No. 12-12462

IN THE

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

BAYOU LAWN & LANDSCAPE SERVICES, *et al.*,

Plaintiffs-Appellees,

v.

HILDA L. SOLIS, Secretary of Labor, *et al.*,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
CASE NO. 3:12-cv-183, CHIEF JUDGE M. CASEY RODGERS

BRIEF OF THE APPELLEES

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26-1, the undersigned believes that the certificate of interested persons contained in Defendants-Appellants' Brief is complete.

s/Robert P. Charrow
Robert P. Charrow

STATEMENT REGARDING ORAL ARGUMENT

Although the defendants-appellants have requested oral argument, plaintiffs-appellees believe that the issues raised on appeal can be resolved by well-established Supreme Court precedent and therefore resolution of this appeal does not require oral argument.

s/Robert P. Charrow
Robert P. Charrow

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I. COUNTERSTATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the government's appeal from an order issued by Chief Judge M. Casey Rodgers granting a motion for a preliminary injunction filed by Bayou Lawn & Landscape Services, the Chamber of Commerce of the United States of America, the National Hispanic Landscape Alliance, Silvicultural Management Associates, Inc., Professional Landcare Network ("PLANET"), and the Florida Forestry Association (collectively "small business plaintiffs"). The district court enjoined the implementation of regulations issued by the Department of Labor ("DOL") affecting the use of temporary, non-agricultural, foreign workers in the United States. The government stated that this Court has both subject matter and appellate jurisdiction. That statement is correct.

II. COUNTERSTATEMENT OF THE ISSUES

A. Did the district court abuse its discretion in entering a preliminary injunction, precluding the enforcement of regulations promulgated by the Department of Labor when Congress granted rulemaking authority to the Department of Homeland Security not to the Department of Labor?

B. Did the district court abuse its discretion in determining that the small business plaintiffs would be irreparably harmed by rules which, by the government's own admission, significantly increase the costs of doing business for those businesses that employ temporary, non-agricultural, foreign workers when no other workers are available?

C. Did the district court abuse its discretion when it determined that the public interest would be served and the Department of Labor would not be harmed by enjoining the implementation of rules that were issued without statutory authority especially where the government presented no evidence disputing the district court's findings.

D. Did the district court abuse its discretion in entering a nationwide injunction where, as here, the small business plaintiffs and their members do business across the country.

III. COUNTERSTATEMENT OF THE CASE

A. Statutory and Regulatory Background

The Immigration and Nationality Act of 1952 established a comprehensive framework for the regulation of immigration. *See* Immigration and Nationality Act of 1952 ("INA"), 66 Stat. 163, as amended, 8 U.S.C. § 1101, *et seq*. It includes provisions for permanent and temporary foreign workers. Prior to 1986, a single program existed for all temporary foreign workers. In 1986, however, Congress amended the INA and provided for two separate programs – the H-2A program applicable to agricultural workers and the H-2B program applicable to non-agricultural workers. *See* Immigration Reform and Control Act of 1986, Pub. Law No. 99-603, § 301(a), 100 Stat. 3359, 3411 (codified at 8 U.S.C. § 1101(a)(15)(H)(ii)(a), (b)).

Only the H-2B program is at issue in this case. The program is used predominantly by small businesses, including landscaping, hotel, construction, restaurant and forestry businesses. *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. *See* 8 U.S.C. § 1184(a). The INA provided that the question of importing non-immigrant aliens in any specific case or cases was to be "determined by the Attorney General, after consultation with appropriate agencies of Government." *See id*. § 1184(c)(l). Later, Congress transferred most of the Attorney General's authority to the Secretary of Homeland Security ("DHS"), but authorized the Attorney General to issue rules on questions of law. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, § 402, 116 Stat. 2135, 2178 (Nov. 25, 2002).

Before an employer may file a petition for an H-2B visa, DHS requires, under its rules, that the employer first apply for and receive a temporary labor certification from the Secretary of Labor. 8 C.F.R. § 214.2(h)(6)(iii)(A), (C). The certification constitutes "advice . . . 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*. § 214.2(h)(6)(iii)(A).

In 2008, DOL and DHS issued coordinated final rules that changed the filing model for the H-2B program. *See* 73 Fed. Reg. 78,104 (Dec. 19, 2008) (DHS H-2B Rule); *id*. at 78,020 (DOL H-2B Rule). Various labor organizations challenged these rules, and the United States District Court for the Eastern District of Pennsylvania found that certain aspects, including the method for calculating wages, violated the Administrative Procedure Act ("APA"), 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. *Bayou Lawn & Landscape Servs., et al. v. Solis*, Civil No. 11-445-MCR-EMT. That matter is pending although Congress effectively stayed implementation of the Wage Rule through September 30, 2012, by barring DOL from using appropriated funds to enforce the rule. *See* Dep't of Labor Appropriations Act, 2012, Pub. L. No. 112-74, Title I, Div. F, § 110 (Dec. 23, 2011).

On March 18, 2011, DOL proposed major changes to the H-2B program by importing into the H-2B program many rules that it finalized in 2010, for the H-2A

temporary foreign agricultural worker program. 76 Fed. Reg. 15,130 ("Proposed Program Rules"). These proposed rules redefined the term of "temporary need" from ten months to nine months, required that H-2B employers guarantee payment of three-quarters of the anticipated hours of work to each H-2B employee regardless of whether the hours were actually worked, required that H-2B employers pay employees' transportation, subsistence and housing costs, required that H-2B employers pay the same wages and benefits to both H-2B employees and a newly created group of U.S. workers engaged in "corresponding employment[,]" and imposed additional requirements on employers. *See id*.

Certain plaintiffs, including the Chamber of Commerce of the United States of America (the "Chamber"), PLANET, and the Hispanic Landscape Alliance, filed public comments with the Secretary highlighting the adverse economic effects of the Proposed Program Rules on U.S. jobs and the economy in general. *See* Comments of Chamber at ETA-2011-0001-0456[1] (May 20, 2011); Comments of PLANET at ETA-2011-0001-0422 (May 17, 2011); Comments of Hispanic Landscape Alliance at ETA-2011-0001-0446 May 18, 2011. The Small Business Administration ("SBA") also opined that DOL's assessment of the economic impact of the Proposed Program Rules understated their impact. *See* Comments of Winslow Sargent and Janis Reyes, Office of Advocacy, SBA at ETA-2011-0001-0438 (May 17, 2011) ("SBA Letter").

In spite of these comments, SBA's views and the acknowledged injurious effect of the Proposed Program Rules, DOL issued final rules on February 21, 2012, with minor changes. *See* 77 Fed. Reg. 10,038. 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

[1] Documents with ETA designations reference the government's administrative record filed with the district court as Document No. 49.

material way[,]" even though it acknowledged that it could not measure or had not taken the time to measure many of the adverse effects. 77 Fed. Reg. at 10,115 (col. c). The Program Rules were to go into effect on April 27, 2012.[2]

B. Procedural Posture

On April 16, 2012, the small business plaintiffs instituted a lawsuit and requested an injunction against the implementation of the Program Rules. In their complaint, the small business plaintiffs alleged that DOL lacked rulemaking authority to issue the Program Rules (Count I), that its Regulatory Flexibility Act analysis was legally improper (Count II), and that the Program Rules were arbitrary and capricious (Count III).

