UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

BAYOU LAWN & LANDSCAPE SERVICES, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL HISPANIC LANDSCAPE ALLIANCE, PROFESSIONAL LANDCARE NETWORK, SILVICULTURAL MANAGEMENT ASSOCIATES, INC., FLORIDA FORESTRY ASSOCIATION, Plaintiffs v. HILDA L. SOLIS and JANE OATES, Defendants.	)	No. _____

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY RELIEF

Monte B. Lake (DC 925818)
Wendel V. Hall (DC _439344)
C.J. LAKE LLC
525 Ninth Street, N.W., Suite 800
Washington, D.C. 20004
Tele: 202-465-3000; Fax: 202-347-3664
Email: mlake@cj-lake.com;
whall@cj-lake.com

Robert P. Charrow (DC 261958)
Laura Metcoff Klaus (DC 294272)
Laura Reiff (DC 424579)
GREENBERG TRAURIG LLP
2101 L Street, N.W., Suite 1000
Washington, D.C. 20037
Tele: 202-533-2396; Fax: 202-261-0164
Email: charrowr@gtlaw.com;
klausl@gtlaw.com; reiffl@gtlaw.com

Counsel for Plaintiffs

Of Counsel:
Robin S. Conrad
Rachel Brand
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
Tele: (202) 463-5337
Email: RConrad@USChamber.com;
RBrand@USChamber.com
Attorneys for Plaintiff Chamber of
Commerce of the United States of America

Plaintiffs challenge a comprehensive set of rules (New Rules or Program Rules) issued by the United States Department of Labor ("DOL") on February 21, 2012, governing temporary non-agricultural employment of certain foreign employees in the United States. These are the wrong rules issued by the wrong agency at the wrong time. Plaintiffs therefore request a temporary restraining order and the entry of a preliminary injunction enjoining the implementation of these rules.

INTRODUCTION

The Immigration and Nationality Act of 1952 ("INA") established a comprehensive framework for the regulation of immigration in effect today. It included provisions for temporary workers, known as the H-2 program. The H-2 program now applies to two types of temporary nonimmigrant employees:[1] (i) agricultural under H-2A; and (ii) non-agricultural under H-2B. The former is subject to a detailed statutory scheme, while the latter is not. This case involves the H-2B program which allows non-agricultural employers facing a shortage of U.S. employees to hire temporary seasonal, unskilled foreign employees. The program is used predominantly by small businesses, including landscaping, hotel, construction, restaurant and forestry. *See* 76 Fed. Reg. 15,130, 15,161 (March 18, 2011), The INA initially vested all authority for implementing its provisions, including rulemaking, in the Attorney General, in consultation with "appropriate agencies." *See* 8 U.S.C. §§ 1184(a), 1184(c)(l). Later, Congress transferred the Attorney General's authority to the Secretary of Homeland Security ("DHS"). *See* Homeland Security Act of 2002, Pub. L. No. 107-296, § 402, 116 Stat. 2135, 2178 (Nov. 25, 2002).

In 2008, however, DOL and DHS issued a final rule that changed the filing model for the H-2B program. Various labor organizations challenged these rules, and the United States District Court for the Eastern District of Pennsylvania found that certain aspects (relating to

[1] The INA distinguishes broadly between two classes of aliens: "immigrant" and "nonimmigrant." An immigrant is an alien who, when coming to the United States, intends to abandon his or her foreign residence permanently. A nonimmigrant is an alien who does not intend to abandon his or her foreign residence permanently. All aliens admitted under 8 U.S.C. § 1101(a)(15)(H)(ii)(b) are nonimmigrant aliens.

calculating wages) violated the Administrative Procedure Act, 5 U.S.C. § 553, because they were issued without notice and comment. *Comite de Apoyo a los Trabajadores Agricola* [*CATA*] *v. Solis*, Civil No. 09-240, 2010 LW 3431761 (E.D. Pa. Aug. 30, 2010). In January 2011, DOL finalized a wage rule that would have required increased wages for H-2B workers starting on January 1, 2012. Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program Final Rule, 76 Fed. Reg. 3452 (Jan. 19, 2011) ("Wage Rule"). Various small businesses and trade associations challenged that rule--and DOL's authority to issue it--in this Court. *Bayou Lawn & Landscape Servs., et al. v. Solis*, Civil No. 11-445-MCR-EMT That matter is pending.

On March 18, 2011, DOL proposed major changes to the H-2B program by importing many rules that it finalized in 2010, for the H-2A temporary foreign agricultural worker program into the H-2B program. The new H-2B rules include a redefinition of the term of "temporary need" from ten months to nine months; establish a bifurcated application process, first to evaluate an employer's need for temporary employees by requiring the filing of a registration that must be approved prior to the filing of an application for temporary employment certification; expand obligations of employers to recruit U.S. workers and expand DOL recruitment oversight; require that H-2B employers guarantee payment of three-quarters of the anticipated hours of work to each H-2B employee; require that H-2B employers pay employees' transportation, subsistence and housing costs, and require that H-2B employers pay the same wages and benefits to both H-2B employees and a newly created group of U.S. workers engaging in "corresponding employment." All of these requirements have to be assured or satisfied before DOL will provide the labor certification necessary to petition DHS to obtain visas for foreign H-2B workers. 76 Fed. Reg. 15,130 ("Program Rules") (Complaint, Exhibit 2).

Plaintiffs, including the Chamber of Commerce of the United States of America (the "Chamber"), filed public comments with the Secretary highlighting the adverse economic effects of the Program Rules on U.S. jobs and the economy in general. The Small Business Administration ("SBA") also opined that DOL's assessment of the economic impact of the

Program Rules understated the impact. It believed that the Program Rules coupled with the Wage Rule would shut small businesses out of the H-2B program. *See* Letter from Winslow Sargent and Janis Reyes, Office of Advocacy, Small Business Administration dated May 17, 2011 ("SBA Letter") (Complaint, Exhibit 3)

In spite of these comments, SBA's views and the acknowledged injurious effect of the Program Rules, DOL issued final rules on February 21, 2012, with minor changes. *See* 77 Fed. Reg. 10038 (Complaint, Exhibit 1). DOL insisted that its Program Rules "would not adversely affect the economy or any sector thereof, productivity, competition, jobs, the environment, or public health or safety in a material way." 76 Fed. Reg. 10,115 (col. c).

