No. 15-10623-EE

IN THE 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.

REPLY BRIEF OF DEFENDANTS- APPELLANTS

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General, Civil Division
United States Department of Justice

EREZ REUVENI
Senior Litigation Counsel
P.O. Box 878, Ben Franklin Station
Washington, DC 20044-0878
Telephone: (202) 307-4293

LEON FRESCO
Deputy Assistant Attorney General

Attorneys For Defendants-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FEDERAL STATUTES

FEDERAL REGULATIONS

FEDERAL REGISTER NOTICES

FEDERAL RULES OF APPELLATE PROCEDURE

INTRODUCTION

The Immigration and Nationality Act (INA) directs the Department of Homeland Security (DHS) to consult with "appropriate agencies of the government" when determining whether to admit temporary foreign workers to the United States in the H-2B nonagricultural workers classification. 8 U.S.C. § 1184(c)(1). DHS's regulations require a determination of "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." 8 C.F.R. § 214.2(h)(6)(iii)(A). For years, without challenge, DHS has reasonably made this determination by consulting with the Department of Labor (DOL) – the administrative body with expertise in matters concerning U.S. employment and a long and extensive history of making labor market determinations – regarding labor market conditions. DHS has also by regulation directed DOL to "separately establish [by] regulation at 20 CFR 655" procedures for administering DOL's portion of the temporary labor certification program, including determining the prevailing wage applicable to an application for temporary labor certification. *See id.* § 214.2(h)(6)(iii)(D) (2013); 77 Fed. Reg. at 10,148-64 (2008 DOL regulation).

As explained below, because the rule at issue in this case has been superseded by new rules as of April 29, 2015, this appeal is moot and the judgment

should be vacated. *See U.S. v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950).

If the appeal is justiciable, then DOL has authority, both express under DHS regulations, and implied through Congressional acquiescence, to order its consultation by rules of general applicability. First, the Court must defer to DHS's reasonable determination to condition the issuance of H-2B petitions on the receipt of approved temporary labor certifications from DOL, and to DHS's reasonable determination that DOL, in performing its consultative role, may issue regulations governing the process by which it reviews requests for temporary labor certifications. Second, Congress has acquiesced to this state of affairs for decades, permitting DOL to rely on general regulations in effectuating its advisory role to the Attorney General (now DHS) in the administration of the H-2B program for the protection of the domestic labor market, an underlying mandate of the INA. Accordingly, if there is jurisdiction here, it would be well established that DOL has authority under the INA to issue regulations in connection with DHS's permissible condition of the grant of H-2B petitions on the advice of DOL, pursuant to Congress's directive that DHS decide whether to grant H-2B petitions after consultation with appropriate agencies of the government.

ARGUMENT

I. The Dispute Concerning the 2012 Regulations Is Moot.

As Plaintiffs implicitly suggest, this case is moot because the 2012

regulations at issue here have been superseded and are no longer in effect. App. Br. at 1. On April 29, 2015, a new set of rules governing the H-2B program jointly issued by DOL and DHS superseded prior rules. *See* 80 Fed. Reg. 24,042, 24,043 (Apr. 29, 2015) (2015 Temporary Non-Agricultural Employment of H-2B Aliens in the United States; Interim Final Rule), 80 Fed. Reg. 24,146, 24,147 (2015 Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program; Final Rule). This lawsuit challenges the predecessor rule issued in 2012. *See* Appx. at 166-69. Plaintiffs sought and secured an injunction enjoining the Defendants "from implementing the Final Program Rules titled 'Temporary Non-Agricultural Employment of H-2B Aliens in the United States,' (77 Fed. Reg. 10,038 (Fed. 21, 2012))," a declaration invalidating the rule, and "an order vacating the [Rules] and permanently enjoining Defendants from implementing them." *Id.* at 187.

The underlying rule Plaintiffs challenge no longer exists, and the relief they seek, vacatur of the 2012 Rule, is no longer possible.[1] *See U.S. v. Georgia*, 778

[1] Although the Eleventh Circuit recognizes exceptions to the general mootness rule, *see Coral Springs St. Sys. v. City of Sunrise,* 371 F.3d 1320, 1342-43 (11th Cir. 2004), neither exception applies. Plaintiffs challenge DOL's independent rulemaking authority. Thus, the 2012 rule at issue does not share relevant "features" with respect to DOL's independent authority with the rules that now exist, which were issued jointly by DHS and DOL. 80 Fed. Reg. at 25,042, 25,146. Moreover, this case does not involve the voluntary cessation exception, *id.*, because there is no "evidence indicating that the government intends to return to its prior legislative scheme," *Georgia*, 778 F.3d at 1205 and that even if it did, it would affect the same parties. *See K.A. v. Fulton Cnty. Sch. Dist*., 741 F.3d 1195,

F.3d 1202, 1204 (11th Cir. 2015); *Sierra Club v. EPA*, 315 F.3d 1295, 1304 (11th Cir. 2002) ("case moot where later agency action superseded the agency action under judicial review"). [2]

Moreover, if an action is mooted while on appeal, this Court should, as it and the Supreme Court routinely do, vacate the underlying judgment, "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *See Munsingwear*, 340 U.S. at 40. Thus, as this Court routinely does, since this case is moot, the Court should vacate the decision below. *See, e.g.*, *Neidich v. Salas*, 783 F.3d 1215, 1216 (11th Cir. 2015); *Key Enterprises of Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1309-10 (11th Cir. 2000) ("When a case has become moot, we do not consider the merits presented, but instead *vacate the judgments* below with directions to dismiss even if a controversy did exist at the time the district court rendered its decision.") (emphasis added).

