.), 157 Cong. Rec. H7528 (Nov. 14, 2011). Congress subsequently lifted the appropriations rider prohibiting the implementation of DOL's 2011 wage rule. *See Louisiana Forestry Ass'n v. Sec'y of Labor*, 745 F.3d 653, 667 (3d Cir. 2014).

[2] On March 4, 2015, the District Court for the Northern District of Florida issued an Order vacating and permanently enjoining DOL from enforcing its 2008 H-2B regulations (73 Fed. Reg. 78,020). *Perez v. Perez*, Civil No. 3:14-682-MCR (N.D. Fla.), ECF No. 14. DOL requested a temporary stay of the Court's *vacatur* order "until and including April 15, 2015," which the Court granted. *See* ECF No. 19. The stay of the *vacatur* ends on April 16, 2015. *See* ECF No. 32.

B. The Courts Uphold DOL's Rulemaking in the H-2B Program

In 2011, DOL published a new prevailing wage rule through notice and comment rulemaking. *See* 76 Fed. Reg. 3452 (DOL) (Jan. 19, 2011).[3] A group of employers challenged DOL's authority to issue the 2011 wage rule, but the Third Circuit upheld DOL's authority to issue rules in its consultative role providing advice to DHS in the H-2B program. *See Louisiana Forestry Ass'n* , 745 F.3d at 671-75. In holding that DOL has authority to issue such rules, the Third Circuit determined that DOL's 2011 wage rule was "issued pursuant to the DHS's permissible 'conditioning' of the grant of H-2B petitions on the advice of the DOL pursuant to DHS's charge from Congress to 'determine[]' H-2B visa petitions 'after consultation with appropriate agencies of the Government.'" *Id*. at 675. The court observed that "DOL has institutional expertise in matters concerning U.S. employment and a long and extensive history of issuing temporary labor certifications," creating a "reasonable connection between the DOL's limited rulemaking authority and the DHS's determination of H-2B visa petitions." *Id*. at 674 (internal quotation marks omitted).

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[3] DOL used notice-and-comment procedures to publish this rule after a district court invalidated several portions of DOL's 2008 rule based in part on DOL's failure to issue that rule in compliance with notice-and-comment rulemaking requirements. *See Comité de Apoyo a los Trabajadores Agrícolas v. Solis*, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010) (Pollak, J.) (*CATA*). The court remanded the 2008 rule to DOL and directed the agency to promulgate new rules "in compliance with the Administrative Procedure Act." *Id*. at *27.

The Third Circuit in *Louisiana Forestry* rejected the employers' argument that the statute did not implicitly authorize DOL to issue regulations in its consultative capacity. As the court explained, "Congress is and has been aware of the DOL's involvement in the administration of the H-2B visa program for several decades, and yet, despite several opportunities to do so, has never amended the INA to prohibit the DOL's involvement in the H-2B program or to specify which agencies are the 'appropriate' ones with which the DHS may consult in exercising its authority to grant or deny H-2B visas." *Id*. at 674. The Third Circuit also noted that Congress did not enact any changes to the H-2B program after the Supreme Court in *Alfred Snapp v. Puerto Rico*, 458 U.S. 592 (1982), recognized that DOL had adopted regulations concerning temporary labor certifications under the H-2 program, which indicated Congress's acquiescence to DOL's reliance on such regulations in the H-2B program. *Id*.

In another challenge to DOL's authority to issue the 2008 rule, the District Court for the District of Colorado also upheld DOL's authority to issue such regulations in the H-2B program, finding that the text, structure, and objectives of the statute show Congress's implied delegation of authority to DOL to issue rules governing the labor certifications its provides under the H-2B program. *See G.H. Daniels III & Associates v. Solis*, 2013 WL 5216453, at *5 (D. Colo. Sept. 17, 2013), *appeal pending* No. 13-1479 (10th Cir.). The *G.H. Daniels* Court

recognized that the INA does not contain an express grant of such authority, but the statutory history showed that Congress was aware of DOL's long-established practice of issuing rules in the H-2 program and chose to leave DOL's authority intact when creating the H-2B program. *Id*. Moreover, the court noted that DOL's issuance of rules in the H-2B program had not been undercut by any subsequent statutory amendment, and that DOL's participation in the program advanced the objective of the INA to protect the domestic labor market. *Id*. The court concluded that "[b]y choosing to leave the statutory framework intact, while acknowledging DOL's regulations relating to the labor certification program, Congress endorsed the agencies' interpretation of the statute as conferring rulemaking authority on the DOL." *Id*. (internal quotations and citation omitted).

C. The District Court Below Vacates DOL's 2012 Comprehensive Rule

In 2012, DOL replaced the 2008 rule with more rigorous, comprehensive regulations containing stronger protections for the domestic labor market. *See* 76 Fed. Reg. 15,130 (DOL) (Mar. 18, 2011). DOL proposed, among other things, a new definition of "temporary" employment, and a guarantee that employers compensate H-2B workers for not less than three-fourths the number of hours in the H-2B job order for each four-week period covered by the job order. *Id*. at 15,138, 15,143. DOL also proposed requiring that employers pay wages to United States workers equal to the wages of foreign workers in "corresponding

employment." *Id*. at 15,135. After receiving and considering public comments on the proposed rule, DOL published the final 2012 comprehensive rule in the *Federal Register* with an extensive discussion of the basis and purpose of the rule along with a corresponding cost-benefit analysis. *See* 77 Fed. Reg. at 10,038-10,148.

After Bayou filed a complaint and motion for a preliminary injunction challenging DOL's 2012 rule, the Eleventh Circuit upheld the district court's order preliminarily enjoining DOL from enforcing the 2012 comprehensive rule on the theory that DOL lacks express rulemaking authority under the INA to issue rules governing the H-2B program. *See Bayou Lawn & Landscape v. Sec'y of Labor*, 713 F.3d 1080, 1084 (11th Cir. 2013). The panel's decision was based on the presumption that Congress knows how to delegate rulemaking authority under the INA, but failed expressly to grant such authority to DOL in the context of the H-2B program. *Id*. The panel did not address whether and to what extent DHS may consult with DOL in the H-2B program, and whether the Court should defer to DHS's regulations requiring employers to obtain temporary labor certifications from DOL and authorizing DOL to establish regulations of general applicability governing the labor certification process. *Id*.

On December 18, 2014, following a remand from the Eleventh Circuit in the *Bayou* matter, the district court granted Bayou's motion for summary judgment

and vacated DOL's 2012 comprehensive rule because it determined that DOL lacks authority under the INA to issue rules concerning the H-2B program. *See Bayou Lawn & Landscape Serv. v. Perez*, --- F. Supp. 3d ---, 2014 WL 7496045, *4 (N.D. Fla. 2014). The court noted that the INA provides DOL with express rulemaking authority in the H-2A program, but not in the H-2B program. *Id*. at *5. The court also noted that the statute expressly permits DHS to delegate enforcement authority in the H-2B program to DOL, but not DHS's rulemaking authority. *Id*. The court applied the "Congress knows how to say" canon to conclude that Congress acted intentionally in expressly granting DOL rulemaking authority in one section of the statute while omitting any reference to such authority under the H-2B provision. *Id*.

In holding that DOL lacks authority to issue regulations governing the labor certifications it provides under the H-2B program, the district court did not examine the relevance of any other canon of statutory construction, nor did it discuss the fact, addressed in the *Louisiana Forestry* and *G.H. Daniels* decisions, that Congress subsequently failed to amend the statute to preclude DOL's role in the H-2B program despite DOL's forty-year-long practice of relying on regulations under the H-2B program. *Id*. The district court acknowledged that its decision is contrary to *Louisiana Forestry Association*, 745 F.3d at 669, which held that DHS's regulations lawfully condition its granting of H-2B petitions on an

employer's ability to obtain a labor certification from DOL, *see Bayou*, 2014 WL 7496045, *6. The district court recognized that "DOL was designated a consultant" under the H-2B program through DHS's regulation, but it rejected the notion that DOL may issue regulations to structure its consultation with DHS because the district court opined that the Eleventh Circuit had already rejected this interpretation of the term "consultation." *Id*.

