NO. 21-80

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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REPLY FOR PETITIONERS

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Petitioners filed this action challenging the authority of DOL to issue H-2B regulations and adjudicate labor certifications. Before the district court, DOL claimed that whether it possessed independent rulemaking authority did not have to be

decided. Pet. 9. Nevertheless, the Fourth Circuit explicitly decided that DOL possessed independent rulemaking authority. Yet DOL now declines to defend that decision. Br. of Resp. 17 ("the question of which agency's statutory authority supports the jointly issued 2015 regulations … does not warrant this Court's review."). Instead, DOL tells this Court that its regulations are sound because they were "jointly issued" with DHS, but DOL tells the public that it has independent authority to issue regulations, just as the Fourth Circuit determined. Pet. 33. This has the redolence of a waffle.

Under penalty of waiver, *see* Sup. Ct. R. 15.2, DOL's opposition fails to dispute the factual or legal bases for the numerous compelling reasons supporting certiorari review. DOL ignores the inconvenient fact that both the nondelegation doctrine and a clear-statement rule required Congress – not DHS – to clearly select DOL as Congress's designated instrumentality to promulgate legislative regulations for the H-2B program. There is not a word in the opposition addressing the fact that DOL promulgated the challenged regulations despite DOL's longstanding policy that it was disqualified from balancing the statutory goals at stake. Pet. 30-31. Nor does DOL question that Congress explicitly ruled out DOL's rulemaking and adjudication with the original passage of the immigration statute in 1952. DOL does not even proffer a position on the important question of statutory construction. Nor is there any dispute that the 2015 DOL Rule affects a broad segment of society, triggers exorbitant compliance costs, and that the source of DOL's purported authority is rife with confusion as reflected in numerous judicial

opinions. Even DOL's previous concession that it cannot regulate without rulemaking or adjudication, Pet. 35, merely underscores the importance of the question presented.

Nor does DOL defend the correctness of the Fourth Circuit's finding that DOL has independent rulemaking authority, much less give additional reasons to sustain that conclusion. Instead, DOL pockets the outcome, ignores the holding, and attempts to transform the question presented from whether DOL has independent authority to whether DHS has authority to "jointly promulgate" with DOL. DOL then attempts to buttress that sleight-of-hand by contending that there is no circuit split on the new question, and that this case is a poor vehicle for addressing the agencies' "joint action."

I. DOL HAS IMPROPERLY ENLARGED THE JUDGMENT BY TRANSFORMING THE QUESTION PRESENTED WITHOUT FILING A CROSS-PETITION

According to DOL, the question presented is whether DOL and DHS were authorized to "jointly promulgate" the 2015 DOL Rule. Br. of Resp. I. This is one of DOL's conflicting theories of authority that it asserts from time to time and which the trial court characterized as part of DOL's "circular retreat from one [theory] to the next." Pet. 81a. The trial court easily rejected "joint rulemaking," concluding that "DHS alone could [not] issue a rule that purports to cover the Secretary of Labor and his subordinates, and is published under DOL's title of the Code of Federal Regulations." Pet. 94a. DOL did not cross-appeal, and the Fourth Circuit did not address the

joint-rulemaking theory. *See* Pet. 42a (holding that DHS did not redelegate authority to DOL).

Respondents failed to file a cross-petition to pursue this separate issue of "joint action." The focal point for this review must be the Fourth Circuit's decision, not an issue that was not considered below. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 280 n. 10 (1993) (the fact that the respondent has the right to restate the question presented "does not give [it] the power to expand the questions presented as … Rule [24.2] itself makes clear."). DOL's attempt to enlarge the judgment, transform the question presented to an issue not decided below, and raise its own serious constitutional issue, should be avoided in "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 719 n. 7 (2005).

DOL's transformative question is both factually and legally unfounded. There is no evidence – other than the label that the Departments chose to use – that these regulations were, in fact, "jointly issued."[1] And DOL's opposition does not identify any statutory authority for its claim that DHS and DOL may jointly promulgate legislative regulations. *See United Airlines v. Brien*, 588 F.3d 158, 179 (2d Cir. 2009) (INA required INS and the Secretary of State to issue regulations jointly, so INS could not "amend the jointly enacted regulation on its own"). Nor does DOL explain the unprecedented

[1] To the contrary, the available evidence indicates that DOL regarded the 2015 DOL Rule as solely its prerogative. *See, e.g.*, 80 Fed. Reg. 23443 (Apr. 28, 2015)(DOL unilaterally modified the "jointly-issued" regulations one day before publication); 81 Fed. Reg. 43430, 43448 (July 1, 2016) (DOL unilaterally modified the "jointly-issued" regulations after publication).

claim that DHS alone may authorize "jointly issued" rules co-listing another agency – DOL, a mere consultant – as an issuing agency when DHS previously determined that DOL's participation in the rulemaking was mere "surplusage," yet "instructed" DOL to "separately establish" legislative regulations governing the H-2B program. *See* DOL's Mot. for Sum. Judg. 30 n. 20, 31-32, ECF No. 102-1. A statement of rulemaking authority "should not read like a detective mystery." *Reliance Elec. Co. v. Consumer Product Safety Comm'n,* 924 F.2d 274, 279 (D.C. Cir. 1991).