Although the case is moot and Article III jurisdiction is lacking, Defendants respond to Plaintiffs' arguments to demonstrate they are not entitled to an injunction if the case is not moot.

1200 (11th Cir. 2013). This absence is especially important where the Government asserts mootness. *See Coral*, 371 F.3d at 1328-29.

[2] This case being moot, DOL reserves the question of whether it has independent rule-making authority in the H-2B program for another day.

II. Corrected Statutory and Regulatory Background

The history of DOL's participation in the H-2B nonagricultural worker program is laid out in Defendant's opening brief. *See* App. Br. at 3-8. Plaintiffs incorrectly describe certain historical elements of the H-2 program. "The DOL has played a role in the administration of the nation's immigration laws in general, and the admission of foreign workers in particular, since the Department's inception in 1913." *La. Forestry Ass'n v. Sec'y United States DOL*, 745 F.3d 653, 661 (3d Cir. 2014). The legacy Immigration and Naturalization Service (INS), which performed the executive functions of the current DHS, has long relied on "a certification from the Secretary of Labor or his designated representative stating that qualified persons in the United States are not available and that the employment policies of the [DOL] have been observed . . . " in adjudicating H-2 petitions. Miscellaneous Amendments, 31 Fed. Reg. 4,446 (Mar. 16, 1966) (codified at 8 C.F.R. § 214.2); *see also* 18 Fed. Reg. 4925 (INS) (Aug. 19, 1953) (requiring employers to obtain certification from the United States Employment Service).

Contrary to Plaintiffs' suggestion, at least since 1968 DOL has structured its advice to the INS in the H-2 program through substantive regulations. For example, in 1968, DOL formally issued regulations of its own governing the temporary certification process through notice and comment rulemaking. *See* Certification of Temporary Foreign Labor for Industries Other than Agriculture or

Logging, 33 Fed. Reg. 7,570-71 (codified at 20 C.F.R. § 621). This 1968 rule notified the regulated community that DOL would issue temporary labor certifications if DOL determined that U.S. workers are unavailable and that the terms and conditions of employment would not adversely affect the wages and working conditions of U.S. workers similarly employed. 33 Fed. Reg. at 7571. In making such a determination, DOL would review the employer's recruitment efforts and the appropriateness of the wages and working conditions offered. 29 C.F.R. § 621.3(b) (1968). These are substantive standards that do more than establish the procedure by which applications would be reviewed and processed. In later years, DOL amended the regulations governing the H-2 certification process, again through notice and comment rulemaking. *See, e.g.*, Temporary Employment of Alien Agricultural and Logging Workers in the United States, Labor Certification Process, 43 Fed. Reg. 10,306 (Mar. 10, 1978).

DOL continued its role in the administration of both the H-2A and H-2B visa programs after Congress's passage of the Immigration Reform and Control Act of 1986 (IRCA), Pub. Law No. 99-603, § 301(a) (Nov. 6, 1986); H.R. Rep. No. 99-682 pt. 1 at 80. That law bifurcated the H-2 program, creating agricultural (H-2A) and non-agricultural (H-2B) visa programs. Although IRCA was silent as to DOL's rulemaking authority concerning the H-2B program, *see* IRCA § 301(a), the INS and then DHS continued to authorize DOL's involvement pursuant to their

own agency regulations. *See* 8 C.F.R. § 214.2(h).

Plaintiffs' suggestion that "[p]rior to 2008, DOL had never issued legislative rules governing" the H-2B program and that the program "operated successfully with no legislative rulemaking by DOL," is misleading. App. Br. at 4-6. During the first two decades of the H-2B program, in addition to the substantive standards issued through legislative rules noted above, DOL issued several General Administration Letters governing the substance of the employment certification of H-2B workers and the determination of prevailing wage rates. *See, e.g.*, Procedures for H-2B Temporary Labor Certification in Nonagricultural Occupations, Gen Admin. Ltr., No. 1-95 (DOL Nov. 10, 1994), *available at* http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=393; Interim Prevailing Wage Policy for Nonagricultural Immigration Programs, Gen Admin. Ltr., No. 4-95 (DOL May 18, 1995), *available at* http://wdr.doleta.gov/directives/attach/GAL4-95_attach.pdf.