Plaintiffs seek to temporarily and preliminarily enjoin implementation of the Program Rules until the Court has an opportunity to resolve this case on the merits. Otherwise, the Program Rules are scheduled to go into effect on April 23, 2012.

STATEMENT OF FACTS

Plaintiffs and Plaintiff Associations' members include small, family-owned businesses with low margins, high labor costs, and long-term contracts with their customers. These businesses depend on the H-2B program for seasonal workers. The H-2B Wage Rule, which already is subject to a complaint pending before this Court, will increase wages in a time of recession. The Program Rules that are the subject of this complaint will exacerbate the adverse impact of the Wage Rule by adding substantial additional costs. Plaintiffs and Plaintiff Associations' members cannot survive these increases without terminating employees or curtailing or even ceasing production. Such a course will inevitably lead to loss of customers and goodwill, and in some cases, loss of their businesses.

SUMMARY OF ARGUMENT

Defendants have issued an omnibus rule overhauling the entire H-2B visa program even though they acknowledge that Congress has not directly delegated rulemaking authority to them and nothing in the INA authorizes them to issue rules for the H-2B program. Defendants instead suggest that Congress *sub silentio* delegated rulemaking authority to them. According to DOL,

Congress had been aware of DOL's improper rulemaking and did nothing to curb the agency when it enacted the 1986 and 2005 amendments to the INA. From this congressional silence, defendants infer a congressional intent to delegate rulemaking to DOL. The problem with this theory of acquiescence is that Congress delegated rulemaking authority exclusively to DHS.

Defendants advance a second theory--delegation through accretion. Under this construct, if Congress permits DHS to delegate one function to DOL, then DOL is permitted to assert jurisdiction over all functions, including those not delegated. Thus, since Congress authorized DHS in 2005, to delegate limited authority to DOL to impose civil money penalties for violations relating to the petition to admit H-2B workers, DOL asserts it has rulemaking authority over the entire H-2B program. This theory too has no basis in law or logic. In fact, DOL was improperly issuing H-2B rules even before DHS delegated any authority to it.

Finally, defendants resort to legislative history to support their twin theories of legislation through acquiescence and accretion. Resort to legislative history, though, is only proper to resolve a statutory ambiguity, and there is no ambiguity here. Even if it were properly considered, that history suggests that Congress knew about the DOL's improper rulemaking and sought to limit it in the H-2B program.

Apart from the lack of authority to issue these rules, the H-2B regulations are inconsistent with other rules issued by DHS and thus violate the APA. Nor did DOL conduct a proper analysis of the Program Rules under the RFA. And, finally, DOL's rules are arbitrary and capricious where, as here, they lack any support in the record that justifies this new approach.

ARGUMENT

I. LEGAL STANDARDS

A. Emergency Injunctive Relief

To demonstrate entitlement to a temporary or preliminary injunction, the court must consider four factors:

> (1) whether there is a substantial likelihood that the party applying for preliminary relief will succeed later on the merits; (2) whether the applicant will suffer an irreparable injury absent preliminary relief; (3) whether the harm that the

> applicant will likely suffer outweighs any harm that its opponent will suffer as a result of an injunction; and (4) whether preliminary relief would disserve the public interest.

Scott v. Roberts, 612 F.3d 1279, 1290 (11th Cir. 2010).

B. Regulatory Flexibility Act

Small entities are entitled to judicial review of an agency's RFA analysis or an agency's certification that no such analysis is required. *See* 5 U.S.C. § 611. An agency action may be set aside if it is arbitrary, capricious or an abuse of discretion. *See* 5 U.S.C. § 611, *incorporating by reference* 5 U.S.C. § 706(2). DOL receives no deference for its interpretation of its obligations under the RFA. *See Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997) ("[W]e do not defer to [DOL's] interpretation here of the APA's provision for allocating the burden of persuasion under the preponderance of the evidence standard" because "[t]he APA is not a statute that [DOL] is charged with administering."); *Aeronautical Repair Station Ass'n, Inc. v. FAA*, 494 F.3d 161, 176 (D.C. Cir. 2007) ("[W]e do not defer to the FAA's interpretation of the RFA … because the FAA does not administer the RFA.").

C. Administrative Procedure Act

This suit challenges DOL's statutory authority to issue the Program Rules. The Court's analysis is limited to the legal rationale that DOL presented in the preamble to the proposed and final rules. *See National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 683-84 (2007) ("We have long held, however, that courts may not affirm an agency action on grounds other than those adopted by the agency in the administrative proceedings.") (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)). In such a challenge, the agency is entitled to no deference where, as here, neither the INA nor the APA are statutes which DOL is authorized to administer. *See Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

II. PLAINTIFFS ARE SUBSTANTIALLY LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS

A. Congress Did Not Authorize DOL to Issue the Program Rules

"It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). *See Gonzales v. Oregon*, 546 U.S. 243, 258-59 (2006). "Rulemaking authority is legislative power" which can only be delegated to an agency by Congress. *Whitman v. American Trucking Ass'n, Inc.*, 531 U.S. 457, 488 (2001) (Stevens, Souter, JJ, concurring) (internal quotations omitted). The APA itself requires no less, prohibiting an agency from issuing a "substantive rule ... except within jurisdiction delegated to the agency and as authorized by law." 5 U.S.C. § 558(b). As such, "[t]he starting point for [determining the scope of an agency's rulemaking authority is], of course, the language of the delegation provision itself. In many cases, that authority is clear because" the proposed rule identifies the relevant statutory provision, as required by the APA. *Id.*; *see* 5 U.S.C. § 553(b)(2). "The reference must be sufficiently precise to apprise interested persons of the agency's legal authority to issue the proposed rule." ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 29 (1947); *see Bowen*, 488 U.S. at 218 (Scalia, J., concurring) (noting that the MANUAL is authoritative on matters involving the APA); *Global Van Lines, Inc. v. Interstate Commerce Comm'n*, .714 F.2d 1290, 1298 (5th Cir. 1983) (agency's "failure to articulate the legal basis [under 5 U.S.C. § 553(b)(2)] that its counsel now advances for the rule . . . effectively deprived the petitioners of any opportunity to present comments on what amounts to half of the case.").

