SECRETARY OF LABOR
WASHINGTON, D.C. 20210

Issue date: August 9, 2023

ARB Case No.: 2021-0047

ALJ Case No.: 2018-TNE-00022

In the Matter of:

ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

Petitioner

v.

GRAHAM AND ROLLINS, INC.,

Respondent.

BEFORE: JULIE A. SU
Acting Secretary of Labor

FINAL AGENCY DECISION AND ORDER

On December 22, 2022, a divided Administrative Review Board ("ARB" or "Board") issued a Decision and Order ("DO") regarding fees and costs under the Equal Access to Justice Act ("EAJA") in this matter. Pursuant to Section 6(b)(2) of Secretary's Order 01-2020, 85 Fed. Reg. 13186, 13188 (Mar. 6, 2020), the Secretary of Labor may "[a]t any point during the first 28 calendar days after the date on which a decision was issued . . . in [their] sole discretion, direct the Board to refer such decision to the Secretary for review." On January 19, 2023, the Secretary of Labor exercised this discretionary authority to undertake further review of the ARB's Decision in this matter.[1] The ARB thereafter promptly provided the administrative record in accordance with Section 6(c)(1) of Secretary's Order 01-2020.

After reviewing the record, and as discussed further below, I now issue this Final Agency Decision and Order reversing in part and affirming in part the ARB's December 22, 2022, DO.

I. Background

This case originally arose out of an enforcement action by the Wage and Hour Division ("WHD") Administrator ("Administrator") against the Respondent, Graham & Rollins, Inc. ("Respondent"), under the H-2B provisions of the Immigration and Nationality Act ("INA").

[1] On March 11, 2023, I became Acting Secretary of Labor.

After an investigation, WHD issued a determination letter on February 13, 2018. WHD found that Respondent, a crab meat processing business and employer of nonimmigrant workers under the H-2B provisions of the INA ("H-2B program"), had committed violations of the H-2B program during 2011 and 2012, and ordered Respondent to pay a total of $16,560. *See Adm'r v. Graham & Rollins, Inc.*, ALJ Case No. 2018-TNE-22, slip op. at 8–11 (OALJ June 26, 2018).[2] Respondent moved to dismiss WHD's determination on the grounds that the enforcement action was barred by a statute of limitations. The Administrator opposed, contending that no statute of limitations applied to the proceeding at issue. The ALJ granted Respondent's motion, concluding that the 5-year limitation period of 28 U.S.C. § 2462 applied, and the ARB affirmed the ALJ's decision. *Adm'r v. Graham & Rollins, Inc.*, ARB Case No. 19-009, 2020 WL 7319287, at *1 (ARB Nov. 16, 2020). Thereafter, Respondent filed a motion for attorney's fees under EAJA.

II. Decisions Below

On May 19, 2021, the ALJ issued a Recommended Decision and Order Awarding Attorney's Fees ("Recommended Order"). The ALJ concluded that EAJA applied to the H-2B enforcement proceeding at issue, focusing on the Department's regulations. Recommended Order 4. The ALJ determined that although H-2B proceedings are not included in the list of proceedings the Department has deemed to be "adversarial adjudications" subject to EAJA, *see* 29 C.F.R. § 16.104(a), the proceedings were nonetheless subject to EAJA because the "entire nature and conduct of the proceeding was adversarial" because "the position of the government was . . . presented by an attorney . . . who . . . participated in the proceeding in an adversarial capacity." Recommended Order 4. The ALJ also concluded that Respondent was entitled to fees and costs under EAJA because the Administrator had not shown that the government's position in this proceeding was "substantially justified." *Id.* at 5. The Administrator filed a motion to vacate the ALJ's decision, arguing that it was void for lack of subject matter jurisdiction as EAJA does not apply to H-2B enforcement proceedings; the ALJ denied the Administrator's motion. Order Denying Mot. to Vacate (Sept. 24, 2021).

On December 22, 2022, the ARB affirmed the ALJ's decision in part and reversed it in part. DO 2. By a 2-1 majority, the ARB affirmed the ALJ's conclusion that the Department's H-2B enforcement proceedings are subject to EAJA. All three members of the Board agreed that under EAJA, to constitute an "adversary adjudication," defined in EAJA as "an adjudication under section 554 of" the Administrative Procedure Act ("APA") "in which the position of the United States is represented by counsel or otherwise," a proceeding must have three elements: there must be an adjudication; "the adjudication must be required by statute to be determined 'on the record'"; and "the statute must provide an 'opportunity for an agency hearing.'" DO 5, 6, 37. All three judges further agreed that the only issue that the parties disputed was whether H-2B enforcement adjudications are "required by statute to be 'determined on the record.'" *Id.* at 8 37.

