DOCKET NO. 15-10623-EE

United States Court of Appeals

for the

Eleventh Circuit

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

Plaintiffs/Appellees,

v.

THOMAS E. PEREZ, Secretary of Labor, *et al*.,

Defendants/Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
CASE NO: 3:12-cv-00183-MCR-CJK

(Hon. M. Casey Rodgers and Hon. Charles J. Khan, Jr.)

BRIEF OF APPELLEES

CHRISTOPHER J. SCHULTE
MONTE B. LAKE
CJ LAKE, LLC
525 Ninth Street, N.W., Suite 800
Washington, D.C. 20004
(202) 465-3000

MICHAEL R. SKLAIRE
LAURA FOOTE REIFF
GREENBERG TRAURIG, LLP
1750 Tysons Boulevard, Suite 1200
McLean, Virginia 22102
(703) 749-1300

STEVEN P. LEHOTSKY
U.S. CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20036

Counsel for Plaintiffs/Appellees

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, but would note that Plaintiff Professional Landcare Network has changed its name to the National Association of Landscape Professionals.

s/ Christopher J. Schulte
Christopher J. Schulte

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 and Eleventh Circuit precedent, including prior panel precedent in this case and, therefore, resolution of this appeal does not require oral argument.

s/ Christopher J. Schulte
Christopher J. Schulte

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases:

Rules, Statutes, and Other Authorities

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 of the Northern District of Florida granting a motion for summary judgment 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., National Association of Landscape Professionals (previously known as the Professional Landcare Network), and the Florida Forestry Association (collectively "small business plaintiffs"). The district court also denied the motion for summary judgment filed by the Department of Labor ("DOL"). The district court permanently enjoined the implementation of regulations issued by DOL affecting the use of temporary, non-agricultural, foreign workers in the United States. The district court had jurisdiction under 28 U.S.C. § 1331. The government stated that this Court has both subject matter and appellate jurisdiction.[1]

[1] After the government filed Appellants' Brief, DOL issued an Interim Final Rule, "jointly" with the Department of Homeland Security (DHS), that the agencies describe as "virtually identical" to the 2012 regulations permanently enjoined by the district court in this case. 80 Fed. Reg. 24,042, 24,043 (Apr. 29, 2015) (2015 IFR). DOL does not argue lack of jurisdiction based on mootness of this appeal; however, that possibility is suggested because the 2012 regulations are no longer in force and the 2015 "joint rule" IFR proposes to rest on both DHS and DOL authority. As stated below in

II. COUNTERSTATEMENT OF THE ISSUES

A. Did the district court abuse its discretion in following previous decisions by that court and by a prior panel of this Court, which specifically held that the plaintiffs-appellees were likely to succeed on their claim that the Department of Labor does not have rulemaking authority as to the H-2B visa program?

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

C. 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 and the injunction is directed at the Secretary of Labor?

III. COUNTERSTATEMENT OF THE CASE

The statutory and regulatory history of this case have not changed since they were briefed to this Court in 2012, when this case was previously argued on the same underlying legal issues. In the interest of completeness, and in response to certain characterizations of the statutory and regulatory history of the H-2B program in Appellants' Brief, a background for the regulations at issue and the history of this case are provided below.

---

note 4, Appellees contest that DOL has a co-equal role with DHS in issuing a joint rule.

A. Statutory and Regulatory Background

The Immigration and Nationality Act of 1952 ("INA") established a comprehensive framework for the regulation of immigration. *See* 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 nonagricultural workers. *See* Immigration Reform and Control Act of 1986 ("IRCA"), Pub. Law No. 99-603, § 301(a), 100 Stat. 3359, 3411 (codified at 8 U.S.C. § 1101(a)(15)(H)(ii)(a), (b)).

As in the earlier appeal to this Court, only the H-2B program is at issue in this case. That program is primarily used by small businesses, including those in landscaping, forestry, hospitality, and construction. *See* 76 Fed. Reg. 15,130, 15,161 (Mar. 18, 2011). The INA vested all rulemaking authority over the H-2 program with the Attorney General. *See* 8 U.S.C. § 1184(a). The question of importing non-immigrant aliens for temporary employment in the United States was to be "determined by the Attorney General, after consultation with appropriate agencies of Government." *See* 8 U.S.C. § 1184(c)(1). Congress later transferred most

of the Attorney General's authority to the Secretary of DHS. *See* Homeland Security Act of 2002, Pub. Law 107-296, § 402, 116 Stat. 2135, 2178 (Nov. 25, 2002).

An employer seeking to hire H-2B workers must petition to DHS, which requires the employer to first apply for and obtain a temporary labor certification from the Secretary of Labor. 8 C.F.R. § 214.2(h)(6)(iii)(A), (C). That 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).

Prior to 2008, DOL had never issued legislative rules governing the substance of an employer's application for workers under the H-2B program. The regulations referred to in Appellants' Statement of the Case at page 3 were Wagner-Peyser Act regulations governing how state unemployment compensation agencies were to be administered or regulations regarding agricultural workers. *See Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. 592, 595-96 (1982) (apple pickers); *Fla. Fruit & Vegetable Ass'n v. Brock*, 771 F.2d 1455, 1458-59 (11th Cir. 1985) (sugar cane harvesters). Plaintiffs-Appellees are not aware of (and DOL does not identify) any legislative rules

promulgated by DOL specific to non-agricultural workers before 2008. The only "rule" for non-agricultural workers from this early period was issued in 1968, and simply identified where an employer should send an application and how the Department would manage its internal review of that application, imposing nothing like the substantive obligations on employers found in the rule at issue in this case. *Compare* 33 Fed. Reg. 7570 (May 22, 1968), *with* 77 Fed. Reg. 10,038 (Feb. 21, 2012).