At no time has DOL referenced any express statutory authority supporting its Program Rules. Nor could it have, as nothing in the INA or any other statute authorizes the Secretary of Labor to issue these rules. Indeed, the Secretary acknowledged that the INA contains no provision authorizing her to issue rules implementing the H-2B program. *See* 77 Fed. Reg. at 10,043 (col. b) ("Congress did not specifically address the issue of the Department's authority to engage in legislative rulemaking in the H–2B program[.]"). Inasmuch as "[i]t is axiomatic that

administrative agencies may promulgate regulations only pursuant to authority delegated to them by Congress," the Secretary's admission that the INA does not authorize DOL to issue rules should end this case. *American Library Ass'n v. Fed. Commc'ns Comm'n*, 406 F.3d 689, 691 (D.C. Cir. 2005). Defendants, nonetheless, argue in the preamble that despite this lack of express statutory authority, their right to issue rules can be inferred from the INA and its legislative history augmented by *Chevron* deference. This circular "gestalt theory" of rulemaking finds no support in the case law, and none has been cited. *In re Pharm. Indus. Average Wholesale Price Litig.*, 457 F.Supp.2d 65, 75 (D. Mass. 2006) (gestalt theory inappropriate for assessing federal question jurisdiction).

The INA provides no support for defendants' hypothesized rulemaking authority. The text, no matter how read, channels virtually all H-2B rulemaking authority to the Secretary of Homeland Security. Defendants have failed to point to a single word, phrase, clause or sentence in the INA that implies, even obliquely, the delegation of rulemaking authority to Labor. Without any language to support their rulemaking authority, defendants have reverted to mining the legislative history, but that effort is similarly misplaced. First, resort to legislative history is only proper where the underlying legislation is ambiguous; defendants have failed to identify any ambiguity. The INA, as noted above, is not ambiguous: it vests rulemaking jurisdiction in the Secretary of Homeland Security. Second, the legislative history demonstrates that Congress intentionally decided not to confer broad rulemaking authority on the Secretary of Labor. Reliance on *Chevron* deference is foreclosed under these circumstances by *Gonzales v. Oregon*, 546 U.S. at 255-56 ("Deference in accordance with *Chevron* … is warranted only 'when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.'") (citations omitted).

1. The INA Contains No Language Authorizing DOL Rulemaking

An agency is required to identify a rule's legal basis. Instead of identifying their statutory authority, defendants offer three INA provisions from which they suggest their general

rulemaking authority for the H-2B program can be inferred: (1) 8 U.S.C. § 1101(a)(15)(H)(ii)(B) (*see* 77 Fed. Reg. 10,038 (col. b), 10,043 (col. b)); (2) 8 U.S.C. § 1184(c)(14)(B) (*see* 77 Fed. Reg. 10,038 (col. b), 10,043 (col. c)); and (3) 8 U.S.C. § 1184(c)(1) (*see* 77 Fed. Reg. 10,038 (col. b)).[2] Reliance on these references is misplaced.

Section 1184(c)(1) merely instructs the Secretary of Homeland Security to consult with the "appropriate agencies of the Government" in resolving whether to grant a visa upon the "petition of the importing employer." One of those agencies is DOL. Nothing in section 1184(c)(1) addresses rulemaking or grants rulemaking authority to anyone. In contrast, in an earlier section, INA expressly granted the Secretary of Homeland Security the authority "to establish such regulations ... as he deems necessary for carrying out his authority [under the INA]." 8 U.S.C. § 1103(a)(3). Defendants suggest that since Congress authorized DHS to consult with other agencies, including DOL, then by implication, that authority must necessarily extend to consulting with DOL on rulemaking which, by further implication, confers on DOL the authority to engage in rulemaking without DHS. The contrary is true: agencies are not free to divvy-up their statutory authority willy-nilly and even if they were free to do that, there is nothing to indicate that DHS delegated its rulemaking authority to DOL. *See Ry. Labor. Execs. Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 670 (D.C. Cir. 1994) (an agency does not possess "*plenary* authority to act within a given area simply because Congress has endowed it with *some* authority to act in that area.") (emphasis in original).

In *Nat'l Mining Ass'n v. Jackson*, 816 F.Supp.2d 37 (D.D.C. 2011), the court recently struck down an administrative "re-allocation" of authority similar to the one at issue here. The Clean Water Act divides authority over dredging permits between the Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("Corps"). The Corps is authorized to issue

[2] These three statutory provisions also form the sole basis for the proposed rule and appear in the section titled "Statutory Standard and Current Department of Labor Regulations." 76 Fed. Reg. 15,130 (March 18, 2011). The proposed rule also referenced a DHS rule at 8 C.F.R. § 214.2(b), but that rule does not deal with rulemaking and does not delegate rulemaking authority to defendants.

the permits, where proper, but EPA is given authority to issue guidelines and limited authority to veto permits approved by the Corps. At issue in *Jackson* was whether the agencies could share permit approving authority by jointly assessing "pending permit applications under the Clean Water Act." *Id.* at 41. The government's argument in *Jackson* paralleled DOL's position in this rulemaking, namely "any time the Congress creates a regulatory program involving more than one agency, those agencies can establish whatever coordination procedures" they deem appropriate. *Id.* at 43. The Court rejected that argument, concluding that "Congress established a permitting scheme in which the Corps is to be the principal player, and the EPA is to play a lesser, clearly defined supporting role." *Id.* at 45. That is precisely the situation here. DHS was given overall responsibility, including rulemaking authority, for implementing the H-2B program. DOL was given a supporting role, as a consultant. As such, DOL is not free to extend its authority into areas, such as rulemaking, that Congress has committed exclusively to the Secretary of Homeland Security.

Thus, when Congress has carefully provided limited authority in some areas, *i.e.*, to act as a consultant, but not in others, *i.e.*, to issue rules, that forecloses authority in those other areas. *See Adams Fruit Co. v. Barrett,* 494 U.S. 638, 649-650 (1990) (holding that a delegation of authority to promulgate motor vehicle safety "standards" did not include the authority to decide the pre-emptive scope of the federal statute because "[n]o such delegation regarding [the statute's] enforcement provisions is evident in the statute"); *Amalgamated Transit Union v. Skinner,* 894 F.2d 1362 (D.C. Cir. 1990) (authority to investigate on a case-by-case basis does not provide agency with authority to issue legislative rules); *Merck & Co., Inc. v. Kessler,* 80 F.3d 1543, 1549-50 (Fed. Cir. 1996) (Patent and Trademark Office's broad grant of procedural rulemaking authority does not authorize it to issue substantive rules).

