NO.

SUPREME COURT OF THE UNITED STATES

OUTDOOR AMUSEMENT BUSINESS ASSOCIATION, INC.; MARYLAND STATE SHOWMEN'S ASSOCIATION, INC.; THE SMALL AND SEASONAL BUSINESS LEGAL CENTER; LASTING IMPRESSIONS LANDSCAPE CONTRACTORS, INC.; THREE SEASONS LANDSCAPE CONTRACTING SERVICES, INC.; NEW CASTLE LAWN & LANDSCAPE, INC.,

Petitioners

v.

DEPARTMENT OF HOMELAND SECURITY; UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES; DEPARTMENT OF LABOR; EMPLOYMENT & TRAINING ADMINISTRATION; WAGE & HOUR DIVISION,

Respondents

On Petition for Writ of Certiorari to the United States Court Of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

With exceptions not relevant hereto, Congress has expressly bestowed all "administration and enforcement" functions under the Immigration and Nationality Act, 8 U.S.C. §§1101 *et seq*., including rulemaking and adjudication for the admission of temporary, non-agricultural workers under the H-2B visa program, exclusively on the Secretary of Homeland Security. *Id*. §§ 1101(a)(15)(H)(ii)(b), 1103(a)(1), (3), and 1184(a)(1), (c)(1). The Secretary adjudicates employer H-2B petitions "after consultation with appropriate agencies of the Government." *Id*. § 1184(c)(1). The question presented is:

Whether Congress, consistent with the nondelegation doctrine and clear-statement rule, impliedly authorized the Secretary of Labor individually to promulgate legislative rules for the admission of H-2B workers and adjudicate H-2B labor certifications.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners Outdoor Amusement Business Association, Inc., Maryland State Showmen's Association, Inc., The Small and Seasonal Business Legal Center, Lasting Impressions Landscape Contractors, Inc., Three Seasons Landscape Contracting Services, Inc., and New Castle Lawn & Landscape, Inc., were plaintiffs in the district court and appellants in the court of appeals.

Respondents Department Of Homeland Security, United States Citizenship & Immigration Services, Department of Labor, Employment & Training Administration, and Wage & Hour Division were defendants in the district court and appellees in the court of appeals.

Margharita Kuri, Timothy King, Andrew Mitschell, Henry Wojdylo, Ronald Nyenhuis, Shirley Harmon, Antonio Rivera Martinez, Comité de Apoyo a los Trabajadores Agrícolas, Pineros y Campesinos Unidos del Noroeste, and Northwest Forest Workers Center were intervenors in the district court and court of appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioners Outdoor Amusement Business Association, Inc., Maryland State Showmen's Association, Inc., The Small and Seasonal Business Legal Center, Lasting Impressions Landscape Contractors, Inc., Three Seasons Landscape Contracting Services, Inc., and New Castle Lawn & Landscape, Inc., hereby certify that each has no parent corporation and that no public company holds 10% or more of their stock.

STATEMENT OF RELATED PROCEEDINGS

There are no other proceedings arising out of the same trial court proceedings.

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SUPREME COURT OF THE UNITED STATES

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With exceptions not relevant hereto, Congress expressly bestowed all "administration and enforcement" functions under the Immigration and Nationality Act, including rulemaking and adjudication for the admission of temporary, non-agricultural workers under the H-2B visa program, on the Secretary of Homeland Security. 8 U.S.C. §§1101(a)(15)(H)(ii)(b), 1103(a)(1), (3), and

1184(a)(1), (c)(1). By its terms, the INA authorizes the Secretary to adjudicate employer H-2B petitions "after consultation with appropriate agencies of the Government." *Id.* §1184(c)(1). This case concerns whether that provision, by authorizing the Secretary to consult with unnamed agencies before adjudicating, also authorizes those consultants, in this case the Secretary of Labor, who are chosen solely by the Secretary, to promulgate legislative rules concerning the admission of H-2B workers, and adjudicate H-2B labor certifications.

There is a square circuit split on this issue. The Eleventh Circuit was the first appellate court to address the Secretary of Labor's independent authority under the H-2B program. *See Bayou Lawn & Landscape Servs. v. Secretary of Labor*, 713 F.3d 1080 (11th Cir. 2013). The Eleventh Circuit incisively determined that Congress failed to extend rulemaking "to DOL," and that this "congressional silence" was out of keeping with *Chevron* deference and likely the Constitution. *Id.* at 1084, 1085. As the Eleventh Circuit found, statutory interpretation must comply with any conditions or limitations placed by Congress. The statute provides that DHS "determines," and all rulemaking and adjudicative functions are solely extended to DHS. For this reason, the court declined to find DOL possessed implicit rulemaking power that Congress had explicitly granted to another agency. *Id.* at 1085 & n. 5.

The Fourth Circuit below rejected this view. The panel noted that implied authority arises when "'the agency's generally conferred authority and other statutory circumstances'" establish that "'Congress would expect the agency to be able to

speak with the force of law when it addresses ambiguity in the statute ...."' *Outdoor Amusement Bus. Ass'n, Inc. v. Department of Homeland Sec.*, 983 F.3d 671, 684 (4th Cir. 2020)(*quoting United States v. Mead Corp.*, 533 U.S. 218, 229 (2001)). The Fourth Circuit then pointed to potential ambiguity in the immigration statute and other visa provisions, in which Congress had expressly designated DOL's role, and extended *Chevron* deference to DOL's claimed authority. *Id*. at 685-86.

The issue of the Secretary of Labor's independent rulemaking and adjudicative authority is important and recurring. More than 4000 employers participate in the H-2B program each year and DOL has estimated the employers' costs to comply with DOL's regulations are $1.2 billion over 10 years, or more than $30,000 per day. *See* 80 Fed. Reg. 24042, 24105, 24180-81 (Apr. 29, 2015). The question of the Secretary of Labor's authority in the H-2B program was also raised in, but was not decided, in *Louisiana Forestry Ass'n Inc. v. Secretary of Labor*, 745 F.3d 653 (3d Cir. 2014) and *G.H. Daniels III & Assocs., Inc. v. Perez,* 626 F. App'x 205 (10th Cir. 2015). Despite the unsettled nature of its authority, DOL is now using the Fourth Circuit's decision to support its view that it has unquestioned authority. 86 Fed. Reg. 28198, 28202 nn. 25-26 (May 25, 2021).

This case provides an ideal vehicle to address the issue of whether an agency may exercise legislative rulemaking authority in the absence of congressional authorization and when Congress has expressly conferred rulemaking authority on another agency. Under the nondelegation doctrine and a related clear-statement rule, it is Congress's responsibility to clearly indicate those agencies that

it has selected to carry out its designated policies; it did so by choosing the Secretary of Homeland Security exclusively. Once Congress chose its selected instrumentality, there was no basis for extending *Chevron* deference to unnamed agencies. This Court should grant the petition for a writ of certiorari and resolve the circuit split over the proper interpretation of §1184(c)(1) and whether an agency may exercise legislative rulemaking authority in the absence of congressional authorization and when Congress has expressly conferred rulemaking authority on another agency.