For more than half a century, from 1952 to 2008, the non-agricultural H-2 program operated successfully with no legislative rulemaking by DOL. The program was universally understood to be the province of the Attorney General and later the Secretary of DHS. The repeated references to DOL's "regulations" or "requirements" governing the H-2B program prior to 2008 overstate the Department's recognized role of providing "advice" to the Attorney General or Secretary of DHS. *See* 55 Fed. Reg. 2606, 2626 (Jan. 26, 1990) (INS H-2B Regulations). Both Congress, which did not grant express rulemaking authority to DOL, and DOL, who did not promulgate legislative rules, appear to have understood that this authority did not exist.

Regardless of the absence of any legislative rules, DOL was able to perform its consultative role with DHS (and before that with INS) by

virtue of its administration of the state employment service system that matches U.S. workers seeking employment with employers seeking to employ workers in job opportunities. 29 U.S.C. § 49k. The Wagner-Peyser Act, a New Deal statute codified in chapter 4B of title 29, only authorizes the Secretary of Labor to make such rules and regulations as may be necessary to carry out the provisions of that chapter, placing requirements on state unemployment offices, not on the employers seeking workers. That chapter does not authorize the Secretary to issue any rules implementing the INA, a completely separate statutory system addressing immigration and foreign workers. And although DOL's job-matching and wage data functions—made possible through the occupational wage data provided by DOL's Bureau of Labor Statistics—enable it to provide advice to DHS on labor certifications, neither of the statutes providing DOL authority to oversee the employment service or compile occupational wage data give it authority to issue regulations under the H-2B program.

Notwithstanding this lengthy history, DOL usurped DHS's authority by issuing extensive legislative rules in 2008, 2011, and 2012 that significantly expanded the scope of its authority and the H-2B wage and program requirements beyond the limited labor certification functions it had

provided in the past. In 2008, DOL and DHS simultaneously issued final rules that changed the filing requirements and structure for the H-2B program. *See* 73 Fed. Reg. 78,104 (Dec. 19, 2008) (2008 DHS H-2B Rule); *id.* at 78,020 (2008 DOL H-2B Rule). Those rules were challenged by a group of labor organizations, and the U.S. District Court for the Eastern District of Pennsylvania found that certain aspects of the rules, including the method for calculating wages, violated the Administrative Procedures Act ("APA"), 5 U.S.C. § 553, because they were issued without notice and comment. *Comite de Apoyo a los Trabajadores Agricola v. Solis*, Civil No. 09-240, 2010 U.S. Dist. LEXIS 90155 (E.D. Pa. Aug. 30, 2010). In January 2011, DOL issued a final wage rule that would have required significantly increased wages for H-2B workers. 76 Fed. Reg. 3452 (Jan. 19, 2011) ("2011 Wage Rule").

A group of small businesses and trade associations challenged the 2011 Wage Rule in the Northern District of Florida. *Bayou Lawn & Landscape Servs. v. Solis*, Civil No. 11-445-MCR-EMT ("Bayou I"). Based on a concern with DOL's lack of rulemaking authority and substantive concerns with the 2011 Wage Rule, Congress blocked that rule through a series of appropriations riders. *See* Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. 112-55, 125 Stat. 552, Div. B, Title V,

sec. 546 (Nov. 18, 2011); *see also* 80 Fed. Reg. 24,149 n.10 (listing 5 further appropriations bills containing language barring the 2011 Wage Rule).

Additional litigation ensued in the Eastern District of Pennsylvania with respect to the wage provisions in the 2008 DOL H-2B Rule (*CATA II*, 933 F. Supp. 2d 700 (E.D. Pa. 2013)), after which DOL and DHS jointly issued an interim final wage rule in 2013. 78 Fed. Reg. 24,047 (Apr. 24, 2013) ("2013 IFR"). That rule took the place of the 2011 Wage Rule, and the litigation over the 2011 Wage Rule (*Bayou I*) came to an end. Challenges to the 2013 IFR arose in *CATA III*, 774 F.3d 173 (3d Cir. 2014), and DOL issued a Final Rule based on the IFR on April 29, 2015. 80 Fed. Reg. 24,146.

While contesting legal challenges to the 2008 and 2011 wage provisions, DOL promulgated the rule at issue before this Court to replace the remaining, non-wage provisions of the 2008 DOL H-2B Rule, with respect to the application process and substantive requirements to be imposed on employers. 77 Fed. Reg. 10,038 (Feb. 21, 2012) ("2012 Program Rule"). This case was filed on April 16, 2012 to challenge the 2012 Program Rule, and on April 26, 2012, the district court entered a temporary restraining order and preliminary injunction against the rule taking effect. DOL appealed from that preliminary injunction, and this

Court affirmed the district court's decision. The district court granted Plaintiffs-Appellees' motion for summary judgment, denied the government's cross-motion for summary judgment, and vacated the 2012 Program Rule and entered a permanent injunction against the implementation of the Rule on December 18, 2014. App. at Tab 74.

The day after the district court issued its judgment, a new case was filed before the same judge by an individual seeking to vacate the 2008 DOL H-2B Rule based on the same ground that DOL lacked the statutory authority to promulgate legislative rules—the same basis on which the district court set aside the 2012 Program Rule. *See Perez v. Perez*, No. 14-cv-682. The district court entered a permanent injunction against the 2008 DOL H-2B Rule on March 4, 2015 in the *Perez* case.[2] 2015 U.S. Dist. LEXIS 27606 (Mar. 4, 2015).

On April 29, 2015, DOL and DHS "jointly" issued an interim final rule that they characterized as "virtually identical" to the 2012 Program Rule. 80 Fed. Reg. 24,042, 24,043 (Apr. 29, 2015) ("2015 IFR"). The 2015 IFR is currently in effect and sets the requirements for employers seeking to employ H-2B visa workers. That rule has also been

[2] The time for DOL to appeal from the *Perez* decision has passed without the Department challenging that decision.

challenged. *Bayou Lawn & Landscape Servs., et al. v. Johnson, et al.*, N.D. Florida Case No. 3:15-cv-249, Complaint filed June 1, 2015, Motion for Temporary Restraining Order and Preliminary Injunction denied June 5, 2015.