In 1998, DOL issued a letter introducing the Occupational Employment Statistics (OES) survey as the source for determining the prevailing wage where other methods did not exist. *See* Prevailing Wage Policy for Nonagricultural Immigration Programs, Gen. Admin. Ltr., No. 2-98 (DOL Oct. 31, 1997), *available at* http://wdr.doleta.gov/directives/attach/GAL2-98_attach.pdf. And under the same letter, DOL began to consider "skill level" in determining the prevailing wage, classifying H-2B employment opportunities as either "entry

level" or "experienced" and considering the skill level of an occupation as one of several factors affecting prevailing wage rates for that job. *See* Gen. Admin. Ltr.[3] 4-95, at 5-6. In 2005, DOL issued a new prevailing wage policy, and expanded the number of skill levels from two to four when setting the wage based on the OES. Prevailing Wage Determination Policy Guidance (DOL, May 9 2005), *available at* http://www.foreignlaborcert.doleta.gov/pdf/policy_nonag_progs.pdf.

These rules clearly set substantive standards that imposed obligations on employers seeking temporary labor certifications and restricted the discretion of agency officials by establishing standards governing review of employers' applications for labor certifications. Had the rules been issued today, they would be subject to the APA's procedural requirements for rulemaking. *See, e.g.*, *Mendoza v. Perez*, 754 F.3d 1002, 1021-24 (D.C. Cir. 2014); *Comite de Apoyo a los Trabajadores Agricolas v. Solis*, 933 F. Supp. 2d 700, 715 (E.D. Pa. 2013).

Thus, contrary to Plaintiffs' argument, DOL issued substantive standards concerning the H-2 program both through regulation and subregulatory policy for decades prior to 2008. *See e.g.*, *Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. 592, 595-96 (1982); *Fla. Fruit & Vegetable Ass'n v Brock*, 771 F.2d 1455, 1458-

[3] In 2008, DOL promulgated a regulation governing the labor certification process through notice and comment rulemaking, codifying several aspects of guidance in these letters. *See* Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture (H-2B Workers), 73 Fed. Reg. 78,020 (Dec. 19, 2008) (codified at 20 C.F.R. §§655-56).

59 (11th Cir. 1985); 43 Fed. Reg. at 10,306 (1978 Rule); 33 Fed. Reg. at 7571 (1968 Rule); General Administration Letters, *supra*, 8-9.

In the years since IRCA, INS and DHS both continued to authorize DOL's involvement pursuant to their own agency regulations. *See, e.g.*, 8 C.F.R. § 214.2(h). Most recently in 2008, DHS acknowledged it lacked the expertise needed to make labor market determinations, and indicated that it would continue to rely on DOL to determine whether importing H-2B workers would adversely affect wages and working conditions for American workers. *See* 73 Fed. Red. at 78,110. DHS stated in a 2008 rulemaking that "this rule eliminated DHS's current practice of adjudicating H-2B petitions where the Secretary of Labor . . . has not granted a temporary labor certification." *Id.* at 78,104. Elsewhere, DHS stated that the rule "[p]reclude[s] DHS from approving H-2B petitions filed without an approved labor certification issued by DOL." *Id.* at 78,107. These statements mirror the plain language of DHS's regulation requiring employers to file approved temporary labor certifications as a precondition for DHS adjudicating an H-2B petition. *Id.* at 78,129; 8 C.F.R. §§ 214.2(h)(6)(iii)(A), (C), (iv)(A). The requirement was again confirmed in 2013 in a joint rule with DOL: "an employer may not file a petition with [DHS] for an H-2B temporary worker unless it has received a labor certification from the Secretary of Labor." 78 Fed. Reg. at 24,049.

Finally, DHS has made it clear through a regulation that "[t]he Secretary of

Labor shall separately establish for the temporary labor program under his or her jurisdiction, by regulation at 20 CFR 655, procedures for administering that temporary labor program under his or her jurisdiction, and shall determine the prevailing wage applicable to an application for temporary labor certification for that temporary labor program in accordance with the Secretary of Labor's regulation at 20 CFR 655.10." 8 C.F.R. § 214.2(h)(6)(iii)(D); *accord* 78 Fed. Reg. at 24,050 (similar).

In short, the INS and now DHS have authorized DOL's involvement pursuant to their own agency regulations in the H-2B program and have consulted with and received advice from DOL on matters within DOL's specific labor market expertise.

III. Standard of Review

Plaintiffs incorrectly suggest an "abuse of discretion" standard governs this appeal. Summary judgment decisions are reviewed *de novo*, and the court owes no deference to the lower court's legal reasoning. *See Johnson v. Governor of Fla.*, 405 F.3d 1214, 1217 (11th Cir. 2005). The court "view[s] the record and draw[s] all reasonable inferences in the light most favorable to the non-moving party," here, Defendants. *Id.* While the merits and scope of a decision to issue an injunction are reviewed for an "abuse of discretion," the "underlying legal conclusions" supporting the injunction are reviewed *de novo*. *Garrido v. Dudek*,

731 F.3d 1152, 1158 (11th Cir. 2013).

IV. *Bayou* Does Not Control the Outcome of this Appeal

If this case is not moot, the Court should reverse the decision below. Plaintiffs argue this Court's prior *Bayou* decision: (1) is binding precedent, and (2) that the "law of the case" doctrine forecloses Defendants' arguments. App. Br. at 19-32. Both arguments miss the mark because the prior panel does not address the issues raised in this appeal and exceptions to the law of the case doctrine apply.