OPINIONS BELOW

The court of appeals' opinion (Appx, *infra*, 1a-43a) is reported at 983 F.3d 671. The district court's opinion (Appx, *infra*, 46a-97a) is reported at 334 F. Supp. 3d 697.

STATEMENT OF JURISDICTION

The court of appeals entered judgment (Appx, *infra*, 1a-43a) on December 18, 2020, and denied re hearing (Appx, *infra*, 44a-45a) on February 16, 2021. This case was subject to an automatic 60-day extension under [citation], making this petition due on July 16, 2021. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are set forth in the Appendix (Appx, *infra*, 98a).

STATEMENT OF CASE

Petitioners are a group of individual employers and related trade associations relying upon the H-2B temporary, non-agricultural visa program to seasonally supplement employer workforces. J.A. 31-34. Petitioners sued DOL and DHS for issuing, without statutory authority, the 2015 DOL Rule. J.A. 34-42.

I. STATUTORY FRAMEWORK AND HISTORY

The H-2B program originated in 1952 when Congress passed the Immigration and Nationality Act and created the H-2 visa for both temporary agricultural and non-agricultural employment. *Immigration and Nationality Act of 1952*, Pub. L. No. 82-414, 66 Stat. 163 (1952). There were numerous contemporaneous attempts to extend a role to the Department of Labor to regulate temporary labor, each of which failed. During hearings on the proposed legislation, American Federation of Labor's representative testified that DOL "should be required to make a thorough survey of the labor market, certify the need for the importation of foreign labor, and establish regulations governing the importation and use of such labor." *Revision of Immigration, Naturalization, and Nationality Laws: Joint Hearings on S. 716, H.R. 2379, and H.R. 2816*, 82nd Cong., at 661, 664-65 (1951) (statement of Walter J. Mason). Although the Senate Committee

on the Judiciary included a role for DOL for immigrants, it rejected DOL's role as "*unnecessary*" when applied to "Nonimmigrant aliens [who] were granted temporary admission only." S. Rep. No. 82-1137, at 11, 13, 20 (1952) (emphasis added).

The opposition to the McCarran bill was led by Sen. Humphrey's subcommittee, where DOL testified that it opposed transferring the initial certification function to INS because it would separate "administration from certification." *Hearings on Migratory Labor – Part I*, 82d Cong., at 51 (1952) (testimony of Michael J. Galvin, Acting Secretary of Labor). DOL claimed that it was the only agency with the necessary skills and facilities, so assigning those functions to the INS was "illogical." *Id*. DOL also testified that it did not have the authority to determine prevailing wages. *Id*. at 77. Sen. Humphrey drafted a bill to accomplish DOL's temporary foreign labor proposals, *id*. at 926, but Humphrey's bill failed.

Even after the INA was adopted, President Truman immediately convened a commission. According to DOL, the INA needed to be amended to require that DOL determine unavailability of U.S. workers for unskilled positions. President's Comm'n on Immigration & Naturalization, 82d Cong., *Hearings before the President's Commission on Immigration and Naturalization* 1380, 1383 (1952) (testimony of Robert Goodwin, DOL). This never happened.

It is well-established that Congress created all H visas, in part, to promote the national interests, H.R. Rep. No. 82-1365, at 52 (1952); INS Comm'r Argyle R. Mackey, *The New Immigration and Nationality Act and Regulations*, 1 I.&N. Rptr. 29, 29

(Jan., 1953), and alleviate U.S. labor shortages for temporary positions by providing nonimmigrant alien labor, *see* H.R. Rep. 82-1365, at 44-45; INS, *Annual Report of the INS* 31 (1953). The H-2B program accomplishes these goals by balancing the interests of employers and U.S. workers. *See, e.g., A.F.L.-C.I.O. v. Dole*, 923 F.2d 182, 187 (D.C. Cir. 1991).

Since 1952, Congress has endowed only the DHS Secretary or his predecessors with exclusive authority for "administration and enforcement" of the INA, 8 U.S.C. §1103(a)(1), and rulemaking authority over the admission of all aliens, §1103(a)(3), including H-2B workers, §1184(a)(1). DHS's Secretary alone is mandated to adjudicate all individual H-2B petitions:

> The question of importing any alien as a nonimmigrant under subparagraph (H), (L), (O), or (P)(i) of section 101(a)(15) … in any specific case…**shall be determined by** the [DHS Secretary], after consultation with appropriate agencies of the Government, upon petition of the importing employer.

8 U.S.C. §1184(c)(1)(emphasis added). Since 1952, Congress has never authorized DOL to promulgate H-2B legislative rules or adjudicate labor certifications. *See id.* (DHS's Secretary may consult with unnamed federal agencies only when determining the admission of temporary workers).

II. THE 2015 DOL RULE AND REGULATORY HISTORY

DOL's longstanding position is that its mandate under the H-2B program is to protect only U.S. workers, 76 Fed. Reg. 37686, 67686, 37688 (June 28, 2011), at the expense of employers' and the national interest, 77 Fed.Reg 10038, 10053 (Feb. 21, 2012). Based on this longstanding view, DOL finalized its 2012 regulations and expressly failed to balance employer needs or the national interest. *Id*. Because the 2012 DOL Rule was originally enjoined and later vacated, DOL later incorporated the 2012 DOL Rule – and its failure to consider employer or national interests – in bulk in the 2015 DOL Rule. 80 Fed. Reg. 24042, 24043 (Apr. 29, 2015)(the 2015 DOL Rule "is virtually identical to the 2012 final rule that DOL developed following public notice and comment ….").

The primary regulation at issue in this case is the 2015 DOL Rule, which specifies how DOL issues H-2B labor certifications. DOL never claimed in the 2015 DOL Rule that Congress extended rulemaking or adjudicative functions to DOL by statute, even though DOL conceded that DOL *could not issue labor certifications without rulemaking authority*. 80 Fed. Reg. at 24047, 24090. Rather, DOL's authority citation was limited exclusively to DHS's regulations at "8 C.F.R. §214.2(h)," *id*. at 24108, because **DHS, not Congress**, "requires" DOL to provide consultation "by issuing regulations," 81 Fed.Reg. 42983, 42984 n.1 (July 1, 2016).

III. TRIAL COURT PROCEEDINGS

This litigation was framed as a challenge to DOL's rulemaking and adjudicative authority. The trial court had jurisdiction under 28 U.S.C. §1331

and 5 U.S.C. §704. Before the trial court, the Government waived any claim of implied or independent authority for rulemaking or adjudicative functions under the H-2B program. ECF 113, Gov't Reply Brief at 32 (DOL's independent authority to issue rules is simply not at issue in this case); Tr. 27 ("DOL's independent rulemaking authority is [not] at issue in this case.").