B. Procedural Posture

On April 16, 2012, the plaintiffs instituted a lawsuit and requested an injunction against the implementation of the 2012 Program Rule. In their complaint, the plaintiffs alleged that DOL lacks legislative rulemaking authority to issue the 2012 Program Rule (Count I), that its Regulatory Flexibility Act analysis is legally improper (Count II), and that the 2012 Program Rule is arbitrary and capricious (Count III). App. at Tab 1.

The district court held a hearing on April 24, 2012, and entered an order on April 26, 2012 preliminarily enjoining DOL from enforcing the 2012 Program Rule on the ground that DOL lacks legislative rulemaking authority. The district court concluded that the plaintiffs had standing to bring the case, and that it was substantially likely that they would succeed on the merits in light of DOL's acknowledgement that it lacked express authority to promulgate the 2012 Program Rule. Then, as now, DOL attempted to argue that it could infer authority from other provisions of the

INA and the Wagner-Peyser Act, and that Congress had acquiesced to DOL's authority to issue legislative rules.

DOL appealed from the preliminary injunction, and this Court issued a decision on April 1, 2013, affirming the district court's decision in full. 713 F.3d 1080. The presiding panel made a number of determinations that are relevant to the current appeal, including that:

> In 1986, when Congress split the agricultural workers and the non-agricultural workers into two separate programs, Congress granted the Department of Labor (the "DOL") limited rulemaking authority over the agricultural H-2A program, but declined to extend that authority to the non-agricultural program. The DOL does not dispute that it has no *express* authority to make rules for the H-2B program.

Id. at 1083 (emphasis in original).

Before this Court on the initial appeal, DOL raised the same "consultation" argument that it now advances in this appeal; specifically, that the statutory instruction in the INA that the DHS Secretary is to consult with the "appropriate agencies of the Government" in deciding whether to grant an employer's H-2B petition conveys to DOL "authority to issue legislative rules to structure its consultation with DHS." *Id.* at 1084. The Court rejected that interpretation of "consultation," stating:

> Under this theory of consultation, any federal employee with whom the Secretary of DHS deigns to consult would then have the "authority to issue legislative rules to structure [his]

> consultation with DHS." This is an absurd reading of the statute and we decline to adopt it.
>
> DHS was given overall responsibility, including rulemaking authority, for the H-2B program. DOL was designated a consultant. It cannot bootstrap that supporting role into a co-equal one.

Id. at 1084. The Court similarly dismissed DOL's reliance on the H-2B section of the INA as the source of rulemaking authority, noting that Congress had expressly granted DOL the authority to make legislative rules for the H-2A program but, in the very next section, withheld that power for the H-2B program. "The absence of a delegation of rulemaking authority to DOL over the non-agricultural H-2B program in the presence of a specific delegation to it of rulemaking authority over the agricultural worker H-2A program persuades us that Congress knew what it was doing when it crafted these sections." *Id.* at 1084 (citing *Dean v. United States*, 556 U.S. 568, 573 (2009)).

The Court also rejected DOL's argument based on the Wagner-Peyser Act, reasoning that the Act "is limited to the funding, operation and coordination of state unemployment offices" and "cannot be stretched to authorize DOL to issue rules to implement a visa program committed by law to the governance of another agency." *Id.* at 1085 n.5.

The Court further disposed of DOL's argument seeking to interpret congressional silence as conferring rulemaking authority, because: (1) an agency's power to promulgate legislative regulations is limited to the authority granted to it by Congress; (2) that authority was "specifically and expressly delegated by Congress to a different agency"; and (3) if congressional silence were a sufficient basis to build rulemaking authority, "'agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.'" *Id.* at 1084-1085 (quoting *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995)).

Upon remand, the parties cross-moved the district court for summary judgment. By order dated December 18, 2014, the district court granted the plaintiffs' motion for summary judgment and denied the government's motion for summary judgment, vacating and permanently enjoining the 2012 Program Rule. App. at Tab 74. In its opinion accompanying the order, the district court revisited the legislative and regulatory history of the H-2B program, noting that DOL continued to concede that it lacks express statutory authority to engage in legislative rulemaking under the H-2B program, and again rejected DOL's claims of "implied" authority based on its consultative role vis-à-vis DHS. The district court considered and

rejected DOL's Wagner-Peyser Act argument, as had this Court. The district court also rejected DOL's argument that it should follow the Third Circuit's decision in a separate challenge to DOL's H-2B rulemaking authority, *Louisiana Forestry Ass'n, Inc. v. Sec'y U.S. Dep't of Labor*, 745 F.3d 653 (3d Cir. 2014).[3]

The district court ordered that the 2012 Program Rule must be vacated as *ultra vires*, and DOL permanently enjoined from enforcing it, based on DOL's lack of authority to promulgate legislative rules for the H-2B program. DOL timely appealed from that order. After the appeal was noticed, indeed after Appellants' brief was filed, DOL and DHS "jointly" issued the 2015 IFR, which they describe as "virtually identical" to the 2012 Program Rule.[4]

IV. COUNTERSTATEMENT OF FACTS

The plaintiffs and their members include small family-owned businesses with low-profit margins, high-labor costs, and long-term contracts with their customers. These businesses depend on the H-2B

[3] The merits of the *Louisiana Forestry* case are discussed *infra* in response to DOL's argument that it requires a different outcome than the earlier appeal in this case.

[4] Based on this Court's April 2013 decision in this case, Appellees believe that DOL lacks a "co-equal" role with DHS to promulgate "joint" legislative rules, as DOL purports to do in the 2015 IFR, to govern the H-2B program. 713 F.3d at 1084. The validity of the 2015 IFR is not before the Court in this case.

program for seasonal workers. The 2012 Program Rule would have significantly increased costs to the plaintiffs and their members, and DOL has not denied this. In the announcement of the rule, DOL estimated that certain parts of the 2012 Program Rule, standing alone, would have cost the business community more than $100 million in the first year if it had taken effect. 77 Fed. Reg. 10,039. This estimate is too low, as DOL acknowledged that it had not conducted a full analysis of the Rule's impact on the regulated community. Throughout this case, DOL has never disputed nor presented evidence to contradict the statements by the plaintiffs that the 2012 Program Rule would have imposed unbearable costs and resulted in lost customers and good will, and even the destruction of their businesses.