Following a hearing on April 24, 2012, the district court, on April 26, 2012, preliminarily enjoined DOL from enforcing the Program Rules. As a preliminary matter, the district court found that the small business plaintiffs had Article III standing to proceed. On the merits, the district court found that it was substantially likely that the small business plaintiffs would succeed in light of DOL's own acknowledgement that it lacked express authority to promulgate the Program Rules. The district court was not persuaded by DOL's attempt to infer authority from other provisions of the INA. The district court also found that the small business plaintiffs demonstrated a substantial threat of irreparable harm if the Program Rules were to go into effect. In contrast, the district court noted that DOL had not articulated any harm that it would suffer were the implementation of the Program Rules delayed while the merits of the case proceeded. Finally, the district court found that the public was best served by preliminarily enjoining the enforcement of rules that were issued without the requisite congressional authority. More than one

[2] Although the Program Rules were originally scheduled to go into effect on April 23, 2012, DOL extended the effective date to April 27, 2012. *See* 77 Fed. Reg. 24,137 (April 23, 2012).

week later, on May 4, 2012, DOL filed an emergency motion to stay the preliminary injunction and requested that the district court act on that motion no later than May 11, 2012. On May 11, 2012, defendants filed their notice of appeal and on the same day, the district court denied defendants' motion for a stay. *See* Record Excerpts ("R.E.") at Tab H. Defendants renewed their stay motion with this Court, which denied the motion on August 8, 2012.

IV. COUNTERSTATEMENT OF FACTS

The small business plaintiffs and their 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 in the district court, will increase wages in a time of recession. The Program Rules that are the subject of this case will significantly increase costs to the small business plaintiffs and will also exacerbate the adverse impact of the Wage Rule. DOL denies none of this. By DOL's own estimates, some of the Program Rules alone would cost the business community more than $100 million in the first year. This is a low estimate in that DOL acknowledged that it lacked the time and clearances to conduct a full analysis of the impact of the Program Rules on the regulated community. The small business plaintiffs and their members asserted, both in the complaint and in supporting declarations, that they cannot survive these increases without foregoing bidding on various long-term contracts, 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. DOL undertook no effort to dispute these statements in the district court and introduced no evidence.

V. STATEMENT OF THE STANDARD OF REVIEW

This Court reviews a district court's entry of a preliminary injunction under a deferential abuse-of-discretion standard. *Grizzle v. Kemp*, 634 F.3d 1314, 1320 (11th Cir. 2011). "This scope of review will lead to reversal only if the district court applies an incorrect legal standard, or applies improper procedures, or relies on a clearly erroneous factfinding, or if it reaches a conclusion that is clearly unreasonable or incorrect." Otherwise, "an abuse-of-discretion standard recognizes there is a range of choice within which [the court] will not reverse the district court even if [it] might have reached a different decision." *Forsyth County v. U.S. Army Corps of Eng'rs*, 644 F.3d 1032, 1039 (11th Cir. 2011) (quoting *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1226 (11th Cir. 2005).

VI. SUMMARY OF ARGUMENT

DOL argues that the district court abused its discretion in concluding that there was a substantial likelihood that DOL lacked statutory authority to issue general rules governing the H-2B visa program. DOL, however, acknowledges that Congress did not expressly grant it rulemaking authority over the H-2B program, but instead, granted that authority to the Secretary of Homeland Security. DOL also acknowledges that in 1986, Congress granted it limited rulemaking authority over the H-2A Program, but declined to extend that authority to the H-2B Program. DOL also acknowledges that Congress has considered granting it H-2B rulemaking authority, but has failed to do so.

It is against this backdrop that DOL argues that the district court abused its discretion by not inferring rulemaking authority from DOL's consultative role, namely that DHS is authorized to issue to rules after consulting with appropriate agencies, including DOL. The problem is that a consultative authority and rulemaking authority are mutually exclusive. DOL argues that this minor linguistic problem can be overcome since it is entitled to *Chevron* deference.

However, *Chevron* deference is only accorded the agency that has been authorized to administer the statute, in this case, DHS, not DOL. It also applies only where the underlying statute is ambiguous; DOL has not highlighted any ambiguity.

DOL also argues on appeal that a depression era law--the Wagner-Peyser Act--is the real source of its rulemaking authority. The only problem is that this revelation is not in the rulemaking record and was not presented to the district court prior to the issuance of the preliminary injunction. As such, DOL has waived its ability to assert Wagner-Peyser in this appeal.

DOL mines the legislative history to argue that Congress has been aware that DOL has been issuing rules and that since Congress has done nothing to curb DOL's improper conduct, it has acquiesced in that conduct and has acquiesced in DOL's rulemaking. However, as the Supreme Court has consistently pointed out, resort to legislative history is only proper to resolve a statutory ambiguity and none has been identified. Even so, the Court has been reluctant to imbue an agency with rulemaking authority through congressional silence, especially where as here, Congress has affirmatively declined to authorize DOL rulemaking in this area.

Finally, DOL argues that the small business plaintiffs will not be harmed even though the uncontroverted evidence and the rulemaking record indicate otherwise. DOL also argues that it will suffer harm if it is unable to implement the Program Rules but failed to introduce any evidence of any such injury. Although it also argues that the public interest would be served if the rule were implemented, the public interest is never served if an agency is permitted to act in excess of its authority.

VII. ARGUMENT

A. The District Court Properly Concluded that DOL Lacks Rulemaking Authority

1. An Agency Can Only Issue Legislative Rules If Congress Has Granted It the Authority to Do So

"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). *See also FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 161 (2000); *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638 (1990); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986); *United States v. Storer Broadcasting Co*., 351 U.S. 192 (1956); *Nat'l Broadcasting Co. v. United States*, 319 U.S. 190 (1943); *Kelly v. E.P.A.*, 15 F.3d 1100 (D.C. Cir. 1994); *Amalgamated Transit Union v. Skinner*, 894 F.2d 1362 (D.C. Cir. 1990); Stephen G. Breyer, Richard B. Stewart *et al*., ADMINISTRATIVE LAW AND REGULATORY POLICY 522 (7th ed. 2011) ("An agency can only engage in rulemaking to the extent its organic statute authorizes it do so."). "Thus, if there is no statute conferring authority, a federal agency has none." *Michigan v. E.P.A.*, 268 F.3d 1075, 1081 (D.C. Cir. 2001).

The APA itself prohibits 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) (emphasis supplied).

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

a. The INA Contains No Language Authorizing DOL Rulemaking in the H-2B Program

"The starting point for [determining the scope of an agency's rulemaking authority is], of course, the language of the delegation provision itself." *Gonzales*, 546 U.S. at 259. 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[.]"). DOL's admission should end the merits portion of this case. *See American Library Ass'n v. Fed. Commc'ns Comm'n*, 406 F.3d 689, 691 (D.C. Cir. 2005).

At no time during the course of its rulemaking has DOL identified any express statutory authority granting it rulemaking authority. Nor could it have, because nothing in the INA or any other statute authorizes the Secretary of Labor to issue these rules. The text of the INA's general rulemaking provision, which was conspicuously absent from DOL's opening brief, provides that the

> (1) Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter [Immigration and Nationality] and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers. . . . [and] (3) [h]e shall establish such regulations . . . as he deems necessary for carrying out his authority under the provisions of this chapter.

8 U.S.C. § 1103(a) (emphasis supplied).

The INA also gives the Attorney General limited rulemaking authority. *See id.* at § 1103(g)(2). By dividing rulemaking between DHS and DOJ, Congress left no room for DOL to issue rules. *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[.]").

b. Statutory Provisions Relied Upon by DOL that Are in Rulemaking Record Do Not Authorize It to Issue the Program Rules

An agency is required to identify in its Federal Register notice 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));[3] and (3) 8 U.S.C. § 1184(c)(1) (*see* 77 Fed. Reg. 10,038 (col. b)).[4] None of these sections authorizes rulemaking by DOL.