On cross-motions, the trial court entered summary judgment for the Government on most of the Government's theories of authority and upheld the challenge regulations. *See Outdoor Amusement Bus. Ass'n, Inc. v. DHS*, 334 F. Supp. 3d 697 (D. Md. 2018) (Appx, *infra*, at 46a). The trial court acknowledged that DOL's rulemaking authority was a "close question." 334 F. Supp. 3d at 717. Consistent with the Government's waiver, the trial court apparently rejected any claim that DOL had implied authority direct from Congress, *see id.* (rejecting several Government claims of authority without identifying them), and apparently ruled that Congress had acquiesced in DOL's jurisdiction, *id.* at 717-20.

IV. APPELLATE COURT PROCEEDINGS

In pertinent part, the Fourth Circuit affirmed. 983 F.3d 671 (4th Cir. 2020) (Appx, *infra*, at 1a). The Fourth Circuit determined that DOL had "implicit rulemaking authority" that was "implicitly delegated" from Congress to DOL because "Congress made its intent clear that a consulting agency or agencies *chosen by* Homeland Security would help Homeland Security in considering petitions for H2B visas." 983 F.3d at 684, 685 & 688 n. 10 (emphasis

added). In doing so, the Fourth Circuit relied upon this Court's statement that implied authority "'can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law.'" *Id.* at 684 (*quoting United States v. Mead Corp.*, 533 U.S. 218, 229 (2001)). Once *DHS* "designated [DOL] as the consulting agency," DOL was accorded Chevron deference to fill in gaps created by statutory ambiguity. *Id.* at 685.

The Fourth Circuit referenced the Petitioners' arguments that a clear-statement rule required a statute to identify selected agencies by name, and the presumption that only one agency has authority to promulgate rules under a statute. *Id.* at 686. Even so, the Fourth Circuit conceded that "it is not clear why having an **unnamed** agency with a consulting role in H-2B would create problems." *Id.* at 687 (emphasis added). *See also id.* at 688 ("it is not clear why Labor, with Homeland Security's blessing, cannot promulgate regulations"). After sidestepping the clear-statement rule, the Fourth Circuit identified three reasons why Congress had selected DOL as a recipient of rulemaking authority. First, the Fourth Circuit concluded that DOL was expressly identified as a consultant for sister-H-2A visas, and Congress expressly extended rulemaking authority to DOL under the separate H-2A statute, so "[s]urely" Congress extended the same authority when DOL similarly "consulted" on H-2B petitions. *Id.* at 687. Second, DOL had issued H-2B labor certifications and related rules "for decades … without serious challenge from the political branches

or courts," so this was "at least some evidence that Congress intended" that DOL had rulemaking authority. *Id.* Finally, in at least one other statute similar to the H-2A scheme, Congress had selected an agency and identified it as a "consultant," and then expressly extended to that agency explicit rulemaking authority. *Id.* at 688. For these reasons, the Fourth Circuit concluded that "**not naming** the consulting agency provides Homeland Security with more discretion and does nothing to show that rulemaking authority was withheld from the consulting agency." *Id.* at 687 (emphasis added).

The Fourth Circuit acknowledged that the Eleventh Circuit had "rejected this implicit delegation for Labor to rulemake based on its role as a consulting agency." *Id.* at 688. In recognizing the circuit split, the Fourth Circuit rejoined the Eleventh Circuit's opinion by addressing whether DHS was free to consult with any federal employee whatsoever, but did not address any of the other, numerous reasons adopted by the Eleventh Circuit. *See id.*

REASONS FOR GRANTING THE PETITION

There is a square and acknowledged circuit conflict whether Congress "implicit[ly] delegate[ed authority] for Labor to rulemake based on its role as a consulting agency." (Appx, *infra*, at 32-33a). This issue is recurring and of great public importance. More than 4000 employers continue to comply with DOL's 2015 Program Rule and incur more than $100,000,000 of compliance costs every year. According to DOL, it cannot administer its H-2B

consultations without rulemaking and adjudicative authority. 80 Fed. Reg. at 24047, 24090.

This case provides an ideal vehicle for resolving the circuit conflict. The issue is squarely presented. And the facts cast into stark relief the consequences of allowing an agency that was never selected as Congress's instrumentality to carry out congressional policy. Here, the Department of Labor admits that it is authorized only to consider the well-being of U.S. workers and that it is prohibited from balancing the statute's competing goals of the needs of U.S. employers and the interests of the nation. DOL also benefits from *Chevron* deference without a clear line of accountability as to which agency is responsible for what. Further, there is no attempt to fairly balance this visa program as occurs, for example, under the H-2A statute, where Congress imposes statutory deadlines and other due process rights for H-2A employers. Also absent is the moderating influence that Congress long expected the Secretary of Homeland Security and his predecessors would exert on this visa program through their policymaking function. The petition should be granted.

I. THE COURTS OF APPEALS ARE DIVIDED OVER WHETHER §1184(c)(1) AUTHORIZES THE SECRETARY OF LABOR TO ISSUE H-2B LEGISLATIVE RULES AND ADJUDICATIONS

The INA never mentions whether the Secretary of Labor has any role to play under the H-2B visa program. There is an acknowledged circuit split concerning whether Congress implicitly authorized DOL's rulemaking and adjudications.

That conflict warrants this Court's review. *See* Sup. Ct. R. 10(a).

The Eleventh Circuit was the first appellate court to address the Secretary of Labor's independent authority under the H-2B program. *Bayou Lawn & Landscape Servs. v. Secretary of Labor*, 713 F.3d 1080 (11th Cir. 2013). The Eleventh Circuit incisively determined that Congress failed to extend rulemaking "to DOL," and that this "congressional silence" was out of keeping with *Chevron* deference and likely the Constitution. *Id*. at 1084, 1085. As the Eleventh Circuit found, statutory interpretation must comply with any conditions or limitations placed by Congress. The statute provides that DHS "determines," and all rulemaking and adjudicative functions are solely extended to DHS. For this reason, the court declined to find implicit rulemaking power for DOL that Congress had explicitly given to another agency. *Id*. at 1085 & n. 5.

For its part, DOL never appealed the Eleventh Circuit decision, thereby accepting the ruling for many years. Effectively, DOL moved on to a new theory, which was based upon the absence of independent authority and the need for "joint action" with DHS. *See* 80 Fed.Reg. at 24151 (DOL acknowledged that the courts had determined that DOL lacked independent rulemaking or adjudicative authority).