SUMMARY OF THE ARGUMENT

The statute directs DHS to consult with "appropriate agencies of the government" when determining whether to admit temporary foreign workers to the United States in H-2B classification. 8 U.S.C. § 1184(c)(1). DHS's regulations require a determination "whether or not United States workers capable of performing the temporary services or labor are available and whether or not the alien's employment will adversely affect the wages and working conditions of similarly employed United States workers," and DHS makes this determination by soliciting an opinion from DOL regarding labor market conditions. *See* 8 C.F.R. § 214.2(h)(6)(iii)(A). DOL's H-2B regulations create the standards by which it makes the relevant labor market determination in consultation with DHS. *See* 73 Fed. Reg. at 78,110 (DHS); 77 Fed. Reg. at 10,148-64 (DOL).

The statute authorizes DHS to rely on DOL's use of such rules to resolve issues of general applicability and to structure its fact-finding and related advice to

DHS in administering the H-2B program. The Court owes substantial deference to DHS's determination to condition the issuance of H-2B petitions on the receipt of temporary labor certifications from DOL, which may in turn issue regulations by which it will process requests for temporary labor certifications. Moreover, Congress has acquiesced for decades in DOL's practice of relying on such regulations in advising the Attorney General (now DHS) in the administration of the H-2 non-agricultural worker program for the protection of the domestic labor market, which is an underlying mandate of the INA. Thus, DOL has authority under the INA to issue regulations in connection with DHS's permissible conditioning of the grant of H-2B petitions on the advice of DOL, pursuant to Congress's directive that DHS determine H-2B petitions after consultation with appropriate agencies of the government. Those arguments are not foreclosed by the law-of-the-case doctrine.

The prior *Bayou* panel's decision upholding the district court's preliminary injunction did not address DHS's interpretation of 8 U.S.C. § 1184(c)(1) to allow for DOL's rulemaking to carry out its consultative role by issuing temporary labor certifications. The *Bayou* panel's prior determination that DOL lacks implied authority under the INA to issue rules governing its role under the H-2B program was a clear legal error. The Court should reverse the district court's decision and hold that DOL's 2012 rule was issued consistent with the statute. If the Court does

not reverse, it should at the very least find that the district court abused its discretion by entering a nationwide injunction.

STANDARD OF REVIEW

The Court reviews *de novo* the district court's grant of summary judgment. *See Warshauer v. Solis*, 577 F.3d 1330, 1335 (11th Cir. 2009). In cases under the Administrative Procedure Act (APA), the "arbitrary and capricious" standard of review applies, which provides the Court with very limited discretion to reverse an agency decision even in the context of summary judgment. *See Mahon v. Dep't of Agriculture*, 485 F.3d 1247, 1253 (11th Cir. 2007); *City of Oxford v. FAA*, 428 F.3d 1346, 1351 (11th Cir. 2005). This Court applies the APA standard directly to the agency's action and accords "no particular deference to the judgment of the District Court." *Deppenbrook v. Pension Benefit Guaranty Corp*, 778 F.3d 166, 171 (D.C. Cir. 2015) (internal quotations and citations omitted); *Louisiana Forestry*, 745 F.3d at 668-69.

The sole issue in this case is whether DOL has authority under the INA to issue regulations to assist in its consultation with DHS under the H-2B program. This is a pure question of law that the Court may resolve by determining the meaning of the relevant statutory provisions and DHS's implementing regulations, in light of controlling administrative law deference doctrines, and accordingly affirming or setting aside DOL's rule. *See* 5 U.S.C. § 706(2); *Louisiana Forestry*

Ass'n, 745 F.3d at 668-69.

ARGUMENT

In a prior decision, a panel of the Eleventh Circuit upheld the district court's preliminary injunction prohibiting DOL from enforcing the 2012 comprehensive rule on the theory that DOL lacks express rulemaking authority under the INA to issue rules concerning its consultation in the H-2B program. *See Bayou*, 713 F.3d at 1084. The panel's decision was based on the presumption that Congress knows how to delegate rulemaking authority under the INA, but failed expressly to grant such authority to DOL in the context of the H-2B program. *Id*. The panel rejected the notion that the statutory term "consultation" under 8 U.S.C. § 1184(c)(1) allows DOL to publish regulations concerning the H-2B program "*even* without DHS." *Id*. The panel did not address whether and to what extent DHS may consult with DOL in the H-2B program, and whether the Court should defer to DHS's regulations providing for DOL to issue temporary labor certifications as part of the H-2B petition process and authorizing DOL to issue regulations of general applicability concerning the labor certifications it provides as part of that process. *Id*.

Because the *Bayou* panel did not address DHS's regulation as a basis for DOL's authority, as discussed in the subsequently decided *Louisiana Forestry* case, *see* 745 F.3d at 669, the *Bayou* panel's decision does not operate as law of the

case on this issue. In addition, the *Bayou* panel's conclusion that DOL lacks implied authority under the INA to issue regulations to carry out its furnishing advice to DHS constitutes a clear legal error falling outside the law-of-the-case doctrine.

A. The Law-of-the-Case Doctrine Does Not Apply Because the *Bayou* Panel Did Not Address DHS's Regulation

The law-of-the-case doctrine requires that the Court follow legal conclusions reached in a prior appellate decision in the same case. *See This That & The Other Gift & Tobacco, Inc. v. Cobb Cnty., Ga.*, 439 F.3d 1275, 1283 (11th Cir. 2006). The doctrine extends to matters decided explicitly and by necessary implication. *See Terrell v. Household Goods Carrier's Bureau*, 494 F.2d 16, 19 (5th Cir. 1974).[4] But law of the case does not prevent the Court from deciding contentions that were not addressed in a prior opinion. *See Schiavo v. Schiavo*, 403 F.3d 1289, 1292 (11th Cir. 2005).

The *Bayou* panel held that DHS has rulemaking authority under the INA, and concluded on that basis that DOL does not have authority to issue regulations concerning its consultation with DHS under 8 U.S.C. § 1184(c)(1). *See Bayou*, 713 F.3d at 1084. The panel specifically found that DOL cannot issue rules "*even* without" DHS's authorization or request for consultation in the H-2B program. *Id.*

[4] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981.

But the panel did not address the separate basis for DOL's rulemaking stemming from DHS's regulation requiring employers to obtain a temporary labor certification from DOL. *See* 73 Fed. Reg. at 78,107. Nor did the panel address DHS's provision under its own regulations that DOL "establish regulatory procedures for administering elements of the program necessary to provide DHS with the requisite advice with respect to the labor market." 78 Fed. Reg. at 24,050. Because the law-of-the-case doctrine only applies to issues actually decided, the Court is not prevented from addressing whether DOL may issue rules for the temporary labor certification process under DHS's regulations.

In *Oladeinde v. City of Birmingham*, this Court held that the law-of-the-case doctrine does not prevent a subsequent panel from deciding the merits of a claim that a prior panel had not addressed. *See* 230 F.3d 1275, 1289 (11th Cir. 2000). Similarly, in *Schiavo*, the Court resolved claims in a subsequent appeal that "were not decided in our prior opinion." 403 F.3d at 1289. Like in *Oladeinde* and *Schiavo*, there are claims to be decided in this appeal that the *Bayou* panel did not address either explicitly or by necessary implication in its opinion. The *Bayou* panel did not decide whether DHS's regulation provides authority for DOL to issue regulations to structure its advice to DHS through the temporary labor certification process. *See* 713 F.3d at 1084. Rather, the *Bayou* panel only considered whether DOL had authority under the INA to issue rules "*even* without DHS." *Id*. As a

result, the Court is not bound by law of the case from considering DOL's authority on the basis of DHS's regulation conditioning the approval of H-2B petitions on temporary labor certifications as part of the consultation process under 8 U.S.C. § 1184(c)(1). *See* 8 C.F.R. 214.2(h)(6)(iii)-(iv); 73 Fed. Reg. at 78,107; 78 Fed. Reg. at 24,050. Moreover, because a sister circuit subsequently held that DOL has authority to issue regulations in connection with the consultation provided for in DHS's regulations, it is appropriate for the Court to consider this contention in resolving the current appeal. *See Louisiana Forestry*, 745 F.3d at 669-672.

