No. 21-80

In the Supreme Court of the United States

OUTDOOR AMUSEMENT BUSINESS ASSOCIATION, INC., ET AL., PETITIONERS

v.

DEPARTMENT OF HOMELAND SECURITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

BRIAN H. FLETCHER
Acting Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Acting Assistant Attorney General
GLENN M. GIRDHARRY
JOSHUA S. PRESS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the Department of Labor and Department of Homeland Security possess statutory authority to jointly promulgate regulations governing the process by which the Secretary of Homeland Security consults with the Secretary of Labor concerning petitions for the admission of temporary foreign workers under 8 U.S.C. 1101(a)(15)(H)(ii)(b).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Md.):

Outdoor Amusement Bus. Ass'n v. *Department of Homeland Security*, No. 16-cv-1015 (Oct. 11, 2018)

United States Court of Appeals (4th Cir.):

Outdoor Amusement Bus. Ass'n v. *Department of Homeland Security*, No. 18-2370 (Dec. 18, 2020)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-43a) is reported at 983 F.3d 671. The opinion of the district court (Pet. App. 46a-97a) is reported at 334 F. Supp. 3d 697.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 2020. A petition for rehearing was denied on February 16, 2021 (Pet. App. 44a-54a). By orders dated March 19, 2020, and July 19, 2021, this Court extended the time within which to file any petition for a writ of certiorari due on or after March 19, 2020, to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a timely petition for rehearing, as long as that judgment or order was issued before July 19, 2021. The petition for a writ

of certiorari was filed on July 16, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA or Act), 8 U.S.C. 1101 *et seq.*, provides a framework for the regulation of immigration into the United States, including for the admission of temporary foreign workers. As relevant here, 8 U.S.C. 1101(a)(15)(H)(ii)(b) addresses the admission of an individual "having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform [non-agricultural] temporary service or labor" in circumstances in which "unemployed persons capable of performing such service or labor cannot be found in this country." *Ibid.* Known by a shorthand label for that statutory provision, the H-2B program "permits U.S. employers to recruit and hire temporary unskilled, non-agricultural workers from abroad to fill positions that no qualified U.S. worker will accept." *Louisiana Forestry Ass'n* v. *Secretary U.S. Dep't of Labor*, 745 F.3d 653, 659 (3d Cir. 2014).

The Department of Homeland Security (DHS) is vested with the primary authority to administer the H-2B program. The INA charges the Secretary of Homeland Security with the "administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens." 8 U.S.C. 1103(a)(1). The INA authorizes the Secretary generally to "establish such regulations * * * and perform such other acts as he deems necessary for carrying out his authority under [the Act]." 8 U.S.C. 1103(a)(3). And it provides that the "admission to the United States of any alien as a nonim-

migrant shall be for such time and under such conditions as the [Secretary] may by regulations prescribe." 8 U.S.C. 1184(a)(1).[1]

Since the inception of the Department of Labor (DOL) in 1913, however, that agency has also "played a role in the administration of the [N]ation's immigration laws in general, and the admission of foreign workers in particular." *Louisiana Forestry Ass'n*, 745 F.3d at 661; see Act of Mar. 4, 1913, ch. 141, § 3, 37 Stat. 737. Beginning in 1966, employers seeking to admit temporary workers under the predecessor to the H-2B program were required to seek "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 Department of Labor have been observed." *Miscellaneous Amendments*, 31 Fed. Reg. 4446, 4446 (Mar. 16, 1966); see *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592, 595-596 (1982). And since 1968, DOL has issued and amended regulations governing that certification process. See, *e.g.*, *Part 621—Certification of Temporary Foreign Labor for Industries Other than Agriculture or Logging*, 33 Fed. Reg. 7570 (May 22, 1968); *Labor Certification Process*, 43 Fed. Reg. 10,306 (Mar. 10, 1978).