In a rush to avoid Petitioners' nondelegation challenge, DOL runs headlong into yet another nondelegation issue by claiming the rulemaking was the "joint action" of DOL and DHS. There is no shortage of reasons for rejecting DOL's novel joint action theory. Most importantly, it fails to resolve whether DOL's rulemaking and adjudicative authority are authorized by Congress directly or redelegated by DHS. *See* Br. of Resp. 14 (DHS's "requirement" that DOL issue regulations and adjudicate labor certifications "was imposed by DHS, acting alone"). Because an agency necessarily operates under the same constitutional restrictions placed on Congress by the nondelegation clause, *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 433 (1935), DHS must "clearly" delineate DOL as a redelegatee of DHS's authority, not imply that DOL has independent authority. But DHS never provided an explicit statutory citation authorizing DHS to redelegate its power. Instead, DHS relies on the rationale that DOL's rulemaking results in the "most effective administration" of the H-2B program. 80 Fed. Reg. 24146, 24147 (Apr. 29, 2015). The most

that DHS has stated is that it was "permissible" for DHS to "allow[ ]" DOL to issue regulations, 80 Fed. Reg. at 24154, which suggests that DHS merely conceded that DOL already had independent rulemaking authority.

The restriction on redelegating governmental functions, such as rulemaking,[2] is rooted in the nondelegation doctrine because agencies cannot simply give away or share their authority. As Justice Cardozo explained, grants of administrative discretion must be "canalized within banks that keep it from overflowing." *Panama Ref. Co.*, 293 U.S. at 440 (1935) (Cardozo, J., dissenting). *Accord A.L.A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495, 551 (1935) (Cardozo, J., concurring); *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 672 (1980) (Rehnquist, J., concurring in judgment) (broad delegation of exposure limits to OSHA violated "the doctrine against uncanalized delegations of legislative power").

Justice Cardozo's view and the early development of what became the Administrative Procedure Act precipitated the American Bar Association's subsequent review of the delegation of legislative power to administrative agencies. The ABA identified several classifications of "extreme example[s] of delegated legislative power," including when Congress delegated rulemaking authority and also extended to the agency "the power to subdelegate that power, and to create, establish,

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[2] Administrative or governmental functions include rulemaking, adjudication, and enforcement. See, e.g., B-156510 (Comp. Gen. Feb. 23, 1971) <http://www.gao.gov/products/400043#mt=e-report>.

determine the character of, and discontinue, agencies to exercise the subdelegated power." *Report of the Special Committee on Administrative Law*, 61 Annu. Rep. A.B.A. 720, 780 (1936). The ABA judged this classification was particularly dangerous because it

> goes far beyond the delegation of power to make rules of conduct. In [this] class, Congress gives up its prerogative of determining what **kind and character of agency shall exercise the delegated legislative power**, and passes it over to an executive official, leaving him **free to use existing agencies** or to create new agencies, to follow any pattern he chooses, **to subdelegate and redistribute the functions assigned to him as he pleases**, to fix the duties and salaries of individuals and, in short, to do **everything that Congress does** when it establishes a[n agency] ….

Id. at 780-81 (emphasis added).[3] Despite this acknowledged danger, DOL has not cited a statutory basis for DHS to redelegate its rulemaking authority.

Even assuming that DHS "clearly" redelegated authority to DOL, DOL's new question presented implicates the administrative-function rule and its anti-redelegation principle. The administrative-function rule is a statutory and constitutional principle prohibiting an agency from redelegating any power requiring the exercise of discretion unless Congress has authorized it. *See* 35 Op. Att'y Gen. 15, 1925 U.S. AG Lexis 3, at *7 (1925). The

[3] The fact that the ABA ultimately expressed no view regarding the constitutionality of this classification, 61 Annual Rep. A.B.A. at 781, demonstrates just the sort of confusion warranting certiorari review. The subsequent advent of the clear-statement rule supports certiorari review to clarify this important nondelegation issue.

Administrative Procedure Act prohibits one agency from undertaking rulemaking or adjudication that falls within the jurisdiction of another agency. 5 U.S.C. § 558 (b) ("A … substantive rule or order [may not be] issued except within jurisdiction delegated to the agency and as authorized by law."); S. Rep. No. 79-752, at 25 (Nov. 19, 1945)(agency may not "undertake directly or indirectly to exercise the functions of some other agency."). In addition, the Reorganization Act prohibits redelegating functions without express notice to and approval by Congress. 5 U.S.C. §903(a)(5). Further, interagency transfers of "primary administrative functions" are also prohibited by the Economy Act, 31 U.S.C. § 1535. *See, e.g.*, B-156510 (Comp. Gen. Feb. 23, 1971). And as a matter of statutory construction, this Court has prohibited interagency redelegation of authority when doing so contravened the statute. *See ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 515-17 (1988) (statute provided that the Secretary of the Interior may not enter into a contract to withdraw water from a lake without approval of the Secretary of the Army; the Secretary of Interior lacked authority to withdraw water despite Army's acquiescence and an interagency agreement with Army).