Defendants also rely on 8 U.S.C. § 1184(c)(14)(B), which permits the Secretary of Homeland Security "to delegate to the Secretary of Labor, with the agreement of the Secretary of Labor, any of the authority given to the Secretary of Homeland Security" to impose administrative remedies for willful misrepresentation of material facts in petitions under H-2B.

Defendants suggest that given "Congress' delegation of enforcement authority under 8 U.S.C. 1184(c)(14)(B) to USCIS and the Department, it would be irrational to assume that Congress didn't intend for the Department to issue rules to define the terms of the H–2B program in the absence of statutory standards. *Cf. Nat'l Ass'n Home Bds. v. OSHA*, 602 F.3d 464, 467 (DC Cir. 2010)." 77 Fed. Reg. at 10,043 (col. c) - 10,044 (col. a). In the same vein, defendants argue that rulemaking is far superior to case-by-case adjudication and "it would defeat Congress's goals to conclude that DOL is only authorized to engage in case-by-case adjudication. *See USV Pharm. Corp. v. Weinberger*, 412 U.S. 655, 665 (1973)." 77 Fed. Reg. at 10,043 (col. c). The problem here is that Congress recognized the need for rulemaking, but gave that authority to DHS rather than Labor. There is nothing irrational or untoward about Congress allocating responsibility amongst various agencies. Defendants' reliance on *National Ass'n of Home Builders* and *Weinberger* is misplaced. At issue in *Home Builders* was whether the Secretary of Labor had authority to define the unit of violation under the Occupational Safety and Health Act. The parties agreed that the Secretary had been granted plenary authority to implement OSHA through rulemaking and the only issue was whether "defining" the unit of violation was within the Secretary's plenary rulemaking authority or the limited authority of the Occupational Safety and Health Review Commission. Here, Labor has no plenary rulemaking authority; that authority rests with the Secretary of Homeland Security. At issue in *Weinberger* was whether FDA had the authority to review and approve defendant's drug before it was marketed or whether the agency's authority was limited to seizing or recalling the product should it prove either unsafe or ineffective. *Weinberger* had nothing to do with rulemaking; both options considered by the Court required a "case-by-case" assessment by FDA.

Section 1184(c)(14)(B) is the only provision in the INA that permits the Secretary of Homeland Security to delegate limited authority to the Secretary of Labor to impose civil money penalties for certain willful misrepresentations. This highlights that Congress knew how to delegate authority to the Secretary of Labor under the H-2B program, but chose not to do so

except for limited purposes set out in (14)(B).[3] It also demonstrates that under defendants' theory of thematically inferred authority, this provision would be superfluous. If, as defendants suggest, their general rulemaking powers can be "inferred" from the gestalt of the INA, then there would be no reason to spell them out with precision in paragraph (14)(B).

The final statutory source of Labor's alleged rulemaking authority identified in the preamble is 8 U.S.C. § 1101(a)(15)(H)(ii)(B). That section defines an H-2B alien as "having a 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 person capable of performing such service or labor cannot be found in this country . . . ." The subclause does not grant the Secretary of Labor any rulemaking authority. The absence of rulemaking authority was intentional. In clause (ii)(A), which immediately precedes clause (ii)(B) and which creates the H-2A program for agricultural workers, Congress expressly granted defendants rulemaking authority in that program. An H-2A immigrant is defined as an alien "having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services, as defined by the Secretary of Labor in regulations . . . ." 8 U.S.C. § 1101(a)(15)(H)(ii)(A) (emphasis supplied). Where, as here, Congress grants an agency limited and focused rulemaking authority in one area (*e.g.*, the H-2A program), but does not do so in another area (*e.g.*, the H-2B program), that indicates that Congress intended to limit the agency's rulemaking authority to that one area. *See Dean v. United States*, 556 U.S.568, 573 (2009) ("where Congress includes particular language in one section of a statute but omits it in another section of same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)); *Adams Fruit Co. v. Barrett*, 494 U.S. at 649-650 (holding that a delegation of authority to promulgate motor vehicle safety "standards" did

[3] Defendants indicate that "DHS on January 16, 2009 delegated [to DOL] enforcement authority granted to it by the INA. 8 U.S.C. 1184(c)(14)(B)." 76 Fed. Reg. 15,130, 15,131 (col. a) (March 18, 2011). We have been unable to locate a public record of that delegation.

not include the authority to decide the pre-emptive scope of the federal statute because "[n]o such delegation regarding [the statute's] enforcement provisions is evident in the statute"); *Global Van Lines, Inc. v. Interstate Commerce Comm'n, supra* (Commission's general statutory rule-making did not impart power to Commission to extend restriction removal rules to freight forwarders). In short, "an agency may not bootstrap itself into an area in which it has no jurisdiction." *Federal Maritime Comm'n v. Seatrain Lines, Inc*., 411 U.S. 726, 745 (1973).

2. Defendants Have Failed to Identify a Statutory Ambiguity, Making Resort to Legislative History Inappropriate

The Supreme Court and this Circuit have consistently held that "appeals to statutory history are well-taken only to resolve 'statutory ambiguity,'" *Barnhill v. Johnson*, 503 U.S. 393, 401 (1992), and where a statute is not ambiguous or its meaning is "discernible in light of canons of construction, we should not resort to legislative history or other extrinsic evidence." *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1225 (11th Cir. 2001) (citing *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 117-18 (2001)); *see also BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 186 (2004) (absent a statutory ambiguity, a court has "no occasion to resort to legislative history."); *Ratzlaf v. United States*, 510 U.S. 135. 147-48 (1994) ("But we do not resort to legislative history to cloud a statutory text that is clear."). Given a "straightforward statutory command [that defendants' authority is purely consultative], there is no reason to resort to legislative history." *United States v. Gonzales*, 520 U.S. 1, 10 (1997) (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992)). Here, defendants have not identified any word, sentence, paragraph or pragmatic feature of the INA's rulemaking provisions that is ambiguous. This inability to identify any ambiguity is not due a lack of opportunity. Defendants have been on notice since receiving public comments to the proposed rule in 2011, that many commenters doubted Labor's legal authority to issue the rule, a fact acknowledged in the

preamble to the final rule.[4] Defendants cannot identify any ambiguity because the statute is remarkably clear in not vesting rulemaking authority in defendants.