As it currently stands, the INA provides that the admission of a nonimmigrant under the H-2B program "in any specific case or specific cases" shall be determined by the Secretary of Homeland Security, "after

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[1] The Act originally, and as still codified, vested this authority in the Attorney General. 8 U.S.C. 1184(a)(1). In 2002, however, Congress transferred that authority to the Secretary of Homeland Security. See 6 U.S.C. 202, 557.

consultation with appropriate agencies of the Government." 8 U.S.C. 1184(c)(1). DHS has implemented that consultation requirement by relying on DOL's experience and knowledge of the labor market in the United States. See 8 C.F.R. 214.2(h); see also *Louisiana Forestry Ass'n*, 745 F.3d at 661-662. Specifically, DHS regulations require any employer seeking to hire temporary workers under the H-2B program to seek from DOL a "temporary labor certification," which then serves as "advice" to 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).

Until 2008, DHS regulations permitted an employer that was denied such a certificate to submit a petition for an H-2B visa to DHS along with "countervailing evidence" demonstrating that, despite the denial, "qualified workers in the United States are not available, and that the terms and conditions of employment are consistent with the nature of the occupation." 8 C.F.R. 214.2(h)(6)(iv)(D) (2007). In 2008, DHS amended its regulations to make not just seeking, but obtaining, a "temporary labor certification" from DOL a prerequisite to petitioning for an H-2B visa. *Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers*, 73 Fed. Reg. 78,104, 78,129 (Dec. 19, 2008); see 8 C.F.R. 214.2(h)(6)(iv)(A); see also 8 C.F.R. 214.2(h)(6)(iii)(C) and (E).

In 2015, DHS and DOL jointly promulgated rules establishing "the process by which employers obtain a temporary labor certification" from DOL, *Temporary Non-Agricultural Employment of H-2B Aliens in the*

United States, 80 Fed. Reg. 24,042, 24,045 (Apr. 29, 2015), and the methodology that DOL would use to "calculate[] the prevailing wages to be paid to H-2B workers," *Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program*, 80 Fed. Reg. 24,146, 21,146 (Apr. 29, 2015). Although DOL had previously issued similar rules governing the certification process, the agencies issued the 2015 rules jointly "[t]o ensure that there can be no question about the authority for and validity of the regulations in this area." 80 Fed. Reg. at 24,045.

2. Petitioners are businesses that have participated in the H-2B program to hire temporary foreign workers, as well as trade associations whose members have participated in the program. Pet. App. 47a. They initiated this action in 2016, challenging the regulations promulgated in 2008 and 2015 on the ground, among others, that the regulations exceed the agencies' statutory authority. See *id.* at 48a-50a. Petitioners seek declaratory and injunctive relief. *Id.* at 48a.

The district court granted summary judgment in favor of the government. Pet. App. 46a-97a. The court first held that petitioners' challenge to the 2008 regulation is barred by 28 U.S.C. 2401(a), which provides that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." Pet. App. 70a (brackets and citation omitted). The court explained that a facial challenge to a regulation, like the one brought by petitioners, accrues "when the agency publishes the regulation." *Ibid.* (citations omitted). And it found no exception that would permit petitioners' facial challenge, which was filed eight years after DHS promulgated the 2008 regulation. *Id.* at 71a-76a.

Next, the district court rejected petitioners' contention that the 2015 jointly issued regulations are invalid on the theory that "rulemaking authority was delegated by Congress to DHS alone." Pet. App. 80a. "[F]or more than 50 years," the court observed, "DHS (or its predecessor) has consulted with DOL." *Id.* at 83a-84a. "And, throughout that period, Congress has never gainsaid that decision or DOL's rulemaking in the context of the Program." *Id.* at 84a. To the contrary, the court reasoned that "the history of the H-2B program demonstrates Congress's expectation that the DOL would engage in legislative rulemaking." *Id.* at 86a (citation omitted). The court therefore declined to "take from DOL a power that it has openly exercised for decades." *Id.* at 88a.

3. The court of appeals affirmed. Pet. App. 1a-43a.

The court of appeals first agreed with the district court that petitioners' challenge to the 2008 regulation issued by DHS is time barred by 28 U.S.C. 2401(a). Because petitioners "are seeking to enjoin the [2008 regulation] as improperly issued," the court explained, "the statute of limitations began to run eight years before this suit was filed." Pet. App. 18a-19a. "As the challenge needed to be brought within six years, the challenge to the 2008 [regulation] is barred." *Id.* at 19a (citation omitted). Accordingly, the court determined that it "need not decide whether [DHS] may interpret 'consultation'" as it did in the 2008 regulation "to require a favorable labor certification from Labor before considering an H-2B petition." *Id.* at 22a.