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

[3] It does not appear that DOL is pursuing on appeal the argument that section 1184(c)(14)(B) is the source of its rulemaking authority. Out of abundance of caution, the small business plaintiffs will address this provision.

[4] 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.

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. DOL actually argues that it "has authority to issue legislative rules to structure its consultation with DHS." Defendants-Appellants' Brief ("DOL Brief") at 22. The contrary is true: consultation and rulemaking are distinct activities. The phrase "after consultation with" means that the entity that is to be consulted, in this case DOL, is not the entity that has been authorized by Congress to undertake the agency action, and indeed, the agency action must occur after the consultation. A consultative role and an active role are mutually inconsistent. There are more than 100 federal statutes that authorize one agency to issue rules, but only after consulting with another agency or entity. Under DOL's view, any agency that must be consulted before another agency issues rules automatically has rulemaking authority as well. No authority is cited for this remarkable proposition, and indeed, DOL's reading defies English usage and leads to absurd results.

First, the "ordinary meaning of the word consult is to 'seek information or advice from (someone with expertise in a particular area)' or to 'have discussions or confer with (someone), typically before undertaking a course of action.'" *California Wilderness Coalition v. Dep't of Energy*, 631 F.3d 1072, 1087 (9th Cir. 2011) (quoting THE NEW OXFORD DICTIONARY 369 (2001)); (emphasis added). Thus, the term "consult" or the phrase "after consultation with," as it appears in section 1184(c)(1), means that DOL's role is "advisory." *See* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 395 (4th ed. 2006) (defining the word "consultation" to mean "[a] conference at which advice is given or views are exchanged."). To the extent that DOL believes that it has authority to issue

rules to govern how it consults with DHS, those rules, by definition, would not be legislative, but rather procedural, and certainly could not be used to regulate those outside DOL, as is the case with the Program Rules. Moreover, the phrase "after consultation with" creates a duty in the agency with rulemaking authority to consult with the passive agency before it issues a rule. See *California Wilderness Coalition v. Dep't of Energy*, 631 F.3d at 1088. It creates no rights in the passive agency to engage in rulemaking.

Second, many statutes and Executive Orders require agencies to consult with other agencies, or with states or private parties before issuing rules. Under DOL's view, for example, the General Services Administration should have rulemaking authority over the Central Intelligence Agency (*see* Executive Order 11690 § 7(c), as amended) ("Director of Central Intelligence, after consultation with the Administrator of General Services, shall prescribe such regulations for the Central Intelligence Agency . . . ."), state banking supervisors, in addition to the Federal Reserve and Treasury, should have rulemaking authority over recordkeeping for international banking transactions (*see* 12 U.S.C. § 1829b) ("The Secretary and the Board shall jointly prescribe, after consultation with State banking supervisors, final regulations requiring that insured depository institutions," to maintain appropriate records of international transactions), and the Secretary of Health and Human Services should have rulemaking authority over the Department of Defense's healthcare system. *See* 10 U.S.C. § 1099 ("The Secretary of Defense, after consultation with the other administering Secretaries, shall prescribe regulations to carry out this section").

DHS was given overall responsibility, including rulemaking authority, for 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. 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.

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 suggested in the rulemaking 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." 77 Fed. Reg. at 10,043 (col. c) - 10,044 (col. a). In the same vein, defendants argued 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." 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.[5]

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[5] In the rulemaking, as a source of its authority, DOL relied on *Nat'l Ass'n of Home Builders v. OSHA*, 602 F.3d 464, 467 (D.C. Cir. 2010) and *USV Pharm. Corp. v. Weinberger*, 412 U.S. 655, 665 (1973). Neither case is relevant. 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, DOL 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.

There is nothing irrational or untoward about Congress allocating responsibility amongst various agencies.

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).[6] 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 out DOL's powers with precision in paragraph (14)(B).

The final statutory source of DOL'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 persons 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 contrast, in clause (ii)(A), which immediately precedes clause (ii)(B) and which creates the H-

[6] 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.

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 ("[n]o such delegation regarding [the statute's] enforcement provisions is evident in the statute"); *Global Van Lines, Inc. v. Interstate Commerce Comm'n*, 714 F.2d 1290 (5th Cir. 1983) (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).

Finally, DOL tries to make a silk purse out of a sow's ear by arguing that language in the 2012 Labor Appropriations Act designed to maintain the status quo while the parties litigate the propriety of the Wage Rule somehow endows DOL with authority to issue the Program Rules. There is nothing in the Appropriations

Act that in any way amends the organic legislation and absent such amendment, DHS retains exclusive rulemaking authority.

c. Statutory Authority Cannot Be Inferred Where It Has Been Delegated to Another Agency

Recognizing the absence of any express grant of rulemaking authority, DOL argues that rulemaking authority, in general, can be inferred, and then argues that such rulemaking authority should be inferred because DOL has jurisdiction over some aspect of the H-2B program.

In so doing, DOL argues that *Bowen*, *Gonzales*, and even *Adams* are all distinguishable, and that the Supreme Court really did not mean what it said when it held in each case that an agency's rulemaking authority must be supported by a congressional grant.[7] DOL claims that these three cases are distinguishable, but the distinctions it cites do not assist its cause. In all three cases, agencies with express rulemaking authority over specific programs, sought to extend their

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[7] DOL also argues that the district court's reliance on *Louisiana Pub. Servs. Comm'n* v. *FCC*, 476 U.S. 355 (1986), was misplaced and that *Amalgamated Transit Union v. Skinner*, 894 F.2d 1362 (D.C. Cir. 1990), which is discussed later, is distinguishable. Both cases, though, stand for the proposition that an agency's rulemaking authority springs solely from a congressional grant and absent that grant, the agency has no authority. DOL seeks to brush *Louisiana Pub. Servs. Comm'n* under the rug by characterizing it as a preemption case. At issue there was which of two statutory provisions controlled--one which gave the FCC authority to issue rules and the other, which arguably gave the states authority to "drive the train" within their borders. In reviewing the provisions, the Court held that "the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency." 476 U.S. at 374. The district court followed this basic formula and was unable to find DOL's rulemaking authority in any congressional grant.

authority within the program, but beyond the congressional grant. Here, in contrast, DOL has no rulemaking authority whatsoever over H-2B Program.

In *Bowen*, for example, the Health Care Financing Administration, which had exclusive jurisdiction over Medicare reimbursement and express authority to issue rules through the Secretary of Health and Human Services (*see* SSA § 1871), issued a rule that retroactively affected payments to hospitals under Medicare. The Court held that Congress had not authorized the Secretary to issue retroactive rules. Congress corrected that omission in the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 § 903(a), Pub. L. No. 108-179 (Dec. 8, 2003). DOL reads the case as limited to retroactive rulemaking. In fact, the case stands for the longstanding proposition that an agency's rulemaking authority is a creature of statute and is limited to what Congress delegates, whether prospective or retrospective.