A. The Prior Precedent Rule Does Not Control This Case

First, the prior precedent rule does not control this case. Although the prior precedent rule applies when a prior panel in a *different* case issues a clear principle of law, it does not apply where, as here, a prior panel in the *same* case issues a decision at the preliminary injunction posture.[4] *See, e.g.*, *This That & the Other Gift & Tobacco, Inc. v. Cobb County,* 439 F.3d 1275, 1285 (11th Cir. 2005) (explaining law of the case doctrine governs whether prior panel decision in same case is binding); *Roe v. State of Alabama*, 68 F.3d 404, 408 (11th Cir. 1995) (same).

[4] None of the cases Plaintiffs cite arise in the context of whether a prior panel decision at the preliminary injunction stage binds a subsequent panel in the *same* case, *see* App. Br. at 19-20, and the prior precedent rule therefore does not apply. Even assuming it does, the rule does not foreclose the making of *different* legal arguments in a subsequent case, particularly where the prior panel did not issue a holding on the issue or where its holding is premised on case law undermined by the Supreme Court. *See U.S. v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008).

The *Bayou* panel did not address the issues raised in this appeal. The prior panel addressed a narrow issue: does DOL have independent statutory authority to "engage[] in legislative rulemaking for the H-2B program." 713 F.3d at 1083-85.

The panel first rejected DOL's reliance on 8 U.S.C. § 1184(c)(1) to argue that given its consultative role, by implication it had "authority to issue legislative rules to structure its consultation with DHS." 2012 Br. at 22. The panel construed this as an argument that DOL "is empowered" "to engage in rulemaking, even without DHS," and rejected it. *Bayou*, 713 F.3d at 1084.

The panel then rejected DOL's argument that it had authority to issue legislative rules in light of 8 U.S.C. § 1101(a)(15)(H)(ii)(b), applying the *expressio unius* canon and concluding that "[t]he 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.*

Finally, the panel rejected DOL's argument that the "text, structure and object" of the INA evinced a congressional intent that "DOL should exercise rulemaking authority over the H-2B program" because Congress had "expressly delegated that authority to a different agency," and "congressional silence" did not provide implied rulemaking authority. *Id.* at 1084-85.

These limited holdings demonstrate why the prior precedent rule does not apply: the prior panel did not address the issues this appeal raises. DOL is not now making arguments explicitly or implicitly rejected by *Bayou* or that could have been raised before the panel at the preliminary injunction stage.[5] DOL argues that the 2012 rule resulted from a valid exercise of rulemaking authority premised on "DHS's reasonable interpretation of the term 'consultation' under 8 U.S.C. § 1184(c)(1) as encompassing such rulemaking authority as needed for DOL to carry out its consultative role by issuing temporary labor certifications." Opening Br. at 26. Unlike in *Bayou*, DOL argues that, given DHS's engaging DOL in a consultative role, DOL retains limited authority to issue regulations to assist it in its advisory role, so that DOL may deploy rules of general applicability to guide its consultative role, rather than engage in ad hoc adjudication in thousands of H-2B

[5] Plaintiffs' suggestion that Defendants could have, but did not, raise the arguments presented here to the prior panel misses the mark. *See* App. Br. at 23-24. The argument Defendants raise here – that DHS's interpretation of "consultation" under 8 U.S.C. § 1184(c)(1) and its issuance of 8 C.F.R. § 214.2(h)(6)(iii), give DOL authority to issue limited rules governing the certification process, *see infra* at 21-31 – could not have been raised before the prior panel. That panel reviewed the district court's preliminary injunction addressing DOL's arguments that (a) its independent legislative rulemaking "authority can be inferred from three provisions of the INA; (b) DHS delegated categorical rulemaking authority to DOL; and (c) Congress has acquiesced in its rule making" – not the arguments raised here. *See* ECF 24, *Bayou Lawn & Landscape v. Solis*, 12-cv-00183-MCR-CJK, at 5. Moreover, the prior panel could not have addressed DOL's argument that DHS regulations and subsequent case law – for example, 73 Fed. Reg. at 78,110 and *La. Forestry*, 745 F.3d at 674 – support its argument because the district court did not address those issues in its injunction decision. ECF 24 at 1-8.

cases. Accordingly, the prior precedent rule does not foreclose this appeal. *See Roe*, 68 F.3d at 408.

B. The Law of the Case Doctrine Does Not Foreclose Review

Perhaps acknowledging that the prior precedent rule does not apply, Plaintiffs also rely on the law of the case doctrine. Plaintiffs concede the law of the case doctrine is less "rigorous" than the prior precedent rule they premise much of their briefing on. App. Br. at 23.

"Under the law-of-the-case doctrine, the resolution of an issue decided at one stage of a case is binding at later stages of the same case *Schiavo ex rel. Schindler v. Schiavo,* 403 F.3d 1289, 1291 (11th Cir. 2005). The doctrine "does not limit the court's power to revisit previously decided issues when, as here, "controlling authority has been rendered that is contrary to the previous decision" or "the earlier ruling was clearly erroneous and would work a manifest injustice if implemented." *Id.* Nor does it preclude deciding issues not addressed in a prior opinion. *See, e.g.*, *Schiavo,* 403 F.3d at 1292; *Oladeinde v. City of Birmingham*, 230 F.3d 1275, 1289 (11th Cir. 2000).