The court of appeals further held that the jointly issued 2015 regulations are supported by Congress's "implicit[] delegat[ion]" to DOL of the "authority to administer its labor certifications as part of its duty as the

consulting agency" for the H-2B program. Pet. App. 22a; see *id.* at 22a-37a. The court reasoned that DHS's determination to consult with DOL through temporary labor certifications reflects a reasonable determination consistent with the agencies' practice for H-2 visas "since at least 1968." *Id.* at 25a; see also *id.* at 30a-31a. It found that, once DHS had "used its discretion to consult with Labor through labor certifications," that imposed a "duty on Labor as the consulting agency to administer the grant of those certifications." *Id.* at 25a. And it reasoned that by virtue of that delegated duty, DOL could choose to use "rulemaking"—rather than an "ad hoc process" or "informal guidance letters"—to "structure the certification process." *Ibid.*

ARGUMENT

Petitioners contend (Pet. 11-37) that this Court's review is warranted to determine whether the Secretary of Labor is "individually" authorized to promulgate legislative rules governing certain aspects of the H-2B program or to "adjudicate" H-2B labor certifications. Pet. ii. The court of appeals, however, correctly rejected petitioners' challenge to regulations governing the H-2B program and the Secretary of Labor's consulting role. The court's decision does not conflict with any decision of this Court or of another court of appeals. And, in any event, this case would be a poor vehicle for considering the scope of the Secretary of Labor's independent authority over the H-2B program, because the only regulations timely challenged in this case were jointly issued by the Secretary of Homeland Security and the Secretary of Labor. The petition for a writ of certiorari should therefore be denied.

1. Although petitioners' challenge initially extended to a 2008 DHS regulation, their challenge in this Court

is confined to the regulations governing the labor-certification process, which were jointly promulgated by DHS and DOL in 2015. See, *e.g.*, Pet. ii (addressing the question presented to legislative rules promulgated by DOL); Pet. 5 ("Petitioners sued DOL and DHS for issuing, without statutory authority, the 2015 DOL Rule."); Pet. 11, 17, 20, 26, 30, 32 (challenging the validity of the "2015 DOL Rule"); see also Pet. 8 (asserting that "[t]he primary regulation at issue in this case is the 2015 DOL Rule" without indicating any other regulations at issue). The court of appeals correctly rejected petitioners' challenge to the 2015 regulations. See Pet. App. 22a-36a.

This Court has long recognized that "[t]he power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton* v. *Ruiz*, 415 U.S. 199, 231 (1974). Accordingly, while "an agency literally has no power to act * * * unless and until Congress confers power upon it," *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 374 (1986), a delegation of rulemaking authority over a particular question may be expressly or impliedly conferred. See *United States* v. *Mead Corp.*, 533 U.S. 218, 229 (2001) (recognizing that it can 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").

In the INA, Congress expressly directed the Secretary of Homeland Security to "consult[] with appropriate agencies" before determining whether to grant or

deny an employer's petition under the H-2B program. 8 U.S.C. 1184(c)(1). DHS has reasonably chosen to fulfill that consultation requirement by relying on the Secretary of Labor's conclusions about questions within DOL's area of expertise concerning the labor market. See 8 C.F.R. 214.2(h)(6)(iii). And the court of appeals correctly determined that, as a result, the Secretary of Labor has been empowered to promulgate regulations "to structure the certification process" and to "administer th[at] consultation." Pet. App. 25a; see *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947) ("[T]he choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.").