V. STATEMENT OF THE STANDARD OF REVIEW

This Court reviews a district court's entry of a permanent injunction under a deferential abuse-of-discretion standard. *Simmons v. Conger*, 86 F.3d 1080, 1085 (11th Cir. 1996); *see also, Centel Cable Television Co. v. Thos. J. White Dev. Corp.*, 902 F.2d 905, 910 (11th Cir. 1990). "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)).

The Court reviews the entry of summary judgment *de novo*, and "must 'hold unlawful and set aside agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1288 (11th Cir. 2015) (*quoting* 5 U.S.C. § 706). The Court also conducts *de novo* review of claims that a regulation is *ultra vires*. *Iquique v. United States Attorney General*, 374 Fed. Appx. 901, 902 (11th Cir. 2010) (*per curiam*).

VI. SUMMARY OF ARGUMENT

The arguments concerning the statutory authority of the DOL to issue legislative rules for the H-2B program presented in this appeal have already been considered and decided in favor of Appellees by a prior panel of this Court. The district court entered a preliminary injunction against certain rules issued by the DOL in 2012, holding that the plaintiffs were likely to

succeed on their claim that the Department had no authority to issue the 2012 Program Rule. DOL appealed to this Court from that decision, and on April 1, 2013, this Court affirmed the district court's order, agreeing with the district court and rejecting each of the arguments that DOL advances again in this appeal. The district court subsequently entered a permanent injunction consistent with this Court's decision.

On its return to this Court, DOL argues that the prior panel's decision is not binding on this Court, and that the earlier decision was based on clear error. Neither argument is correct, and the district court's judgment should be affirmed.

After this Court's decision in 2013, the Third Circuit issued a decision in *Louisiana Forestry* concluding that DHS lawfully conditioned its granting of H-2B petitions on obtaining labor certifications from DOL, which was given limited rulemaking authority to carry out that charge. 745 F.3d 653, 675 (3d Cir. 2014). The *Louisiana Forestry* decision obviously is not binding on this Court, which has come to the opposite conclusion from the Third Circuit, and in any event that decision is not correct. Furthermore, the government's legal arguments rehash the arguments it previously made to this Court—and which this Court expressly rejected in its April 1, 2013 decision in this case.

DOL again misconstrues the pre-IRCA legislative and regulatory history to suggest that it has a long and recognized pattern of issuing legislative rules over the non-agricultural H-2 program. A closer inspection reveals otherwise and actually highlights how Congress, DHS—the agency designated by Congress to administer this program—and even DOL itself consistently understood which agency was to issue legislative rules for this program (INS and DHS) and which agency was not (DOL). There is no ambiguity in the history of the H-2B program.

Many of DOL's arguments rely on what DHS has done or not done, but unlike the cases that DOL relies upon in urging a different outcome than in the earlier appeal to this Court, DHS is not a party to this case. DOL argues that a wage regulation that it "jointly" issued with DHS concerning a different part of the H-2B program in April 2013, more than a year after the rule under review was issued, somehow reaches back in time and confers statutory authority upon DOL to have issued the 2012 Program Rule at that time. Such are the lengths to which DOL has gone to claim the authority to issue a rule that is has already replaced with a "virtually identical" rule that it issued "jointly" with the agency that has undisputed authority to issue such rules.

VII. ARGUMENT

A. *Louisiana Forestry* Does Not Affect this Court's Prior Ruling in this Case, and the Prior Panel Precedent Rule Requires Affirmance of the District Court's Decision.

DOL asserts that the Third Circuit's decision in *Louisiana Forestry* creates a split among the circuits and requires a different outcome than the previous appeal in this case. That argument fails for several reasons.

First, and most importantly, a decision by another circuit is not binding on this Court, while a decision by a prior panel of this Court is binding. *See Doe v. Drummond Co.*, 782 F.3d 576, 600 n. 34 (11th Cir. 2015) (*citing United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008) (prior panel precedent rule requires adherence to the holding of an earlier panel, absent abrogation by the Supreme Court in a decision clearly on point or reconsideration by this court sitting *en banc*)); *In re Lambrix*, 776 F.3d 789, 794 (11th Cir. 2015) (collecting cases); *see also Tippitt v. Reliance Standard Life Ins. Co.*, 457 F.3d 1227, 1234 (11th Cir. 2006) ("a prior panel precedent cannot be circumvented or ignored on the basis of arguments not made to or considered by the prior panel"); *Smith v. GTE Corp.*, 236 F.3d 1291, 1301-04 (11th Cir. 2001) (categorically rejecting an "overlooked reason" exception to the prior-panel-precedent rule); *Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1076 (11th Cir. 2000) (prior-panel-precedent rule

depends on neither "a subsequent panel's appraisal of the initial decision's correctness" nor "the skill of the attorneys or wisdom of the judges involved with the prior decision—upon what was argued or considered").[5] Therefore, even if the Third Circuit's *Louisiana Forestry* decision were on point with the current case, it would not control and the Court must follow its 2013 decision in this case.

DOL does not cite, nor do there exist, any decisions since this Court's April 1, 2013 decision from the Supreme Court or from an *en banc* panel of this Court that clearly abrogate this Court's decision. That alone requires that the Court affirm the district court's entry of a permanent injunction in this case, consistent with this Court's earlier ruling in the first appeal. *See Archer*, 531 F.3d at 1352.

1. *Louisiana Forestry* Involved Different Agencies, A Different Regulation, and Different Issues.

