

Exhibit A

**Transcript of April 24, 2012 District Court
Hearing (Motion to Intervene Arguments)**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

BAYOU LAWN & LANDSCAPE
SERVICES, et al.,

Plaintiffs,

vs.

HILDA L. SOLIS, et al.,

Defendants.

Case No. 3:12cv183/MCR

Pensacola, Florida

April 24, 2012

2:05 p.m.

TRANSCRIPT OF MOTION PROCEEDINGS
BEFORE THE HONORABLE M. CASEY RODGERS
CHIEF UNITED STATES DISTRICT JUDGE
(Pages 1-100)

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04:08:36PM 1 for a nationwide injunction. Well, that's an issue that I have
04:08:45PM 2 to consider in this case is whether that is too broad, but that
04:08:55PM 3 is what's before me. I don't know that I can alter the
04:09:00PM 4 Plaintiffs' claim here for purposes of this discussion. So
04:09:06PM 5 unless Mr. Charrow is willing to concede something, I don't
04:09:09PM 6 think I can -- again, I can't alter his claim or narrow it.

04:09:17PM 7 **MR. FORNEY:** Okay. I'd like to seek leave to contact
04:09:22PM 8 your chambers hopefully by noon your time tomorrow.

04:09:26PM 9 **THE COURT:** All right.

04:09:27PM 10 **MR. FORNEY:** And I'll communicate with your clerk or
04:09:30PM 11 with the courtroom deputy --

04:09:32PM 12 **THE COURT:** Call my chambers at 850-435-8448 and speak
04:09:42PM 13 either to Ms. Rock, R-O-C-K, or Ms. Klotz -- and this is Ms.
04:09:50PM 14 Klotz here, my law clerk, Amy Klotz, K-L-O-T-Z. You could speak
04:09:57PM 15 to either one of them.

04:09:59PM 16 And Mr. Forney, I appreciate you doing that. And if
04:10:03PM 17 the answer is that they will not agree to it, we'll go ahead and
04:10:08PM 18 start our research and see if that's absolutely necessary. If
04:10:16PM 19 the case law doesn't support it and they don't agree, I'll have
04:10:19PM 20 something out. It may not be as thorough as I would like it to
04:10:24PM 21 be, but I will certainly analyze it. And I might have to
04:10:34PM 22 incapsulate my reasoning in the written order, but it will be
04:10:38PM 23 there for appellate review.

04:10:41PM 24 Okay. We have the Motion to Intervene. I've
04:10:48PM 25 indicated that I would hear that if we had time, but I do want

04:10:52PM 1 to stress that I only want to hear something that is new. So if
04:10:59PM 2 it's not new -- I mean, this isn't a motion to reconsider. You
04:11:04PM 3 have that issue before the Eleventh Circuit in the Bayou I case.
04:11:10PM 4 If I'm wrong, legally incorrect, they will tell me that and send
04:11:14PM 5 it back.

04:11:15PM 6 And otherwise, I mean, if there's something
04:11:18PM 7 distinguishable about this case for purposes of the Motion to
04:11:25PM 8 Intervene, then I'll hear you on that. And then also on the
04:11:29PM 9 Motion to Transfer, if there's something distinguishable as
04:11:33PM 10 well. And I think there may be on the Motion to Transfer. Go
04:11:38PM 11 ahead.

04:11:39PM 12 **MS. GRAUNKE:** With respect to the Motion to
04:11:47PM 13 Intervene -- and I do want to be solicitous of the Court's time
04:11:55PM 14 in this regard, and I know that we have briefed this in Bayou I.

04:12:00PM 15 I think it's important to point out that the far
04:12:05PM 16 reaching implications of enjoining this rule really do implicate
04:12:13PM 17 the interest of the workers who are attempting to intervene in
04:12:17PM 18 this lawsuit in some very significant ways.

04:12:19PM 19 The Plaintiffs have been talking about this case as
04:12:23PM 20 though it's just about the landscaping industry, but it affects
04:12:26PM 21 many industries, the hospitality industry among them. And some
04:12:30PM 22 of the new intervenors in this case are hospitality workers who
04:12:35PM 23 are speaking about the effects that these new regulations would
04:12:35PM 24 have on their jobs.