3. The Legislative History Confirms that Defendants Lack Rulemaking Authority

In any event, defendants' resort in the preamble to legislative history, even if appropriate, provides no support for their rulemaking. Defendants' central argument, as set out in the preamble, is that Congress legislates against the backdrop of history--that before the 1986 amendments to the INA,[5] Congress was aware that DOL had been issuing regulations in the H-2 program, but failed to enact any curbs on those activities and therefore, Congress must have intended DOL to continue issuing regulations, even though it was not authorized to do so. DOL's search for authority collides with precedent.

First, "congressional inaction is perhaps the weakest of all tools for ascertaining legislative intent, and courts are loathe to presume congressional endorsement unless the issue plainly has been the subject of congressional attention." *Butterbaugh v. Dep't of Justice*, 336 F.3d 1332, 1342 (Fed. Cir. 2003) (rejecting government's attempt to infer congressional endorsement of administrative action through congressional inaction). *See also Solid Waste Agency of N. Cook County v. Army Corps of Eng'rs*, 531 U.S. 159, 169 (2001) (rejecting similar attempt, stating "[a]lthough we have recognized congressional acquiescence to administrative interpretations of a statute in some situations, we have done so with extreme care.").

Second, prior to the 1986 Amendments, the H-2 program was a single program. The 1986 amendments split that program into two, creating the H-2A program for agricultural workers and the H-2B program for non-agricultural workers. The legislative history reveals that the Conference Committee was concerned that the regulations issued by the Secretary of Labor and the Attorney General did "not fully meet the need for an efficient, workable and coherent

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[4] Public comment period for the proposed rule closed on May 17, 2011. *See* 76 Fed. Reg. 15,130 (col. a).

[5] *See* The Immigration Reform and Control Act ("IRCA" or "1986 Amendments"), Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986).

program that protects the interests of agricultural employers and workers alike." H. Rep. No. 99–682, pt. 1, 99th Cong., 2d Sess. at 79-80 (July 16, 1986), 1986 WL 31950, at *34. When allocating rulemaking authority, Congress expressly authorized the Secretary of Labor to issue rules to implement certain aspects of the H-2A program. *See e.g.*, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(A), 1188(a)(2) (Labor may by regulation set an application fee and require employers to pay that fee), *id*., § 1188(c)(4) (Labor authorized to issue rules for housing H-2A workers). There is no corresponding grant to Labor of rulemaking authority with respect to any aspect of the H-2B program, even including the relatively ministerial authority to set application fees by rule.

Nor can the absence of a congressional grant of authority be chalked up to congressional oversight that ought to be corrected by the Court. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (internal quotation marks omitted). In 1983, legislation was introduced that would have authorized the Secretary of Labor, with the approval of the Attorney General, to issue rules with respect to H-2B certifications. *See* H.R. 1510, 98th Cong. § 211(d) (1983). That legislation was not enacted. Congress made a conscious decision to grant to the Secretary of Labor limited rulemaking authority only in the H-2A program. Given the language and the legislative history, one cannot read into the INA any grant to the Secretary of Labor of any relevant rulemaking authority with respect to the H-2B program and the Secretary has identified none. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 147-48 (2000) (Congress had considered bills granting FDA power to regulate tobacco, but those bills did not pass; FDA lacked authority). "[I]f there is no statute conferring authority, a federal agency has none." *Michigan v. Environmental Protection Agency*, 268 F.3d 1075, 1081 (D.C. Cir. 2001). If such a rule is to be issued, it must be issued by the agency with delegated authority to do so, here DHS and not DOL.

4. Defendants Are Not Entitled to *Chevron* Deference Where the Enabling Statute is Administered by Another Agency

Finally, DOL suggests in its preamble that its determination that it has H-2B rulemaking authority under the INA is entitled to *Chevron* deference. According to DOL,

> [e]ven if the legislative history does not resolve the issue of DOL's rulemaking authority, when the statute does not delegate rulemaking authority explicitly, such statutory ambiguities are implicit delegations to the agency administering the statute to interpret the statute through its rulemaking authority. *Arnett v. CIR*, 473 F.3d 790, 792 (7th Cir. 2007).

77 Fed. Reg. at 10,043 (col. b). DOL then notes that

> [i]n recent decisions, the Supreme Court has affirmed this approach by applying *Chevron* deference to an agency's construction of a jurisdictional provision in its organic statute. *See Coeur Alaska v. Southeast Alaska Conserv. Council*, 129 S. Ct. 2458, 2469 (2009); *United States v. Eurodif*, 129 S. Ct. 878, 888 (2009).

Id. at n.3.

Chevron deference is only accorded to "an administrative agency's construction of a statute it administers" and only where that statute is ambiguous. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. at 132. The cases relied upon by defendants in the preamble do not suggest otherwise. All three cases involve regulations issued by agencies with rulemaking or similar authority. *Arnett* involved the propriety of the Internal Revenue Service's interpretation of one of its rules; *United States v. Eurodi* involved the propriety of the Commerce Department's interpretation of a provision of the Tariff Act, an act which it administers; and *Coeur Alaska* involved the propriety of an action taken by the EPA and Army Corps of Engineers with respect to matters they administer under the Clean Water Act. None of those cases involved a statute administered by another agency, as is the case here.

Where, as here, the administration of the INA has been squarely committed to DHS, DOL is entitled to no deference, especially when it seeks to supplant DHS's rulemaking authority. *Dole v. United Steelworkers of Am.*, 494 U.S. 26 (1990), is instructive. There, the Court struck down the Office of Management and Budget's ("OMB") assertion of jurisdiction,

under the Paperwork Reduction Act, to review the Labor Department's "hazard communication standard." *Id*. at 42-43. That regulation required manufacturers to disclose information about hazardous workplace chemicals directly to their employees, rather than to the government. It was undisputed that OMB had jurisdiction to review "information-gathering rules"--*i.e.,* rules requiring regulated entities to collect data and submit it to the agency. What was uncertain was whether the Act authorized OMB to review "disclosure rules"-- *i.e*., rules requiring regulated entities to collect data and make it available, not to the agency, but to third parties. In that setting, the Court declined to accord *Chevron* deference to OMB's view. *See also, e.g., United States v. Mead,* 533 U.S. 218, 226-27 (2001) (concluding that *Chevron* deference applies "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority"); *United Transp. Union v. Surface Transp. Bd.*, 183 F.3d 606, 612 (7th Cir. 1999) (concluding that the Board unambiguously had jurisdiction over a set of railroad track, but stating that "an agency's determination about the scope of its own jurisdiction indeed does receive *de novo* review and not *Chevron* deference"); *United Transp. Union-Illinois Legislative Bd. v. Surface Transp. Bd.,* 169 F.3d 474, 477 (7th Cir. 1999) (same). This approach is consistent with *Chevron*, which is necessarily limited to instances where the agency has been delegated regulatory responsibility. *Gonzalez v. Oregon,* 546 U.S. at 258 ("*Chevron* deference, however, is not accorded merely because the statute is ambiguous and an administrative official is involved. To begin with, the rule must be promulgated pursuant to authority Congress has delegated to the official.") (citing *Mead, supra,* at 226–227). Here, there is neither ambiguity nor authority, making *Chevron* inapplicable.