Furthermore, the *Louisiana Forestry* decision does not dictate the outcome of the instant case and does not create a "split" between the circuits

[5] The *Louisiana Forestry* court took the position that the prior panel's decision in this case involved only a preliminary injunction and not a final judgment, thus making that decision somehow less persuasive authority to the Third Circuit. DOL has not raised this argument and the case law does not support such a distinction to limit the controlling effect of the prior panel precedent rule.

as claimed by DOL.[6] In *Louisiana Forestry,* the Third Circuit concluded that DOL was allowed "to promulgate a narrow class of rules governing the temporary labor certification process," 745 F.3d at 674, but that case is not on point here for several key reasons. The rule at issue in that case was the 2011 Wage Rule and not the 2012 Program Rule. Moreover, DHS was a named defendant in *Louisiana Forestry*, along with DOL. Significantly, the decision in *Louisiana Forestry* did not address the issue argued by DOL in that case and the precise issue before this Court–whether DOL has express or implied authority to promulgate legislative rules under the H-2B program. Rather, the court based the decision on the narrower ground that the 2011 wage rule was issued pursuant to DHS' permissible conditioning of its granting of H-2B petitions on the advice of DOL based on the limited rulemaking authority DOL has to carry out that charge. The *Louisiana Forestry* court indicated that "we need not decide today whether, as the Departments contend and Appellants vigorously contest, the DOL has

[6] The other case cited by DOL in support of its claim of rulemaking authority, *G.H. Daniels III & Assocs. v. Solis*, 2013 WL 5216453 (D. Colo. Sept. 17, 2013), *appeal pending* No. 13-1479 (10th Cir.), relied solely on the district court's decision in *Louisiana Forestry*, was fully briefed in April 2014 but awaiting decision on appeal, and named as defendants the Secretaries of the Departments of Labor, Homeland Security, and State, as well as the Attorney General of the United States.

express or implied authority under the WPA or INA to promulgate rules concerning the H-2B program." *Id.* at 675.

In the current case, by contrast, DHS is not a party, the only issue under consideration is whether DOL has express or implied authority to issue legislative rules on its own, and the rules in question are not the internal DOL process of determining the prevailing wage in a particular occupation in a given location but, rather, legally binding obligations to be placed on employers by the Department. DOL responds that it is "irrelevant" that DHS is not a party to this case, although DOL attempts to rely on *Chevron* deference to DHS' interpretation of the INA as empowering DOL to promulgate legislative rules. DOL is not entitled to any *Chevron* deference, however, because that deference is only accorded to "an administrative agency's construction of a statute it administers." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). DOL cannot invoke DHS' administration of the H-2B program to arrogate to itself authority to promulgate legislative rules.

Furthermore, the authority DOL cites in support of its argument is inapposite, and involves disputes between private parties relying on agency interpretations of rules that were indisputably validly issued. For example, in *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007), an

employee sued her employer for unpaid wages under the FLSA, and the "regulation" being interpreted was an "interpretation" issued by DOL, even though DOL was not a party to the case. That case was a wage dispute between two private parties, and DOL would not be expected to be a party in such a case.

2. The DHS Regulations Now Relied Upon by DOL Do Not Constitute a New "Claim" that the Prior Panel Failed to Address.

DOL claims that "[b]ecause the *Bayou* panel did not address DHS's regulation as a basis for DOL's authority, as discussed in the subsequently decided *Louisiana Forestry* case, … the *Bayou* panel's decision does not operate as law of the case on this issue." Appellants' Brief at 17. DOL cites *Oladeinde v. City of Birmingham* for the proposition that the law-of-the-case doctrine does not prevent a subsequent panel from deciding the merits of a claim that a prior panel had not addressed. 230 F.3d 1275, 1289 (11th Cir. 2000).

That argument fails on its own, but DOL does not address the prior panel precedent rule of this Court, which is different from and more rigorous than the law-of-the-case doctrine. This is not a question of "law of the case" but, rather, of the prior panel precedent rule. Under that rule, even if an argument were not raised before the prior panel, that panel's decision is

binding. *See Tippitt*, *supra*, 457 F.3d at 1234; *Smith v. GTE Corp*., *supra*, 236 F.3d at 1301-04; *Cohen*, *supra*, 204 F.3d at 1076. Thus, "arguments not made to or considered by the prior panel" or an "overlooked reason" are irrelevant and the prior panel's decision controls until overturned by a Supreme Court decision clearly on point or an *en banc* decision of the Court. *See Archer*, *supra*, 531 F.3d at 1352; *Tippitt*, 457 F.3d at 1234; *Smith*, 236 F.3d at 1301-04; *Cohen*, *supra*, 204 F.3d at 1076.

Moreover, as a threshold matter, DOL failed to raise this issue in the 2013 summary judgment briefing to the district court, never arguing that the law-of-the-case doctrine did not apply in this case. Instead, DOL specifically stated as follows: "The Eleventh Circuit already held that DOL lacks rulemaking authority under the INA, *see Bayou*, 713 F.3d at 1080, which holding is now law of the case …. Nevertheless, Defendants continue to maintain that the Eleventh Circuit's decision is incorrect." Defendants' Motion for Summary Judgment and Supporting Memorandum of Law, at 15 n. 8, Doc. 60, filed September 3, 2013. Accordingly, the government's argument has been waived and should not be considered.

In addition, DOL offers only a partial explanation of the holding in *Oladeinde*. In that case, defendants raised the issue of qualified immunity for the first time on a subsequent appeal, at which point the case had been

pending for more than nine years. Here, the primary issue that DOL raised in the earlier appeal was the argument that it had implied authority to issue legislative rules by virtue of its consultation with DHS. The prior panel's decision did not address the specific regulations that DOL now points to (because DOL did not make that argument at the time), but unambiguously addressed the broader issue of the Department's lack of legislative rulemaking authority. *Oladeinde* does not apply here to undermine the prior panel's decision in this case, nor to give DOL another bite at the apple to offer additional arguments on top of those that failed before.