The Fourth Circuit has now expressly rejected the longstanding Eleventh Circuit and DOL's *de facto* interpretation of §1184(c)(1). (Appx, *infra*, at 1a). The Fourth Circuit concluded that there was no significance to the fact that DOL was not mentioned in this INA provision. The Fourth Circuit concluded

that there was sufficient indication of congressional intent because a different visa program and an unrelated statute created consultative relationships between agencies and then expressly delegated rulemaking authority, so the same authority "[s]urely" extends to DOL's consultations under §1184(c)(1). The Fourth Circuit also pointed out that neither Congress nor the courts had "seriously challenge[d]" DOL's H-2B labor certifications. The Fourth Circuit minimized the Eleventh Circuit's opinion as turning on the *expressio unius* principle.

The confusion surrounding this issue has surfaced in other circuit court opinions. The Third Circuit declined to decide whether DOL had implied rulemaking authority, finding instead that DOL's regulations were a condition precedent to DHS's determinations. *Louisiana Forestry Ass'n Inc. v. Secretary of Labor*, 745 F.3d 653, 674 (3d Cir. 2014). And the Tenth Circuit similarly declined to decide whether DOL had implied rulemaking authority, determining in a non-precedential, unpublished opinion that DHS had improperly redelegated authority to DOL. *G.H. Daniels III & Assocs., Inc. v. Perez,* 626 F. App'x 205, 211-12 (10th Cir. 2015).

II. THE FOURTH CIRCUIT'S INTERPRETATION OF §1184(c)(1) AS IMPLIEDLY AUTHORIZING THE SECRETARY OF LABOR'S LEGISLATIVE RULES AND ADJUDICATIONS IS INCORRECT

Any effort to read §1184(c)(1) as authorizing the Secretary of Labor's rulemaking and adjudications cannot be reconciled with §1184(c)(1)'s

text, the INA's broader statutory scheme, or this Court's precedents.

A. The Text of §1184(c)(1) Does Not Authorize the Secretary of Labor to Issue H-2B Legislative Rules and Conduct Adjudications

Using traditional tools of statutory construction, the correct question is whether Congress in 1952, intended to delegate governmental functions to DOL. *See Utility Air Regulatory Group v. Environmental Protection Agency*, 134 S. Ct. 2437, 2444 (2014). The Fourth Circuit mis-framed the its interpretation of §1184(c)(1) by focusing on DOL's actions taken decades later rather than focusing on the meaning of the statute when enacted in 1952.

Statutory construction begins with the statutory text. The text of §1184(c)(1) is straightforward – it allows the Secretary of Homeland Security to "consult" with unnamed agencies. Nowhere does it purport to grant to the Secretary of Labor any power whatsoever under the H-2B program. That should be dispositive: "When the words of the statute are unambiguous," the "'judicial inquiry is complete.'" *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992).

In context, §1184(c)(1) is an adjudicative clause. Congress's indispensable act under §1184(c)(1) is that DHS, and *only DHS*, must "determine" all H-2B petitions. When the INA was enacted, "determine" meant "to bring to a conclusion, to settle by authoritative sentence, to decide, … to adjudicate on an issue presented," *Black's Law Dictionary* 536 (4th ed. 1951), and "come to a conclusion, give decision; be the decisive factor

with regard to," *The Concise Oxford Dictionary* 327 (4th ed. 1951). Read in context, DHS's mandatory, jurisdictional responsibility is to be the "decisive factor" in deciding every H-2B petition. "Consultation" meant the act of "[t]ak[ing] counsel …; seek[ing] information or advice from." *Id.* at 257. *Accord G.H. Daniels*, 626 F. App'x at 211. DHS's longstanding interpretation similarly recognized that DOL's consultations were advisory only. *See, e.g.*, 111 Cong. Rec. 21805, 21805, 21806 (Aug. 25, 1965) (unsuccessful floor amendment to require the INS to abide by DOL's H-2 "opinion"). Thus, Congress intended a consultation as an adjunct to DHS's final decisionmaking, but it did not authorize the consultant to make a final decision, nor was it a substitute for DHS serving as the "decisive factor" when adjudicating individual H-2B petitions.

Conversely, §1184(c)(1) is not a rulemaking provision. There is *no* statutory text in which Congress indicated that any outside agency had any role to play as a consultant or otherwise in DHS's H-2B rulemaking. Construing the term "consultation" in §1184(c)(1) as a grant of rulemaking authority renders meaningless the limits that Congress imposed through its use of that term.

B. Allowing the Secretary of Labor to Issue H-2B Legislative Rules and Conduct Adjudications Defies the INA's Statutory Scheme

The rest of the statute corroborates that Congress spoke clearly when it reposed all governmental authority on DHS alone. *See Brown v. Gardner*, 513 U.S. 115, 118 (1994) ("Ambiguity is a

creature not of definitional possibilities but of statutory context."). The contrary reading of §1184(c)(1) makes hash of the overall statutory scheme, rendering express provisions redundant and statutory protections impotent. Congress did not equip DOL with the tools to regulate the H-2B program because Congress had no intent for DOL to regulate the H-2B program. It is also "highly unlikely" that Congress would have made DOL a final decisionmaker through the "subtle device" and "cryptic" way of a consultation clause. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 160 (2000) (elephant-in-a-mouse-hole doctrine).

a. Adjudicative Clause. The adjudicative clause in §1184(c)(1) instructs DHS to determine "any specific" H-2B petitions, but DHS does not under the 2015 DOL Role. Under the Government's view, *see* J.A. 209 n.11, DOL, not DHS, alone makes a binding determination of (1) the availability and (2) capability of U.S. workers, and the Department of State alone determines (3) immigrant intent via 8 U.S.C. §1184(b). Even in the case of the final statutory component, (4) temporary need, DOL still exercises final decisionmaking if it denies an application and thus DHS has, at most, "shared" jurisdiction. *See* 73 Fed.Reg. 78104, 78108 (Dec. 19, 2008). Far from being Congress's "decisive factor," DHS is barely an afterthought. The Eleventh Circuit declined to extend rulemaking power to DOL precisely because the statute provides that DHS "determines," and Congress gave all rulemaking and adjudicative functions solely to another agency, DHS. *See Bayou Lawn*, 713 F.3d at 1085 & n. 5. The Fourth Circuit's decision that DOL now

"determine[s]," 983 F.3d at 689, flatly contradicts §1184(c)(1) that DHS alone possesses that authority. DOL, a mere consultant, has now grabbed a veto power over the action agency.

The Government minimizes DHS's failure to determine "any specific" H-2B petition by suggesting that DHS could do so prospectively by mandating that employers obtain favorable labor certifications. This argument generates another structural conflict because §1184(c)(1) mandates DHS's determination "after" any consultation, and "upon petition of the importing employer," but that never happens because DHS does not review consultants' H-2B decisions.

Another structural conflict is that Congress designated H-2B eligibility as a fact issue, but DHS has disposed of it with a conclusive presumption that DOL's determination is final with no further recourse to DHS's adjudication. *See Miller v. United States*, 294 U.S. 435, 440 (1935) (agency improperly eliminated mandatory factfinding with a conclusive presumption); *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 91 (2002) (the remedy created by Congress required case-by-case examination, but agency's rule eliminated that factual inquiry).