Any doubt about the Secretary of Labor's rulemaking authority concerning the H-2B program is removed by DOL's long exercise of such authority throughout the history of the program and its predecessor. As explained above, DOL has been involved in determining the admission of foreign workers into the United States since the agency's creation in 1913. See 37 Stat. 737 (establishing the Bureau of Immigration inside the newly created Department of Labor). With respect to the H-2B program and its predecessor, DHS and its predecessor agency (the Immigration and Naturalization Service, when it was part of the Department of Justice), have required employers to seek certification from the Secretary of Labor since at least 1966. See 31 Fed. Reg. at 4446. And the Secretary of Labor promulgated the first regulations governing those certifications in 1968. See 33 Fed. Reg. at 7570.

Congress has repeatedly acquiesced in the Secretary's exercise of that rulemaking authority. In 1986, Congress divided the predecessor to the H-2B program,

which covered all temporary foreign workers, into separate programs for agricultural (H-2A) and non-agricultural (H-2B) workers. To accomplish that result, Congress amended 8 U.S.C. 1101(a)(15)(H)(ii) and 1184(c)(1) to create a new agricultural-specific H-2A program, but it left intact the consultation requirement that had been the basis for DOL's role in what is now the H-2B program. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 301, 100 Stat. 3411; see *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) ("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."); Pet. App. 30a-31a. In 2005, Congress again amended Section 1184(c) to provide for DOL's exercise of delegated enforcement authority over the H-2B program, without abrogating DOL's H-2B regulations or otherwise calling into question the rulemaking authority it had previously wielded. See Save Our Small and Seasonal Businesses Act of 2005, Pub. L. No. 109-13, Div. B, Tit. IV, § 404, 119 Stat. 319. And in 2011, Congress precluded DOL from using appropriated funds before 2012 to implement, administer, or enforce a then-recently-promulgated final rule about the wage methodology for the H-2B program. See Commerce, Justice, Science, and Related Agencies Appropriations Act, 2012, Pub. L. No. 112-55, Div. B, Tit. V, § 546, 125 Stat. 640. In doing so, however, Congress did not interfere with the enforcement of DOL's previous regulation addressing that subject. See H.R. Rep. No. 284, 112th Cong., 1st Sess. 271 (2011) (explaining that "the Secretary of Labor" was directed "to continue to apply the [prior] rule * * * published by the Department of Labor on December 19, 2008"). That history belies

petitioners' suggestion that DOL is an elephant that surreptitiously slipped into a mousehole in 2015. Pet. 17 (citing *Food & Drug Admin.* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).

Contrary to petitioners' contention (Pet. 22-25), the court of appeals' interpretation of the INA to include this rulemaking authority does not present any concerns under the nondelegation doctrine. "The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government." *Gundy* v. *United States*, 139 S. Ct. 2116, 2121 (2019) (plurality opinion); see *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 472 (2001). It requires that "when Congress confers decisionmaking authority upon agencies Congress must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Whitman*, 531 U.S. at 472 (citation omitted; brackets in original; emphasis omitted). In the INA, Congress provided such intelligible principles for the H-2B program by confining this form of nonimmigrant admission to a worker "[1] having a residence in a foreign country [2] which he has no intention of abandoning [3] who is coming temporarily to the United States [4] to perform [non-agricultural] temporary service or labor [5] 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), and by directing DHS to consult with "appropriate agencies of the Government" in making its determinations about which H-2B petitions to grant, 8 U.S.C. 1184(c)(1).

Such specific and definite direction well exceeds the constitutional minimum required by the nondelegation doctrine. See *Whitman*, 531 U.S. at 474 (collecting statutory standards that provide the required intelligible

principle, such as establishing "'generally fair and equitable'" commodities prices or regulating the airwaves in the "public interest") (citation omitted). And that is particularly clear in the context of immigration regulation, over which the Executive Branch possesses some measure of inherent authority independent of any legislative grant. See *Arizona* v. *United States*, 567 U.S. 387, 394-395 (2012) (explaining that the government's "broad, undoubted power over the subject of immigration and the status of aliens" rests, in part, on "its inherent power as sovereign to control and conduct relations with foreign nations"); see also *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting) ("[W]hen a congressional statute confers wide discretion to the executive, no separation-of-powers problem may arise if 'the discretion is to be exercised over matters already within the scope of executive power.'") (citation omitted).