Even in *Oladeinde,* the Court noted that the law-of-the-case doctrine applies to "'those legal issues that were actually, or by necessary implication, decided in the former proceeding.'" *Id.* at 1288 (quoting *In re Justice Oaks II, Ltd.*, 898 F.2d 1544, 1549 n. 3 (11th Cir. 1996)). Whether DHS had validly conveyed its own legislative rulemaking authority to DOL through regulations—and it is questionable whether it could validly do so—was "by necessary implication" decided in the former proceeding, where the one and only issue was whether DOL had such authority.

Even taking that argument into consideration now, with respect to the two DHS regulations that DOL cites as providing it with legislative rulemaking authority, neither regulation does so. DOL is certainly not

entitled to any deference—either *Auer* deference or *Chevron* deference—as to its interpretation of another agency's rules. *See Fla. Nat'l Guard v. FLRA*, 699 F.2d 1082, 1085 (11th Cir. 1983) ("No great deference is due an agency interpretation of another agency's statute.") (quotation omitted); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (*Chevron* deference is only accorded to "an administrative agency's construction of a statute it administers."). And in any event, the prior panel of this Court did not address DHS' 2008 H-2B Rule, which DOL asserts that the earlier panel in this case overlooked, Appellants' Brief at 19, because DOL did not *make* that argument to this Court in the first place. *See* Appellants' Brief in Case No. 12-12462, filed July 9, 2012.

Even if DOL had not waived this argument, its attempt to bootstrap legislative rulemaking authority from a consultation requirement fails. DOL continues to argue that it must issue legislative rules that bind employers in order for the Department to execute is statutory obligation to "consult" with DHS. A rule – whether legislative or interpretative – creates binding law, on the regulated community or on the issuing agency, respectively. *See, e.g.*, *Nat'l Mining Ass'n v. Sec'y of Labor, Mine Safety & Health Admin.*, 589 F.3d 1368, 1371 (11th Cir. 2009) (one test of whether agency action is "legislative rule" vs. "statement of policy" is "whether the action has a

binding effect on private parties"); *University Health Servs. v. HHS*, 120 F.3d 1145, 1148-49 (11th Cir. 1997) (Secretary's interpretations of agency's own regulations bind agency). Consultation, by definition, cannot create binding law. DOL's position is that the only way that it can provide non-binding advice between two agencies of the government is by creating binding law that imposes obligations on the public—the employers regulated by the 2012 H-2B Program Rule.

The second DHS regulation that DOL cites as grounds for not following the earlier *Bayou* panel's decision is the 2013 wage IFR. There is an obvious difficulty, however, with DOL's argument: the earlier panel could not address that regulation because the decision of that panel was issued on April 1, 2013, while and the 2013 wage IFR was not issued until April 24, 2013, more than three weeks later. Since the regulation did not exist at the time, it is not surprising that the Court did not address it in its decision.

Assuming, *arguendo*, that this issue has not been waived, it nevertheless fails on its own merits. The 2013 wage IFR addressed the single issue of striking one phrase from the portion of the 2008 DOL H-2B Rule that dealt with wage levels. Since the IFR was issued (and made final on April 29, 2015), the wage calculation methodology has been addressed

separately from the "program" rules that set the application process that employers must follow and impose the substantive requirements on employers participating in the H-2B program. The question of determining the prevailing wage in a particular occupation in a given area is a subject for which INS and DHS have consistently solicited DOL's "advice with respect to the labor market," 78 Fed. Reg. at 24,050 (2013 IFR). The internal methodology for reviewing data collected by DOL's Bureau of Labor Statistics is fundamentally different than rules applying to the regulated public. Furthermore, the 2013 IFR was issued "jointly" by DOL and DHS, suggesting that even DOL understood that it could not issue rules without DHS' involvement. Finally, nothing in the 2013 IFR leads to the conclusion that DOL must have legislative rulemaking authority in order to provide the "advice" intended. This Court has already rejected as "absurd" DOL's claim that consultation implies rulemaking authority. 713 F.3d at 1084. Nothing that DOL has offered in the current appeal requires a different conclusion.

3. DOL Fails to Demonstrate that the Prior Panel's Decision was "Based on Clear Error."

DOL urges this Court to abandon its earlier decision in this case, citing the exception to the law-of-the-case doctrine where "the prior decision was clearly erroneous and would result in a manifest injustice." Appellants' Brief at 29, quoting *Oladeinde*, 230 F.3d at 1288. As stated above, the prior

panel precedent rule controls here, so the law-of-the-case doctrine is not at issue. In any event, DOL waived this argument by acknowledging to the district court that the decision of the prior panel of this Court was the law of the case, regardless whether DOL disagreed with the panel's conclusion. Finally, even if the Court were to find that the prior panel precedent rule did not apply and DOL had not waived the issue, DOL's argument fails.

The case upon which DOL relies is *Jenkins Brick Co. v. Bremer*, 321 F.3d 1366, 1370-71 (11th Cir. 2003). In *Jenkins*, the issue was whether one district court was required to follow an arguably erroneous decision of another district court in the same case, where venue had been transferred during the case but after the first court had entered the ruling in question. It was not one involving a prior controlling decision of a panel of this Court. The decision of the first district court in *Jenkins* was found to be contrary to the fundamental public policy of the State in which the second district was located. *Id.*

For several reasons, the *Jenkins* case has no bearing whatsoever on the current dispute. First, this Court is compelled to follow the decision of the prior panel not based on the law-of-the-case doctrine but on the prior panel precedent rule. The warrant for disregarding the prior decision in *Jenkins*—that one State's fundamental public policy will be jeopardized by a court in

another State—has no purchase here. The closest that DOL comes to asserting a "manifest injustice" is that the prior *Bayou* panel did not agree with the Department's arguments. Appellants' Brief at 30. Contrary to DOL's argument, the prior decision did not "turn[] on one canon of statutory construction that Congress knows how expressly to delegate rulemaking authority to an agency under the INA, but failed to delegate such authority to DOL in the H-2B program." *Id.* at 30. In fact, the Court also considered DOL's arguments of "implied" authority and "congressional silence," rejecting them both in turn. 713 F.3d at 1084-85. Just because DOL does not agree with the Court does not mean that the Court did not rule.