1. The statute is silent on the scope of DHS's "consultation"

The INA provides that the question of importing any "H" nonimmigrant into the United States "in any specific case or specific cases shall be determined by [DHS], after consultation with appropriate agencies of the Government, upon petition of the importing employer." 8 U.S.C. § 1184(c)(1). The statute does not indicate how the relevant fact-finding regarding labor market conditions involving "H" petitions is to be conducted, *see Louisiana Forestry*, 745 F.3d at 671, but INS and DHS have historically relied on DOL's labor market determinations under DOL's regulations governing the H-2 non-agricultural worker program, *see* 55 Fed. Reg. at 2626; 73 Fed. Reg. at 78,110. The statute is also silent regarding the question "of what constitutes permissible consultation" when DHS asks DOL for advice in the H-2B program, *see Louisiana Forestry Ass'n*, 745 F.3d at 670,

although the nature and manner of the consultation is left to DHS's "sole discretion," *see* 8 U.S.C. § 1184(c)(6)(F). This type of statutory silence normally creates an ambiguity, and the express granting of authority and discretion to DHS allows it to provide for consultation with DOL in the manner the two Departments require. *See Barnhart v. Walton*, 535 U.S. 212, 218 (2002).

Looking to the ordinary meaning of the term "consultation" at the time when the INA was enacted further supports the conclusion that the statute is silent on the issue of whether DHS's consultant may structure its advice to the agency, in part, through reliance on regulations. *See Carcieri v. Salazar*, 555 U.S. 379, 388 (2009) ("We begin with the ordinary meaning of the word . . . as understood when the [statute] was enacted."); *Sumpter v. Sec'y of Labor*, 763 F.3d 1292, 1298 (11th Cir. 2014). The term "consultation" means the "deliberation of two or more persons on some matter, with a view to a decision," and the word "consult" similarly means "to deliberate upon." *Webster's Revised Unabridged Dictionar*y 311 (1913).[5] The definitions of "consult" and "consultation" are silent on the issue of whether consulting may involve something equivalent to the consultant's use of standards or provisions of general applicability to inform the advice it gives to the party requesting a consultation. *Id*. But where the subject of the consultation includes

[5] Available at: http://machaut.uchicago.edu/?action=search&word=consultation&resource=Webster%27s&quicksearch=on.

thousands of individual determinations like the labor certifications at issue here, the provision for consultation and obvious need for uniformity and efficiency authorize reliance on provisions of general applicability inherent in the consultation.

Although the dictionary definitions do not specifically address the use of general standards in the context of consultation, the common usage of consultation, which must guide the inquiry into the scope of the term, *see FCC v. AT&T, Inc.*, 131 S. Ct. 1177, 1182 (2011); *CBS Inc. v. Primetime 24 Joint Venture*, 245 F.3d 1217, 122-23 (11th Cir. 2001), extends to situations where someone consults a professional with the expectation that the professional's advice will be guided by professional norms or standards, like in the case of a doctor. *Cf. Webster's Revised Unabridged Dictionary* 311 (1913) ("A council or conference, as of physicians, held to consider a special case"); Occupational Information Network (O*NET), *Details Report 29-1063.00, Internists, General*, Tasks ("Provide consulting services to other doctors caring for patients with special or difficult problems");[6] *Louisiana Forestry Ass'n v. Solis*, 899 F. Supp. 2d 711, 725 (E.D. Pa. 2012). The reason behind consulting a doctor or other professional with expertise in an area of specialization turns on the expectation that the specialist will apply the norms or standards of her profession to provide useful advice to the person seeking the

[6] Available at: http://www.onetonline.org/link/details/29-1063.00.

consultation. *See* O*NET, *Details Report 29-1063.00, Internists, General*, Skills ("Using scientific rules and methods to solve problems"). This is precisely what INS and DHS have done over the last forty years by seeking "consultation" with DOL, which applies its expertise under structured procedures and norms to provide advice about the domestic labor market. *See Louisiana Forestry*, 745 F.3d at 673. Thus, common usage suggests that DHS's required "consultation" may turn on DOL's use of general provisions and standards, but at the very least there is an ambiguity arising from common usage. *See Primetime 24 Joint Venture*, 245 F.3d at 1225 ("Any ambiguity in the statutory language must result from the common usage of that language[.]").

In addition to leaving the term "consultation" undefined, the statutory history and structure show that Congress left a gap for DHS to fill in determining the manner and scope of its consultation with appropriate agencies. The INA does not specify which agency shall make labor market determination in the H-2B program, *see* 8 U.S.C. § 1101(a)(H)(15)(ii)(b), and the consultative process is left to the "sole discretion" of DHS, *see* 8 U.S.C. § 1184(c)(6)(F). Moreover, Congress has never once questioned over the last sixty years the conditioning of H-2B petitions on the issuance of temporary labor certification from DOL. *See* H.R. Rep. No. 99-682, pt. 1 at 80; H.R. Rep. No. 101-723(I) (Sept. 19, 1990), 1990 WL 200418, at *6741 ("No temporary workers under H(i)(b) or H(ii)(b), and no non-

priority permanent workers are allowed admission unless an attestation is on file with the Secretary of Labor and so certified."); REAL ID Act of 2005, Public Law No. 109-13, Div. B, § 404 (May 11, 2005) (amending 8 U.S.C. § 1184(c) to allow for DOL's enforcement authority in the H-2B program); H.R. Rep. No. 112-284 (Conf. Rep.), 157 Cong. Rec. H7528 (Nov. 14, 2011) (expecting DOL to continue administering the H-2B program under its 2008 rule). Thus, Congress left the issue of consultation for DHS to resolve and the legislature has acquiesced in the agency's decision to rely on DOL for many decades.

The district court below tried to evade this relevant statutory structure and history by relying on the statutory directive that the admission of nonimmigrants "shall be for such time and under such conditions as [DHS] may by regulations prescribe." *Bayou*, 2014 WL 7496045, *4 (quoting 8 U.S.C. § 1184(a)(1)). But the use of the term "shall" in this context does not answer the question of DOL's role as a consultant in light of Congress's additional provision for DHS to consult with appropriate agencies when adjudicating petitions to import foreign workers. *See* 8 U.S.C. § 1184(c)(1). Moreover, the mandate under Section 1184(a) relates to the conditions imposed on nonimmigrants that DHS "may" by regulation require. Nor does the statute address the level of specificity of DHS's regulations or their relationship to rules that DOL may publish to advise DHS on the conditions that should be imposed on the employment of nonimmigrants. *See* 8

U.S.C. § 1184(a)(1). Because Congress left the appropriate level of specificity regarding the admission of nonimmigrants undefined, DHS has broad discretion to determine the suitable level of relevant regulations. *See LA Union del Pueblo Entero v. FEMA*, 608 F.3d 217, 224 (5th Cir. 2010).

Additionally, Congress left it to DHS's unfettered discretion to determine the nature and extent of its consultations with DOL on the central issue of labor market conditions. *See* 8 U.S.C. § 1184(c)(6)(F). At the very least, these open-ended directives do not confine the manner in which DOL performs its consultative function, including the issuance of regulations, and this ambiguity cannot be resolved through an isolated reference to the term "shall" under section 1184(a)(1), which does not address the central question of DOL's role and function when consulting with DHS. Thus, the statute contains an ambiguity for DHS to resolve.