Petitioners suggest (Pet. 26-28) that Congress's instructions are insufficiently clear in this instance about "the public agency which is to apply" Congress's general policy. *Mistretta* v. *United States*, 488 U.S. 361, 372-373 (1989) (quoting *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946)). But the Court has long recognized that the clarity required for nondelegation purposes may be "derive[d]" from "the purpose of the Act, its factual background and the statutory context in which they appear." *American Power & Light Co.*, 329 U.S. at 104. Here, the purpose of the H-2B program, the history of the Labor Department's involvement in these and similar immigration decisions, and the agency's expertise in the labor market all supply context for DHS's decision about which agencies it is "appropriate" to consult, and that context makes amply clear that DOL fits within that standard. See *Louisiana*

Forestry Ass'n v. *Secretary U.S. Dep't of Labor*, 745 F.3d 653, 674 (3d Cir. 2014) ("[T]he DOL has institutional expertise in matters concerning U.S. employment, and a long and extensive history of issuing temporary labor certifications for non-agricultural jobs and making limited rules to structure the issuance of such certifications.").

Petitioners contend (Pet. 28) that "Congress is presumed to delegate all pertinent authority to a single agency." But as the court of appeals recognized, "multiple agencies commonly cooperate with overlapping statutory duties." Pet. App. 31a (citing Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 Harv. L. Rev. 1131 (2012)). "Congress often assigns more than one agency the same or similar functions or divides authority among multiple agencies, giving each responsibility for part of a larger whole." Freeman & Rossi, 125 Harv. L. Rev. at 1134; see, *e.g.*, Section 7(a)(2) of the Endangered Species Act of 1973, 16 U.S.C. 1536(a)(2) (requiring federal agencies to "insure that any action * * * is not likely to jeopardize the continued existence of any endangered species" "in consultation with" the Fish and Wildlife Service); National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* (requiring federal agencies to consider the environmental impact of major federal actions under regulations promulgated by the Council on Environmental Quality). Here, any presumption in favor of a single agency's "exclusive jurisdiction," Pet. 28, over the H-2B program has been overcome by Congress's express direction to DHS to "consult[]" with other "appropriate agencies." 8 U.S.C. 1184(c)(1).

Finally, petitioners contend (Pet. 15-21) that any role of the Secretary of Labor in the H-2B program must be

limited to "consult[ing]" on DHS's exercise of its exclusive authority to "determine[]" an employer petition under the H-2B program, 8 U.S.C. 1184(c)(1), and that the requirement to obtain a temporary labor certification from DOL before filing a petition with DHS is inconsistent with a consulting role. See Pet. 20 ("Obviously, DOL is no longer 'consulting' when it is co-determining H-2B visas."). But that requirement was imposed by DHS, acting alone, in its 2008 regulation, not in the 2015 joint regulation. See 73 Fed. Reg. at 78,104 ("To better ensure the integrity of the H-2B program, this rule eliminates DHS's current practice of adjudicating H-2B petitions where the Secretary of Labor * * * has not granted a temporary labor certification."). The court of appeals determined that petitioners' 2016 challenge to the 2008 regulation was untimely under the six-year statute of limitations for civil actions against the United States. Pet. App. 18a-19a (citing 28 U.S.C. 2401(a)). Accordingly, the court declined to consider "whether [DHS] may interpret 'consultation' to require a favorable labor certification from [DOL] before considering an H-2B petition." *Id.* at 22a. Petitioners provide no reason to question that determination.

2. Petitioners err in contending (Pet. 12-14) that the court of appeals' decision conflicts with the decision in *Bayou Lawn & Landscape Services* v. *Secretary of Labor*, 713 F.3d 1080 (11th Cir. 2013). In *Bayou*, the plaintiffs challenged regulations promulgated by DOL in 2011 to govern certain aspects of the H-2B certification process. *Id.* at 1083. Like petitioners, the *Bayou* plaintiffs contended that DOL lacked authority to issue legislative rules concerning the H-2B program. *Ibid.* The district court issued a preliminary injunction, prohibiting the enforcement of the rules during the pendency of

the action. *Ibid.* The court of appeals found no abuse of discretion in the district court order and thus affirmed. *Id.* at 1084-1085.