04:12:37PM 25 This isn't just the Wage Rule. There's a number of

04:12:40PM 1 tangible benefits being afforded to them by these rules,
04:12:43PM 2 including, for example, the recruitment provisions, which
04:12:46PM 3 unemployed U.S. workers have a very strong interest in seeing
04:12:54PM 4 exist for the purposes of knowing that these jobs are available,
04:12:56PM 5 as well as the rights that would go to workers in corresponding
04:13:00PM 6 employment with H-2B workers, the U.S. workers who are doing the
04:13:03PM 7 same jobs as H-2B workers.

04:13:05PM 8 I think we remain very concerned about the issue of
04:13:11PM 9 the Rule 65(c) security. I believe we have briefed that to some
04:13:16PM 10 extent before, so I won't go into a lot of detail here. But
04:13:20PM 11 here there is a quantifiable harm that is going to be caused to
04:13:23PM 12 workers if this rule is enjoined, and that's particularly
04:13:29PM 13 exemplified in the case of H-2B workers who, under the
04:13:33PM 14 regulation, would be entitled to reimbursement for travel
04:13:37PM 15 expenses at the midpoint of the contract.

04:13:39PM 16 The DOL, for example, estimated that at being
04:13:43PM 17 approximately \$900 per worker that would be paid, and so that
04:13:47PM 18 provides sort of a sum by which this Court can calculate
04:13:50PM 19 security. So workers -- the workers that we represent
04:13:55PM 20 applicants for intervention seek to protect these very tangible
04:13:59PM 21 benefits that are conferred by the statute through the mechanism
04:14:01PM 22 of 65(c), if an injunction is granted, but regardless, that is
04:14:06PM 23 the strong compelling interest here.

04:14:09PM 24 **THE COURT:** I guess I still am of the view that what's
04:14:17PM 25 at issue in this case -- solely what's at issue in this case is

04:14:23PM 1 this agency's rulemaking authority and their compliance with the
04:14:27PM 2 APA and the RFA.

04:14:31PM 3 It is -- that is not an interest that you all have. I
04:14:38PM 4 mean, this, in terms of what's at issue by this Plaintiff and
04:14:44PM 5 this Defendant, I do not see the intersection of your clients'
04:14:51PM 6 rights with what's at issue in this case.

04:14:54PM 7 I understand you see a benefit to your clients or your
04:14:58PM 8 clients feel that they have a benefit to enforcement of the rule
04:15:09PM 9 against these Plaintiffs, but that doesn't give you a right to
04:15:11PM 10 intervene in this lawsuit.

04:15:14PM 11 **MS. GRAUNKE:** Well, Your Honor, if I may, I think the
04:15:18PM 12 *Chiles v. Thornburgh* case and the *Army Corps of Engineers* cases
04:15:22PM 13 which are cited in our brief are very important. And
04:15:25PM 14 unfortunately -- and I apologize -- I'm not sure that we did as
04:15:27PM 15 good a job as we should have in terms of presenting the relevant
04:15:32PM 16 Eleventh Circuit authority in *Bayou I*, and I certainly apologize
04:15:38PM 17 to the extent that we fell down on the job a bit there. But I
04:15:40PM 18 think *Chiles* is relatively instructive.

04:15:42PM 19 For example, in *Chiles*, the Eleventh Circuit held that
04:15:44PM 20 detainees at an immigrant detention facility in Florida had a
04:15:48PM 21 right to intervene into a lawsuit that was between a U.S.
04:15:52PM 22 senator who was challenging the federal government's
04:15:55PM 23 administration of this detainee prison. And he was not doing it
04:15:59PM 24 on behalf of the detainees; he was not representing their
04:16:03PM 25 interest. His was representing his interest as a United States

04:16:07PM 1 senator who --

04:16:07PM 2 **THE COURT:** What legally protected right did the
04:16:10PM 3 plaintiffs have that was at issue in that case?

04:16:13PM 4 **MS. GRAUNKE:** In *Chiles* the Court discussed the issue
04:16:15PM 5 of how the detainees were being affected by the way the prison
04:16:19PM 6 was being run deficiently.

04:16:20PM 7 **THE COURT:** Constitutionally?

04:16:21PM 8 **MS. GRAUNKE:** Yes, and that they had potential
04:16:24PM 9 complaints that arose from the problematic conditions at the
04:16:28PM 10 detention facility which were separate from, but still legally
04:16:29PM 11 enforceable, but they were separate from those that were
04:16:31PM 12 presented by Senator Chiles in his complaint.