Another structural conflict is that §1184(c)(1) grouped H-2B with 7 other employment-based visas, thereby suggesting similar governmental functions. However, Congress declined any DOL role for L, O, and P visas, 20 C.F.R. §656.2(c)(3), while choosing minimalist labor attestations or labor applications for H-1B, H-1B1, and H-1C, *id.* §655.731-.732, 655.1112(c)(2), and labor certifications with rulemaking for H-2A, *id.* §655.161(a). Congress has a long history of judiciously choosing its

instrumentalities, yet has steadfastly refused to do the same for the H-2B program for nearly 70 years.

b. Other Visas. Other visas are similarly stratified. Congress has subjected only PERM immigrants to full-blown labor certifications, discussed below, with minimalist labor attestations or labor applications for D and E-3, §§655.510(d), 655.731-.732, and declining to delegate any DOL authority for Q and R visas, §656.2(c)(3).

DOL as final decisionmaker also conflicts with the role Congress carefully circumscribed for labor certifications. Under the INA, "any" alien – including H-2B workers – performing unskilled labor is inadmissible unless DOL "determines" availabililty and adverse effect on the employment market. 8 U.S.C. §1182(a)(5)(A)(i). However, this requirement does not apply to H-2B workers because of a (1) limitation to designated immigrant visas (PERM or green cards), *id*. §1182(a)(5)(D), and (2) general exception whenever admission is "otherwise provided in this Act," *id*. §1182(a). Making DOL's H-2B labor certifications as final action ignores both the limitation and the exception of PERM labor certifications. Having "textually committed"[1] when labor certifications are used, *see Whitman v. American Trucking Ass'n, Inc*., 531 U.S. 457, 472 (2001), the Government cannot create an exception.

c. Other INA Clauses. Another structural conflict concerns revenue and reporting under the comprehensive INA. The INA grants DHS the power

[1] The Fourth Circuit failed to appreciate the critical distinction between issues that Congress has "textually committed" to another agency and the reach of the *expressio unius* maxim. *Accord Gonzales v. Oregon*, 546 U.S. 243, 260 (2006).

to generate fees for adjudicating petitions, 8 U.S.C. §1356(m), (t)&(u), but DOL has no such funding source for H-2B labor certifications, but it does charge for H-2A labor certifications, §1188(a)(2) & (g). DOL must file periodic reports to Congress for other activities, §1381, but no such requirement exists for the H-2B program.

d. Congressional Policies. As discussed *supra*, another structural conflict is DOL's longstanding position that its mandate is to protect only U.S. workers, at the expense of employers' and the national interest. The 2015 DOL Rule expressly failed to balance employer needs or the national interest.

Another structural conflict is that Congress' decision to put DHS in charge was the result of a political compromise to hold DHS politically accountable. DOL has subverted that careful balance by intervening. *See Ragsdale*, 535 U.S. at 94.

The 2015 DOL Rule also conflicts with congressional policy as articulated by Congress's selected policymaker, DHS. First, for 60 years, DHS has called for DOL's "advice," 8 C.F.R. §214.2(h)(6)(iii)(A), including in the very regulations at issue, 80 Fed. Reg. at 24043, 24045. Obviously, DOL is no longer "consulting" when it is co-determining H-2B visas. One important study of the statutory phrase "in consultation with" concluded that it obviously conveyed that one agency was primary. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation From the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901, 1007 (2013). The study further identified 201

cases interpreting "in consultation with" in various statutes, not a single one of which had ever questioned which agency was primary. *Id.* at 1009 n. 419. Second, the fact that DHS is attempting to channel DOL's discretion in the 2015 DOL Rule as a purported congressional delegatee undercuts any plausible claim to independent authority.

For more than a century, the courts have uniformly construed "consultation" within the several immigration statutes to require the primary agency to make the determination. *Billings v. Sitner*, 228 F. 315, 317-19 (1st Cir. 1915) (immigration board improperly regarded medical certificate as final and "controlling" on issue of feeble-mindedness and failed to consider other evidence and determine the issue by reviewing it and making its "own judgment"); *Secretary of Labor v. Farino*, 490 F.2d 885, 891-92 (7th Cir. 1973)(DOL itself could not rely on state workforce agencies to determine unavailability of U.S. workers without extending to employers the opportunity to submit rebuttal evidence).

Even this Court has determined that a "consultant's" role is so limited that *Chevron* deference is not warranted, *Gonzales,* 546 U.S. at 265, and consulting does not entail rulemaking authority, *id.* at 262. All of this has now apparently changed, at least in the Fourth Circuit.[2]

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[2] To be sure, the Fourth Circuit noted two statutes in which Congress extended to putative "consultants" certain governmental functions. Congress is free to combine a consultation with a requirement for concurrence, approval, or joint action. Jody Freeman & Jim Rossi, *Agency Coordination and Shared Regulatory Space*, 125 Harv. L. Rev. 1131, 1157-60 (2012). For example, Congress provided very detailed

C. The Fourth Circuit's Interpretation of §1184(c)(1) Is Precluded by Canons, Clear-Statement Rules and Presumptions

Other than a cursory reference to Petitioners' argument, the Fourth Circuit failed to confront *Chevron* Step Zero – the initial inquiry whether the *Chevron* rules even apply. *See* Sunstein, Chevron *Step Zero*, 92 Va. L. Rev. 187, 191 (2006). This Court has frequently established a preliminary inquiry to determine *Chevron's* application and which takes precedence over the agency's views of ambiguity. This assortment of canons, clear-statement rules, and presumptions protect substantive values in statutes or the Constitution.

1. Constitutional-Avoidance Doctrine. Agencies may not interpret statutes in ways that raise serious constitutional doubts. If multiple statutory interpretations are "fairly possible" and the constitutional question is serious and substantial, then Congress must decide the issue in an explicit statement. *See Rust v. Sullivan*, 500 U.S. 173, 191 (1991). Thus, the constitutional-avoidance doctrine displaces *Chevron* deference. *See DeBartolo Corp. v. Florida Gulf Coast Bldg. Council*, 485 U.S. 568, 575 (1988).

The constitutional-avoidance doctrine applies to nondelegation issues. *See Industrial Union Dep't*

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provisions to govern the "consultant" in *Bennett v. Spear*, 520 U.S. 154 (1997), but the action agency was still free to accept or reject the advice. Suffice to say, Congress made no such provisions for the simple "consultation" clause in §1184(c)(1), but DHS's own regulations leave it no longer free to accept or reject DOL's "advice."

v. American Petroleum Inst., 448 U.S. 607, 646 (1980). The nondelegation doctrine is based upon the delegation clause, U.S. Const. art. I, §1, the separation-of-powers principle, *Mistretta v. United States*, 488 U.S. 361, 371 (1989), and due process, *Washington v. Roberge*, 278 U.S. 116, 122-23 (1928). The nondelegation doctrine preserves accountability and forces Congress to make hard choices. *See* Bressman, Schechter Poultry *at the Millennium: A Delegation Doctrine for the Administrative State*, 109 Yale L.J. 1399, 1416-17 (2000). Thus, an agency literally has no power to act unless Congress confers it. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). "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). The nondelegation doctrine continues to have constitutional force. *Whitman*, 531 U.S. at 472.