Petitioners focus (Pet. 13) on the Eleventh Circuit's determination that the *Bayou* plaintiffs had demonstrated a "likelihood of success on the merits of their claim." *Bayou*, 713 F.3d at 1085. But petitioners ignore the procedural posture of the decision, which resolved an appeal of a district court's discretionary grant of a preliminary injunction. Notwithstanding some broader language in the *Bayou* decision, as the Third Circuit has since recognized, the *Bayou* decision should be understood to have "opined only on whether the District Court abused its discretion in finding that the employer-plaintiffs were likely to succeed on the merits of their challenge to the DOL's rulemaking authority, not on whether the DOL actually has that authority or not." *Louisiana Forestry Ass'n*, 745 F.3d at 675 n.17. And by the time the case returned to the Eleventh Circuit after final judgment, DHS and DOL had jointly promulgated the rules at issue here, mooting the plaintiffs' challenge to the then-superseded 2011 rules. See *Bayou Lawn & Landscape Servs.* v. *Secretary, U.S. Dep't of Labor*, 621 Fed. Appx. 620, 621 (11th Cir. 2015) (per curiam) (vacating the final judgment and remanding to the district court to determine mootness); Order, *Bayou Lawn & Landscaping Servs.* v. *Solis*, No. 12-cv-183 (N.D. Fla. Apr. 20, 2016) (upon remand, dismissing the case as moot).[2]

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[2] For similar reasons, the government's decision not to seek further review of the Eleventh Circuit's affirmance of the preliminary injunction did not indicate "DOL's *de facto* interpretation" of its statutory authority. Pet. 13; see *United States* v. *Mendoza*, 464 U.S. 154, 161 (1984) ("Unlike a private litigant who generally does not

3. In any event, even if DOL's authority to "individually" promulgate regulations governing aspects of the H-2B program warranted this Court's review, this case would be an unsuitable vehicle because the 2015 regulations that petitioners timely challenged were not issued by DOL "individually." Pet. ii. In the wake of the Eleventh Circuit's decision in *Bayou* and the district court's subsequent final judgment, DHS and DOL jointly adopted the 2015 regulations challenged in this case. The agencies explained that they were issuing the rules "together" "[t]o ensure that there can be no question about the authority for and validity of the regulations in this area." 80 Fed. Reg. at 24,045. "By proceeding together," DHS and DOL each "affirm[ed]" their determinations that the rules are "fully consistent with the INA and implementing DHS regulations" and that the functions that DOL performs under those regulations are "vital to DHS's ability to faithfully implement the statutory labor protections attendant to the [H-2B] program." *Id.* at 24,045-24,046

Petitioners acknowledge that DHS possesses general rulemaking authority over questions of federal immigration law. See, *e.g.*, Pet. 1. And they contend that DHS has "exclusive jurisdiction" over the implementation of the H-2B program. Pet. 28. There can thus be no question that, under petitioners' own theory, DHS itself possesses the statutory authority that DOL purportedly lacks—the authority to promulgate rules governing the H-2B program. Although petitioners assert that DOL "has now grabbed a veto power over" DHS

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forgo an appeal if he believes that he can prevail, the Solicitor General considers a variety of factors, such as the limited resources of the Government and the crowded dockets of the courts, before authorizing an appeal.").

(Pet. 18), they provide no reason to conclude that DOL's involvement tainted DHS's own consideration and promulgation of the rules that govern how DOL will render the advice about labor-market conditions on which DHS has decided it will depend. Accordingly, even if petitioners were to prevail on the question they present about DOL's "individual[]" authority (Pet. ii), that would not be sufficient to invalidate the regulations. See Pet. App. 22a ("[W]e must decide whether Homeland Security *or* Labor had statutory authority to promulgate the 2015 Program and Wage Rules.") (emphasis added). And the question of which agency's statutory authority supports the jointly issued 2015 regulations, which was not addressed by the Eleventh Circuit in *Bayou*, does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

BRIAN H. FLETCHER
Acting Solicitor General
BRIAN M. BOYNTON
Acting Assistant Attorney General
GLENN M. GIRDHARRY
JOSHUA S. PRESS
Attorneys

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