04:16:34PM 13 His concern was with the safety effects of the prison
04:16:36PM 14 being located in that community and improper staffing leading to
04:16:39PM 15 things like riots and prison escapes. The detainees were
04:16:44PM 16 themselves nonviolent immigrant detainees who were concerned
04:16:46PM 17 about being preyed upon by violent prison detainees -- excuse
04:16:50PM 18 me -- immigrant detainees there. So there was this concern
04:16:54PM 19 about harm that was really separate from what was being
04:16:56PM 20 presented by Senator Chiles.

04:16:56PM 21 **THE COURT:** Not just harm, though. Those were
04:16:59PM 22 Constitutional rights that those plaintiffs had.

04:17:01PM 23 **MS. GRAUNKE:** That's right.

04:17:03PM 24 **THE COURT:** Excuse me -- that those intervenors had.

04:17:05PM 25 **MS. GRAUNKE:** Yes. And there are legal rights that

our clients have -- that applicants for intervention have with respect to the H-2B guestworker regulation. They can enforce those through contracts just as any employee can enforce the guarantee through an employment contract against an employer who has breached. So that's one.

There are also administrative rights that the workers have within this system to make complaints with the Wage and Hour Division of Department of Labor, for example, if the H-2B regulations are not being respected.

And finally, there are the rights that the workers have under the APA. And I think if this Court were to find that there were no rulemaking authority on the part of DOL, one of the options I think CATA and PCUN would have to consider, going to their 2008 case involving the 2008 regs, is whether they would want to challenge the validity of the 2008 rule, for example, that was dealt with by the Court in that case.

THE COURT: I didn't -- with what case?

MS. GRAUNKE: I'm sorry. This is the CATA case in the Eastern District of Pennsylvania. So the issue of DOL rulemaking, you know, our clients as well have rights to sue under the APA as aggrieved individuals, and so we have sort of similar rights to challenge regulatory actions, whether that's --

THE COURT: But you're not intervening as plaintiffs here.

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MS. GRAUNKE: That's true.

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THE COURT: You're intervening as defendant.

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MS. GRAUNKE: That's true. But what I'm saying is

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that there is a legally protected right based on their status as aggrieved persons in relation to the APA.

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THE COURT: Right, but you have to set that out in a

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pleading what you've done in an answer in this case.

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MS. GRAUNKE: Right, yes.

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THE COURT: So that's what I'm looking at is what

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you've set forth in your answer that gives you a right to

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intervene.

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MS. GRAUNKE: Yes.

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THE COURT: And I don't think that was set forth as

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far as you're not challenging -- you haven't raised your rights under the APA in this case, your clients' rights.

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MS. GRAUNKE: No. But what I'm trying to refer to is,

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in cases like *Chiles* and the *Army Corps of Engineers* case, which

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is also cited in our brief, it wasn't necessary that the

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specific legal right that was being asserted by the intervenors

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be at issue in the case in which they sought to intervene.

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Rather, the important thing is that they had legal rights that

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could be affected by the outcome of these proceedings.

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THE COURT: Okay. I guess the one thing that stands

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out in my mind here is that at least most of the cases that I

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reviewed that you all cited stressed that the regulation or rule

04:19:45PM 1 or law at issue controlled or governed the party.

04:19:52PM 2 In this case that's not the case. The regulations at
04:19:55PM 3 issue control these individuals, not your clients.

04:20:00PM 4 **MS. GRAUNKE:** We respectfully disagree, Your Honor.
04:20:02PM 5 They do, in fact, regulate our clients.

04:20:04PM 6 **THE COURT:** I didn't say impact. I said controlled or
04:20:07PM 7 governed. I didn't say impact.

04:20:09PM 8 **MS. GRAUNKE:** But, for example, the regulations set
04:20:12PM 9 forth -- a good example is the three-quarter guarantee, Your
04:20:15PM 10 Honor. Normally if an employee enters into a contract with an
04:20:20PM 11 employer for a specific amount of work, that employer would be
04:20:24PM 12 obligated to provide that work if it was a contractual promise.

04:20:28PM 13 Here, with the three-quarters guarantee, the
04:20:31PM 14 regulation is setting the maximum amount that a worker can
04:20:35PM 15 expect to be compensated -- have a guarantee of being
04:20:38PM 16 compensated for during their working contract. They don't have
04:20:41PM 17 the power to negotiate above that.

04:20:43PM 18 And so these regulations are setting certain
04:20:46PM 19 nonnegotiable terms and conditions that govern the employee's
04:20:52PM 20 rights and regulate the employee's work experiences and
04:20:56PM 21 conditions.

04:20:57PM 22 **THE COURT:** But your clients don't have the right for
04:20:59PM 23 any of these employers to participate in the program.