The majority and dissent diverged, however, in their conclusions on this question. The majority, while acknowledging that the INA does not state that an H-2B enforcement proceeding must be

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[2] This case involved alleged violations of the regulations at 20 C.F.R. Part 655 as codified by the Final Rule published on December 19, 2008 ("2008 Rule"). *See* DO 7 n.24 (citing 73 Fed. Reg. 78,020 (Dec. 19, 2008)).

on the record and that the scope of EAJA, as a waiver of sovereign immunity, must be "strictly construed" "in favor of the United States," nonetheless determined that "Congress intended that H-2B enforcement proceedings be conducted on the record" due to the "quasi-judicial nature" of such proceedings, which "involve disputed adjudicatory facts decided on the basis of an evidentiary record" and which can result in "administrative remedies . . . including civil monetary penalties and debarment." *Id.* at 9, 18, 23. The majority based this conclusion primarily on its reading of the APA's legislative history—in particular, the 1947 Attorney General's Manual on the APA ("APA Manual"). *Id*. at 12; *see also id.* at 21 n.83. It determined that "'on the record' language is not necessary" for "those quasi-judicial administrative adjudications that are inherently adjudicatory in nature," since section 554 of the APA is "presumed" to apply to such proceedings. *Id.* at 12 (citing APA Manual at 42). And it concluded that H-2B enforcement proceedings fall within this category. *Id.* at 23.

In contrast, the Chief Judge, in her partial dissent, concluded, based on the "language, context, [and] history" of the H-2B enforcement provision, that Congress did not intend H-2B enforcement proceedings to be on the record. *Id.* at 38. She found it "notable" that the INA provision governing H-2B enforcement proceedings does not state that such proceedings must be on the record or "otherwise reference or incorporate APA section 554[.]" *Id.* at 39 (construing 8 U.S.C. § 1184(c)(14)(A)). Although the Chief Judge agreed with the majority that "Congress need not necessarily explicitly state . . . that proceedings must be 'on the record' to invoke [section 554 of] the APA," *id.*, she reasoned that the absence of such language in the H-2B enforcement provision is significant because Congress expressly invoked section 554 in several other enforcement provisions of the INA, *id.* at 39–40 (citing, e.g., 8 U.S.C. §§ 1324a(e)(3)(B), 1324c(d)(2)(B)), 1375a(d)(5)(A)(ii)). She thus concluded that Congress's omission of such language from the H-2B enforcement provision should be regarded as "an intentional and meaningful choice[.]" *Id.* at 40. The Chief Judge disagreed with the majority's conclusion that Congress intended that "quasi-judicial . . . proceedings" be conducted "on the record," noting that multiple courts have held that "the statutory obligation to provide a hearing and the statutory obligation to make a determination 'on the record' are independent, discrete procedural" requirements. *Id.* at 43 (citing, e.g., *Five Points Rd. Joint Venture v. Johanns*, 542 F.3d 1121, 1125 (7th Cir. 2008); *Friends of the Earth v. Reilly*, 966 F.2d 690, 692–96 (D.C. Cir. 1992); and *St. Louis Fuel & Supply Co., Inc. v. FERC*, 890 F.2d 446, 448–49 (D.C. Cir. 1989)). And she noted that in the EAJA context, these conclusions were "reinforce[d]" by "the well-established convention that waivers of sovereign immunity must be strictly construed." *Id.* at 37–38 n. 156.

Although the ARB was divided on whether EAJA applies to H-2B enforcement proceedings, all three members agreed that the Administrator's position in this matter regarding the statute of limitations was substantially justified and reasonable even though the Administrator did not prevail. Therefore, the ARB unanimously reversed the ALJ's award of fees and costs under EAJA. *Id.* at 28, 34–36.

On January 5, 2023, the Principal Deputy Administrator of WHD filed a Petition for Secretarial Review of the ARB majority's conclusion that EAJA applies to H-2B enforcement proceedings. Respondent filed an opposition to the petition on January 17, 2023. On January 19, 2023, the

Secretary of Labor notified the Board of the Secretary's determination to exercise discretion to undertake further review pursuant to section 6(b)(2) of Secretary's Order 01-2020.[3]

III. Analysis

A. Standard of Review

Whether EAJA's fee-shifting provisions apply to an H-2B administrative enforcement proceeding is a question of statutory interpretation that I review *de novo*. *See Eno v. Jewell*, 798 F.3d 1245, 1250 (9th Cir. 2015); *cf. Application of Section 1804 of the Atomic Energy Act of 1954, as Amended by the Energy Policy Act of 1992, to Decontamination and Decommissioning Work Performed at the Department of Energy's Y-12 National Security Complex, Oak Ridge, Tenn.*, ARB No. 11-083, 2013 WL 4715031, at *3 (ARB Aug. 8, 2013) (noting that the ARB, "[a]s an administrative appellate body standing in the shoes of the Secretary of Labor . . . review[s] de novo pure questions of law, a traditional role of an appellate body").

B. Governing Legal Framework

i. Sovereign Immunity

It is an "elementary" principle of federal law that sovereign immunity shields the United States and its agencies from suit absent a waiver by Congress. *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *see F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit."). The Supreme Court and the Courts of Appeals have set forth "crystal clear" principles for determining whether Congress has waived the United States' immunity from a claim for monetary damages. *Peck v. ARB*, 996 F.3d 224, 229 (4th Cir. 2021) (citing, e.g., *FAA v. Cooper*, 566 U.S. 284, 290 (2012)). First, such a waiver must be established by the statutory text itself, not by legislative history, *United States v. Nordic Village Inc.*, 503 U.S. 30, 37 (1992), or by an agency's regulation, *Friends of the Earth*, 966 F.2d at 695. Additionally, as the Supreme Court has made clear and the ARB has consistently recognized, a waiver of sovereign immunity "must be 'unequivocally expressed' in statutory text," not merely implied. *Peck v. NRC*, ARB Case No. 2017-0062, 2019 WL 7285749, at *7 (ARB Dec. 19, 2019) (quoting *Lane v. Peña*, 518 U.S. 187, 192 (1996)), *aff'd, Peck*, 996 F.3d 224; *see Cooper,* 566 U.S. at 290; *Mitchell*, 445 U.S. at 538; *see also, e.g., Tindall v. Dep't of the Treasury,* ARB Case No. 2022-0030, 2022 WL 1997482, at *1 (ARB May 16, 2022); *Mull*