B. Even if DOL Were Authorized to Promulgate these Rules, It Failed to Perform the Analysis Required under the Regulatory Flexibility Act

Even if the Labor Secretary had the authority to issue regulations under the INA and even if those regulations were consistent with the INA, DOL failed to conduct a proper regulatory flexibility analysis as required by the RFA. Congress enacted the RFA to require

agencies to consider the potential impact of their regulations on small businesses such as Plaintiffs and Plaintiff Associations' members in this case. *See* RFA, Pub. L. No. 96-354, 94 Stat. 1164, § 2 (1980). In enacting the RFA, 5 U.S.C. §§ 601-612, as amended by the Small Business Regulatory Enforcement Fairness Act ("SBREFA"), Pub. L. No. 114-121, Title II, 110 Stat. 847, 857-74, §§ 201-253 (1996), Congress expressly recognized that agency rules frequently had a disproportionate adverse impact on small businesses, not-for-profit organizations, and small governmental entities. These entities, for example, face practical difficulties in complying with federal rules that differ significantly from those encountered by their larger counterparts, including "their limited access to capital," that "small concerns must borrow heavily to make modifications[,]" and that costs of complying cannot be easily absorbed or spread by small entities as they can by larger entities. S. Rep. No. 878, 96th Cong., 2d Sess. 4 (1980). Small entities lack access to the equity markets and "[e]ven if small businesses can afford additional debt, banks and other lenders are often reluctant to loan money for improvement purposes not related to productivity." *Id.* This lack of access to financing--whether debt or equity--has become particularly acute since the onset of the recession in September 2008, and has only worsened since then.

In light of this disparate impact, in the RFA, Congress required agencies, as part of the rulemaking process, to conduct initial and then final regulatory analyses to ascertain the economic impact that a putative rule will have on small entities, to set out the less onerous alternatives considered by agency, and to discuss the agency's rationale for declining to adopt these less costly alternatives. *See* 5 U .S.C. §§ 603-604. If DOL has rulemaking authority in this area, there is no dispute that the RFA applies here. *See* 76 Fed. Reg. at 15,166.

DOL failed to conduct a proper regulatory flexibility analysis in both its proposed and final H-2B Rules. In its initial analysis, DOL declared that its proposed rules were "not likely to impact a substantial number of small entities and, therefore, an Initial Regulatory Flexibility analysis is not required by the RFA." 76 Fed. Reg. at 15,166 (col. c). This conclusion was based on DOL's belief that employment in the H-2B program represented a "very small fraction of the

total employment in the U.S. economy, both overall and in the industries represented in the H-2B program." *Id.* at 15,167 (col. a). It looked to the "top five industries" that hired H-2B employees in FY 2007 to FY 2009--(1) landscaping services (78,027); (2) janitorial services (30,902); (3) construction (30,242); (4) food services and drinking places (22,948); and (5) amusement, gambling, and recreation (14,041). *See id.* According to DOL, "the H-2B program represents a small fraction of the total employment even in each of the top five industries in which H-2B workers are found." *Id.* at (col. b). These same conclusions and same data were repeated in the final rule. *See* 77 Fed. Reg. at 10,132 (col. b) ("this rule is not likely to have a significant impact on a substantial number of small entities and, therefore, a Final Regulatory Flexibility Analysis (FRFA) is not required by the RFA.")

As SBA pointed out in its letter to DOL concerning this rule, DOL used the wrong denominator in its substantive analysis. *See* SBA Letter at 4. DOL's reliance on a pool of over one million small businesses as the denominator minimized the economic impact of the rule; the universe of potentially affected entities for RFA purposes should have included only those small entities in the regulated community, *i.e.,* the entities that use the H-2B program. *Id.*

As SBA commented, two courts had rejected RFA analyses conducted by the Department of Commerce that relied on a similar attempt to lessen the economic impact of a proposed rule by using too great a universe to measure the economic impact. *S. Offshore Fishing v. Daley,* No. 97-1134-CIV-T-23C (M.D. Fla. Oct 16, 1998); *N. Carolina Fisheries Ass'n, Inc. v. Daley,* 27 F. Supp. 2d 650 (E.D. Va. 1998). In *Southern Offshore Fishing,* the court faulted the agency's initial RFA analysis of a rule which imposed harvest quotas for various types of sharks because the agency assessed the impact of the rule using the entire pool of permit holders (about 2,000) as the denominator rather than the number of permittees who had actually caught at least one shark (about 350). The court explained: "Of course, electing the 2,000-plus permit holders as the operative universe enables NMFS to disperse arithmetically the statistical impact of the quotas on shark fishermen." *Id.,* quoted in *S. Offshore Fishing Ass 'n v. Daley,* 55 F. Supp. 2d 1336, 1339 (M.D. Fla. 1999). There, the Secretary of Commerce at

least made some effort, albeit incorrectly, to measure the rule's effect against the entire regulated sector. Here, no such effort was even made. The court rejected a similar approach in *North Carolina Fisheries,* when the agency used the total number of vessels issued a permit to analyze a proposed quota on flounder fishing. The court found the analysis "utterly lacking in compliance with the requirements of the RFA because it did not consider a community any smaller than the entire state," the Secretary ignored readily available data which showed the impact of its rule, and, in using the total number of permit holders as the "universe" of participants, displayed "willful blindness" in consciously ignoring its own data and selecting a "flawed methodology." *N. Carolina Fisheries,* 27 F. Supp. 2d at 659. In the final rule, DOL infers that use of a regulated community specific denominator is not required by SBA (*see* 77 Fed. Reg. at 10,133 (col. a)); the SBA "strongly disagrees with DOL." SBA Letter at 4.