Adams Fruit involved the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA"), 29 U.S.C. § 1801 *et seq*, which authorizes DOL to issue rules governing the safe transportation of agricultural workers by their employers. *Id*. at § 1841. The law also created a private right of action for violation of the AWPA. *Id*. at § 1854. At issue in *Adams Fruit* was whether DOL had statutory authority to issue a rule precluding a private right of action by an employee against his or her employer if state workers compensation was available. Although DOL had jurisdiction over the AWPA program and express rulemaking authority, the Court nonetheless held that the DOL rule was *ultra vires* because its rulemaking authority was limited and did not extend to section 1854, involving a private right of action. Like *Bowen*, *Adams Fruit* stands for the simple and broad proposition that Congress' delegated rulemaking authority is limited even within

programs. DOL claims that *Adams Fruit* is limited to cases involving private rights of action.[8]

DOL argues that neither *Bowen* nor *Adams Fruit* is applicable by reading each case narrowly and confining the holding to the precise facts of that case, *e.g.*, *Palsgraf* involved an injury occurring on a railway platform and therefore, its precedential impact is limited to railway stations. The Court, however, views its holdings more expansively as shedding light on fundamental principles of law that apply in various settings. Thus, in *Gonzales*, the Court relied on *Adams Fruit* to assess whether an agency had rulemaking authority over the use of narcotics. At issue in *Gonzales* was whether the Drug Enforcement Administration, which had been delegated authority under the Controlled Substances Act ("CSA") to regulate narcotics, could issue a rule that banned the use of certain narcotics in state sanctioned assisted suicides. The Court held that the Attorney General's rulemaking authority under the CSA was limited to issuing rules relating only to "registration," "control," and "for the efficient execution of his functions" under the statute, and that grant of authority was not sufficient to support a rule effectively banning the use a drug for a specific purpose. *See Gonzales*, 546 U.S. at 269-70. DOL does not and cannot argue that *Gonzales* is distinguishable from the case *sub judice*.

In all three cases, the agencies invited the Court to infer rulemaking authority from the limited authority expressly delegated by Congress. In all three cases, the Court declined the invitation. Here, though, unlike in *Bowen*, *Gonzales*, and *Adams Fruit* there is no nub from which a Court could infer any DOL authority to issue the Program Rules. Where a statute delegates rulemaking

[8] Under that theory, Alfred L. Snapp & Son, Inc., the case relied upon by DOL and discussed later, must be limited only to Puerto Rican agricultural workers.

authority to one agency, but is silent as to another agency, courts are not free to infer from that silence authorization to issue rules by the unnamed agency. *See English v. Ecolab, Inc.*, No. 06 Civ. 5672, slip op. 12 (S.D.N.Y. March 31, 2008). If courts were to presume rulemaking authority from congressional silence, as DOL appears to champion, that would result in a fundamental change in the relationship between the Legislative and Executive Branches. "Were courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well." *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995).

DOL asserts instead that *United States v. Mead Corp.*, 513 U.S. 218, 229 (2001), suggests that an agency's authority to issue rules can be inferred. The *Mead* Court's discussion of implied authority was well cabined. First, *Mead* was examining agency authority in the context of *Chevron* deference and a non-legislative rule. Second, in *Mead*, the theory of inferred authority, if it exists at all, only applies where an agency has general rulemaking authority and seeks to extend that authority to a related provision over which no agency has express rulemaking authority. That is not the case here.

DOL also argues that it is unnecessary for Congress to grant it rulemaking authority if one concludes that it has jurisdiction over the subject matter: "the issue is not whether Congress specifically stated that DOL shall have rulemaking authority in the H-2B program, but whether Congress granted DOL jurisdiction over a specific subject matter." DOL Brief at 25. This proposition that jurisdiction alone suffices is not only at odds with virtually every relevant Supreme Court decision in the last fifty years, but with the APA itself. The APA, like the courts, requires not only jurisdiction, but also a grant of authority. *See* 5 U.S.C. § 558(b). While DOL has never argued otherwise, it has focused exclusively on jurisdiction.

This case is not about jurisdiction, but rather authorization and it is that authorization that remains missing. *See Adams Fruit Co.,* 494 U.S. at 649-650 ("[n]o such delegation regarding [the statute's] enforcement provisions is evident in the statute" even though the agency had jurisdiction over migrant workers); *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). DOL argues that *Amalgamated Transit* is either distinguishable or not relevant because "the Court held that [the agency] lacked authority under the statute to issue substantive rules" even though it had enforcement jurisdiction. DOL Brief at 24. However, the government's argument in *Amalgamated Transit,* which was rejected by the court, is precisely DOL's argument here--it has jurisdiction, therefore, it has authority to issue rules.

Correspondingly, in *United Airlines v. Brien,* 588 F.3d 158 (2d Cir. 2009), the court invalidated an immigration rule issued by the Immigration and Naturalization Service because although the agency clearly had jurisdiction over the issue, it was required by statute to issue the rule jointly with the Department of State. According to the court, "[t]he INS's attempt to amend the jointly enacted regulation on its own, therefore, is ineffective." 588 F.3d at 179. At least in *Brien*, the agency had a modicum of general rulemaking authority, albeit shared; here there is none.

Finally, DOL relies on *Production Tool Corp. v. ETA*, 688 F.2d 1161 (7th Cir. 1982), for its authority to issue legislative rules, such as the Program Rules.[9]

[9] The court's holding on the merits was effectively reversed in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994).

See DOL Brief at 25. That case only proves the small business plaintiffs' point. At issue in *Production Tool* was the validity of an "interpretative," as opposed to a legislative, rule. In upholding DOL's ability to issue an interpretative rule in the absence of express authority to do so, the court emphasized that if the rule were legislative, it would have to be "promulgated under a delegation of legislative authority." *Id*. at 1167. In the absence of authorization, and there is none, the Program Rules are invalid. DOL argues preemptively that the rule at issue in *Production Tool* was really a legislative rule, even though the court thought otherwise, because it was issued following notice and comment rulemaking. However, the fact that an agency used notice and comment procedures does not mean that the issuance was a legislative rule. "There are many reasons why an agency may voluntarily elect to utilize notice and comment rulemaking: the proposed rule may constitute a material amendment to the old rule, the agency may wish to avoid potential litigation over whether the new rule is legislative or interpretive, or the agency may simply wish to solicit public comment." *Independent Living Resources v. Oregon Arena Corp*., 982 F. Supp. 698, 744 n.62 (D. Or. 1997). DOL also relies for its rulemaking authority on *Texas Rural Legal Aid v. Legal Serv. Corp.*, 940 F.2d 685 (D.C. Cir. 1991) and *Dole v. United Steelworkers of Am.*, 494 U.S. 26 (1990). *See* DOL Brief at 25. Neither case is relevant. In *Texas Rural*, various legal aid offices challenged an agency rule prohibiting them from engaging in redistricting litigation. In upholding the rule, the court concluded that "the Act clearly grants both general and specific rulemaking powers to LSC . . . ." *Id.* at 690-91. Here, in contrast, general rulemaking has been committed to DHS, not DOL. In *Dole*, the Court held that OMB lacked authority under the Paperwork Reduction Act to block an OSHA rule. The Court does not discuss rulemaking authority.

d. Statutory Provisions Relied Upon by DOL that Are Outside Rulemaking Record Did Not Authorize It to Issue the Program Rule

After the district court entered its preliminary injunction, DOL argued in its stay motion and now in its opening brief that its rulemaking authority really stems from the Wagner-Peyser Act as interpreted by the Supreme Court and augmented, once again by its duty to consult with DHS before DHS issues rules. That reliance is also misplaced. The Wagner-Peyser Act of 1933 is a depression era law aimed at helping states establish employment offices. DOL asserts that it "has long maintained that the Wagner-Peyser Act . . . is a basis for its rulemaking authority" and has been endorsed by the Supreme Court. DOL Brief at 13-14. There are two problems with this argument. First, DOL's rulemaking authority under Wagner-Peyser is narrow and expressly limited to funding, operation and coordination of state unemployment offices. It does not authorize DOL to issue rules to implement a visa program committed by law to the governance of another agency. The Supreme Court's decision's in *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982), does not hold otherwise. Second, Wagner-Peyser was not identified by DOL in the rulemaking record as the source of its H-2B rulemaking authority nor was it even mentioned in the DOL memorandum opposing the small business plaintiffs' motion for a preliminary injunction. Since this is an appeal from a preliminary injunction, DOL, as appellant, cannot raise arguments in this Court that it did not raise when opposing the preliminary injunction in the district court. Nor can DOL rely a new source of statutory authority that is outside the rulemaking record. *See e.g., Camp v. Pitts,* 411 U.S. 138 (1973). Reliance on Wagner-Peyser, to the extent it is even applicable, has been waived.