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[3] Secretary's Order 01-2020 provides for two mechanisms by which the Secretary may review an ARB decision. Under section 6(b)(1), a party to the case may file a petition to the Board for further review, and if a majority of the Board determines that review by the Secretary is warranted, it so advises the Secretary, who may decline, accept, or take no action on the Board's referral. Under section 6(b)(2), the Secretary, at any point within 28 days of the decision, may direct the Board to refer the decision to the Secretary. Section 6(b)(1), Board referral upon petition, is limited to cases where the petition "presents a question of law that is of exceptional importance," while section 6(b)(2), the section under which the Secretary has undertaken discretionary review in this case, contains no such limitation. Thus, the "exceptional importance" standard need not be addressed here.

v. Salisbury Vets. Admin. Med. Ctr., ARB Case No. 09-107, 2011 WL 3882479, at *2 (ARB Aug. 31, 2011).

Consistent with the high threshold for a waiver of sovereign immunity, any statutory ambiguities are construed in favor of the government and against a waiver—both as to whether Congress has waived immunity at all and as to the scope of any waiver. *Cooper*, 566 U.S. at 290–91; *Ardestani v. I.N.S.*, 502 U.S. 129, 137 (1991); *Lane*, 518 U.S. at 192 ("To sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims."). While this rule of construction does not require Congress to "use magic words," *Cooper*, 566 U.S. at 291, or displace other interpretative canons, *Richlin Security Service Co. v. Chertoff*, 553 U.S. 571, 589 (2008), it "require[s]" that if "the scope of Congress' waiver" is not "clearly discernable from the statutory text in light of traditional interpretive tools," a reviewing court must "take the interpretation [of the statute] most favorable to the Government." *Cooper*, 566 U.S. at 291.

ii. EAJA and Adversary Adjudications

The provisions of EAJA relevant here allow a party that prevails against the government in an administrative "adversary adjudication" to recover attorney's fees and costs unless the government's position was "substantially justified" or "special circumstances make an award unjust." 5 U.S.C. § 504(a)(1). EAJA defines "adversary adjudication," with certain exceptions not relevant here, as "an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise[.]" *Id.* § 504(b)(1)(C)(i).

The phrase "section 554 of this title" in EAJA references a section of the APA that delineates a detailed set of procedural safeguards and requirements for the subset of agency adjudications that are "required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. § 554(a). An adjudication governed by section 554 "must feature the following procedural components: an impartial and unbiased presiding officer, *id.* § 556(b); notice and an opportunity to participate in the hearing, *id.* § 554(c); the right of the parties to appear with counsel, *id.* § 553(b); the right to present oral and written evidence (including rebuttal evidence) and to conduct such cross-examination as is required for a full and true disclosure of the facts, *id.* § 556(d); the right to submit proposed findings, conclusions and exceptions, *id.* § 557(c); the compilation of an exclusive record upon which the agency must base its decision, *id.* § 556(e); and limitations on ex parte communications and on the combination of prosecutorial and adjudicative functions, *id.* § 554(d)." *St. Louis Fuel*, 890 F.2d at 448.

The Supreme Court has explained that the "unambiguous" meaning of "an adjudication under section 554" in EAJA is that the proceedings at issue must actually be "governed by the procedural provisions established in . . . that section," and may not merely be a similar type of proceeding. *Ardestani*, 502 U.S. at 134–35. That is, Congress must have manifested an intent for the particular administrative proceedings at issue to be governed by section 554 and subject to all of its requirements. *See St. Louis Fuel*, 890 F.2d at 448–49. Additionally, because EAJA constitutes a partial waiver of the United States' sovereign immunity with respect to fees and costs under the "adversary adjudication[s]" described in the statute, it "must be strictly construed in favor of the United States." *Ardestani*, 502 U.S. at 137. Thus, the question here is whether

Congress manifested a clear intent for enforcement proceedings under the H-2B program to be governed by, and subject to all of the procedures specified in, 5 U.S.C § 554.

iii. Enforcement Proceedings Under The H-2B Program

The H-2B program permits the employment of nonimmigrants to perform temporary, non-agricultural labor or services 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). An employer seeking to hire nonimmigrant workers under the H-2B program must obtain a certification from the Department of Labor that these workers "will not adversely affect the wages and working conditions of U.S. workers similarly employed" before the employer petitions the Department of Homeland Security ("DHS") to employ H-2B workers. 20 C.F.R. § 655.1(b) (2009).