To delegate governmental functions to DOL, the unlawful delegation doctrine requires Congress to:

1. Delineate a policy for DOL to administer. *South Carolina Med. Ass'n v. Thompson*, 327 F.3d 346, 351 (4th Cir. 2003)(no constitutional challenge in part because Congress delineated the agency charged with applying the policy).

2. Select DOL as its "instrumentalit[y]" to carry out the congressional policy. *Schechter Poultry Corp.* v. *United States,* 295 U.S. 495, 530 (1935); *see also Gonzales v. Oregon*, 546 U.S. 243, 258 (2006)(Congress must delegate "to the official"). Congress

makes such a selection by committing the issue to the agency's care "*by statute*." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 845 (1984) (emphasis added).

3. Set boundaries on DOL's authority. *Schechter*, 295 U.S. at 530.

4. Set an intelligible principle or standard for measuring DOL's conformance to the statute. *Whitman*, 531 U.S. at 472.

Here, a serious constitutional question arises because Congress did none of these things and exerted even less control than it did with the unconstitutional statute in *Schechter*. Certainly, Congress failed to select DOL "by statute," so the fact that DOL was unnamed is fatal to any claim of *Chevron* deference. And the fact that the Fourth Circuit acknowledged that DOL had no authority until chosen by DHS's Secretary, 983 F.3d at 685, underscores that the statute alone granted no such authority. The Government has previously admitted that Congress did not select nor direct DOL to conform to any standard. J.A. 222. Rather than confront this serious constitutional issue, this Court uses the constitutional-avoidance canon as surrogate for the nondelegation doctrine. Bressman, 109 Yale L.J. at 1409-11. In this instance, the Court avoids the serious constitutional question by construing the statute to determine that DOL lacks rulemaking and adjudicative functions in the H-2B program.

Instead of Congress making the necessary choice, the Fourth Circuit vested the choice of instrumentalities solely in DHS's Secretary. 983 F.3d at 685 (DHS's decision "that the petitions must include an approved labor certification … imposed a

duty on Labor as the consulting agency to administer the grant of those certifications.") This compounded the constitutional issue and reinforced the absence of a clear statement from Congress. *See Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 472 (2001) ("an agency can [not] cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute."). "The very choice of which portion of the power to exercise – that is to say, the prescription of the standard that Congress had omitted – would *itself* be an exercise of the forbidden legislative authority." *Id.* at 473 (emphasis in original).

Another constitutional principle derived from sound separation-of-powers principles is the *Chenery* doctrine, under which a rule may be upheld only on the agency's basis provided in the record when adopted. *Securities & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 87-89, 94-95 (1943). *Accord Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). In short, neither the Government nor this Court can raise belated theories or hypothesize how the Government's position might be sustained, and it violates separation of powers to do so. *See* Stack, *The Constitutional Foundations of* Chenery, 116 Yale L.J. 952, 992, 996-97 (2007)(*Chenery* doctrine bolsters due process and the nondelegation doctrine's anti-inherency principle by ensuring that agencies ground their action in congressional authority). As shown *supra*, DOL did not claim implied rulemaking authority during the rulemaking, and even abandoned it before the trial court. Positions raised during litigation are not the result of an agency's delegated power, *Martin v. Occupational Safety & Health Review Comm'n*, 499

U.S. 144, 156-57 (1991), and are entitled to "near indifference," *United States v. Mead*, 533 U.S. 218, 228 (2001). Further, DOL's naked authority citation to DHS's regulation found at 8 C.F.R. §214.2(h) plainly shows that the 2015 DOL Rule was not based on an implied delegation of congressional authority.

2. Clear-Statement Rule. Clear-statement rules ensure Congress considered and chose the fundamental policy. A clear-statement rule means that there is no *Chevron* ambiguity for the agency to interpret, *INS v. St. Cyr*. 533 U.S. 289, 320 n. 45(2001), and it trumps the agency's interpretation of any statutory ambiguity, *see EEOC v. Arabian Am. Oil Co*., 499 U.S. 244, 250, 258 (2001). *See also* Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 339 (2000) (under clear-statement rules, there is nothing to lament because Congress was unable to muster the will to authorize the agency action).

Congress's responsibility to select instrumentalities raises a clear-statement rule. The Government must show that Congress "clearly" delineated DOL as the responsible agency. *Mistretta*, 488 U.S. at 372-73. *Accord S.C. Med.*, 327 F.3d at 350. In this case, given that Congress did not designate DOL at all, it certainly did not designate DOL "clearly." *See Morrison v. National Australia Bank Ltd., 561* U.S. 247, 255 (2010)(when the statute gives no clear indication, there is none)(clear-statement rule relieves the court of giving effect to *all* indicia of intent). Thus, contrary to the Fourth Circuit, the fact that DOL is unnamed is fatal to its claim for rulemaking and adjudicative authority. The Fourth Circuit's search for indicia of congressional intent was incorrect.

3. Major-Question Doctrine. Some decisions are so important that they must be made by Congress, thereby denying agencies the power to interpret ambiguity for large-scale statutory changes. Under the major-question doctrine, issues addressed to a central aspect or "essential characteristic" of the statute that fundamentally expand or contract the statute are not within an agency's authority and are subjected to independent judicial review. *MCI Telecomm S. Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1991); *Whitman* 531 U.S. at 468. This promotes accountability and integrity of the democratic process. Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* 9 (1993)(delegation allows Congress to maintain power without accountability). Here, the extent to which and by whom the national interests are protected under 8 U.S.C. §1101(a)(15)(H)(ii)(b) and was such a major question. *See Texas v. United States*, 809 F.3d 134, 180-81 (5th Cir. 2015)(INA's employment-authorization scheme was a major question), *aff'd by equally divided court*, 136 S. Ct. 2271 (2016) (*per curiam*).

The major-question doctrine also gives rise to another clear-statement rule. "For an agency to issue a major rule, Congress must *clearly* authorize the agency to do so. If a statute only *ambiguously* supplies authority for the major rule, the rule is unlawful." *U.S. Telecom Ass'n v. FCC,* 855 F.3d 381, 419 (D.C. Cir. 2017)(Kavanaugh, J., dissenting) (emphasis in original). When Congress has debated but declined to pass legislation creating authority, that inaction "does not license the Executive Branch to take matters into its own hands." *Id.* at 426. The 2015 DOL Rule was such a major rule, and we

discussed *supra* that Congress extensively debated the issue and failed to legislate.