1. The Wagner-Peyser Act of 1933 Does Not Authorize H-2B Rulemaking

The Wagner-Peyser Act was designed to help create and coordinate state-operated employment offices where employers seeking to hire and those seeking to be hired could be brought together. The Act was aimed at tackling the severe unemployment associated with the Great Depression and ensuring that unemployment insurance was properly distributed. Toward that end, the Act authorized the creation and federal funding of local state employment offices. *See Nat'l Ass'n for the Advancement of Colored People, Western Region v. Brennan*, 360 F. Supp. 1006, 1009 (D.D.C. 1973); 29 U.S.C. § 49. The Act, which is codified in chapter 4B of title 29, also authorizes the Secretary of Labor "to make such rules and regulations as may be necessary to carry out the provisions of this chapter." 29 U.S.C. § 49k (emphasis supplied). DOL's rulemaking authority is limited to implementing a single chapter (chapter 4B) and that chapter does not mention the words "visa," "immigrant," or "non-immigrant temporary worker." Nor is there language in Wagner-Peyser authorizing the Secretary to issue rules implementing the INA. Indeed, DOL's own website identifies all of the regulations issued under the authority of the Wagner-Peyser Act as those set out in 20 C.F.R. pts. 652-654. *See* <http://www.doleta.gov/programs/almislaws.cfm> (visited May 5, 2012). The H-2B Rules were and are set out at 20 C.F.R. pt. 503 and 29 C.F.R. pt. 655. *See* 77 Fed. Reg. 10,038 (Feb. 21, 2012). Moreover, DOL did not rely on the Wagner-Peyser Act as a source of its H-2B rulemaking authority. It specifically rejected the notion that the model employed under the Wagner-Peyser Act was designed to foster national uniformity, an essential feature of the H-2B program. *See id*. at 10,063 (col. a) (the "existing cooperative Federal-State model under the Wagner-Peyser system is much too decentralized to

accommodate the requirement that SWAs [state workforce agencies] use a specific form.").

DOL acknowledges these shortcomings, but nonetheless argues that section 49k is the source of DOL's rulemaking for the H-2B program because, according to DOL, "it is implementing Chapter 4B of the Wagner-Peyser Act by issuing regulations governing how H-2B employers are required to locate available United States workers through participation in the employment service system. *See* 77 Fed. Reg. at 10,154." DOL Brief at 16. The portion of the regulation referenced by DOL merely discussed state unemployment offices, known as state workforce agencies. It is a long leap from regulating how state unemployment offices are to be operated and funded to regulating how and when employers must pay for the transportation costs of their foreign H-2B workers, how and when employers must pay increased wages for so-called corresponding employees, how many months an H-2B employee may remain in the United States, and how many hours an employer must guarantee that an H-2B employee works in any given quarter. These are all INA functions as DOL acknowledged in its rulemaking.

DOL's problem is not just the length of its leap having to cross from Title 29, administered by DOL, to Title 8, administered by DHS and DOJ, but Congress' language which not only expressly limits DOL's rulemaking authority to implementing the Wagner-Peyser Act, but which also grants H-2B rulemaking authority to DHS, not DOL. "It would be anomalous for Congress to have so painstakingly described the [Secretary of Labor's] limited authority to [fund and regulate state employment services], but to have given him, just by implication, authority [over the entire H-2B program]." *Mead*, 546 U.S. at 262. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion. . . . This is

particularly true here, where subsections . . .were enacted as part of a unified overhaul . . . ." *Nken v. Holder*, 556 U.S. 418, ___, 129 S.Ct. 1749, 1759 (2009) (internal citations and quotations omitted); *see also KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 118 (2004) (same). DOL's novel interpretation would effectively negate DHS' rulemaking authority in contravention of the well-established rule that repeal by implication is disfavored. *See Morton v. Mancari*, 417 U.S. 535, 549 (1974).

DOL believes that these statutory inconveniences are of little consequence because, according to DOL, it has been given "rulemaking authority under Supreme Court case law" in *Alfred L. Snapp & Son, Inc. v. Puerto Rico.* DOL Brief at 14. DOL spills much ink preemptively arguing that the Court's reasoning in *Snapp,* while *dictum* is nonetheless binding on this Court. Whether the relevant portions of *Snapp* are binding *dictum,* somewhat of an oxymoron, is not relevant. *Snapp* sheds no light on the issue before this Court, namely whether DOL has statutory authority to issue the H-2B Program Rules. At issue in *Snapp* was whether Puerto Rico had article III standing to sue, on behalf of its citizens, an employer that hired H-2 workers to perform agricultural tasks rather than offering those positions to unemployed United States citizens, including Puerto Ricans. Puerto Rico alleged that its workers had been discriminated against in favor of foreign visa holders. DOL highlights that according to the Court, the

> Attorney General is charged with determining whether entry of foreign workers would meet this standard [absence of unemployed in United States capable of performing the tasks] "upon petition of the importing employer." 8 U.S.C. § 1184(c). He is to make this determination "after consultation with appropriate agencies of the Government." *Ibid*. The Attorney General has delegated this responsibility to the Commissioner of Immigration and Naturalization, 8 C.F.R. § 2.1 (1982), who, in turn, relies on the Secretary of Labor for the initial

> determinations. 8 C.F.R. § 214.2(h)(3) (1982). To meet this responsibility, the Secretary of Labor relies upon the employment referral system established under the Wagner-Peyser Act.

Alfred L. Snapp, 458 U.S. at 595; *see* DOL Brief at 14.

The portion of the Court's opinion reproduced above merely stands for the rather unremarkable proposition that DOL relies on its "employment referral system established under the Wagner-Peyser Act" when consulting with the Attorney General. *Id*. at 595. There is nothing in the Court's opinion that suggests that this consultation role somehow bestows general rulemaking authority on DOL. Ironically, the only two rules referenced in the snippet quoted by DOL (*i.e.*, 8 C.F.R. §§ 2.1 and 214.2(h)(3)) were issued by the Immigration and Naturalization Service and not DOL. Undeterred, DOL argues that the language in the opinion recognizing DHS' duty to consult with DOL under section 1184(c) somehow vests DOL with rulemaking authority. According to DOL, it "may use rulemaking to fulfill its consulting role, which necessarily implicates the recruitment of domestic workers through the interstate clearance system under Wagner-Peyser." DOL Brief at 15. This argument, though, does not turn on Wagner-Peyser or on *Snapp*, but rather on the nature of DOL's "consulting role" under section 1184. As discussed above, an agency that must be consulted is an agency that lacks rulemaking authority.

Further, whatever marginal relevance *Snapp* may have had to this case has been overtaken by events. Four years after *Snapp*, Congress bifurcated the H-2 program into the H-2A program for agricultural workers, such as the ones in *Snapp*, and the H-2B program for non-agricultural workers. Congress authorized DOL to issue regulations with respect to the H-2A program (*see* 8 U.S.C. § 1101), but declined to do so for the H-2B program. Where Congress authorizes an agency to issue rules in one area (H-2A), but contemporaneously declines to do so in another

area (H-2B), courts are not free to extend the agency's rulemaking into that other area.