Finally, DOL asserts that the prior panel's decision "radically disrupts settled expectations regarding DOL's role in the H-2B program, which has been in place over the last forty years." Appellants' Brief at 31. DOL worries that the Court's decision

> would effectively remove DOL from meaningful participation in the H-2B program, leave DHS without the critical labor market advice that it requires under the statute, and adversely affect the domestic labor market to the extent it allowed employers to import foreign workers without an adequate and systematic assessment of the availability of United States workers for jobs that employers intend to fill with vulnerable and underpaid foreign labor.

Id. at 31. Setting aside the unsubstantiated and specious allegation that "employers intend to fill jobs with vulnerable and underpaid foreign labor,"

this argument misstates the history of the H-2B program and raises a straw-man threat. Consultation without regulation marked the *entire* early history of the non-agricultural H-2 and H-2B program, from 1952 until 2008.

It was only when DOL began to issue legislative rules to impose specific and binding requirements on H-2B employers in 2008, 2011 and again in 2012 that the current wave of litigation arose. The cause of the litigation was obvious—DOL's 2012 program rule consisted of 114 pages of Federal Register text that imposed many new, burdensome, costly and binding rules, such as "corresponding employment" and a three-quarters guarantee of wages that had never been a part of the H-2B program. *See* 77 Fed. Reg. 10,038-10,182 (Feb. 21, 2012). Moreover, many of the provisions in the 2012 Program Rule were tailored to agricultural employment and issued by DOL based on the H-2A program rulemaking authority given to it by Congress under IRCA in 1986, as discussed below. This is contrasted to DOL's 1968 "rule" which consisted of one column of one page in the Federal Register, wherein DOL basically directed employers seeking H-2 workers to file applications in the local state employment service offices after which a labor certification would be issued if employer efforts to recruit U.S. workers and wages offered were appropriate. 33 Fed. Reg. 7570 (May 22, 1968).

DOL's argument that returning to the 1952-2008 *status quo* is what threatens the program, rather than its own attempted usurpation of DHS' rulemaking authority, is without merit. DOL has failed to articulate why it would be unable to consult with DHS as to wages and the existence of qualified, willing, and able U.S. workers without being able to issue its own legislative rules, which is particularly strange since it did exactly that for more than 60 years. And that is in stark contrast to the chaos of the past six years created by DOL's attempt to implement the 2008, 2011, and 2012 H-2B rules.

B. Congress Has Not Expressly or Implicitly Authorized DOL to Issue Legislative Rules and Specifically Chose Not to Do So in IRCA.

The Department of Labor has never identified the express statutory source of its claim of authority to issue legislative rules over the H-2B program. In fact, it has repeatedly conceded that no such authority exists. "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 also Motion Picture Ass'n of Am. v. F.C.C.*, 309 F.3d 796, 801 (D.C. Cir. 2002) ("An agency may not promulgate even reasonable regulations that claim a force of law without delegated authority from Congress.").

Although DOL acknowledges that no express statutory authority from Congress exists, it seeks to cobble together arguments of "congressional acquiescence" or "implied authority." Those arguments did not prevail when DOL raised them in 2012 to this Court, and they should not prevail now.

1. DOL's Argument as to Congressional "Acquiescence" to the Department's Rulemaking Authority Was Rejected by this Court Before and Should be Rejected Again.

In the acknowledged absence of express statutory authority to issue legislative rules, DOL next turns to rehashed arguments claiming that it has "implied" power that Congress has "acquiesced" to by not explicitly directing DOL not to issue these rules. This argument has already been considered and rejected twice by the district court and another time by this Court. But a brief discussion of the argument's flaws follows below.

As it did in 2012 when briefing this issue to this Court, DOL again fails to identify any ambiguity in the INA or any other statute that requires the Court to undertake a review of legislative history. 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)).

The notion that agencies possess plenary power to promulgate legislative rules until Congress orders them to stop suggests, as this Court concluded, "a fundamental change" in the relationship between the executive and legislative branches and offers agencies "virtually limitless hegemony." 713 F.3d 1080, 1085 (quoting *Ethyl Corp.*, *supra*, 51 F.3d at 1060). This is especially troubling where, as here, Congress considered the question of which agency or agencies should have such rulemaking authority and expressly chose an agency other than the one claiming the authority.

As discussed above, DOL offers an incomplete portrait of the state of regulations in 1986 when Congress debated and passed IRCA, expressly authorizing DOL to issue rules for the H-2A program. *See, e.g.*, 8 U.S.C. §§ 1101(a)(15(H)(ii)(a), 1188(a)(2) and 1188(c)(4). Congress specifically considered and declined to do so for the H-2B program. *See* H.R. Rep. No. 99-682, Part 1, at 80 (1986) ("The bill makes no changes to the statutory language concerning non-agricultural H-2's."). Beyond DOL's decision to disregard Congress's intent as to rulemaking authority generally, this case is particularly egregious because the IRCA also included specific substantive requirements for H-2A employers that were not imposed on H-2B employers; yet these requirements are precisely what DOL is now attempting to impose by bureaucratic fiat in the 2012 Program Rule, including a three-quarters guarantee, a new definition of "corresponding employment," and significantly different recruiting requirements for employers, among many other new requirements.[7]

It is well settled that "where Congress knows how to say something but chooses not to, its silence is controlling." *CBS Inc. v. Prime Time 24*

[7] The H-2A rules are included in 20 C.F.R. Part 655 and 29 C.F.R. Part 501 (February 12, 2010). Compare "corresponding employment" at § 655.103 in the H-2A rules with the same concept in the 2012 H-2B regulations at § 655.5; and similarly "3/4 guarantee" at § 655.122(i) (H-2A) and § 655.20(f) (H-2B).

Joint Venture, *supra*, 245 F.3d at 1226 (11th Cir. 2001). Likewise, "'where 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.'" *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). These well-established interpretative principles call for the rejection of DOL's argument yet again.