2. The Court must defer to DHS's interpretation of "consultation" to include DOL's rules for the issuance of temporary labor certifications

Because the statute does not expressly address the scope of DHS's consultation, the Court must uphold DHS's reasonable construction of the statute. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984); *Barnhart v. Walton*, 535 U.S. 212, 218 (2002) (statutory silence "creates ambiguity"). DHS has authority to administer the INA, *see* 8 U.S.C. § 1103(a), which means the agency's interpretations issued through notice-and-comment

rulemaking warrant *Chevron* deference, *see Miccosukee Tribe of Indians v. United States*, 566 F.3d 1257, 1273 (11th Cir. 2009) (finding agency handbook entitled to *Chevron* deference where agency was authorized to issue regulations and handbook was issued through notice-and-comment process). Thus, this Court must defer to DHS's reasonable interpretation of the term "consultation" under 8 U.S.C. § 1184(c)(1) as encompassing such rulemaking authority as needed for DOL to carry out its consultative role by issuing temporary labor certifications. *See* 73 Fed. Reg. at 78,110; *Louisiana Forestry*, 745 F.3d at 674.

It is irrelevant that DHS is not a party to this lawsuit because the issue of DOL's role in the H-2B program turns, in significant part, on the relationship between DHS and DOL, and DHS has reasonably interpreted the relevant statutory term "consultation" to include the furnishing of advice in the manner structured by DOL. *See* 8 U.S.C. § 1184(c)(1); 73 Fed. Reg. at 78,110. Courts regularly resolve issues of statutory interpretation based on an agency's construction of its organic statute even where the agency is not directly involved in the lawsuit. *See*, *e.g.*, *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173–174 (2007); *Palm Beach Golf Center-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, --- F.3d ---, 2015 WL 1004234, *7-8 (11th Cir. 2015); *Buckner v. Florida Habilitation Network, Inc.*, 489 F.3d 1151, 1155 (11th Cir. 2007).

Chevron deference is warranted here because DHS reasonably relies on the structure afforded by DOL's temporary labor certifications and the regulations under which they are issued as part of the consultation for determining H-2B petitions. *See* 73 Fed. Reg. at 78,110; 78 Fed. Reg. at 24,050. The INA does not specify which agency is to make the relevant fact-finding regarding labor market conditions relating to the H-2B program, *see* 8 U.S.C. § 1101(a)(15)(H)(ii)(b), but the statutory structure, history, and purpose resolve the ambiguity in favor of the permissibility of DHS relying on DOL's temporary labor certifications issued under its regulations, *see Louisiana Forestry*, 745 F.3d at 673-75. Congress recognized DOL's use of rules in the non-agricultural worker program when it continued the program without alteration under IRCA, *see* H.R. Rep. No. 99-682, pt. 1 at 80, and the subject area addressed in section 1101(a)(15)(H)(ii)(b) – the availability of United States workers – falls within the special competence and expertise of DOL, which DHS fully recognizes. *See* 73 Fed. Reg. at 78,110; *Louisiana Forestry*, 745 F.3d at 673. Furthermore, DOL's issuance of temporary labor certifications as advice to DHS in determining H-2B petitions fulfills the underlying goals and objectives of the INA to protect the United States against the deleterious effects of imported foreign labor. *See Elton Orchards v. Brennan*, 508 F.2d 493, 500 (1st Cir. 1974); H.R. Rep. No. 99-682, pt. 1 at 80. Thus, DHS's regulation permissibly conditions the grant of H-2B petitions on the advice of DOL

in the form of temporary labor certifications issued under DOL's regulations. *See Louisiana Forestry*, 745 F.3d at 674-75.

Although DHS plainly has authority to rely on DOL's advice regarding labor market conditions, Bayou still argues that it is unreasonable for DOL to structure its related fact-finding through rulemaking. But DOL's use of rulemaking to structure its labor market determinations for DHS reflects a reasonable interpretation and implementation of the statute given the uniformity and the important procedural protections that the regulations provide. Notice-and-comment rulemaking provides important procedural protections to the public, allows agencies to apprise themselves of relevant issues and views, and promotes predictability. *See Int'l Union v. MSHA*, 626 F.3d 84, 95 (D.C. Cir. 2010). Without the use of this process, the public would be deprived of these important benefits that are unavailable in case-by-case adjudication. *See Nat'l Petroleum Ref. Ass'n v. FTC*, 482 F.2d 672, 683-84 (D.C. Cir. 1973).

By the same logic, Bayou's claim that DOL cannot issue regulations to assist in its advisory role is contrary to common sense. DHS must adjudicate and seek "consultation" on thousands of H-2B petitions every year. *See* 8 U.S.C. § 1184(g)(1)(B) (allocating 66,000 H-2B visas for each fiscal year). Bayou's argument leads to the absurd result that DOL must engage in ad hoc adjudication to provide advice to DHS in each of the thousands of cases. Without structuring

DOL's advisory role through general rules, the adjudicatory process would lack uniformity and would likely result in confusion and delay, forcing the agency to re-adjudicate basic issues with each application. *See Lopez v. Davis*, 531 U.S. 230, 243-44 (2001); *Heckler v. Campbell*, 461 U.S. 458, 468 (1983). Congress could not have intended this absurd consequence, especially where it was well aware of DOL's longstanding reliance on regulations to structure its advisory role in the H-2 program. *See* H.R. Rep. No. 99-682, pt. 1 at 80.

Based on DHS's reasonable resolution of the ambiguous scope of the term "consultation" under the statute, the Court should hold, as the Third Circuit has already determined, that DOL has rulemaking authority in the H-2B program pursuant to DHS's permissible conditioning of the grant of H-2B petitions on the advice of DOL through the issuance of temporary labor certifications. *See Louisiana Forestry*, 745 F.3d at 675.

B. The *Bayou* Panel's Decision Was Based on Clear Error

The law-of-the-case doctrine does not apply when "the prior decision was clearly erroneous and would result in a manifest injustice." *Oladeinde*, 230 F.3d at 1288. The Eleventh Circuit recognizes this exception because the law-of-the-case doctrine does not limit the court's power; instead, it is an expression of good sense and wise judicial practice. See *Venn v. St. Paul Fire & Marine Ins. Co.*, 99 F.3d 1058, 1063 (11th Cir. 1996); *see also Arizona v. California*, 460 U.S. 605, 618

(1983) ("Law of the case directs a court's discretion, it does not limit the tribunal's power."). The "clear error" exception, albeit narrow, applies "when the legal error is beyond the scope of reasonable debate." *Jenkins Brick Co. v. Bremer*, 321 F.3d 1366, 1370–71 (11th Cir. 2003).

In *Jenkins*, this Court found a manifest injustice where an Alabama district court made a clearly erroneous legal determination in finding that venue was proper in Alabama, and thus Alabama law would likely have been used to uphold a non-compete agreement that was contrary to the fundamental public policy of Georgia, where venue was proper. *Id*. at 1371-73. Accordingly, the Court reasoned that clear error presents a manifest injustice where the error would likely change the outcome of a case, and public policy concerns are relevant to a determination of manifest injustice. *Id*.

As in *Jenkins*, the *Bayou* panel's truncated discussion of the relevant statutory text turns on a clear error of law that ignores critical indicators of legislative intent regarding the permissibility of DOL's role under the INA generally, and in the H-2B program in particular. The *Bayou* panel's decision turns on one canon of statutory construction that Congress knows how expressly to delegate rulemaking authority to an agency under the INA, but failed to delegate such authority to DOL in the H-2B program. *See Bayou*, 713 F.3d at 1084. The panel misapplied the negative-implication canon, and failed to consider critical

statutory history and years of Congressional acquiescence in DOL's role in the H-2B program, as articulated in extensive detail by the subsequent decision in *Louisiana Forestry*. *See* 745 F.3d at 669-75.

Moreover, the *Bayou* panel's decision works manifest injustice because it radically disrupts settled expectations regarding DOL's role in the H-2B program, which has been in place over the last forty years. The *Bayou* panel's decision, if applied to the entire H-2B regime, would effectively remove DOL from meaningful participation in the H-2B program, leave DHS without the critical labor market advice that it requires under the statute, and adversely affect the domestic labor market to the extent it allowed employers to import foreign workers without an adequate and systematic assessment of the availability of United States workers for jobs that employers intend to fill with vulnerable and underpaid foreign labor. For these reasons, and based on the discussion of the *Bayou* panel's legal errors below, the Court should determine whether DOL can continue its role in the H-2B program, as it has for over forty years, under Congress's implied authorization to issue regulations to perform its job of furnishing advice to DHS.