In 2005, Congress enacted the provisions by which the Department enforces the labor provisions of the H-2B program. *See* Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Div. B, The Real-ID Act, § 404, Pub. L. No. 109–13, 119 Stat. 231, 319 (2005). Congress authorized the Secretary of Labor, by delegation from the Secretary of Homeland Security, to impose administrative remedies and take other action against an employer if the Secretary "finds, after notice and an opportunity for a hearing, a substantial failure to meet any of the conditions of the petition to admit or otherwise provide status to a nonimmigrant [H-2B] worker . . . ." *Id.* (codified at 8 U.S.C. § 1184(c)(14)(A)).

C. The Board Erred in Concluding that an H-2B Enforcement Proceeding is an Adversary Adjudication Subject to EAJA.

The ARB majority erred in concluding that an H-2B enforcement proceeding is an adversary adjudication subject to EAJA. As the Board unanimously agreed, there is no dispute that an H-2B enforcement proceeding is an adjudication and that the statute provides an opportunity for a hearing. *See* DO 8, 38. But the majority erred in concluding that an H-2B enforcement proceeding must be conducted "on the record," as required for a proceeding to be governed by 5 U.S.C. § 554. As discussed below, the majority failed to give sufficient weight to the text of the INA, which contains no evidence, let alone a clear statement, of Congressional intent to require that H-2B enforcement proceedings be conducted on the record or subject to section 554. Instead, the majority, relying almost entirely on the Attorney General's APA Manual, concluded that the mere reference to a "hearing" in the H-2B statutory text and the nature of H-2B enforcement proceedings as "quasi-judicial" provide a sufficient basis on which to conclude that such proceedings are "on the record" and subject to EAJA. This conclusion is unsupported by the relevant authorities and erroneously inverts the presumption in favor of sovereign immunity.

i. The majority failed to focus on the text of the INA, which does not clearly show that Congress intended to require that H-2B proceedings be conducted on the record.

As a general matter, the text of a statute is the starting point for any statutory interpretation. *See BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (stating that "our inquiry begins with the statutory text," because "[t]he preeminent canon of statutory interpretation requires us to

presume that the legislature says in a statute what it means and means in a statute what it says there" (internal quotations and citations omitted)). This principle applies with even greater force when determining whether a statute waives sovereign immunity—a determination that must be made in this case since, as the majority acknowledges, EAJA is a partial waiver of sovereign immunity. *See* DO 4 (citing *Ardestani*, 502 U.S. at 137). As explained above, "waiver[s] of sovereign immunity must be 'unequivocally expressed' in statutory text," *Cooper,* 566 U.S. at 290, and "strictly construed in favor of the United States," *Ardestani*, 502 U.S. at 137, and any waiver "must extend unambiguously" to the specific monetary claims at issue, *Lane*, 518 U.S. at 192. Here, this means that Congress must have "indicated clearly its intent to trigger the formal [, on-the-record] hearing provisions" of section 554 of the APA in the statute authorizing H-2B enforcement proceedings for these proceedings to fall within EAJA's partial waiver of immunity. *Five Points Rd.*, 542 F.3d at 1126 (internal citations omitted).

The text of the H-2B enforcement provision does not explicitly require the proceedings to be conducted "on the record" or otherwise reference or incorporate APA section 554. DO 39. The provision's sole reference to the procedural requirements applicable to H-2B enforcement proceedings is that the Secretary of Labor may impose certain remedies if the Secretary "finds, *after notice and an opportunity for a hearing*, a substantial failure to meet any of the conditions of the petition to admit . . . a nonimmigrant [H-2B] worker . . . or a willful misrepresentation of a material fact in such petition[.]" 8 U.S.C. § 1184(c)(14)(A) (emphasis added).

This does not end the inquiry entirely, however, because EAJA applicability "does not turn, mechanically, on the absence of magic words." *St. Louis Fuel*, 890 F.2d at 448. Rather, courts use traditional tools of statutory construction to determine whether "Congress intended to *require* full agency adherence to all section 554's procedural components" for a particular administrative proceeding. *Id.* at 448–49 (emphasis in original). Such a determination necessarily is specific to the statute establishing the administrative proceeding at issue.

For example, three courts of appeals have agreed that EAJA applies to "the statute[] creating and implementing" the proceedings of the Department of Agriculture's National Appeals Division ("NAD"), 7 U.S.C. §§ 6991–7002, by examining the detailed hearing provisions in the NAD statute. *Aageson Grain & Cattle v. USDA*, 500 F.3d 1038, 1044 (9th Cir. 2007); *see Five Points Rd.*, 542 F.3d at 1126; *Lane v. USDA*, 120 F.3d 106, 108–09 (8th Cir. 1997). As these courts observed, the statute includes a description of the hearing officer's powers and authority, prohibitions on ex parte communications, burdens of proof and standards of review, and critically, "repeated references to the record and [a] provision for trial-type procedures," *Five Points Road*, 542 F.3d at 1126; *Lane*, 120 F.3d at 109, and an explicit reference to the APA, *Aageson*, 500 F.3d at 1045. These courts therefore concluded, based on "the text . . . as well as the structure of the NAD statute . . . that Congress intended for NAD proceedings to be governed by section 554 of the APA." *Five Points Road*, 542 F.3d at 1126; *see Aageson*, 500 F.3d at 1044 (agreeing that "the statutes creating and implementing the NAD mandate each of the three procedural protections in APA § 554"); *Lane*, 120 F.3d at 109 ("The repeated references to the record in the NAD statute and its provision for trial-type procedures make it clear that Congress intended for NAD proceedings to be governed by § 554 of the APA.").