Because *Bayou* did not address DHS's regulations instructing DOL to advise DHS through consultation as a basis for DOL's authority in this case, *Bayou* cannot operate as law of the case. App. Br. at 17. The panel did not address whether and to what extent DHS may consult with DOL in the H-2B program, and

whether courts must defer to DHS's regulations providing for DOL to issue regulations of general applicability concerning the labor certifications it provides as part of that process.[6] Indeed, such DHS regulations were issued *following* the prior panel's ruling. Because the prior panel never considered DHS's construction of the statute it administers, the Court should defer to DHS's later-in-time construction. *Brand X.*, 545 U.S. at 983 ("the agency may, consistent with the court's [prior] holding, choose a different construction, since the agency remains the authoritative interpreter").

Based on the arguments Defendant makes in *this* appeal which could not have been decided by the prior panel, DOL has limited authority under the INA to issue regulations in connection with DHS's permissible conditioning of the grant of H-2B petitions on the advice of DOL. Even assuming the law of the case doctrine applies here, as explained below, the clear error exception would permit review because: (1) the prior panel's exclusive reliance on the negative implication canon to the exclusion of other indicators of statutory intent was clear error, (2) the Third Circuit, the only court of appeals to squarely address the question presented here – whether DHS's promulgation of 8 C.F.R. § 214.2(h)(6)(iii)(A) & (D) serves to demonstrate its intention that DOL participate in the H-2B program and that

[6] Even assuming the argument had been squarely addressed by the prior panel, a decision rejecting the Government's position would be clear error, and thus not subject to the law of the case doctrine. *See* App. Br. at 30-43 and *infra*.

DOL issue limited legislative rules governing its consultative role under the section 1184(c) – has concluded that DHS so intended and that DOL has such authority, *see La. Forestry*, 745 F.3d at 671-75, and (3) the panel's holding concerning congressional acquiescence was clear error.

V. The Prior Panel's Reliance on the Negative Implication Canon Was Clear Error

The *Bayou* panel's exclusive reliance on the *expressio unius* canon conflicts with the Supreme Court's recent clarification of the proper use of negative implication when interpreting statutes. *See Marx v. Gen. Rev. Corp.*, 133 S. Ct. 1166, 1175 (2013). In *Marx*, the Supreme Court explained that the force of the *expressio unius* canon "depends on context." 133 S. Ct. at 1175. Critically, the Court indicated that it had long held that the canon does not apply "unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it," and "that the canon can be overcome by contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion." *Id.*

This holding post-dates *Bayou* and undermines reliance on the negative implication canon, because when Congress created the H-2B program it was well aware of DOL's longtime use of rulemaking in the H-2 nonagricultural context. *See* H.R. Rep. No. 99-682, Part 1, at 80 ("The bill makes no changes to the statutory language concerning non-agricultural H 2's"); 33 Fed. Reg. at 7571. The relevant legislative history and Congress's longtime acquiescence in DOL's use of

rulemaking in the H-2B program show that Congress did not mean to "say no" to DOL's use of general rules in performing its consultative role in the H-2B program. *See Marx*, 133 S. Ct. at 1175-76. Rather, the legislative concern under IRCA was to revise the H-2 *agricultural* temporary worker program, but Congress left the H-2 non-agricultural temporary worker program intact, *see* H.R. Rep. No. 99-682, Part 1, at 80, which included DOL's well-known regulations governing the non-agricultural certification process, *see La. Forestry*, 889 F. Supp. 2d at 729 & n.15; *accord Catawba County v. EPA*, 571 F.3d 20, 36 (D.C. Cir. 2009) ("that Congress spoke in one place but remained silent in another, as it did here, rarely if ever suffices" to show intent to proscribe).[7]

VI. DOL Has Authority to Issue Rules of General Applicability to Govern its Consultative Role With DHS in Regulating the H-2B Program

[7] The panel also erred in finding it "absurd" to conclude that DHS may consult with whomever it chooses in managing the H-2B program. 713 F.3d at 1084. That is precisely what the INA provides. 8 U.S.C. § 1103(a)(6) (conferring upon the Secretary broad discretion "to confer or impose upon any employee of the United States, with the consent of the head of the Department or other independent establishment under whose jurisdiction the employee is serving, any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon officers or employees of the Service."); *accord* 8 U.S.C. § 1184(c). The panel's exclusive reliance on *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), for the proposition that the INA must expressly grant DOL rulemaking authority was also error. 713 F.3d at 1084. *Bowen* articulates a narrower proposition: that the power to promulgate *retroactive* rules must normally be conveyed by Congress expressly. 488 U.S. at 208; *see National Broadcasting Co. v. Satellite Broadcast Networks*, 940 F.2d 1467, 1469 (11th Cir. 1991) (distinguishing express authority requirement for *retroactive* and *prospective* application of an agency policy statement).