1. DOL has implied authority to issue regulations

Whether an agency has authority to issue a regulation governing a specific subject matter turns on Congress's intent. *See Gonzales v. Oregon*, 546 U.S. 243, 258-59 (2006); *Hearth, Patio & Barbecue Ass'n v. Dep't of Energy*, 706 F.3d 499,

504 (D.C. Cir. 2013). If the statute neither expressly includes nor excludes the agency's proffered jurisdiction, the Court must read the statute in light of its overall structure and history. *See FMC v. Seatrain Lines, Inc*., 411 U.S. 726, 731-36 (1973). In all cases of statutory interpretation, the Court must "not look at one word or term in isolation, but instead [must] look to the entire statutory context" to determine legislative intent. *United States v. DBB, Inc*., 180F.3d 1277, 1281 (11th Cir. 1999); *Colortex v. Richardson*, 19 F.3d 1371, 1375 (11th Cir. 1994).

Although the INA does not indicate which agency is to make the relevant fact finding regarding labor market conditions relating to the H-2B program, *see* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); *Louisiana Forestry*, 745 F.3d at 670, the statute directs DHS to conduct a "consultation with appropriate agencies of the government" when determining whether to admit foreign workers to the United States in H-2B classification, *see* 8 U.S.C. § 1184(c)(1). The central term at issue in this case – "consultation" – is silent regarding whether DOL may rely on general standards embodied in regulations when engaged in consultation with DHS on labor market conditions, but the statutory structure, history, and purpose resolve the ambiguity in favor of DHS relying on DOL's temporary labor certifications issued under its regulations. Congress recognized DOL's use of regulations in the non-agricultural worker program when it continued the program without alteration under IRCA, *see* H.R. Rep. No. 99-682, pt. 1 at 80, and the subject area addressed

in section 1101(a)(15)(H)(ii)(b) – the availability of United States workers – falls within the special competence and expertise of DOL, which DHS fully recognizes. *See* 73 Fed. Reg. at 78,104; *Louisiana Forestry*, 745 F.3d at 673. Furthermore, DOL's participations in the H-2B program fulfills the underlying goals and objectives of the INA to protect the United States against the deleterious effects of imported foreign labor. *See Elton Orchards v. Brennan*, 508 F.2d 493, 500 (1st Cir. 1974); H.R. Rep. No. 99-682, pt. 1 at 80.

The statute does not specifically address the precise issue of how DOL will carry out its role under the H-2B program, but it is well established that an agency's authority to issue regulations may stem from an implicit grant of authority derived from the statutory structure, objectives, or legislative history. *See United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1843-44 (2012) (Congress may impliedly grant authority to an agency to speak with the force and effect of law); *Am. Fed. of Gov. Employees v. OPM*, 821 F.2d 761, 770 (D.C. Cir. 1987) (Congressional intent to grant rulemaking authority may be inferred from legislative history where the plain language of the statute fails to address the issue); *Texas Rural Legal Aid v. Legal Serv. Corp.*, 940 F.2d 685, 691-92 (D.C. Cir. 1991) (LSC has rulemaking authority to publish redistricting regulations even where Congress did not specifically state that LSC had the power to issue rules). In this case, the statutory structure and history in conjunction with

the purpose behind the INA to protect the domestic labor market reveal Congress's intent to authorize DOL to use regulations of general applicability to guide its "consultation" with DHS in the H-2B program. *See Roberts v. Sea-Land Serv.*, 132 S. Ct. 1350, 1357 (2012) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."); *Louisiana Forestry*, 745 F.3d at 674-75.

The district court and the *Bayou* panel also erroneously relied on a single canon of statutory construction to the exclusion of other relevant indicia of congressional intent when addressing the meaning of the term "consultation" in relation to other relevant statutory provisions and the statutory history of the H-2B program. The district court held that DOL lacked authority to issue regulations to structure its advice to DHS based on the "Congress knows how to say" canon. *See Bayou*, 2014 WL 7496045, at *5. The district court stated that "while Congress never expressly prohibited DOL from promulgating regulations under the H-2B program, it plainly never granted DOL such authority despite the fact that it granted DOL limited rulemaking authority under the more heavily regulated H-2A program." *Id*. The *Bayou* panel also exclusively relied on this same canon in upholding this Court's preliminary injunction by noting that the "presence of a specific delegation to [DOL] of rulemaking authority over the agricultural worker H-2A program persuades us that Congress knew what it was doing when it crafted

these sections." *Bayou*, 713 F.3d at 1084. These conclusions are incorrect as a matter of law because the courts misapplied the "Congress knows how to say" canon and ignored other more critical indicators showing Congress's intent to grant DOL rulemaking authority in the H-2B program. *See Louisiana Forestry*, 745 F.3d at 673-75.

Moreover, the *expressio unius* canon is a "feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved." *Adirondack Medical Center v. Sebelius*, 740 F.3d 692, 697 (D.C. Cir. 2014). Congress did not define the manner or scope of "consultation" in directing DHS to obtain advice from relevant agencies, *see* 8 U.S.C. § 1184(c)(1), but Congress expressly committed to DHS's "sole discretion" the manner in which it consults with agencies in the H-2B program, *see* 8 U.S.C. § 1184(d)(6)(F). Congress's broad delegation of discretion regarding the arrangement between the agencies in the H-2B program undercuts any definitive reliance on the *expressio unius* canon for support. *See Adirondack Medical*, 740 F.3d at 697. The statutory silence on the scope of consultation in conjunction with the broad delegation of discretion committed to DHS in determining how it consults shows that Congress left it to the agencies to determine how they would determine the critical factual issues relating to the importation of foreign workers. It is always reasonable for agencies to resolve

common factual issues arising in a program through rules of general applicability, *see Lopez v. Davis*, 531 U.S. 230, 244 (2001), so DHS's reliance on DOL's regulations under the H-2B program on the critical issue of labor market conditions is a permissible way to administer the ambiguous directive for a "consultation" with other agencies, *see Louisiana Forestry*, 745 F.3d at 673. Within the context of this statutory structure outlining the parameters of the H-2B program, the *expressio unius* canon provides little guidance. *See Adirondack Medical*, 740 F.3d at 697.

More significantly, the district court's and the *Bayou* panel's exclusive reliance on the *expressio unius* canon conflicts with the Supreme Court's recent clarification of the proper use of negative implication when interpreting statutes. *See Marx v. Gen. Rev. Corp.*, 133 S. Ct. 1166, 1175 (2013). The Supreme Court explained that the negative implication canon "does not apply unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it." *Id*. (internal quotation and citation omitted). Based on this directive, the *Bayou* panel erroneously relied on the negative implication canon, because when Congress created the H-2B program it was well aware of DOL's longtime use of rulemaking in the H-2 nonagricultural context. *See* H.R. Rep. No. 99-682, Part 1, at 80; 33 Fed. Reg. at 7571. The relevant legislative history and Congress's longtime acquiescence in DOL's use of rulemaking in the H-2B program show that

Congress did not mean to "say no" to DOL's continued use of rules of general applicability in the H-2B program. *See Marx*, 133 S. Ct. at 1175-76. Rather, the legislative concern under IRCA was to revise the H-2 *agricultural* temporary worker program, but Congress left the H-2 non-agricultural temporary worker program intact, *see* H.R. Rep. No. 99-682, Part 1, at 80, which included DOL's well-known regulations governing the non-agricultural certification process, *see Louisiana Forestry*, 889 F. Supp. 2d at 729 & n.15.