Similarly, the First Circuit concluded that EAJA applies to debarment proceedings under the Service Contract Act ("SCA"), *see* 41 U.S.C. § 6507(a), following "a careful review of the relevant statutory provisions" governing SCA debarment. *Dantran, Inc. v. United States Department of Labor,* 246 F.3d 36, 47 (1st Cir. 2001). Specifically, the First Circuit explained that the SCA incorporates by reference the enforcement authority of another statute, the Walsh-Healey Act, that, in turn, expressly requires compliance with the APA's procedural requirements. *Id.* "By that chain of relationship," the court concluded, "all of the requirements for EAJA coverage would be met." *Id.* (construing provisions currently codified at, e.g., 41 U.S.C. §§ 6707(a), 6507, and 6509(a)).

In contrast, in cases where the statutory provision at issue does not demonstrate intent to apply all of section 554's required procedures, courts have concluded that EAJA does not apply. Thus, in finding EAJA inapplicable to a provision of the Department of Energy ("DOE") Organization Act, 42 U.S.C. § 7193(c), the D.C. Circuit explained that although the statute ensured "the opportunity to participate through the submission of briefs, oral or documentary evidence, and oral arguments; cross-examination . . . ; and the issuance of an order, based on findings of fact, which constitutes a final agency action subject to judicial review," it nonetheless "provide[d] something less than APA section 554 mandates." *St. Louis Fuel*, 890 F.2d at 448–49. The court also found it "significant" that unlike the provision at issue, other provisions in the same statute *did* expressly invoke the APA. *Id.* at 449. Similarly, in another case, the D.C. Circuit concluded that a hearing on the withdrawal of a state's authorization to administer a hazardous waste program under the Solid Waste Disposal Act ("SWDA") was not covered by EAJA, finding it "significant" that Congress "merely required a 'public hearing'" "in enacting" the provision at issue, 42 U.S.C. § 6926(e), while "it required a hearing 'subject to section 554'" in the employee protection section of the same statute, 42 U.S.C. § 6971(b). *Friends of the Earth*, 966 F.2d at 694.

An analysis of the H-2B provision at issue here, 8 U.S.C. § 1184(c)(14)(A), reveals that in addition to the lack of any explicit "on the record" language or provision incorporating section 554 or the APA, there is no other textual evidence of Congressional intent—much less "clear[]" intent, *see Five Points Rd.*, 542 F.3d at 1126—to require that H-2B enforcement proceedings be conducted on the record or in full compliance with section 554.

First, as the Chief Judge explained, "[u]nlike the H-2B enforcement provision[], several of the other enforcement provisions Congress added elsewhere to the INA, both before and after the 2005 enactment of the H-2B enforcement provisions," *do* "expressly invoke and incorporate APA section 554." DO 39. Specifically, the INA explicitly requires that hearings under a provision governing the employment of unauthorized migrants (enacted in 1986), a provision governing document fraud (enacted in 1990), and a provision governing international marriage brokers (enacted in 2005) be conducted in accordance with section 554's requirements. Immigration Reform and Control Act of 1986, Pub. L. No. 99–603, § 101, 100 Stat. 3359, 3366 (codified as amended at 8 U.S.C. § 1324a(e)(3)(B)); Immigration Act of 1990, Pub. L. No. 101–649, § 544, 104 Stat. 4978, 5060 (codified as amended at 8 U.S.C. § 1324c(d)(2)(B)); Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109–162, § 833, 119 Stat. 2960, 3074 (codified as amended at 8 U.S.C. § 1375a(d)(5)(A)(ii)); *see* DO 39 n.162. Similarly, as the Chief Judge pointed out, enforcement provisions in the INA's H-1B, H-1B1, and E-3 programs, some of which were enacted shortly before 2005, explicitly provide for

a hearing under APA section 556, which itself applies to hearings required by section 554. *See id.* at 39–40 n.162 (citing Immigration Act of 1990, § 205 (codified as amended at 8 U.S.C. § 1182(n)(2)(B)); United States-Chile Free Trade Agreement Implementation Act, Pub. L. No. 108–77, § 402, 117 Stat. 909, 942 (2003) (codified as amended at 8 U.S.C. § 1182(t)(3)(B)); Consolidated Appropriations Act, 2005, Pub. L. No. 108–447, § 424, 118 Stat. 2809, 3355 (codified as amended at 8 U.S.C. § 1182(n)(2)(G)(viii))).[4]

These INA provisions demonstrate that when Congress intends for an immigration enforcement proceeding to be subject to section 554's procedures for formal adjudications, it is aware of the language it can use to make such intent clear. The absence of any such language in the H-2B enforcement provision is therefore much more significant than it might otherwise be in isolation. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another . . ., it is generally presumed that Congress act[ed] intentionally and purposely[.]") (internal quotations and citations omitted). As noted above, the D.C. Circuit has twice applied this principle in concluding that EAJA was inapplicable to specific proceedings where other proceedings in the same statute explicitly incorporated the APA or section 554. *See St. Louis Fuel*, 890 F.2d at 448–49; *Friends of the Earth*, 966 F.2d at 694.