DOL is also wrong on the premise that the source of its rulemaking and adjudicative authority is an insufficient basis for granting certiorari. Br. of Resp. 17. Even if "joint action" could legitimately authorize DOL's rulemaking and adjudications, the source of that authority is still critical. For example, under *Chevron*, DOL was entitled to the deference extended by the Fourth Circuit only if Congress itself – not DHS – entrusted DOL with the authority to

administer the statute. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984). Thus, the source of DOL's purported authority is likely outcome determinative in this case. Further, a redelegatee steps into the shoes of the redelegator within the scope of the redelegation, *see United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266-67 (1954), and complying with the confines of DHS's regulations and practices places palpable restrictions on DOL's otherwise independent actions. *Compare* 8 C.F.R. § 103.5 (a) (2) (DHS's review of denied petitions is *de novo*) *with* 20 C.F.R. § 655.13 (c) (2) (DOL's review of prevailing wage determinations is based solely upon the record initially presented to the agency).

II. THERE IS A DIRECT CONFLICT BETWEEN THE FOURTH AND ELEVENTH CIRCUITS

DOL takes the unusually-narrow view that there is no circuit split on the question of DOL's independent rulemaking authority because the Eleventh Circuit's ruling that DOL likely lacks independent authority was issued upon review of a preliminary injunction. This is surely news to the Fourth Circuit, which explicitly acknowledged the circuit split. Pet. 32a. It must also be news to DOL itself, which has similarly acknowledged that courts have determined that DOL lacks independent rulemaking or adjudicative authority. Pet. 13. It must also be news to those courts that have applied the Eleventh Circuit's ruling as a final judgment. *See, e.g.*, *Union Pac. R.R. Co. v. Surface Transp. Bd.*, 863 F.3d 816, 826 (8th Cir. 2017). The fact that

other appellate courts have blazed separate paths interpreting the same statutory provisions, Pet. 31-32, further shows the conflict is real, persistent, and intolerable. Given that a primary purpose of certiorari is to achieve uniformity, *Thompson v. Keohane*, 516 U.S. 99, 106 (1995), these circumstances speak in favor of this Court's review.

Even if it was possible to conclude that this circuit split on DOL's independent rulemaking authority is reconcilable, the conflict and confusion is still sufficiently clear and the case sufficiently important that certiorari is warranted. *See, e.g., Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 364 (2002). There is no dispute that this important statutory issue of DOL's authority is now subject to numerous "divergent approaches," *see Chicago Teachers Union v. Hudson*, 475 U.S. 292, 300 (1986), or "varying approaches" among the lower courts, *see Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 280 (1998).

III. THIS CASE IS A STRONG VEHICLE FOR RESOLVING THE CONFLICTING LOWER COURT APPROACHES

Having won a judgment below that DOL has independent rulemaking authority, after previously losing that very issue in another circuit, it is disingenuous for DOL now to suggest that this case is a poor vehicle to resolve DOL's independent authority because DOL has yet another rulemaking theory that it wishes to deploy in its circular retreat. Br. of Resp. 7 & 16. Under that approach, DOL will always evade this Court's review merely by declaring yet another of its "creative" theories. *G.H. Daniels*

III & Assocs., Inc. v. Perez, 626 F. App'x 205, 209 n. 6 (10th Cir. 2015) (explaining that DHS and DOL got "creative" with their claim of authority after the Eleventh Circuit affirmed the injunction against DOL's prior H-2B regulations). The Fourth Circuit's ruling is ripe for this Court's review.

DOL contends that finding DOL lacks independent authority will not invalidate the 2015 DOL Rule because DHS undoubtedly possessed rulemaking authority. Br. of Resp. 17. But the trial court already determined that even though DHS had rulemaking authority, DHS's participation in the purported "joint action" says nothing about DOL's rulemaking or adjudicative authority, which must still flow from a statute. DHS's authority cannot salvage DOL's regulations without implicating the nondelegation doctrine. DHS cannot commandeer another agency into performing under DHS's authority, nor can it channel DOL's authority. *See, e.g., American Bus Ass'n v. Slater*, 231 F.3d 1, 6 n. 1 (D.C. Cir. 2000) (one agency cannot "channel the choices" of a coordinate agency).

Furthermore, even if certiorari is granted to review the transformative question raised by DOL, there is nothing to prevent this Court from "isolat[ing]" the question of the source of DOL's independent authority. *Darr v. Burford*, 339 U.S. 200, 227 (1950) (Frankfurter, J., dissenting). And given that the constitutional issue is at least as serious with DOL's "joint action" theory, it is as likely or even more likely that this Court will dispose of the case based upon whether DOL possesses independent authority to promulgate legislative regulations for the H-2B program.

CONCLUSION

The petition should be granted.

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