DOL has authority to promulgate rules through its consultative role as established by DHS regulation concerning the temporary labor certification process in the H-2B program. The authority derives from 8 C.F.R. § 214.2(h)(6)(iii), which DHS promulgated pursuant to its authority to administer the nation's immigration laws generally, and the H-2B program specifically. *See* 6 U.S.C. §§ 202, 271(b); 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1103(a)(3) & (6), 1184(a) & (c). This (1) express authority and (2) the text, structure, and objectives of the INA, and Congress's acquiescence over decades in DOL's participation in the H-2B program despite numerous opportunities to legislate otherwise, make clear that DOL has authority to separately issue regulations to govern its consultative role. To the extent the prior panel addressed the second issue, its conclusion was clear error and may be revisited.

A. DHS's decision to interpret "consultation" under section 1184(c) to include DOL's rules for the issuance of temporary labor certifications is entitled to deference

The INA explicitly grants DHS the authority to grant nonimmigrant H visas to foreign workers, but only "after consultation with appropriate agencies of the Government, upon petition of the importing employer." 8 U.S.C. § 1184(c)(1); *see La. Forestry*, 745 F.3d at 670. The INA does not explicitly define the meaning or scope of this "consultation," but as noted, INS and DHS have historically relied on DOL labor market determinations under DOL's regulations governing the H-2

non-agricultural worker program. *See* 73 Fed. Reg. at 78,110; 55 Fed Reg. at 2626. Moreover, the statute is silent as to "what constitutes permissible consultation" when DHS asks DOL for advice, *see La. Forestry*, 745 F.3d at 670. The use of the phrase "consultation" without further definition by Congress, creates a classic ambiguity, which functions as an express grant of authority and discretion to DHS to establish consultative processes through regulation or otherwise as DHS requires. *See Brand X*, 545 U.S. at 997. That ambiguity readily satisfies step one of the *Chevron* analysis. *See id.*; *La. Forestry*, 745 F.3d at 671.

DHS's resolution of that ambiguity satisfies step two of the *Chevron* analysis. *Id.* at 986; *La. Forestry*, 745 F.3d at 671-75. DHS exercised that discretion by promulgating 8 C.F.R. § 214.2(h)(6)(iii)(A), which specifically provides that "[p]rior to filing a petition" with DHS "to classify an alien as an H-2B worker," the petitioner "shall apply for a temporary labor certification" with DOL, and such certification "shall be advice to the director on whether or not United States workers capable of performing the temporary services or labor are available and whether or not the alien's employment will adversely affect the wages and working conditions of similarly employed United States workers." And DHS further exercised that discretion by establishing that "[t]he Secretary of Labor shall separately establish for the temporary labor program under his or her jurisdiction, by regulation at 20 CFR 655, procedures for administering that

temporary labor program under his or her jurisdiction, and shall determine the prevailing wage applicable to an application for temporary labor certification for that temporary labor program in accordance with the Secretary of Labor's regulation at 20 CFR 655.10." *See id.* § 214.2(h)(6)(iii)(D); *accord* 78 Fed. Reg. at 24,050 (stating that the aforementioned provision "will underscore that the consultative process has occurred and that DHS adopts DOL's prevailing wage methodology as part of the advice required for the administration of temporary labor certifications").

The question before this court is whether DHS's promulgation of these regulations demonstrates its intention that DOL participate in the H-2B program thus granting DOL limited authority to make legislative rules governing its consultative role. The Third Circuit, the only federal court of appeals to squarely address the question, answered in the affirmative, and this Court should do the same. *See La. Forestry*, 745 F.3d at 671-75.

The Third Circuit concluded that DOL's regulations issued pursuant to its consultative role with DHS would constitute a subdelegation of statutory authority (and hence be potentially unlawful) only if DHS had in fact "subdelegat[ed]" its Congressionally-mandated authority over the H-2B program by either "shift[ing] to another party almost the entire determination of whether a specific statutory requirement . . . has been satisfied," or by "abdicat[ing] its final reviewing

authority." *Id.* at 672.[8]

Here, the full authority Congress delegated to DHS in the INA bears no resemblance to the advisory role DHS has provided DOL through 8 C.F.R. § 214.2. *Id.* As noted, Congress has charged DHS with administering the INA and "determin[ing] . . . [t]he question of importing any alien as a nonimmigrant under [the H2-B program] . . . after consultation with appropriate agencies of the Government, upon petition of the importing employer," if "unemployed persons capable of performing such service or labor cannot be found in this country." 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1184(a), (c)(1). DHS regulations by contrast grant DOL a limited role by merely requiring employers seeking to admit workers under the H-2B program to first "apply for a temporary labor certification with the Secretary of Labor," which "certification shall be advice to the director [of the DHS] 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." 8 C.F.R. § 214.2(h)(6)(iii)(A). Although DHS's decision to grant an H-2B petition depends, in part, on whether or not DOL issues

[8] The Third Circuit held that such a subdelegation is only unlawful "absent a clear statement from Congress authorizing such." *Id.* at 671. Defendants submit in the alternative that even if DHS had subdelegated its statutory authority (which it has not), such subdelegation would be fully consistent with DHS's broad authorities under 8 U.S.C. §§ 1103(a)(3) & (6), 1184(a) & (c).