Second, the H-2B enforcement provision contains no other "affirmative indication of [C]ongressional intent" to require adherence to all of section 554's requirements. DO 44. Unlike the NAD statute, which has been found to be subject to EAJA because of its detailed provisions that repeatedly reference the administrative record and provide for trial-type procedures, *Five Points Rd.,* 542 F.3d at 1126; *Aageson*, 500 F.3d at 1044; *Lane*, 120 F.3d at 109, the H-2B statute sets forth no procedural requirements whatsoever beyond "notice and an opportunity for a hearing." 8 U.S.C. § 1184(c)(14)(A). Nor does the H-2B enforcement provision cross-reference other provisions explicitly incorporating section 554's requirements, as the SCA debarment provision does. *Dantran*, 246 F.3d at 47. The text of the H-2B statute thus does not provide any evidence that Congress intended for H-2B enforcement proceedings to be "on the record."

I have evaluated the majority and Respondent's arguments on the above points and do not find them persuasive. While I agree that the presumption described in *Russello* that ascribes meaning to the inclusion of certain language in one statutory provision and its omission in another is not irrebuttable, it is not, as the majority appears to suggest, DO 21–22 n.87, limited to circumstances where the textual differences occur in the same legislation. Rather, it is simply strongest under those circumstances, and continues to apply where the disparate provisions of the same statute were enacted at different times. *Orton Motor, Inc. v. HHS*, 884 F.3d 1205, 1214 (D.C. Cir. 2018). Moreover, as discussed above, many of the INA enforcement provisions that

[4] Additionally, as the Chief Judge noted, "Congress expressly invoked APA section 554, or expressly dictated that agency determinations must be made 'on the record,' in numerous other enforcement and whistleblower statutes entrusted to the Secretary of Labor and, by delegation, to the Board." DO 39–40 n.163 (citing, e.g., the whistleblower provision of the Clean Air Act, 42 U.S.C. § 7622(b)(2)(A), the whistleblower provision of the Energy Reorganization Act, 42 U.S.C. § 5851(b)(2)(A), and the provision governing civil monetary penalties under the Fair Labor Standards Act, 29 U.S.C. § 216(e)(4)).

do explicitly incorporate the APA were enacted in close temporal proximity to the H-2B enforcement provision. Against this backdrop, the exceedingly sparse textual description of H-2B procedure—"notice and an opportunity for a hearing"—suggests no intent to include the full panoply of protections that several other provisions in the INA explicitly incorporated.

The majority also points to a statutory note accompanying the 2005 legislation that established the H-2B enforcement provisions, the Real ID Act, noting that "Congress excluded formal APA procedure from several sections of the Real ID Act to allow for faster agency implementation of the statutory language." DO 23 n.90 (citing Pub. L. No. 109–13 § 407, 119 Stat. 231, 321). But to the extent that the majority reads this note as indicative of Congressional intent to apply the requirements of section 554 of the APA to H-2B enforcement proceedings, this is a misreading. The note exempted several *rulemaking* provisions of the Real ID Act from the APA and other laws so that they could be implemented quickly.[5] Nothing in this provision manifests an affirmative intent that H-2B enforcement adjudications be subject to section 554's "on the record" requirement. Certainly, this statutory note falls well short of the clear evidence of Congressional intent needed to waive sovereign immunity under EAJA.

ii. The majority erred in presuming that H-2B hearings are subject to EAJA.

As the above discussion makes clear, the H-2B provisions of the INA contain no language indicating that Congress intended to require that enforcement proceedings be conducted on the record. To the contrary, the H-2B statutory text provides only for "notice and an opportunity for a hearing." The plain reading of this language, therefore, is that H-2B proceedings require a hearing but not that the hearing be on the record, and thus EAJA does not apply.[6]

The majority nonetheless concluded that Congress intended to impose an on-the-record requirement on H-2B enforcement proceedings, determining that such a requirement is "presumed" to apply to all "quasi-judicial" adjudicative hearings required by statute and suggesting that Congress must have taken some affirmative steps to *preclude* application of this requirement to H-2B enforcement proceedings for EAJA not to apply. DO 22–23. The majority

[5] Specifically, the note provides that "[t]he requirements of [the APA] or any other law relating to *rulemaking*, *information collection* or publication in the *Federal Register* shall not apply to any action to implement" new provisions addressing "numerical limitations on H-2B workers" (section 402); the establishment of "a fraud prevention and detection fee" (section 403); and the "allocation of H-2B visas" for each fiscal year (section 405) "to the extent that [the relevant federal agency heads] determine that compliance with any such requirement would impede the expeditious implementation of such sections[.]" Pub. L. No. 109–13 § 407 (emphases added).

[6] This is particularly the case in light of the rule against surplusage, which requires courts "to give effect, if possible, to every clause and word of a statute," *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotations and citations omitted); *see Barton v. Barr*, 140 S. Ct. 1442, 1458 (2020) (describing the rule against surplusage as "[a]mong the most basic interpretative canons") (internal quotations and citations omitted). By interpreting the word "hearing" as encompassing both the hearing and the on-the-record elements, the majority's view fails to give effect to all of the relevant language in EAJA and the APA. *See* 5 U.S.C. §§ 504(a)(1), (b)(1)(C), 554(a).

derived this presumption in significant part from its reading of the Attorney General's 1947 APA Manual, though it also purported to find support in some of the above-cited cases. *See id.* at 12–18, 22. As discussed below, the majority's approach is contrary to well-established sovereign immunity principles and misconstrues the relevant caselaw.