2. DOL Misconstrues the Pre-IRCA Regulatory Landscape and Presumes Too Much From Congress' "Silence" on this Issue.

DOL claims that it issued multiple "regulations" prior to 1986 and, therefore, by leaving the non-agricultural H-2 program unchanged in IRCA, Congress understood that law to be an endorsement of DOL's then-existing rulemaking authority and a conscious decision not to revoke that existing authority. DOL fails to identify a binding legislative rule that issued before 1986 with respect to the H-2B program that Congress could have "endorsed" by way of IRCA in 1986. No such rules existed, and Congress' passage of IRCA cannot reasonably be interpreted as an endorsement *sub silentio* of DOL's authority to promulgate such rules.

At most, DOL can identify rules that do no more than direct where to file applications and interpret how the Department's internal deliberations

will proceed in order to provide "advice" to INS, like the 1968 "rule." Those are not of the same character as the legislative rule issued in 2012. But even if DOL could identify legislative rules, the argument goes too far in trying to infer meaning from congressional silence. As a rule, "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.").

"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 considered by Congress 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, through the IRCA, to the Secretary of Labor the limited rulemaking authority only for the H-2A program. Given the language and the legislative history, one cannot infer in the INA any general grant to the Secretary of Labor of any relevant rulemaking authority for the H-2B program. *See 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); *see also Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) (rejecting Attorney General's claim of "implicit" rulemaking power from Congress; "'Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.'") (quoting *Whitman v. American Trucking Assns, Inc.*, 531 U.S. 457, 468 (2001)).

In the seven years since DOL began issuing legislative rules as to the H-2B program, Congress has not been entirely silent on this issue. While it has not enacted new substantive legislation with respect to the H-2B program since IRCA, it has enacted multiple appropriations bills that have

blocked DOL rulemaking in this area.[8] And H.R. 4238, introduced in the 113th Congress, would have expressly eliminated DOL's consultative role in the H-2B program and reiterated that DHS alone has the power to issue any rules with respect to that program. Even if Congress had said nothing, that would not constitute an "implicit endorsement" of DOL's authority. *See Brown v. Gardner*, 513 U.S. 115, 120-121 (1994).

C. The District Court Appropriately Entered a Nationwide Injunction Against the 2012 Program Rule.

DOL's final argument is that, even if the district court correctly entered judgment in favor of the small business plaintiffs, "it still erred by issuing an order 'permanently enjoin[ing] [DOL] from enforcing [the 2012 rule]." Appellants' Brief at 48 (quoting App. at Tab 74, p.13). DOL asserts that the district court abused its discretion because it exceeds the court's authority under the APA and violates the principle that a court's decision "is binding only between the parties." *Id.* That argument does not apply to injunctions, especially those issued against the Secretary of Labor where the effect is inherently nationwide. *See, e.g.*, *Bresgal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1987).

[8] *See* Pub. Law 112-55, 125 Stat. 552, Div. B, Title V, sec. 546 (Nov. 18, 2011); Pub. Law 112-74, 125 Stat. 786 (Dec. 23, 2011); Pub. Law 112-175, 126 Stat. 1313 (Sept. 28, 2012); Pub. Law 113-6, 127 Stat. 198 (Mar. 26, 2013); Pub. Law 113-46, 127 Stat. 558 (Oct. 17, 2013); Pub. Law 113-73, 128 Stat. 3 (Jan. 15, 2014).

DOL does not suggest what the appropriate scope of the injunction should have been, particularly where, as here, the parties include multiple national organizations with members in all 50 States. Nor does DOL suggest how the injunction would be applied under their theory, with some employers' petitions for foreign workers considered under one set of criteria and others' considered under a different set of factors.

DOL's primary argument against a nationwide injunction is that it would "impede the usual process by which disputed legal issues are considered by different circuits before (if necessary) being resolved by the Supreme Court." Appellants' Brief at 51. DOL's actions after filing that brief have overtaken the Department's argument. Appellants' Brief was filed on April 13, 2015. On April 15, 2015, the stay of the district court's order in *Perez*, vacating the 2008 DOL H-2B Rule expired. On April 29, 2015, DHS and DOL issued the 2015 IFR. Thus, DOL itself has eliminated the possibility of future challenges in other circuits to the 2012 Program Rule, since it never took effect as such and has been replaced by the 2015 IFR. Based upon the decision in *Perez*, the decisions in this case, and the issuance of the 2013 IFR and 2015 IFR, there are currently no regulations issued solely by DOL in place for the H-2B program.

CONCLUSION

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

Respectfully submitted,

s/ Christopher J. Schulte
Christopher J. Schulte
Monte B. Lake
CJ LAKE, LLC
525 Ninth Street, NW, Suite 800
Washington, DC 20004
(202) 465-3000

Michael R. Sklaire
Laura Foote Reiff
GREENBERG TRAURIG LLP
1750 Tysons Blvd., Suite 1200
McLean, VA 22102
(703) 749-1300

Steven P. Lehotsky
U.S. CHAMBER LITIGATION CENTER, INC.
1615 H St., NW
Washington, DC 20036
(202) 463-5337

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses Times New Roman 14-point typeface and contains 9,109 words.

s/ Christopher J. Schulte
Christopher J. Schulte

CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2015, 7 copies of the brief were dispatched for delivery to the Clerk's Office of the United States Court of Appeals for the Eleventh Circuit by third-party commercial carrier for overnight delivery at the following address:

Douglas J. Mincher, Clerk of Court
U.S. Court of Appeals for the 11th Circuit
56 Forsyth St., N.W.
Atlanta, Georgia 30303

On this same date, a copy of the brief was served on the following by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to received electronic Notices of Electronic Filing:

Geoffrey Forney
Erez Reuveni
U.S. Department of Justice
Consumer Protection Branch
450 5TH ST NW
WASHINGTON, DC 20001

/s/ Catherine B. Simpson
Counsel Press, LLC
1011 East Main Street
Richmond, VA 23219
(804) 648-3664

Filing and service were performed by direction of counsel