4. Presumptions. Under the doctrine of "exclusive jurisdiction," Congress is presumed to delegate all pertinent authority to a single agency. *Union Pac. R.R. Co. v. Surface Transp. Bd.*, 863 F.3d 816, 826 (8th Cir. 2017)(it is unlikely that Congress gave the same authority to 2 agencies to develop conflicting rules); Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 S. Ct. Rev. 201, 222-25. The INA further supports this unitary-agency model. 8 U.S.C. §1103(a)(1) (DHS has *all* INA administrative functions unless Congress itself has conferred it on other officials). Moreover, the Constitution's presumption is that congressional power not expressly conferred on an agency is denied to it. *American Bus Ass'n v. Slater*, 231 F.3d 1, 9 (D.C. Cir. 2000)(Sentelle, J., concurring). And, there is no implied governmental functions when Congress expressly gave that authority elsewhere. *Union*, 863 F.3d at 823. In this case, there is no evidence that Congress "textually committed" this authority to DOL after giving it to DHS. *See Whitman*, 531 U.S. at 468.

Further, even the Fourth Circuit's primary authority indicates that *Chevron* deference is lost if there is any "doubt" whether Congress delegated to the agency. *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001). Surely there is doubt whether Congress intended 2 agencies to regulate the same subject matter.

D. *Mead* Cannot Sustain the Fourth Circuit's Interpretation of §1184(c)(1)

The Fourth Circuit primarily relied on *dicta* in this Court's *Mead* decision that implied authority may be apparent because of "'generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute ….'" *Id*. at 684 (*quoting United States v. Mead Corp.*, 533 U.S. 218, 229 (2001)). *Mead* involved case-specific tariff rulings and is readily distinguishable.

To start, the issue of DOL's authority had to be resolved first, *see Gonzales v. Oregon*, 546 U.S. 243, 258 (2006), before the Fourth Circuit could determine that DOL's rulemaking was "necessary," 983 F.3d at 686. This did not happen.

Second, *Mead* does not apply to the facts presented in this case. The problem, once again, is that Congress – as opposed to DHS – had not extended *any* administrative responsibility through "generally conferred authority" *to* DOL. *See Mead*, 533 U.S. at 226-28 (the agency must be charged by Congress to administer the statute); *City of Arlington v. FCC,* 569 U.S. 290, 308 (2013) (same). All statutory provisions were expressly extended to DHS. *See* 8 U.S.C. §§1101(a)(15)(H)(ii)(b), 1103(a)(1), 1184(c)(1). In *Mead*, the agency already had rulemaking authority and a generalized "administrative power," and the issue was whether that was good enough to imply power in another area. The *Mead dicta* was in turn based upon *dicta* in *Chevron* discussing implied delegations "to an agency on a particular question" that it was "entrusted to administer." *Chevron*, 467 U.S. at ___. In this case, DOL lacked any predicate "generally

conferred authority" from which to imply other powers.

Third, DOL never established the necessity for the implicit power. *See PennEast Pipeline Co., LLC v. New Jersey*, No. 19-1039, slip op. at *18 (Sup. Ct. June 29, 2021) ("'[J]ust as permission to harvest the wheat on one's land *implies* permission to enter on the land for that purpose,' … so too does authorization to take property interests *imply* a means through which those interests can be peaceably transferred. An eminent domain power that is incapable of being exercised amounts to no eminent domain power at all.") (emphasis added) (*quoting* Antonin Scalia & Bryan Garner, *Reading Law* 192 (2012)). DOL consulted for decades without H-2B legislative rules.

Fourth, contrary to *Mead*, Congress did not expect DOL to act with the "force of law." To do so, DOL had to act in Congress's stead and balance the competing policy interests. *A.T. Massey Coal Co. v. Holland*, 472 F.3d 148, 166-67 (4th Cir. 2006). As shown *supra*, the purpose of the H-2 visa is to balance the interests of employers in an adequate workforce and protection of U.S. workers. DOL contends that its longstanding mandate is to protect only U.S. workers, 76 Fed. Reg. 37686, 67686, 37688 (June 28, 2011), at the expense of employers' and the national interest, 77 Fed.Reg 10038, 10053 (Feb. 21, 2012). Based on this longstanding view, DOL finalized its 2012 Rule and then incorporated them in bulk in the 2015 DOL Rule. 80 Fed. Reg. at 24043 (the 2015 DOL Rule "is virtually identical to the 2012 final rule that DOL developed following public notice and comment …."). Because DOL has disqualified itself from balancing the competing

interests, DOL's actions negate the stated purpose of the statute and lack the force of law and any implied authority. *See King v. Burwell*, 135 S. Ct. 2480, 2492-93 (2015). The failure to weigh competing policies or to maintain the "structural compromise" in the statute also means that *Chevron* deference is lost. *Massey*, 472 F.3d at 166 & 168.

And a word about the Fourth Circuit's claim that Congress never "seriously challenged" DOL's rulemaking, and that this was some indicia of congressional intent. The Fourth Circuit did not make a case for congressional acquiescence. It cited no congressional actions that have "altered the meaning" of the operative statutory terms of §1184(c)(1), *see SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 966-67 (2017), nor any "overwhelming evidence of acquiescence" before replacing "plain text and original understanding of the statute with an amended agency interpretation," *see Rapanos v. United States*, 547 U.S. 715, 750 (2006) (plurality)(*quoting SWANCC v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169–70 n.5 (2001)). *See also Alexander v. Sandoval*, 532 U.S. 275, 292 (2001) ("isolated amendments" are "impossible" to interpret as "congressional approval" of prior court interpretations).

E. The Erroneous Departure from §1184(c)(1)'s Text Has Spawned Additional Circuit Conflicts

The circuit courts have diverged sharply on the issue of DOL's H-2B authority, and this underscores why certiorari is important to remove the confusion. No court other than the Fourth

Circuit has ever determined that DOL has implied rulemaking authority and no court other than the Fourth Circuit has ever found rulemaking authority in a consultation relationship, even though there have been multiple decisions posing the question under the INA alone. In other words, when Congress expressly charged DHS with the relevant determinations, only the Fourth Circuit has concluded that Congress meant another agency entirely would make those determinations.

In addition to the immediate conflict concerning implied rulemaking, confusion reigns because other circuits have taken different approaches. The Third Circuit declined to rule on the issue of DOL's authority. Instead, it ruled that DHS could properly require labor certifications as a condition precedent. In so doing, the Third Circuit failed to address the justification for DOL's own rulemaking. *Louisiana Forestry Ass'n Inc. v. Secretary of Labor*, 745 F.3d 653, 674 (3d Cir. 2014). DOL reinforced this view the following year by expressly positing the citation authority for the 2015 DOL Rule on DHS's regulations, thereby compounding the error that Congress was not involved.