1. The majority's analysis impermissibly inverts the presumption in favor of sovereign immunity.

When examining a waiver of sovereign immunity such as EAJA, "the presumption [is] *against* waiver of sovereign immunity," *Friends of the Earth,* 966 F.2d at 696 (emphasis added), and can only be overcome by clear and "unequivocal" statutory text. *See, e.g., Peck*, 2019 WL 7285749 at *4 ("The extent of the federal government's waiver of sovereign immunity … [is] defined by the language of the waiver," which "must be 'unequivocally expressed[.]'") (quoting *Lane*, 518 U.S. at 192); *Mull*, 2011 WL 3882479 at *3 (citing *Lane*, 518 U.S. at 192). Although the ARB has acknowledged and applied these principles in previous cases,[7] it failed to do so here. Any notion that EAJA applies to all "quasi-judicial" proceedings unless Congress takes some action to preclude its application necessarily "inverts the presumption against waiver[.]" *Friends of the Earth*, 966 F.2d at 696. The majority's assumption that H-2B enforcement proceedings are covered by EAJA is thus contrary to bedrock sovereign immunity principles.

While it acknowledged the presumption against waiver, the majority contended that its application in this case was "particularly difficult" because "three statutes [EAJA, the INA, and the APA] are in play" and because of what it described as EAJA's "conditional features." DO 18, 19. It also emphasized that the Supreme Court has described this principle as "a canon of construction" and has noted that "canons are not mandatory rules." *Id.* at 19 (quoting *Richlin*, 553 U.S. at 589–90, and *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001)). Similarly, Respondent argued that the principle regarding strict construction of waivers of sovereign immunity is inapplicable because, in its view, "there is no doubt or ambiguity regarding whether Congress waived sovereign immunity through EAJA." Resp. Br. 22.

These arguments, however, are foreclosed by the Supreme Court's decision in *Ardestani*. Like this case, *Ardestani* concerned whether certain proceedings under the INA were covered by the APA and EAJA, and therefore involved the same "three statutes" and "conditional features."

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[7] Other examples of the ARB applying sovereign immunity principles include *Tindall*, 2022 WL 1997482, at *5 (whistleblower provision of the Taxpayer First Act did not waive Treasury Department's sovereign immunity); *Mull*, 2011 WL 3882479, at *9 (Energy Reorganization Act whistleblower provision does not waive sovereign immunity of Federal licensee of the Nuclear Regulatory Commission); *Erickson v. EPA*, ARB Case Nos. 03-002, 03-003, 03-004, 03-064, 2006 WL 1516646, at *8 (ARB May 31, 2006) (Environmental Protection Agency's sovereign immunity waived by Clean Air Act and Solid Waste Disposal Act whistleblower provisions but not by Federal Water Pollution Prevention and Control Act whistleblower provision). *See also Cody-Ziegler et. al. v. WHD Admin.*, ARB Case Nos. 01-014 01-015, 2003 WL 23114278, at *11, n.7 (ARB Dec. 19, 2003) (noting that the ARB has held that Davis-Bacon Act administrative proceedings are not subject to EAJA and indicating that such waivers of sovereign immunity "must be strictly construed in favor of the sovereign").

There, the Court emphasized that "[t]he EAJA renders the United States liable for attorney's fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity," and invoked the principle that "[a]ny such waiver must be strictly construed in favor of the United States" in rejecting arguments that EAJA applied to the proceedings at issue. *Ardestani*, 502 U.S. at 137. *See also Friends of the Earth*, 966 F.2d at 696 (citing *Ardestani* in concluding that sovereign immunity principles apply when determining if a proceeding must be on the record under EAJA); *St. Louis Fuel*, 890 F.2d at 449–50 (declining to conclude that EAJA applied to the proceedings at issue "because we are bound to honor the canon that waivers of the sovereign's immunity must be strictly construed"). Thus, the principle that waivers of sovereign immunity must be narrowly construed applies with no less force in this case than elsewhere.

2. The Attorney General's Manual on the APA does not support EAJA coverage of H-2B enforcement proceedings.

The majority's error is compounded by its reliance on legislative history rather than statutory text. As noted above, the majority concluded that the APA's on-the-record requirement is "presumed" to apply to all "quasi-judicial" adjudicative hearings required by statute. DO 12, 22–23. It based this conclusion principally on the APA Manual, which provides, in relevant part, "It is believed that with respect to adjudication the specific statutory requirement of a hearing, without anything more, carries with it the further requirement of decision on the basis of the evidence adduced at the hearing." APA Manual at 43. Respondent's brief likewise cited the APA Manual for this proposition. Resp. Br. 15–16.