The district court ignored this critical statutory history and concluded that it would be "anomalous for Congress to have granted DOL specific, limited authority under the H-2A program if it intended to give DOL general rulemaking authority under both the H-2A and H-2B programs." *Bayou*, 2014 WL 7496045, at *5. But the changes that Congress effected under IRCA do not support any such assumed anomaly because Congress only addressed the H-2A program while leaving the H-2B program intact. *See* H.R. Rep. No. 99-682, Part 1, at 80. Congress specifically addressed the problems with the agricultural worker program, not DOL's long established role in the non-agricultural program that Congress left untouched under the renamed "H-2B" program. In addition, contrary to the district court's suggestion, Congress did not address new rulemaking for the H-2A agricultural worker program under IRCA, but only identified DOL's additional ability to collect fees for filing temporary labor certification applications. *See* 8

U.S.C. § 1188(a)(2); H.R. Rep. No. 99-682, pt. 1 at 80-82 (discussing DOL's existing regulations before IRCA). Congress did not need to address a broad grant of rulemaking authority under either the H-2A or H-2B programs, because it was well established that DOL could issue rules of general applicability concerning its temporary labor certifications under the H-2 programs. *See Snapp*, 458 U.S. at 595-96. Thus, Congress's leaving intact DOL's regulations governing the non-agricultural worker program while enacting a reform of the agricultural program completely deflates the *Bayou* panel's and the district court's truncated and erroneous use of the *expressio unius* canon.

Moreover, the district court and the *Bayou* panel ignored the manner in which Congress historically delegates authority to DOL under the INA. DHS is not the only agency charged with administering the INA. *See* 8 U.S.C. § 1103(g) (Attorney General); 8 U.S.C. § 1104(a) (Secretary of State). DOL also has a significant role in defining the conditions governing the importation of foreign workers. *See* 8 U.S.C. § 1182(a)(5) (permanent labor certification program); § 1182(n) (H-1B nonimmigrant worker program); § 1188 (H-2A nonimmigrant worker program). In each of these areas, Congress has not expressly granted DOL general rulemaking authority, *id*., but given Congress's established expectation that DOL play a significant role in protecting the domestic labor market, it has long been assumed that DOL may issue regulations concerning its participation in each

of these subject areas. *See* 20 C.F.R. Part 655 Subpart H (H-1B regulations); Part 655 Subpart B (H-2A program); Part 656 Subpart C (permanent labor certification program). The courts regularly assume DOL has rulemaking authority in these various areas, despite the lack of an express authorization from Congress. *See, e.g.*, *Kutty v. DOL*, 764 F.3d 540, 547-48 (6th Cir. 2014) (H-1B program); *Durable Manufacturing v. DOL*, 578 F.3d 497, 501 n.6 (7th Cir. 2009); *United Farm Workers v. Solis*, 697 F. Supp. 2d 5 (D.D.C. 2010) (H-2A program). Relatedly, courts have vacated DOL's various attempts to fulfill its role without issuing regulations through notice-and-comment rulemaking. *See, e.g.*, *Kooritzky v. Reich*, 17 F.3d 1509, 1512-14 (D.C. Cir. 1994) (permanent labor certification program); *North Carolina Growers' Ass'n v. Solis*, 644 F. Supp. 2d 644, 672-73 (M.D.N.C. 2009) (H-2A program); *Nat'l Ass'n of Manufacturers v. DOL*, 1996 WL 420868, *16-17 (D.D.C. July 22, 1996) (H-1B program). The same implied authority to issue regulations in aid of its labor-certification function exists in the H-2B program absent a general grant of rulemaking authority, especially given Congress's awareness of DOL's historical role as a vital consultant in the program. *See Louisiana Forestry*, 745 F.3d at 673-74. The district court's and the *Bayou* panel's contrary conclusion flies in the face of Congress's historical practice concerning DOL's role under the INA.

As a result, the district court's and the *Bayou* panel's exclusive reliance on the negative implication canon was clearly erroneous because the canon does not purport to lay down an absolute rule and that, like every other canon, it is "simply one indication of meaning; and if there are more contrary indications . . . it must yield." Antonin Scalia, *A Matter of Interpretation* 27 (Princeton Univ. Pr. 1997). Relatedly, the negative implication canon is ultimately a "hypothesis of careful draftsmanship." *Kapral v. United States*, 166 F.3d 565, 579 (3d Cir. 1999) (Alito, J., concurring). Because DOL has a significant, established role in administering various programs under the INA, and Congress has rarely felt the need to make it explicit that DOL has authority to issue regulations concerning its role under various provisions of the INA. Thus, the statutory structure strongly militates against an application of the negative implication canon in this case.[7]

[7] None of the special legislative drafting discussed in *Dep't of Homeland Security v. MacLean*, 135 S.Ct. 913 (2015), applies in this case. Rather, the decision strongly suggests that the "Congress knows how to say" presumption applies only where an omission appears in a closely related statutory section that shows Congress acted intentionally in addressing the issue disclosed by the omission. In *MacLean*, the agency's argument that its regulation constituted a "law" prohibiting the disclosure of information did not square with Congress's specific use of the word "regulation" "nine times" and "in close proximity" to the word "law" on which the agency's interpretation turned. *Id*. at 919. These grammatical signals are not present in this case where DOL contends that the word "consultation" permits it to use regulations to provide advice to DHS. *See* 8 U.S.C. § 1184(c)(1). Congress does not indicate whether or how regulations may be relied upon in the section directing DHS to consult with appropriate agencies. *Id*. Thus, unlike the grammatical context in *MacLean*, Congress here did not omit a word or phrase that

Nor do the cases on which the district court relied in support of its conclusion that DOL lacks any ability to issue and rely upon general standards in regulations warrant such a holding in the context of the H-2B program. The district court cited two Supreme Court cases for the general proposition that Congress's failure to address rulemaking expressly in the H-2B program precludes DOL from continuing to use regulations governing the temporary labor certifications it provides when consulting with DHS. But the district court's proposition is far too abstract to undercut DOL's authority in the context of the H-2B program. *See Lopez v. Smith*, 135 S. Ct. 1, 4 (2014); *Brooks v. Marbury*, 24 U.S. 78, 91(1826) (Marshall, C.J.) ("An opinion in a particular case, founded on its special circumstances, is not applicable to cases under circumstances essentially different."). For example, the district court's reliance on *Adams Fruit Company v. Barrett*, 494 U.S. 638 (1990), is misplaced because the limitation on rulemaking authority in that case does not exist here. The issue in *Adams Fruit Company* was whether DOL had the authority to define the scope of a private cause of action in court where Congress specifically provided for the Judiciary to be the adjudicator of private claims. *Id*. at 649-50. Unlike *Adams Fruit Company*, Congress did not establish a private cause of action under the H-2B program for the courts to

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it used repeatedly and in close proximity in the same section of the statute under which DOL advances its interpretation.

adjudicate, so there is no issue in this case regarding DOL's entrenchment upon the Judicial power. *See Natural Resources Def. Council v. EPA*, 749 F.3d 1055, 1063-64 (D.C. Cir. 2014) (Under *Adams Fruit*, an agency cannot rely on gap-filling authority to provide an affirmative defense where the statute creates a private right of action).

Similarly, *Federal Maritime Commission v. Seatrain Lines*, 411 U.S. 726 (1973), provides no support for the district court's decision. In *Seatrain Lines*, the agency claimed jurisdiction over a corporate merger resulting in one of the parties ceasing to exist because the agency held the merger to be an "agreement" under the statute, which provided a safe harbor from the antitrust laws to the parties under a qualifying agreement. *Id*. at 729-30. The problem with the agency's interpretation of the term "agreement" to include mergers was that it conflicted with the "frequently expressed view that exemptions from antitrust laws are strictly construed." *Id*. at 733. The agency's interpretation also conflicted with the "structure of the Act," which included a list of covered agreements contemplating "continuing activities." *Id*. at 733-34. The merger at issue in the case did not leave any continuing activity for the agency to police, so the merger fell outside the prescribed list that Congress provided when it defined "agreements" over which the agency could exercise authority. *Id*. at 734. Overall, "the rest of the statutory scheme, which simply does not make sense if the statute is read to encompass one-

time agreements creating no continuing obligations" did not support the agency's exercise of jurisdiction. *Id*. Finally, the legislative history relating to the statutory provision under which the agency claimed jurisdiction showed that the type of transaction at issue was "neither part of the problem nor part of the solution" addressed in the statute. *Id*. at 744.