To the extent DOL purported to conduct analyses to assess the impact of its regulation on small entities, those analyses were of limited validity because, by the agency's own admission, "pursuing a statistically valid survey would not only have been prohibitively time-consuming given the Department's time constraints, but also would have required a lengthy clearance process under the Paperwork Reduction Act." 77 Fed. Reg. at 10,134 (col. b). So while the defendants are more than willing to impose further bureaucratic requirements on the H-2B community, those same agencies refuse to conduct valid studies because those studies would be inconvenient and would have required clearance. Nor did the defendants make any effort to assess the cross-effects of the various requirements (*e.g*., the impact of three-fourths hours guarantee on corresponding employment requirement).

As for alternatives to many of the rules' new requirements, all that DOL came up with was the notion that "applying to hire H-2B workers is voluntary, and any employer (small or otherwise) may choose not to apply." *Id*. at 10,144. The Department added:

> Although applying to hire H–2B workers is voluntary, and any employer (small or otherwise) may choose not to apply, an employer, whether it continues to participate in the H–2B program or fills its workforce with U.S. workers, could face costs equal to or slightly greater than 1 percent

> of annual revenue. However, in the Department's view, increased employment opportunities for U.S. workers and higher wages for both U.S. and H–2B workers provide a broad societal benefit that outweighs these costs.

Id. This statement misses the point. The concern was not that DOL had overestimated the number of potentially affected businesses; the problem was that it underestimated the impact of the rule. DOL did not correct this problem.

C. DOL's H-2B Regulations Are Arbitrary and Capricious

Even if DOL had the authority to issue rules governing the H-2B program, the new rules are arbitrary and capricious. Where as here, the agency has not identified let alone examined the relevant data and explained its action or provided a "rational connection between the facts found and the choice made," the Court may set aside the agency's action as arbitrary or capricious. 5 U.S.C. § 706(2)(A). *Motor Vehicle Mfgs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Owner-Operator Indep. Drivers Ass'n v. Federal Motor Carrier Safety Admin.*, 494 F.3d 188 (D.C. Cir. 2007). The court must be able to discern the connection between the facts relied on and the choices made from the record and the agency decision. *See City of Brookings Mun. Tel. Co. v. FCC*, 822 F.3d 1153, 1165 (D.C. Cir. 1987). That explanation cannot be supplied after the fact. *National Coalition Against the Misuse of Pesticides v. Thomas*, 809 F.2d 875, 883 (D.C. Cir. 1987) (rejecting "a post hoc rationalization … to buttress agency action.").

Here, DOL has imported the program in place for agricultural H-2A workers into the program for non-agricultural, H-2B workers even though Congress declined to do so. In the early 1980s, when Congress first proposed the creation of two subcategories for the H-2 worker program, neither the Senate nor the House bill passed. *See* S. 2222 and H.R. 6514 (97th Cong.). The next year, Congress tried again. This time, the bills proposed the two subcategories for H-2 workers, but included certain provisions applicable only to the certification of H-2A workers, including recruitment requirements and timelines, requirements as to working conditions and compliance provisions. H.R. 1510 and S. 529 (98th Cong.). Here too, the bills failed final

passage. On the third try, the bills that were introduced did not retain the statutory framework for the admission and certification of H-2B non-agricultural temporary workers. All of those provisions were removed, reflecting a deliberate choice to distinguish the requirements and procedures for admission of agricultural workers from those for non-agricultural workers. *See* S. 1200 and H.R. 3080 (99th Cong.). The legislation that ultimately passed and was enacted as the Immigration Reform and Control Act, P.L. 99-103 (99th Cong. 1986) included the current statutory H-2A program. 8 U.S.C. § 1188. In 2006, when Congress again tackled comprehensive immigration reform, it did not incorporate the H-2A provisions into the H-2B program. Its avowed goal was to protect "the jobs of citizens" by protecting the economic viability of the small and seasonal businesses that employed them. *See* 152 Cong. Rec. S 2699, 2709, 2711, 2712 (daily ed. April 3, 2006 (statements of Sens. Mikulski, Warner, and Sarbanes). When Congress considered legislation governing the H-2B program again in 2009, the proposed legislation that mirrored the changes promulgated by DOL in the Final Rule did not even reach the House floor for substantive consideration. *See* H.R. 4381 (111th Cong. 2009).

Where, as here, Congress makes a conscious decision to provide a detailed statutory structure for one program but not another, an administrative agency lacks the power to implement what Congress has declined to implement. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. at 147-48; *Michigan v. Environmental Protection Agency*, 268 F.3d at 1081. It goes without saying that a rule which has no legal basis is arbitrary and capricious.

In addition, DOL "must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (footnotes omitted). *See also State Farm*, 463 U.S. at 42 (when an agency changes its prior position, it "is obligated to supply a reasoned analysis for the change."). Here, DOL abandoned the current system for the H-2B program for reasons which are not supported by the

record before it. Nor has the Department attempted to reconcile its admittedly costly rule and its acknowledged loss of jobs with the Administration's efforts to create jobs by lessening the regulatory burden on the business community. The rulemaking record is devoid of evidence to support the overhaul of the H-2B program.

First, DOL determined that new rules were necessary to expand opportunities for U.S. workers by ensuring that there was an adequate test of the U.S. labor market to determine whether U.S. workers were available for jobs, protect workers by increasing the number of hours per week required for full-time employment, require that U.S. workers deemed to engage in "corresponding employment" receive the same wages and benefits as H-2B workers, and prevent violations of program requirements. 77 Fed. Reg. at 10038-39. According to DOL, there were insufficient worker protections in the current attestation-based model due to a pattern of noncompliance by employers. 76 Fed. Reg. at 15,132. DOL believes that its new rules present employers with a decreased opportunity to defraud the program while increasing the efficiency of the program by addressing potential violations before recruitment or certification. *Id.*

The underlying data, however, demonstrate that DOL's new rules will reduce the number of job opportunities available to everyone by increasing the cost of employing H-2B workers. *See* 76 Fed. Reg. at 15,162; 77 Fed. Reg. at 10,131. Congress similarly determined that limiting the availability of H-2B workers will result in significant losses both in terms of the number of jobs and the effect on small and seasonal businesses. *See The Economics of Mandating Benefits for H-2B Workers: The H-2B Guestworker Program and Improving the Department of Labor's Enforcement of the Rights of Guestworkers*, Domestic Policy Subcomm., House Oversight and Government Reform Comm. (April 23, 2009) (testimony of Patrick A. McLaughlin); 152 Cong. Rec. S 2699, 2710 (daily ed. April 3, 2006) (statement of Sen. Mikulski). *See also* http://www.flcdatacenter.come/CaseH2B.aspx (last viewed April 13, 2012); http://www.foreignlaborcert.doleta.gov/quarterlydata.cfm (certification statistics for FY 2006 through Q2 2011) (last viewed April 13, 2012) (showing DOL's own regulatory experience that U.S. workers are hired first, but additional employees still are needed to meet seasonal demands).