2. DOL Has Waived Reliance on Wagner-Peyser

Not only is DOL's revelation that Wagner-Peyser is the source of its H-2B rulemaking authority irrelevant, but it is too little too late for three reasons. First, courts "will not reverse a district court based on issues not presented to it" and as such, will "consider only the arguments presented by [appellant] in its preliminary-injunction reply." *RTM Media, L.L.C. v. City of Houston*, 584 F.3d 220, 228-29 (5th Cir. 2009); s*ee Miller v. Nationwide Life Ins. Co*., 391 F.3d 698, 701 (5th Cir. 2004) ("We have frequently said that we are a court of errors, and that a district court cannot have erred as to arguments not presented to it."). DOL's made its Wagner-Peyser argument for the first time in its stay motion which was filed after the district court granted the preliminary injunction at issue in this case. This is similar to what occurred in *Cold Stone Creamery, Inc. v. Gorman*, 361 Fed.Appx. 282, 2010 WL 199993 (2d Cir. Jan. 22, 2010), where following the issuance of a preliminary injunction, defendants filed a letter brief with the district court indicating that it had misconstrued certain facts. On appeal, the Court held that the defendants had waived the issue because the defendant "did not assert this argument in the District Court before the preliminary injunction was issued-he asserted it for the *first* time in his letter to the District Court after the preliminary injunction was entered" *Id*. at 286 (emphasis in original).

Second, as the government frequently reminds opposing parties, an APA review is a "record review," and as such, is limited by the administrative record compiled by the agency and submitted to the Court. Under the "record rule," "[i]t is well-established that judicial review under the APA is limited to the administrative record that was before the agency when it made its decision." *Voyageurs Nat'l Park Ass'n v. Norton*, 381 F.3d 759, 766 (8th Cir. 2004). Thus,

when a plaintiff challenges a final agency action, judicial review normally is limited to the administrative record in existence at the time of the agency's decision. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). The agency must justify its final action by reference to the reasons it considered at the time it acted. *See Camp v. Pitts*, 411 U.S. at 142-43 (1973) ("[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."). Here, the administrative record is uniquely devoid of any suggestion that the Wagner-Peyser Act formed the basis of the rulemaking or that the source of DOL's rulemaking authority over the H-2B program was Wagner-Peyser.

Post-hoc rationalizations, devised and honed by skilled litigation counsel, are disregarded by reviewing courts, which must evaluate "agency action solely on the basis of the agency's stated rationale at the time of its decision." *Luminant Generation Co., L.L.C. v. U.S. E.P.A.*, 675 F.3d 917, 925 (5th Cir. 2012); *see Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962) ("The courts may not accept appellate counsel's post hoc rationalizations for agency action; *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself." (citing *SEC v. Chenery Corp*., 332 U.S. 194, 196 (1947))). The APA does not countenance post-hoc rationalizations no matter how ingenuous. *See Motor Vehicle Mfg's Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 50 1983) (a "short — and sufficient — answer to petitioners' submission is that the courts may not accept appellate counsel's post hoc rationalizations for agency action."). "Even if other statutory provisions could support the Commission's asserted authority, we cannot supply grounds to sustain the regulations that were not invoked by the Commission below[.]" *The Business Roundtable v. SEC*, 905 F.2d 406, 417 (D.C. Cir. 1990).

Thus, "[r]eview of agency action under § 706(2)'s 'arbitrary or capricious' standard is limited to the record before the agency at the time of its decision." *Geyen v. Marsh*, 775 F.2d 1303, 1309 (5th Cir. 1985).

Third, agencies are not permitted to change the basis of their rulemaking authority in the course of litigation, as was done here, without violating the notice and comment provisions of APA § 4, 5 U.S.C. § 553(b). DOL argues that it has historically relied on Wagner-Peyser when issuing H-2B rules and that Wagner-Peyser is listed in the Code of Federal Regulations as one of the legislative sources for the H-2B rules at part 655. First, what DOL may have listed in the past as the basis of its rulemaking is not relevant; what counts for APA purposes is what is listed in the two Federal Register notices, as required by APA § 4. Second, contrary to DOL's assertions, it has never relied on Wagner-Peyser for its H-2B rules, other than when referencing State Workforce Agencies. The substantive aspects of the H-2B Program Rules rest firmly on the INA, as acknowledged by DOL in its Federal Register issuances.

DOL also argues that it was not required to list Wagner-Peyser as the source of its rulemaking authority because reference to the INA, 8 U.S.C. § 1184(c)(1), was sufficiently precise and the small business plaintiffs ought to have known that DOL was really relying on Wagner-Peyser, even though, their Federal Register notices indicated to the contrary. Indeed, DOL actually faults the small business plaintiffs for not gleaning DOL's intent from the Wage Rule litigation. DOL fails to explain why, if Wagner-Peyser were such an obvious source of authority, DOL did not mention it during the Wage Rule rulemaking or the subsequent Wage Rule litigation or even in this litigation until after the preliminary injunction was entered. Since the INA and Wagner-Peyser do not cross reference each other, it is difficult to understand how reference to Title 8 would alert readers that what was really meant was a provision in Title 29 of the United States Code.

Finally, relying on *Shinseki v. Sanders*, 556 U.S. 396, 408-10 (2009), DOL argues that even though it may have violated APA § 4 by failing to indicate that Wagner-Peyser was its fundamental legal authority for the Program Rules, that violation cannot be challenged because the small business plaintiffs failed to demonstrate that they suffered injury as a result of DOL's omission. First, *Shinseki* was a harmless error case that did not involve rulemaking or notice and comment. Courts "must exercise great caution in applying the harmless error rule in the administrative rulemaking context." *Paulsen v. Daniels*, 413 F.3d 999, 1006 (9th Cir. 2005). This is so because "notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested parties notice and an opportunity to comment." *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979); *see also Sanders*, 556 U.S. at 411 (stating that in evaluating an agency's error for harmlessness, a reviewing court could consider "the error's likely effects on the perceived fairness, integrity, or public reputation of judicial proceedings.").

Second, if the injury is the issuance of a rule that is legally infirm, then the small business plaintiffs introduced uncontroverted evidence of imminent and irreparable injury. If DOL's theory is that the injury must spring from its failure to notify anyone that Wagner-Peyser was the real source of DOL's regulatory authority, then no person could ever challenge any procedurally defective rule. Under the APA's "record rule," one challenges a rule as issued based on the administrative record and harm is demonstrated based on that record. If the government is free to concoct a new basis for its rulemaking not present in the record and after the record has been closed, after suit has been filed, after evidence has been presented, and after an appealable order has issued, then judicial review would be no longer be possible. The APA was designed to promote openness and not to foster a "hide the ball" mentality.

e. DOL's Resort to Legislative History Is Inappropriate

Unable to point to any language in the INA or elsewhere, DOL resorts to mining the legislative history. That effort fails for two reasons. First, DOL has failed to identify any ambiguity in any statute, a precondition to using legislative history. And second, the legislative history is not helpful.

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 never identified any word, sentence, paragraph or pragmatic feature of the INA's rulemaking provisions that is ambiguous, despite numerous opportunities. They were on notice since receiving public comments to the proposed rule in 2011, that many commenters doubted DOL's legal authority to issue the rule, a fact acknowledged in the preamble to the final rule.[10] Defendants

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

have not identified any ambiguity because the statute plainly vests rulemaking authority in DHS, not DOL.

Defendants' central argument is that Congress legislates against the backdrop of history--that before the 1986 amendments to the INA,[11] 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 a 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 program that protects the interests of agricultural employers and workers alike." H.

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

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) (DOL 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 of rulemaking authority to DOL for 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. Instead, Congress granted 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 for the H-2B program and the Secretary has identified none. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. at 147-48 (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. EPA*, 268 F.3d at 1081. 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.