a temporary labor certification to the petitioner-employer, it is DHS, not DOL, that ultimately determines whether *all* the criteria for an H-2B visa are satisfied. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1184(c)(1).[9]

8 C.F.R. § 214.2 thus does not effect a delegation of authority, but instead simply provides for a type of "legitimate outside party input into agency decision-making processes." *La. Forestry*, 745 F.3d at 672. In such situations, legitimate input includes "establishing a reasonable condition for granting federal approval" and "advice giving." *Id*. 8 C.F.R. § 214.2 readily satisfies the first of these criteria. *Id.* at 672-73. "By adopting a rule that requires H-2B employers to first obtain a temporary labor certification from the DOL on the questions of whether there are U.S. workers capable of performing the job in question and the impact of the aliens' employment on U.S. workers, and giving the DOL discretion to issue a limited set of rules governing the certification process, the DHS was exercising its broad authority to 'determine' the specific 'question of importing any alien' under the H-2B visa program. The DHS thus did not impermissibly subdelegate all of its authority in this area. Rather, the DHS conditioned its own granting of an H-2B petition on the DOL's grant of a temporary labor certification." *Id*.

The Third Circuit went on to explain that such conditioning of a final agency decision on the advice of a separate agency is lawful if "there is a reasonable

[9] *See also* 80 Fed. Reg. 24,044 – 24,047 (providing overall description of the H-2B program, including a description of recent litigation).

connection between the outside agency's decision and the federal agency's determination." *Id.* at 673. Congress expressly instructed DHS to determine whether or not to grant H-2B visa petitions, including by considering whether there are United States citizens available to perform the job for which an H-2B visa is sought. *Id.* Congress separately instructed DHS to "consult[]" with "appropriate agencies of the Government" in making H-2B visa determinations without defining the meaning of "consultation" or what agencies DHS may or may not consult with. *Id.* There is thus a "reasonable connection" between DHS's determination of H-2B petitions and DOL's decisions on temporary labor certifications in light of the statute's silence. *Id.* This is especially so given DOL's unique institutional expertise in labor and employment matters, as well as DOL's history of rulemaking authority in the context of the H-2B program (when it was just the "H-2" program) going back to 1968. *See supra* at 4.

In light of DHS's lawful conditioning of the grant of an H-2B visa on DOL's advice in the form of a labor certification, it is entirely reasonable for DOL to promulgate a limited set of legislative rules governing the temporary labor certification process. *La. Forestry*, 745 F.3d at 674. Indeed, absent the ability to establish such rules to administer the temporary labor certification process, DOL would not be able to fulfill the consulting role defined by DHS's charge to DOL to issue temporary labor certifications. Instead, it would have to engage in ad hoc

adjudication in thousands of cases, an absurd result Congress could not have intended given how inefficient such a confusing and dilatory system would be. *See, e.g.*, *Lopez v. Davis*, 531 U.S. 230, 243-44 (2001).

Finally, although DOL had issued substantive guidance both with and without legislative rulemaking until 2008, the practice of issuing substantive standards through subregulatory policy would not be undertaken today. *See, e.g.*, *Mendoza*, 754 F.3d at 1021-25. Under current law, substantive rules governing the H-2B program require notice and comment rulemaking absent an exception to that general requirement. *See, e.g.*, *id.* at 1021-25. Plaintiffs' suggestion that DOL has conducted *ad hoc* rulemaking until 2008 is incorrect, both because DOL has in fact employed substantive rules, including through notice and comment, to administer the H-2B program for decades, and because courts have rejected DOL's prior position that it could do so without notice and comment rulemaking. *See id.*

B. The Prior Panel's Decision That the INA and Congressional Acquiescence Do Not Provide DOL Independent Rulemaking Authority Was Clear Error

Assuming jurisdiction, the Court may resolve this appeal based on the arguments in the preceding section. However, should the Court disagree, Defendants submit that both the structure and objectives of the INA and Congress's acquiescence over decades to DOL's participation in the H-2B program support DOL's position, and to the extent the prior panel disagreed, that was clear

error. As noted, Congress is and has been aware of DOL's role in the administration of the H-2B visa program for decades, and yet, despite several opportunities to do so, has never amended the INA to prohibit DOL for using legislative rules to structure its involvement in the H-2B program or to specify which agencies DHS may consult in exercising its authority to grant or deny H-2B visas. *See Lorillard*, 434 U.S. at 580 ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change"). This is in stark contrast to the H-2A program. When Congress bifurcated the H-2 program to create the H-2A and H-2B programs, Congress specifically named DOL and the Department of Agriculture as the agencies with which DHS must consult in administering the H-2A program. *See* IRCA § 301(b); 8 U.S.C. § 1184(c)(1). However, Congress was silent as to which agencies DHS may "consult[]"in administering the H-2B program, choosing broad language – "appropriate agencies" – evincing a clear intent to afford DHS *greater* discretion with respect to the agencies with which it may consult concerning the H-2B program. *See La Forestry*, 745 F.3d at 674.