04:21:02PM 24 **MS. GRAUNKE:** That's correct that our -- I mean -- I'm
04:21:06PM 25 sorry -- that intervenors do not have the right to --

04:21:10PM 1 **THE COURT:** I mean, you don't have the right -- if one
04:21:13PM 2 of your clients worked for one of these plaintiffs in this case,
04:21:17PM 3 you don't have any right for them to stay in the program, drop
04:21:21PM 4 out of the program, right? I mean, employers can drop out of
04:21:26PM 5 the program.

04:21:28PM 6 **MS. GRAUNKE:** That's true. It would be up to the
04:21:29PM 7 employer, you know, as approved by the, obviously, DOL and DHS
04:21:36PM 8 whether they could participate in this program. It's not up to
04:21:40PM 9 our clients, that's correct.

04:21:40PM 10 **THE COURT:** And you don't have any employment right
04:21:42PM 11 with those employers.

04:21:43PM 12 **MS. GRAUNKE:** But the regulations do set out certain
04:21:46PM 13 employment rights for U.S. workers, and one of the main thrusts
04:21:49PM 14 of these regulations is obviously to make sure that these
04:21:52PM 15 opportunities are first available to U.S. workers, especially
04:21:55PM 16 given the unemployment crisis in this country.

04:21:58PM 17 And so they do -- workers do have specific rights that
04:22:01PM 18 are laid out under these recruitment regulations and access to
04:22:05PM 19 those opportunities.

04:22:06PM 20 **THE COURT:** If the employer participates in the
04:22:08PM 21 program.

04:22:09PM 22 **MS. GRAUNKE:** That's right, yes, that's right. And I
04:22:13PM 23 understand -- you know, it sounds like the Court is still
04:22:16PM 24 harboring doubts about intervention of right, and I would again
04:22:20PM 25 just say I think we did a better job briefing it this time, and

04:22:24PM 1 I would certainly ask for the Court's consideration of our
04:22:26PM 2 arguments raised there.

04:22:27PM 3 I know we're running short on time. I want to point
04:22:29PM 4 to something that's different from the perspective of
04:22:34PM 5 considering permissive intervention.

04:22:35PM 6 One of the issues with respect to permissive
04:22:39PM 7 intervention, Your Honor felt that the involvement of the
04:22:41PM 8 intervenors would delay things, would slow things down, would
04:22:44PM 9 cause a burden because the intervenors were seeking class
04:22:48PM 10 certification in Bayou I. We are not seeking that here.

04:22:52PM 11 And we really feel that -- and I hope -- we've done
04:22:54PM 12 our best at this argument today to show that we only intend to
04:22:57PM 13 supplement and to represent the specific interests that workers
04:23:00PM 14 have in these regulations which directly regulate their working
04:23:04PM 15 conditions and work opportunities, but that we don't intend to
04:23:08PM 16 bog down the proceedings.

04:23:09PM 17 And I think that this -- in this case the fact that
04:23:13PM 18 we're not seeking class certification, it doesn't inject that
04:23:16PM 19 element of delay.

04:23:17PM 20 So those are -- that's one of the main distinctions
04:23:23PM 21 I'd like to point out in terms of thinking about the permissive
04:23:27PM 22 intervention issue, which would be an option for Your Honor in
04:23:31PM 23 this case.

04:23:31PM 24 **THE COURT:** All right. I do -- or did note that
04:23:35PM 25 distinction so I appreciate you addressing that.

04:23:48PM 1 **MS. GRAUNKE:** Excuse me, Your Honor, if I may?

04:23:51PM 2 **THE COURT:** All right.

04:23:53PM 3 **(Conference between Mr. Graunke and Mr. Schell.)**

04:24:00PM 4 **MS. GRAUNKE:** If Your Honor doesn't have particular
04:24:03PM 5 questions about the Motion to Intervene, would we be able to
04:24:08PM 6 discuss our Motion for Transfer?

04:24:10PM 7 **THE COURT:** Let me ask, what is the common question of
04:24:16PM 8 law or fact that you believe you share -- your clients share
04:24:21PM 9 with the Department here?

04:24:24PM 10 **MS. GRAUNKE:** Well, this question of rulemaking
04:24:26PM 11 authority, for one. We're representing our clients' interest in
04:24:30PM 12 ensuring the DOL can issue rules because in the experience of
04:24:35PM 13 the applicant intervenors the rules are something that's
04:24:39PM 14 important.