Finally, the Supreme Court foreclosed these types of arguments. In *Brown v. Gardner*, 513 U.S. 115, 120-21 (1994), the government contended, as it does here, that Congress ratified a regulation through subsequent reenactments and further that "Congress's legislative silence as to the VA's regulatory practice over the last 60 years serves as an implicit endorsement of its fault-based policy." The Court rejected both the ratification and acquiescence theories and this Court should do the same.

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

Finally, DOL suggests that its determination that it has H-2B rulemaking authority under the INA is entitled to *Chevron* deference. *See* DOL Brief at 31 and 32 n.3 (citing *Arnett v. C.I.R.*, 473 F.3d 790, 792 (7th Cir. 2007); *Coeur Alaska v. Southeast Alaska Conserv. Council*, 129 S. Ct. 2458, 2469 (2009); *United States v. Eurodif*, 129 S. Ct. 878, 888 (2009); *Puerto Rico Maritime Shipping Authority v. Valley Freight Sys*., 856 F.3d 546 (3d Cir. 1988)). DOL also suggests that there is a Circuit split as to whether an agency is entitled to *Chevron* deference to resolve whether it has rulemaking authority. Even if there were a Circuit split, which there is not, this Court need not wade into those waters: *Chevron* only comes into play if there is a statutory ambiguity that would necessarily require rulemaking. DOL has failed identify any ambiguity in the INA or elsewhere.

In addition, *Chevron* deference is only accorded to "an administrative agency's construction of a statute it administers." *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. at 132. The cases cited by DOL 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. At issue in *Maritime Shipping Authority* was whether the district court's refusal to invoke primary jurisdiction was proper and whether a finding by the I.C.C. that it had jurisdiction over a certain common carrier was subject to deference. Only the jurisdiction of the I.C.C. was at issue. The court noted although that had there been a dispute over which of two agencies had jurisdiction, the proper forum for resolving that dispute would have been the courts. *See id*. at 549, *citing Trailer Marine Transp. Corp. v. Federal Maritime Comm'n*, 602 F.2d 379, 381 (D.C. Cir. 1979) (jurisdictional dispute between ICC and FMC must be settled by federal court). 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. *See Dole v. United Steelworkers of Am.*, 494 U.S. at 42-43 (striking down the Office of Management and Budget's ("OMB") interpretation of the Paperwork Reduction Act as allowing it to review the Labor Department's "hazard communication standard" because although OMB had jurisdiction to review "information-gathering rules," the Act did not authorize OMB to review "disclosure rules"). *See also, e.g., United States v. Mead*, 533 U.S. at 226-27 (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. The District Court Did Not Abuse Its Discretion in Concluding that the Small Business Plaintiffs Would Be Irreparably and Imminently Injured by the Program Rules

Defendants argue that the district court abused its discretion in granting a preliminary injunction because the small business plaintiffs' allegations of harm were "speculative, indeterminate … and too distant to qualify as immediate." DOL Brief at 36. The district court found otherwise for good reason. In the proceedings before the district court, the small business plaintiffs presented declarations demonstrating the irreparable and imminent harm caused by DOL's Program Rules. Although in its answer, DOL denied that the Program Rules would have that effect, it introduced no evidence, let alone contrary evidence. The district court noted that there was no dispute that the Program Rules applied to the small business plaintiffs and that it would make their participation in the H-2B program more expensive. R.E. at Tab G (Order at 7).

Before this Court, DOL argues that the declarations do not support the district court's findings but even now, DOL does not dispute the declarants' assertion that the Program Rules will result in the loss of goodwill. Defendants do

not dispute that the loss of goodwill constitutes irreparable harm. *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.'"), quoting *Ferrero v. Associated Materials Inc*., 923 F.2d 1441, 1449 (11th Cir. 1991) (internal quotation marks omitted). *See also Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg Co., Inc.*, 550 F.2d 189, 196-97 (4th Cir. 1977) (holding that "[w]ord-of-mouth grumbling of customers," and harm to a company's general goodwill by its inability to fill outstanding and accumulating orders is irreparable harm). *See also Foundry Servs., Inc. v. Beneflux Corp*., 206 F.2d 214, 216 (2d Cir. 1952) (Hand, J., concurring) (irreparability of harm includes the "impossibility of ascertaining with any accuracy the extent of the loss": That has always been included in its meaning; and I cannot see how the plaintiff will ever be able to prove what sales the defendant's competition will make it lose, to say nothing of the indirect, though at times far-reaching, effects upon its good will . . . ."). The district court did not err in finding that the injury identified by the small business plaintiffs was sufficient to establish irreparable harm under these circumstances.

DOL also takes issue with the immediacy of the harm alleged, claiming that the harm identified by the small business plaintiffs is too distant because it will not occur until "later this year" or as a result of weather patterns in the future. The district court did not err in finding that the timing of the harm was sufficiently imminent because it affected their current bidding processes and would result in lost revenue, customers and good will. R.E. at Tab G (Order at 7). *Cf. McConnell v. Federal Election Comm'n*, 540 U.S. 93, 225-26 (2003) (holding that injury occurring more than five years in the future was too remote to satisfy the test of imminent harm).

Finally, DOL asks this Court to second-guess the district court's finding by arguing that the small business plaintiffs have misconstrued the significance of the three-quarter guarantee rule, the corresponding employment rule, and the potential for processing delays. DOL argues that under the three-quarter rule, employers do not have to pay for hours not worked when an employee voluntarily chooses not to work. DOL Brief at 38. DOL does not dispute that small business employers will have to pay for hours not worked under other circumstances. Similarly, DOL claims that the small business plaintiffs' concerns about corresponding employment are overblown. *Id.* at 39. But, DOL produced no evidence to support these allegations. And, DOL claims that the concerns expressed by the small business plaintiffs about the processing delays that will result from the Program Rules are exaggerated because under the H-2A program, DOL processes 85% of all H-2A applications within 35 days. That means that 15% of H-2A applications are not processed within 35 days. That is hardly comfort to the small businesses whose applications are in limbo.

Mostly though, DOL's argument rests on its own misunderstanding of the declarations. The small business plaintiffs operate under long-term contracts which require them to factor into their costs and hence prices today, the effects of inclement weather in the future. at Tab C, ¶ 12; Tab D, ¶ 12; Tab E, ¶ 3. DOL does not dispute this fact. Nor does DOL dispute that the rules relating to corresponding employment and the three-quarter guarantees, as well as the other aspects of the challenged Rules, would increase costs and harm goodwill.

The uncontroverted evidence established that the Program Rules would force some small business plaintiffs, such as Bayou, out of business and would dramatically decreased the value of other businesses, such as SMA, by increasing their costs, but not their revenues. The evidence showed, without contradiction, that the Program Rules would compel many to breach long-term contracts and

preclude others from competing for contracts that they otherwise would have sought, thereby eroding their customer base and associated goodwill. And, the evidence showed, without contradiction, that the effect of the Program Rules is immediate based on the way contracts are bid.

C. The District Court Did Not Abuse Its Discretion in Deciding that DOL Would Not Be Harmed by a Preliminary Injunction or that Any Harm Was Outweighed

DOL claims that it cannot accept the preliminary injunction issued by the district court because the injunction raises doubts about its underlying authority to administer the H-2B program. According to DOL, its use of the 2008 rules will meet (and already has met) resistance from employers. This "specter of a program hiatus" causes irreparable harm to DOL, according to defendants. DOL Brief at 34-35. This is the same argument that the Department pressed when it opposed the preliminary injunction, but it produced no authority for these assertions.