The reduction in H-2B workers that DOL seeks will result in less jobs as small businesses are forced to reduce the size and scope of their operations or close altogether. These data were available to DOL, some of it was DOL's own data, yet DOL failed to respond to it. DOL's failure to respond is a violation of the APA. *See Lloyd Noland Hosp. and Clinic v. Heckler*, 762 F.2d 1561, 1566 (11th Cir. 1985).

Second, the nine-month limitation is inconsistent with the final version of DHS's rule, 8 C.F.R. § 214.2(h)(6)(ii)(B), adopted in 2008, and that too violates the APA. DHS defined "temporary" as "a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year." DHS proposed the rule (which was adopted as proposed without alteration) because USCIS had "determined that the general one-year limit contained in the [prior] definition ... coupled with the 'extraordinary circumstances' restriction," were "unnecessarily limiting on the employment opportunities that may otherwise qualify for H-2B classification." 73 Fed. Reg. 49109-01, 49115 (Aug. 20, 2008). Accordingly, DHS adopted an approach that would "explicitly provide[] that such a period could last up to three years" to create "a more flexible rule …." *Id.* *See also* 73 Fed. Reg. 78,104-01, 78,118 (Dec. 19, 2008) (noting the definition would "allow U.S. employers and eligible foreign workers the maximum flexibility allowed under this program"). DHS further explained that, "[u]nder the final rule, the validity period of an H-2B petition will therefore be tied to the nature and period of the employer's temporary need and not to any specific time period." *Id.*

DOL's rule, limiting the time period to nine months, cannot be reconciled with the final rule DHS adopted in 2008, which was upheld by the court in *CATA*. Whereas DHS created a "more flexible definition" of "temporary" that would give employers "maximum flexibility," DOL's restriction of the time period to nine months provides minimal or no flexibility. Whereas DHS 's rule was not tied "to any specific time period," and that the outer limit was "possibly as long as three years," DOL's redefinition of temporary to mean only nine months or less is tethered to a specific time period, and a much shorter one than contemplated by DHS. DOL's

rule thus not only lacks any resemblance to the DHS rule, it is incompatible with it. DHS has rulemaking authority; DOL has none.

Third, DOL presented no evidence to demonstrate that increasing wages through increased benefits (*e.g.*, three-fourths guarantee, corresponding employment requirement, transportation and housing) during a major recession and at a time of significant unemployment, would somehow not injure U.S. employees. Again, the only evidence presented by both DOL and SBA showed the opposite effect. There is no evidence in the record to indicate otherwise. This is not the time for a rule that forces businesses to scale back or close. Arguably, no time is ripe for such a rule.

III. PLAINTIFFS AND THEIR MEMBERS WILL SUFFER IMMEDIATE AND IRREPARABLE HARM SHOULD THE RULE BE IMPLEMENTED

DOL's Program Rules will irreparably and imminently harm Plaintiffs and Plaintiff Associations. For those that are able to remain in business, their costs will dramatically increase, yet their income will not. For many Plaintiffs, their customer base will decrease along with their income thereby decreasing the value of the businesses and their associated goodwill. Where a company faces the loss of customers due to an agency's orders, that constitutes irreparable harm. *See BellSouth Telecomm., Inc. v. MCIMetro Access Transmission Servs., LLC*, 425 F.3d 964, 970 (11th Cir. 2005). "Although economic losses alone do not justify a preliminary injunction, 'the loss of customers and goodwill is an irreparable injury.'" *Id.*, *quoting Ferrero v. Associated Materials Inc.*, 923 F.2d 1441, 1449 (11th Cir. 1991) (internal quotation marks omitted). The injury here satisfies that test.

IV. DEFENDANTS WILL NOT BE HARMED BY THE ISSUANCE OF THE INJUNCTIVE RELIEF REQUESTED

Although Plaintiffs and Plaintiffs Associations' members will suffer immediate harm absent a preliminary injunction and stay in the implementation of the rule, DOL will not suffer any significant harm. Defendants would not be prevented from carrying out their statutory functions by a preliminary injunction or temporary restraining order. To the contrary, they would be required to hew to the INA--following the law is not a hardship.

V. THE EQUITABLE RELIEF REQUESTED IS IN THE PUBLIC INTEREST

The issuance of equitable relief is clearly in the public interest. The implementation of the rule subjects employees to termination and will result in the loss of businesses in various communities throughout the United States. It is in the public interest to promote rather than cripple legitimate businesses and to have an independent arbiter determine whether this action is lawful before its implementation.

VI. CONCLUSION

For the foregoing reasons, the TRO and Preliminary Injunction should issue as requested.

Respectfully submitted,

s/Robert P. Charrow

Monte B. Lake (DC 925818)
Wendel V. Hall (DC 439344)
C.J. LAKE LLC
525 Ninth Street, N.W., Suite 800
Washington, D.C. 20004
Tele: 202-465-3000; Fax: 202-347-3664
Email: mlake@cj-lake.com;
whall@cj-lake.com

Robert P. Charrow (DC 261958)
Laura Metcoff Klaus (DC 294272)
Laura Reiff (DC 424579)
GREENBERG TRAURIG LLP
2101 L Street, N.W., Suite 1000
Washington, D.C. 20037
Tele: 202-533-2396; Fax: 202-261-0164
Email: charrowr@gtlaw.com;
klausl@gtlaw.com; reiffl@gtlaw.com

Counsel for Plaintiffs

Of Counsel:
Robin S. Conrad
Rachel Brand
NATIONAL CHAMBER LITIGATION
CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
Tele: (202) 463-5337
Email: RConrad@USChamber.com;
RBrand@USChamber.com

Attorneys for Plaintiff Chamber of
Commerce of the United States of America