Equally instructive is that Congress did not enact any changes to the H-2B program after the Supreme Court's decision in *Alfred*, 458 U.S. at 592. Instead, Congress recognized that DOL promulgates rules concerning the H-2B program, by virtue of enacting amendments to the INA in both 2005 and 2011 without

legislating to the contrary.[10] "The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midatlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986). Thus, if Congress did not intend to allow DOL to issue legislative rules as part of its consultation with DHS, then Congress could have amended the INA accordingly. But where an agency reasonably construes a statute endowing it with broad authority, courts must defer to that interpretation, and "the remedy, if any is indicated, is for congressional, and not judicial, action." *Flood v. Kuhn*, 407 U.S. 258, 285 (1972).

Finally, Plaintiffs' suggestion that DOL's use of a legislative rule in 2012, rather than a guidance letter, somehow renders its exercise of authority suspect misses the mark. As Plaintiffs must concede, notice and comment rulemaking provides important procedural protections to the public, allows agencies to apprise themselves of relevant issues and views, and promotes predictability. *See Int'l Union v. MSHA*, 626 F.3d 84, 95 (D.C. Cir. 2010). Without the use of this process, the public would be deprived of important protections that are unavailable in case-by-case adjudication. *Nat'l Petroleum Ref. Ass'n v. FTC*, 482 F.2d 672, 683-84 (1973). DOL's decision to exercise its consultative role through notice and

[10] Congress directed DOL to use appropriated funds to participate in the H-2B program, *La. Forestry*, 745 F.3d at 667, further demonstrating Congress's understanding that DOL has authority to issue rules as part the H-2B program. *See Morton v. Ruiz*, 415 U.S. 199, 231 (1974).

comment rulemaking in this context is thus preferable to issuing unilateral guidance letters.

C. DHS Does Not Need to be a Party to This Litigation

Plaintiffs suggest that the foregoing does not apply, because DHS is not a party here but was in *La. Forestry*, albeit in the context of a 2011 Rule. App. Br. at 18-23. However, DHS does not need to be a party. *See, e.g.*, *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173–174 (2007); *Palm Beach Golf Center-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 2015 WL 1004234, *7-8 (11th Cir. 2015). Plaintiffs attempt to distinguish at least the first of these cases by noting that it involved two private parties is a distinction without a difference. In *Coke*, the Court analyzed whether a regulation issued by DOL was lawful and entitled to deference, regardless of the fact that DOL was not a party to the litigation. 551 U.S. at 173-74; *accord Auer v. Robbins*, 519 U.S. 452, 461-63 (1997) (deferring to DOL interpretation of elements of statute although DOL was not a party).

DHS has spoken clearly on this matter through regulations, *see* 8 C.F.R. §§ 214.2(h)(6)(iii)(A), (iii)(D); 78 Fed. Reg. at 24,050; 73 Fed. Red. at 78,110, and those pronouncements are controlling and entitled to deference. *See Chevron*, 467 U.S. 837, 843-44 (statutory interpretation); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (regulatory interpretation).

Finally, the Department of Justice speaks on behalf of the entire Executive,

including DHS, even if DHS is not a party to this suit. *See, e.g.*, 28 U.S.C. § 516.

Thus, the fact that DHS is not a party to this litigation does not affect resolution of the justiciable legal question this appeal presents.[11]

CONCLUSION

This case is moot and the prior judgments in this case should be vacated. If still justiciable, DOL has statutory authority to issue rules governing its participation in the H-2B program and the district court's contrary judgment should be reversed.

//

//

[11] Assuming the foregoing does not warrant reversal, the district court erred in granting a nationwide injunction. Op. Br. at 48-55. Plaintiffs' response is to suggest the 2012 Rule at issue has been replaced by new rules, App. Br. at 40, essentially conceding that if the challenge to the 2012 rule is moot, the court lacks jurisdiction to enforce the injunction and should vacate it. Even if not moot, given that the rule no longer exists, to the extent equitable relief is appropriate, it should be tailored to the particular final agency action and parties before the court and "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Should the judgment stand, it should be limited to the parties here.

Dated: July 27, 2015

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

LEON FRESCO
Deputy Assistant Attorney General

By: s/ *Erez Reuveni*
EREZ REUVENI
Senior Litigation Counsel
United States Department of Justice
Office of Immigration Litigation
450 5th Street, NW
Washington, DC 20001
202-306-4293
erez.r.reuveni@usdoj.gov

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that Defendants-Defendants' Brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B), because this brief is proportionally spaced, has a typeface of 14 points, and contains 6,989 words, including the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

s/ *Erez Reuveni*
EREZ REUVENI
Senior Litigation Counsel
United States Department of Justice

CERTIFICATE OF SERVICE

I certify that on July 27, 2015, I electronically filed the foregoing DEFENDANTS-DEFENDANTS' BRIEF with the Clerk of Court by using the CM/ECF system, which will provide electronic notice and an electronic link to this document to all attorneys of record.

s/ *Erez Reuveni*
EREZ REUVENI
Senior Litigation Counsel
United States Department of Justice