Read in light of these material facts, which must necessarily limit the application of the decision to future cases, *see Lopez*, 135 S. Ct. at 4, *Seatrain Lines* has no application to DOL's reliance on regulations to assist it in consulting with DHS under the H-2B program. Unlike the situation in *Seatrain Lines*, DOL's reliance on regulations here does not run afoul of the strong judicial presumption against the creation of exemptions from the anti-trust laws. Additionally, unlike the statute in *Seatrain Lines*, Congress has not provided a list of transactions over which DOL is limited in its role under the INA. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b); 1184(c)(1). Nor does DOL's reliance on regulations when providing advice to DHS conflict with the statutory scheme as a whole. Rather, DOL's role in the H-2B program advances the purpose of the statute to provide adequate labor market information to DHS for the protection of the domestic labor market when allowing for the importing of foreign workers. *See Louisiana Forestry*, 745 F.3d at 673. Finally, unlike the legislative history in *Seatrain Lines* militating against the agency's position, the legislative history in

this case concerning the IRCA amendments shows that Congress was well aware of DOL's vital role in the H-2B program, but did nothing to abrogate or question the agency's longstanding role in the non-agricultural worker program. *See* H.R. Rep. No. 99-682, Part 1, at 80. Thus, *Seatrain Lines* in no way undercuts DOL's reliance on regulations in this case.

2. Longstanding congressional acquiescence

The district court below and the *Bayou* panel also ignored the critical legislative intent evidenced by Congress's longstanding acquiesce in DOL's historical practice of participating in the administration of the H-2B program through reliance, in part, on regulations issued to assist it in doing so. Congress's consistent refusal to withdraw such authority when amending relevant parts of the INA indicates its approval of the manner in which DOL has fulfilled its role. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978).

Congress has left DOL's rulemaking in the non-agricultural program intact over the last forty years. *See Louisiana Forestry*, 745 F.3d at 674. Since 1968, DOL has issued regulations governing the H-2 non-agricultural program, *see* 33 Fed. Reg. at 7570-71, and the legislative history of IRCA specifically acknowledged DOL's practice of issuing regulations, *see* H.R. Rep. No. 99-682, pt. 1, at 80. Following IRCA, Congress amended 8 U.S.C. § 1184 to strengthen INS's discretion to consult with other agencies, without calling into doubt DOL's

continued use of regulations in the H-2B program as a basis for consulting with INS. *See* Public Law No. 102-232, § 204. After transferring authority from INS to DHS under the Homeland Security Act, Congress amended the H-2B program by authorizing DOL's enforcement authority without abrogating DOL's use of regulations to issue H-2B labor certifications. *See* REAL ID Act of 2005, Public Law No. 109-13, Div. B, § 404 (May 11, 2005). More recently, after DOL issued two regulations governing the H-2B program in 2008 and 2011, Congress withheld appropriations to implement the second regulation, but not the first. *See* Public Law No. 112-55, Div. B., Title V, § 546 (Nov. 18, 2011); Public Law No. 112-74, Title I, Div. F, § 110 (Dec. 23, 2011). Finally, Congress subsequently lifted the appropriations rider that prohibited the use of the 2011 regulation without questioning DOL's authority to issue such regulations. *See Louisiana Forestry*, 745 F.3d at 667. By ignoring this established legislative pattern of leaving DOL's rulemaking authority in the H-2B program untouched, the district court and the *Bayou* panel erroneously dismissed the type of critical congressional intent that the Supreme Court has held establishes a controlling legislative design.

Common law courts have long recognized that the meaning of a statute may be inferred from the course of its implementation over time. *See Barnhart v. Walton*, 535 U.S. 212, 220 (2002); *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915); *Trelawny v. Bishop of Winchester*, 1 Burrow's Reports 219, 223 (King's

Bench, Hilary 30 Geo. III, 1757) (Mansfield, C.J.). For example, in *Midwest Oil*, the Supreme Court addressed the issue of whether the President had the authority to withdraw tracts of public land from mineral exploration, in apparent contravention of statutes that provided for such exploration. *See* 236 U.S. at 466-69. The Court held that Congress had implicitly acquiesced in such withdrawals by failing to amend the relevant statutes over a period of decades during which many withdrawals had been made. *Id*. at 472. Congress watched the Executive at work, but at no point did it "repudiate the action taken," and such "silence was its acquiescence[, which is] equivalent to consent to continue the practice until the power was revoked by some subsequent action by Congress." *Id*. at 481.

Similarly, the long history of congressional silence regarding DOL's practice of relying on regulations to aid its participation in the H-2B program shows a legislative intent to continue this practice. Since 1968, DOL has relied on its regulations to issue thousands of H-2B certifications each fiscal year, *see* 8 U.S.C. § 1184(g)(1)(B) (providing for 66,000 H-2B visas for each fiscal year); 33 Fed. Reg. at 7570-71, which is far greater in significance than the limited number of executive actions at issue in *Midwest Oil*, *see Delaware River Stevedores v. DiFidelto*, 440 F.3d 615, 624 (3d Cir. 2006) (Fisher, J., concurring). If Congress thought DOL's practice of using regulations to fulfill its role under the H-2B program were *ultra vires*, it had the opportunity to express its view over the last

forty years, and most recently by withholding appropriations to administer the program through rules of general applicability. *See Louisiana Forestry*, 745 F.3d at 674. Congress's refusal to limit DOL's authority shows a legislative acquiescence in, and a longstanding approval of, DOL's practice of issuing regulations to structure its role in the H-2B program. *See Lindahl v. OPM*, 470 U.S. 768, 782 n.15 (1985) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change") (internal quotation marks omitted). The statutory history provides compelling evidence that Congress intended DHS's and DOL's interpretation of "consultation" to include DOL's reliance on general standards in regulations under the H-2B program, or at least understood the interpretation as statutorily permissible. *See Walton*, 535 U.S. at 220.

Relatedly, when Congress creates a program and appropriates funds for an agency to administer the program, courts presume that the funded agency will necessarily engage in the "formulation of policy and the making of rules to fill any gap left, implicitly or explicitly[] by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). In this case, Congress specifically directed DOL to use appropriated funds to participate in the administration of the H-2B program through the consultation that Congress authorized DHS to request. *See* H.R. Rep. No. 112-284 (Conf. Rep.), 157 Cong. Rec. H7528 (Nov. 14, 2011) (stating that DOL should continue

to use appropriated funds under the 2008 H-2B rule). Congress also recently lifted the temporary appropriations rider that had prevented DOL's 2011 regulation from going into effect. *See Louisiana Forestry*, 745 F.3d at 667. It necessarily follows that Congress expects DOL to rely on regulations to formulate the policies and procedures necessary to provide DHS with advice regarding labor market conditions in the H-2B program.

For these reasons, the district court incorrectly held that DOL lacks rulemaking authority under the INA, and the *Bayou* panel's similar conclusion was based on a clear error of law.

C. The District Court Abused Its Discretion By Entering a Nationwide Injunction

Even if the district court correctly entered judgment in favor of Bayou, it still erred by issuing an order "permanently enjoin[ing] [DOL] from enforcing [the 2012 rule]." *Bayou*, 2014 WL 7496045, *7. The district court abused its discretion in granting a nationwide injunction because the broad scope of its injunction is not necessary to afford relief to Bayou, and a nation-wide injunction is contrary to the district court's authority under the APA and inconsistent with the principle that the district court's decision is binding only between the parties.