The Tenth Circuit took a completely different approach. It also declined to rule on the issue of DOL's rulemaking authority. Instead, it ruled that DHS's selection of DOL as a "consultant," along with DHS's regulations requiring DOL to promulgate its own rulemaking (a fact that the Fourth Circuit chose not to mention), constituted an impermissible redelegation of authority from DHS to DOL. *G.H. Daniels III & Assocs., Inc. v. Perez,* 626 F. App'x 205, 211-12 (10th Cir. 2015). DOL compounded the confusion by taking no action in response to that ruling.

At root, all of these different approaches have been spawned by failing to construe §1184(c)(1) properly. Until this Court speaks, it is expected that other circuits will rely on their own individual approaches.

III. THE ISSUE IS IMPORTANT AND RECURRING

The issue of the Secretary of Labor's independent rulemaking and adjudicative authority is recurring and of great public interest. More than 4000 employers participate in the H-2B program each year, and DOL has estimated their costs to comply with its regulations are $1.2 billion over 10 years, 80 Fed. Reg. 24042, 24105, 24180-81 (Apr. 29, 2015), or more than $30,000 per day.

As discussed supra, DOL's rulemaking authority has generated four circuit court decisions, which have diverged in significant ways and generated confusion. Trial court decisions addressed to the issue have included *Alpha Servs., LLC v. Perez*, 2014 U.S. Dist. Lexis 152454 (S.D. Miss. Oct. 23, 2014); *Bayou Lawn & Landscape Servs. v. Solis*, No. 3:11cv445 (N.D. Fla. Sept. 26, 2011); *Bayou Lawn & Landscape Servs. v. Solis*, No. 3:12cv183 (N.D. Fla. Apr. 26, 2012).

DOL has long recognized that its authority was in question. Despite the unsettled nature of its authority, DOL has seized upon the Fourth Circuit's decision to support its view that it has unquestioned authority. 86 Fed. Reg. 28198, 28202 nn. 25-26 (May 25, 2021). This has allowed DOL to take a more aggressive administrative and enforcement posture.

When the H-2 program began in 1952, no one contemplated that DOL would play a significant, much less dominant, role. Now, the H-2B program is riddled with profound uncertainty.

- Whose regulations appear at Subpart A, 20 C.F.R. §655? The Code of Federal Regulations indicates they are DOL's regulations, but the Government has contended at various points that they are DOL's, DHS's, or both.
- By what authority were the regulations promulgated? Congress bestowed no such authority on DOL, but the Government has contended at times that Congress, DHS, or both authorized them.
- Can DHS promulgate regulations and compel another agency to implement and publish them? Congress gave DHS the option to consult, not conscript.
- Does the "jointly-issued" 2015 DOL Rule retain any significance after the Fourth Circuit's decision?
- Will DOL seek to revise the H-2B regulations for the 17th time since 2008? *See* 73 Fed. Reg. 29942 (May 22, 2008)(DOL's NPRM); 73 Fed. Reg. 78020 (Dec. 19, 2008)(DOL's final rule); 75 Fed. Reg. 61578 (Oct. 5, 2010(DOL's NPRM); 76 Fed. Reg. 3452 (Jan. 19, 2011) (DOL's final rule); 76 Fed. Reg. 15130 (Mar. 18, 2011)(DOL's NPRM); 76 Fed. Reg. 21036 (Apr. 14, 2011) (DOL amended processing form); 76 Fed. Reg. 45667 (Aug. 1, 2011)(DOL final rule); 76 Fed. Reg. 59896 (Sept. 28, 2011) (DOL final rule); 76 Fed. Reg. 73508 (Nov. 29, 2011) (DOL final rule); 76 Fed. Reg. 82115 (Dec. 30, 2011); 77 Fed. Reg. 10038 (Feb. 21,

2012)(DOL final rule); 78 Fed. Reg. 24047 (Apr. 24, 2013)(DOL interim final rule); 78 Fed. Reg. 53643 (Aug. 30, 2013) (DOL final rule); 79 Fed. Reg. 75179 (Dec. 17, 2014) (DOL notice of declaratory order); 80 Fed. Reg. 24042 (Apr. 29, 2015)(DOL interim final rule); 84 Fed. Reg. 62431 (Nov. 15, 2019)(DOL final rule).

- Which agency is primary for administering the H-2B program?

Importantly, according to DOL, it cannot administer its H-2B consultations without rulemaking and adjudicative authority. 80 Fed. Reg. at 24047, 24090.

The importance of the question presented, moreover, extends beyond the DOL and the INA. There are 105 consultative relationships in the INA alone, and thousands of other consultative relationships throughout the U.S. Code. The Fourth Circuit's decision will give those regulators and regulatees pause to consider whether their relationships must be reinvented, as well. Resolving the question presented in this case will shed light on the propriety of numerous other enforcement regimes.

IV. THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLVING THE CONFLICT

This case provides an ideal vehicle for resolving the circuit conflict. The issue is squarely presented. Whether §1184(c)(1) impliedly authorizes DOL's rulemaking was both "pressed" by Petitioners and "passed on" by the Fourth Circuit. *See Verizon Communications Inc. v. FCC*, 535 U.S. 467, 530

(2002). And there are no "logically antecedent questions that could prevent [the Court] from reaching the question of the correct interpretation" of §1184(c)(1). *See Unite Here Local 355 v. Mulhall*, 571 U.S. 83, 85 (2013).

This case, moreover, casts the real-world consequences of the issue into stark relief. Petitioners include 2 trade groups representing a majority of H-2B employers. Those members have incurred hundreds of millions of dollars in compliance costs during the pendency of this case.

The case also demonstrates the consequences of allowing DOL to regulate the H-2B program. By DOL's own calculations, compliance costs skyrocketed. When the compliance costs are distributed among the user pool of more than 4000, the average employer incurs about $30,000 per year just to participate, a princely sum for the small businesses engaged in the program – and that is before payroll and other business expenses. Under the Fourth Circuit's decision, DOL also benefits from *Chevron* deference without a clear line of accountability as to which agency is responsible for what. Further, there is no attempt to fairly balance this visa program. For example, under the H-2A statute, Congress imposes statutory deadlines and other due process rights for H-2A employers. *See, e.g.*, 8 U.S.C. §§ 1188(b)(2)(B)(limitation on debarment); (c)(multiple deadlines for DOL processing of H-2A applications); (d)(1)(joint filings through agricultural associations); (e)(expedited administrative appeals). Also absent is the moderating influence that Congress long expected the Secretary of Homeland Security and his

predecessors would exert on this visa program through their policymaking function.

Equally pernicious are the consequences of allowing an agency that was never selected as Congress's instrumentality to carry out congressional policy. Here, DOL admits that it is unauthorized to consider the interests of Petitioners when promulgating regulations, as well as the national interest. As a result, DOL is prohibited from balancing the statute's competing goals.

This Court should grant the petition for a writ of certiorari and resolve the circuit split over the proper interpretation of §1184(c)(1).

CONCLUSION

The petition should be granted.

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