04:24:40PM 15 Obviously, if this rule is invalidated, they will not
04:24:42PM 16 be receiving these benefits and these rights and these mandated
04:24:46PM 17 contract terms, if the rule is completely invalidated for lack
04:24:52PM 18 of rulemaking authority.

04:24:53PM 19 **THE COURT:** Why doesn't the Department of Labor
04:24:57PM 20 adequately represent that issue in this case?

04:25:00PM 21 **MS. GRAUNKE:** Okay. I mean, I think that that's most
04:25:03PM 22 clearly shown by the fact that the Department of Labor has
04:25:06PM 23 failed to request the security that is required by Rule 65(c) in
04:25:10PM 24 this case, and that would be the monetary security that would be
04:25:13PM 25 required to be fronted by the parties who are seeking an

04:25:16PM 1 injunction in order to protect the workers' tangible interests
04:25:23PM 2 in what the benefits would be providing them -- excuse me -- the
04:25:27PM 3 regulations would be providing them.

04:25:29PM 4 So I think that's the key issue here. I don't think
04:25:33PM 5 -- also, it sounds as though Mr. Forney was beginning to argue
04:25:37PM 6 that he may also be addressing the standing issue. But one of
04:25:41PM 7 the things we have done is discussed at great length raising the
04:25:46PM 8 issues of associational standing and the defects to
04:25:49PM 9 associational standing in the case.

04:25:51PM 10 And again, that links up with this issue of the
04:25:54PM 11 mandatory relief under Rule 65 that, you know, these
04:25:57PM 12 organizations -- these employer associations cannot provide the
04:26:00PM 13 security that's required. Individual parties are required to
04:26:03PM 14 come forward and provide that security.

04:26:04PM 15 And for them to be asking for a nationwide injunction
04:26:07PM 16 when they don't actually have parties before this Court who can
04:26:10PM 17 put up this security is problematic. So that would be another
04:26:15PM 18 issue as well.

04:26:16PM 19 And finally, we are also raising this issue of
04:26:19PM 20 transfer and the first-to-file problems that we see and the
04:26:25PM 21 question of the authority of the CATA court who, in fact,
04:26:29PM 22 directed DOL to go back and engage in legislative rulemaking.

04:26:33PM 23 **THE COURT:** Haven't I ruled on this? I mean, is this
04:26:35PM 24 any different than the prior Motion to Transfer?

04:26:38PM 25 **MS. GRAUNKE:** I do believe it presents somewhat

04:26:41PM 1 different facts, Your Honor, because of this first-to-file
04:26:43PM 2 question, and I can turn to discussing that more specifically.
04:26:47PM 3 But the fact that in the Western District of Louisiana case,
04:26:52PM 4 *Louisiana Forestry*, which was then transferred to Eastern
04:26:58PM 5 District of Pennsylvania, that is the issue being raised in that
04:27:01PM 6 case, whether DOL has rulemaking authority. That is now on
04:27:05PM 7 summary judgment briefing before the Court in the Eastern
04:27:08PM 8 District of Pennsylvania.

04:27:08PM 9 **THE COURT:** It's actually in the Bayou I case as well.

04:27:13PM 10 **MS. GRAUNKE:** That's correct. But it is -- my
04:27:14PM 11 understanding is that the summary judgment briefing has not
04:27:17PM 12 occurred in the Bayou I case, and that the claim in the Western
04:27:22PM 13 District of Louisiana case, which was then transferred to the
04:27:25PM 14 Eastern District of Pennsylvania, the *Louisiana Forestry* case,
04:27:27PM 15 was raised before then.

04:27:29PM 16 **THE COURT:** Right, but in addressing that issue in
04:27:32PM 17 Pennsylvania, that Court will be applying circuit law that's
04:27:36PM 18 very different potentially than the law that will govern me in
04:27:41PM 19 my consideration of the issue.

04:27:43PM 20 **MS. GRAUNKE:** Well, I think that if it were dealing --
04:27:46PM 21 it seems like from the arguments that we are dealing with an
04:27:49PM 22 issue that hasn't been addressed specifically, so I'm not
04:27:52PM 23 certain that there is a great deal of circuit precedent in
04:27:55PM 24 either circuit that speaks directly to this issue.

04:27:58PM 25 **THE COURT:** But that's not a reason for me to defer

04:28:00PM 1 ruling to some other court somewhere else in the country. I
04:28:03PM 2 mean, at any given time there could be a number of courts that
04:28:07PM 3 are looking at, you know, similar or identical -- nearly
04:28:11PM 4 identical issues, legal issues.