It still has not provided any valid basis for acceptance of its allegations. The cases relied on by DOL provide no support at all. DOL relies on two district court decisions, one unpublished and one published, granting injunctions to the government to prevent a federal inmate from placing false and retaliatory liens on the property of a federal judge and the attorneys and probation officer involved in the conviction. The courts found the defendants' liens were frivolous and that there was an imminent threat of irreparable injury to the United States by the abuse of the lien statutes. *United States v. Sec'y of Kansas*, slip op. at *2, 2001 WL 22472226 (D. Kan. 2003); *United States v. Poole*, 916 F. Supp. 861 (C.D. Ill. 1996). Both courts found it was in the public interest to protect public officers, or in the *Poole* case, court-appointed defense counsel, from such groundless and retaliatory harassment. *Sec'y of Kansas*, slip op. at *3; *Poole*, 916 F. Supp. at 863.

Here, DOL cannot and has not argued that the allegations in the small business plaintiffs' complaint are groundless, or false or retaliatory. Instead, DOL overstates the decisions it cites. According to DOL, any time an injunction is issued against the government, it causes irreparable harm. No court has reached such a conclusion.

DOL similarly overstates the effect of the preliminary injunction. According to DOL, the injunction "raises doubts about [its] underlying authority" and causes "huge difficulties in administering the H-2B program. DOL Brief at 33. DOL also suggests that an injunction somehow prevents it from enforcing the 2008 H-2B rules or preventing their abuse. However, there is nothing to indicate that the injunction would in anyway affect DOL's ability to ferret out illegal conduct or that suggests that the 2008 rule permits employers to violate the law with impunity.[12] Nor would an injunction preclude the government from issuing regulations for the H-2B program. Rather, it merely would ensure that such regulations are issued by the agency authorized by Congress.

The district court simply ordered that the *status quo* be maintained. Unless DOL has played no role in the H-2B program over the last three years, its argument is based on hyperbole rather than reality. However, even if such an eventuality were to occur, it would have nothing to do with the injunction; the injury, even if it were real, would derive from this Court's finding and not from this Court's remedy. Moreover, the potential injury DOL now claims is self-inflicted by DOL's decision to publish a notification that the 2012 H-2B Rule had been enjoined and that as a result, the 2008 H-2B Rule would continue to be in effect. DOL then stated:

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[12] DOL has abandoned the argument made before the district court that the injunction would engender confusion.

> However, please be aware that this preliminary injunction necessarily calls into doubt the underlying authority of the Department to fulfill its responsibilities under the Immigration and Nationality Act and DHS's regulations to issue the labor certifications that are a necessary predicate for the admission of H–2B workers.

77 Fed. Reg. 28,764, 28,765 (May 16, 2012). As a result of this Notice, an employer, not involved in this litigation, but involved in a non-judicial administrative enforcement action, raised "doubt" in a letter to DOL about defendants' statutory authority by quoting from the May 16, 2012 Federal Register Notice. A challenge to agency authority, whether in court or in an agency itself, cannot be viewed as harm to the agency. The alleged harm to defendants derives not from the remedy, *i.e.*, the injunction, but rather from public comments questioning the agency's rulemaking authority, its own comments in the Federal Register, and this Court's finding in this case that the small business plaintiffs were substantially likely to prevail on the merits. Any harm is self-inflicted and "self-inflicted wounds are not irreparable injury." *Second City Music, Inc. v. City of Chicago, Ill.*, 333 F.3d 846, 850 (7th Cir. 2003).

D. The District Court Did Not Abuse Its Discretion In Finding The Public Is Not Harmed By a Preliminary Injunction

DOL claims that the harm to the public mirrors its harm. DOL Brief at 41. The public interest, however, is always served when agencies are required to follow the law. *See In re: Medicare Reimbursement Lit.*, 414 F.3d 7, 12 (D.C. Cir. 2005) ("As the district court noted, moreover, even if the delay increased HCFA's administrative burden, the additional "burden [would] not outweigh the public's substantial interest in the Secretary's following the law."). The district court reasonably found that the public interest is served best by enjoining enforcement of potentially invalid rules for the limited purpose of preserving the status quo until

the court determined DOL's authority to issue the Program Rules. R.E. Tab G (Order at 7). Again, DOL does not argue that the district court abused its discretion in reaching this conclusion.

E. The District Court Did Not Abuse Its Discretion in Entering a Nation-wide Injunction Where the Small Business Plaintiffs and Their Members Do Business Nation-wide

Finally, DOL quibbles with the scope of the preliminary injunction. According to DOL, the district court erred in issuing a nationwide injunction rather than allowing DOL to adopt a policy of non-acquiescence and litigate its position in those circuits that have not yet ruled on the validity of its regulations. DOL Brief at 42, citing *Virginia Society for Human Life v. Federal Election Comm'n*, 263 F.3d 379, 393 (4th Cir. 2001), and *Holland v. Nat'l Mining Ass'n*, 309 F.3d 808, 815 (D.C. Cir. 2002).

Yet again, the case support relied on by DOL is inapposite. In *Virginia Society for Human Life*, there was only one plaintiff so the court found that an injunction covering only that plaintiff adequately protected it from the injury feared. The court recognized that other cases may present a different course. The court commented: "An injunction should be carefully addressed to the circumstances of the case. … Nationwide injunctions are appropriate if necessary to afford relief to the prevailing party." *Id.*, 263 F.3d at 393 (citations and parentheticals omitted). In *Holland*, a D.C. Circuit case, the plaintiff challenged the Commissioner of Social Security's application of an interpretation of the Coal Act issued by the Eleventh Circuit to coal operators that were not involved in the lawsuit in the Eleventh Circuit. The D.C. Circuit commented that the Eleventh Circuit judgment did not purport to bind the Commissioner with respect to coal operators who were not party to that litigation and therefore permitted a challenge

to the Commissioner's nationwide application of the Eleventh Circuit's interpretation.

DOL's reliance on this case to challenge the district court's decision here is misplaced. Here, the district court could hardly limit the preliminary injunction to the Northern District of Florida or to only the named small business plaintiffs because the small business plaintiffs and their members are located in Florida as well as Arkansas and every other state in the country. Moreover, small business plaintiffs contract with other services to provide temporary workers and they too are affected by the Program Rules. In similar circumstances, the Ninth Circuit concluded that a district court did not abuse its discretion when it ordered nationwide relief. *See Bresgal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1988) (affirming a nationwide injunction requiring DOL to enforce provisions of the Migrant and Seasonal Agricultural Workers Protection Act with respect to commercial forestry workers as a result of a lawsuit brought by the Northwest Forest Workers Association and individual migrant agricultural workers who worked in forestry on a seasonal basis). *See also Richmond Tenants Org. v. Kemp*, 956 F.2d 1300, 1302, 1309 (4th Cir. 1992) (affirming the entry of a nationwide injunction prohibiting the eviction of public housing tenants because the plaintiffs bring the lawsuit were tenants from across the country). Here, as in *Richmond Tenants Organization*, one of the plaintiffs, the Chamber, is a national association and other plaintiffs are located in states outside of the Eleventh Circuit. The district court did not err in concluding that a nationwide preliminary injunction was necessary to provide relief to the parties here. "In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow." *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973), citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U. S. 1, 15, 27 n. 10 (1971). The preliminary injunction should not be disturbed so that DOL can refuse to acquiesce

in the court's order to pursue litigation with the hope of convincing some other court to decide this case differently.

VII. CONCLUSION

For the foregoing reasons, the decision of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type volume limitation set forth in Fed. R. App. P. 32(a)(7)(B). This brief contains 13,944 words (exclusive of the cover, table of contents and table of authorities).

In addition, this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Time Roman, 14 pt.

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CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2012, a copy of the foregoing Appellees' Brief was served on the following party by both electronic service via the Eleventh Circuit's ECF system and by first-class mail, postage prepaid:

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