Where, as here, no special statutory review provision applies, the proper form of proceeding under the APA is a suit for declaratory or injunctive relief. *See* 5 U.S.C. § 703 (in the absence of a special statutory review procedure relevant to

the subject matter, the form of proceeding under the APA is "any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction"); *Trudeau v. FTC*, 456 F.3d 178, 185 (D.C. Cir. 2006) (the APA provides a "limited cause of action for parties adversely affected by agency action"). Declaratory and injunctive remedies are equitable in nature. *See Reno v. Catholic Social Services, Inc*., 509 U.S. 43, 57 (1993); *Black Warrior Riverkeeper v. U.S. Army Corp of Engineers*, --- F.3d ---, 2015 WL 1285250, *15 (11th Cir. 2015) (setting aside an agency's action under the APA is a form of equitable relief). Additionally, the APA's reference to actions for "declaratory judgments" makes clear that no injunction – much less a nationwide injunction – is in any sense compelled by the APA when agency action is held unlawful. *See* H.R. Rep. No. 1980, 79th Cong., 2d Sess. 42 (1946) (referring to possibility of suits for declaratory relief to "determine the validity or application of a rule or order"); S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945); *see also* Tom C. Clark, *Attorney General's Manual on the Administrative Procedure Act* 97 (1947) ("where agency action is reviewable, but the Congress has not specified the form of review, the courts will continue to select the appropriate form of action."). Rather, equitable relief must be tailored to the particular final agency action and parties before the court and "should be no more burdensome to the defendant than necessary to provide complete relief to the

plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *see also Dep't of Defense v. Meinhold*, 510 U.S. 939 (1993) (granting stay of Armed-Forces-wide injunction, except as to individual plaintiff).

Accordingly, even when a regulation is ripe for pre-enforcement review because it governs primary conduct and would require a regulated party either to change its behavior immediately or to risk serious penalties, a court that finds a rule to be invalid should "set aside," 5 U.S.C. § 706(2), the regulation only in the sense of putting the rule to one side and removing it from consideration as a lawful basis for sustaining the application of the regulation to the plaintiff. *See* Webster's Third New International Dictionary of the English Language 2077 (1993) ("set aside") (definition 1: "to put to one side: DISCARD"; definition 3: "to reject from consideration"); *Webster's New International Dictionary of the English Language* 2291 (2d ed. 1958) (definition a: "To put to one side; discard; dismiss"; definition b: "To reject from consideration; overrule"). Even in such a case, the regulation should be declared unlawful or enjoined only as to the party before the court. *Accord Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664-65 (9th Cir. 2011); *Va. Soc'y for Human Life v. FEC*, 263 F.3d 379, 392-394 (4th Cir. 2001). This principle applies with greater force in this case because DOL's regulations establish conditions on the issuance of labor certifications as advice to

DHS in connection with the adjudication of H-2B petitions in a context committed to DHS's discretion.

Construing the APA to require a nationwide injunction in cases like this one would also impede the usual process by which disputed legal issues are considered by different circuits before (if necessary) being resolved by the Supreme Court. In holding that non-mutual collateral estoppel should not apply against the United States, the Supreme Court explained:

> A rule allowing nonmutual collateral estoppel against the government . . . would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue. Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari.

United States v. Mendoza, 464 U.S. 154, 160 (1984); *see id*. at 163 (explaining that the Court's preferred approach "will better allow thorough development of legal doctrine by allowing litigation in multiple fo-rums"). Following *Mendoza*, courts recognize that, as a general matter, a recurring legal issue involving the federal government should be subject to re-litigation in different circuits even after a court of appeals has ruled on the issue. *See Holland v. Nat'l Mining Ass'n*, 309 F.3d 808, 815 (D.C. Cir. 2002).

The district court's approach in this case reintroduces the same practical difficulties that the *Mendoza* Court sought to avoid. In a case involving a similar issue, the Fourth Circuit Court of Appeals held that the district court abused its

discretion by issuing a nationwide injunction preventing the Federal Election Commission from implementing its regulations outside the Fourth Circuit. *See Va. Soc'y for Human Life*, 263 F.3d at 393. The court noted that an agency must be free to press its position in those circuits that have not yet ruled on the validity of the agency's regulation. *Id*. The court reasoned that allowing a district court to enter a nationwide injunction against an agency is normally not permitted because it has the effect of freezing the first decision rendered on a particular legal issue by preventing other courts in other circuits from addressing the legal issue. *Id*; *see also Los Angeles Haven Hospice*, 638 F.3d at 664-65.

Similarly, in this case, the district court, whose decision is not even binding precedent on any non-parties within the same judicial circuit or district, has through an injunction imposed its view of the law on other persons, districts, and circuits, thereby preventing the development of the law regarding DOL's rulemaking authority and its ability to introduce comprehensive changes to the temporary labor certification regime to prevent fraud and protect the domestic labor market. *See* 77 Fed. Reg. at 10,038-39 (discussing the need for regulatory reform in the H-2B program). Agencies must be permitted not to follow a decision of a single district court, or of a court of appeals in another circuit, to allow for a full development of the law by giving rise to possible circuit disagreements that lead to Supreme Court review. *See Holland*, 309 F.3d at 815; *see also Georgia*

Dep't of Med. Assistance v. Bowen, 846 F.2d 708, 710 (11th Cir. 1988). This point is especially pressing in this case because the Third Circuit has held that DOL *does have* rulemaking authority under the INA. *See Louisiana Forestry*, 745 F.3d at 669-75. By virtue of issue preclusion, that ruling binds all of the entities represented by the plaintiff associations in that case, and domestic and H-2B workers are entitled to the protections under the DOL regulations upheld by the Third Circuit. DOL should be free to implement its 2012 rule to allow for other courts as well to assess the validity of DOL's role in the H-2B program for a full development of the law.

Under certain circumstances, specialized mechanisms are available to provide a broader resolution of a legal issue that can be expected to affect a large number of persons. If the criteria set forth in Federal Rule of Civil Procedure 23 are satisfied, for example, a class can be certified and a recurring question of law resolved more generally, sometimes even on a nationwide basis. *See Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) (explaining that "the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [potential plaintiff] to be litigated in an economical fashion under Rule 23"). Congress also occasionally confers upon a single court the exclusive authority to determine (subject to review by the Supreme Court) whether particular categories of agency regulations are valid. *See, e.g.*, 42. U.S.C. § 7607(b)(1)

(petition for review of an Environmental Protection Agency regulation of nationwide applicability under the Clean Air Act must be filed, in the District of Columbia Circuit within 60 days after the rule is published in the Federal Register); 8 U.S.C. § 1252(e)(3) (providing for exclusive judicial review of challenges to the validity of the system for expedited removal proceedings in the District Court for the District of Columbia). Except where such a mechanism is expressly made available, however, the "case-by-case approach . . . is the traditional, and remains the normal, mode of operation of the courts." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 894 (1990).

The approach taken by the district court in this case is particularly unwarranted because it subjects the government to the risks and burdens associated with a nationwide class action or special review provision, without providing the government the corresponding benefit of a definitive resolution of the disputed legal issue binding upon a broad range of potential plaintiffs. *See, e.g., Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974) (explaining that Federal Rule of Civil Procedure 23 "was intended to insure that the judgment, whether favorable or not, would bind all class members who did not request exclusion from the suit"). By enjoining DOL from implementing the 2012 H-2B rule nationwide, the district court below imposed substantially the same relief as might have been appropriate in a nationwide class action or special review proceeding. By contrast, if the

district court below had sustained DOL's rule against Bayou's statutory challenge, other plaintiffs would have remained free to re-litigate the same issue. Absent a clear statutory text compelling that asymmetrical result – and the text of 5 U.S.C. § 706 does not provide for such a result – the district court plainly erred by entering a nationwide injunction.

CONCLUSION

Because DOL has statutory authority to issue rules governing its participation in the administration of the H-2B program through consultation with DHS, the Court should reverse the judgment of the district court so that the agency may implement the 2012 H-2B rule.

Dated: April 13, 2015

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that Defendants-Appellants' Brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B), because this brief is proportionally spaced, has a typeface of 14 points, and contains 13,220 words, including the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I certify that on April 13, 2015, I electronically filed the foregoing DEFENDANTS-APPELLANTS' BRIEF with the Clerk of Court by using the CM/ECF system, which will provide electronic notice and an electronic link to this document to the following attorneys of record:

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