04:28:15PM 5 **MS. GRAUNKE:** Well, Your Honor, the First-to-File Rule
04:28:18PM 6 at least creates a presumption that the case ought to be
04:28:22PM 7 transferred.

04:28:22PM 8 **THE COURT:** But what -- it's not -- we don't have the
04:28:25PM 9 same parties. I don't understand your --

04:28:26PM 10 **MS. GRAUNKE:** We do have the same defendants, Your
04:28:30PM 11 Honor. Secretary Solis and Deputy Secretary Jane Oates are also
04:28:36PM 12 defendants in the *Louisiana Forestry* case, which is now in the
04:28:39PM 13 Eastern District of Pennsylvania.

04:28:41PM 14 **THE COURT:** They're probably defendants all over the
04:28:46PM 15 country in different cases. I guess I don't see -- I do not see
04:28:47PM 16 the --

04:28:47PM 17 **MS. GRAUNKE:** It is the exact same legal issue. And
04:28:50PM 18 again, the first-to-file cases discuss this and the importance
04:28:54PM 19 of respecting that there is this decision-making process that is
04:28:57PM 20 taking place in another court against these same defendants on
04:29:00PM 21 the precise same legal issue.

04:29:01PM 22 There's also a very serious issue of conflicting
04:29:04PM 23 orders, particularly given the breadth of the injunction that
04:29:07PM 24 Plaintiffs are seeking in this case. It's a nationwide
04:29:10PM 25 injunction that they're asking for. What if the District Court

04:29:13PM 1 in the Eastern District of Pennsylvania decides differently?

04:29:16PM 2 What is DOL then supposed to do?

04:29:19PM 3 There would be a lot of confusion and conflict
04:29:21PM 4 potentially brought out by conflicting decisions, which would
04:29:24PM 5 cause a lot of disruption for H-2B employees, similarly situated
04:29:29PM 6 U.S. workers, and employers, frankly.

04:29:31PM 7 **THE COURT:** So the Eastern District -- Judge Drell's
04:29:35PM 8 case was filed prior to Bayou I?

04:29:40PM 9 **MS. GRAUNKE:** That's my understanding, yes. And I
04:29:42PM 10 apologize because I wasn't involved in the *Louisiana Forestry*,
04:29:45PM 11 and that's why I'm checking with co-counsel here.

04:29:48PM 12 **THE COURT:** All right. Thank you.

04:29:50PM 13 **MS. GRAUNKE:** Thank you for your time.

04:29:51PM 14 **THE COURT:** All right. If you want to respond, Ms.
04:29:53PM 15 Klaus?

04:29:54PM 16 **MS. KLAUS:** Just briefly, Your Honor. The issues
04:30:04PM 17 raised by the Motion to Intervene here are no different than the
04:30:09PM 18 issues that were raised in Bayou I.

04:30:12PM 19 The interests that the intervenors have alleged here
04:30:15PM 20 is in their Motion for Leave to Intervene at page 6, and it is
04:30:19PM 21 the same interests that this Court found in Bayou I. There the
04:30:23PM 22 intervenors state: "The applicants' interest is solely in the
04:30:26PM 23 preservation of the wages and benefits of the workers who are
04:30:29PM 24 affected by this challenge." That is a purely economic
04:30:32PM 25 interest. That's what the Court found in Bayou I, and that

1 interest hasn't changed, and the basis in their motion hasn't
2 changed.

3 Second: With respect to the potential for undue
4 delay, that, too, has not changed. Notwithstanding the absence
5 of a request for class certification, the intervenors do propose
6 to inject new issues into this case. The Rule 65(c) security
7 issue is one of those issues. The transfer is another. They
8 seek to inject a wide range of collateral issues that are
9 specified in their answer and in their request for affirmative
10 relief and in their new materials.

11 They say at the motion -- at their motion on page 7
12 that they intend to raise these issues, among others, if they're
13 granted intervention. And so they are injecting new issues and
14 they are causing delay.

15 And finally, with respect to the Rule 65(c), the case
16 law is fairly clear that the Court has discretion. And where
17 the imposition of a security would preclude the parties from
18 actually raising an APA challenge, then the Court has the
19 discretion to not enter a 65(c) order or to enter a minimal
20 amount.

21 Very briefly on the transfer and the notion that this
22 is a first-to-file issue. It's not a first-to-file issue. But
23 the theory that the intervenors seem to be advocating is that
24 the first court that deals with any particular issue becomes the
25 only court that can deal with that issue.