The majority and Respondent's reliance on the APA Manual is misplaced. First, while legislative history can be a valuable aid in statutory construction, "[l]egislative history cannot supply a waiver that is not clearly evident from the language of the statute." *Cooper,* 566 U.S. at 290 (citing *Lane*, 518 U.S. at 192). Rather, "'the 'unequivocal expression' of elimination of sovereign immunity that [the Supreme Court] insist[s] upon is an expression in statutory text.'" *Lane*, 518 U.S. at 192 (quoting *Nordic Vill.*, 503 U.S. at 37). Thus, the APA Manual is not a substitute for statutory language showing that Congress clearly intended for H-2B enforcement proceedings to be conducted on the record—language that the H-2B statute lacks, as explained above. The ARB has recognized the minimal relevance of legislative history in determining whether Congress has waived sovereign immunity, *see, e.g., Peck,* 2019 WL 7285749 at *4 n.15, *Mull*, 2011 WL 3882479 at *3, but it failed to apply its own precedent here.

Moreover, the APA Manual is an interpretation of the APA, not EAJA, which was enacted 34 years later. Equal Access to Justice Act, Pub. L. No. 96–481, Tit. II, 94 Stat 2321 (1980). While the meaning of section 554 of the APA clearly is relevant to a proper interpretation of EAJA's waiver of sovereign immunity, "[t]he APA Manual," as the Chief Judge noted, "does not discuss sovereign immunity, or how a tribunal's obligation to narrowly construe waivers of sovereign immunity impacts the Attorney General's analysis and assumptions regarding congressional intent." DO 44 n. 178. Thus, even if the manual could be read to support the conclusion that a statutorily required hearing is presumptively on the record within the meaning of the APA—a conclusion with which, as discussed further below, numerous courts have disagreed—such a

conclusion is not appropriate in the EAJA context, as it would "invert[] the presumption against waiver[.]" *Friends of the Earth,* 966 F.2d at 696.[8]

Finally, even if the APA Manual's "proposition that it might ordinarily be assumed that Congress intends for quasi-judicial adjudicatory proceedings to be conducted 'on the record'" were generally applicable in the EAJA context, it would not be dispositive here. DO 43. As the Chief Judge noted, "the APA Manual goes on to provide a critical caveat: 'Of course, the foregoing discussion …is inapplicable to any situation in which the legislative history or the context of the pertinent statute indicates a contrary congressional intent.'" *Id.* (quoting APA Manual at 42–43). Here, the context is the other "enforcement provisions within the INA," which "expressly invoke APA section 554," in contrast to "the H-2B enforcement provision[]," which "conspicuously [does] not" include such language. DO 44. This statutory context overcomes any presumption of EAJA coverage that could be derived from the APA Manual, "particularly," as the Chief Judge remarked, "because of the sovereign immunity issues at stake." *Id.*

3. Even outside of EAJA, courts have rejected the argument that the APA presumptively requires adjudicatory hearings to be on the record.

Additionally, notwithstanding the APA Manual, courts have generally rejected the majority and Respondent's argument that a statutorily required adjudicative hearing is presumptively "on the record." *See Crestview Parke Care Ctr. v. Thompson*, 373 F.3d 743, 748 (6th Cir. 2004) ("Lower courts have explicitly held that a formal adjudication featuring an oral evidentiary hearing is required by the APA only when a statute explicitly calls for a hearing 'on the record.'"); *Chem. Waste Mgmt., Inc. v. EPA*, 873 F.2d 1477, 1481 (D.C. Cir. 1989) ("declin[ing] to adhere" to a presumption that an adjudicative hearing must be on the record); *Bell Tel. Co. of Penn. v. FCC*, 503 F.2d 1250, 1264 (3d Cir. 1974) ("The phrase 'opportunity for hearing' lacks the reference to

[8] The APA manual also is not an interpretation of the H-2B provisions of the INA. The majority appears to suggest that the INA's passage in 1952 shortly after the APA's enactment in 1946 is evidence that the APA presumptively applies to INA proceedings absent an express statutory exclusion. DO 21–22. But even assuming *arguendo* that such a presumption could apply to INA proceedings as they existed in 1952, it cannot be reasonably applied to H-2B enforcement provisions enacted over five decades later. To the contrary, Congress' decision to expressly invoke the APA in more recently-enacted INA provisions on adjudications, *see supra* § III.C.i, strongly suggests that by 2005, it did not believe that any presumption would be sufficient to guarantee the protections of section 554. And, as the Chief Judge noted, *see* DO 41, the legislative history of the H-2B enforcement provisions themselves makes no reference to the APA or to any specific procedures to be applied to such proceedings and thus does not support a conclusion that Congress intended for section 554 to apply. *See, e.g.*, 151 Cong. Rec. S6283–88 (Apr. 13, 2005) (statements of Sens. Mikulski, Warner, and Sarbanes on the Save Our Small and Seasonal Businesses Act of 2005); 151 Cong. Rec. S6535–36 (Apr. 14, 2005) (statement of Sen. Allen on the Save Our Small and Seasonal Businesses Act of 2005); 151 Cong. Rec. S9018–20 (May 10, 2005) (statements of Sen. Mikulski on the Save Our Small and Seasonal Businesses Act of 2005).

a 'record' necessary to trigger the evidentiary requirements of the [APA]."); *City of W. Chi. v. NRC*, 701 F.2d 632, 641–42 (7th Cir. 1983) (". . . Congress must clearly indicate its intent to trigger the formal, on-the-record hearing provisions of the APA . . . . Thus despite the fact that the statute required the Commission to grant a hearing to any materially interested party, there is no indication that Congress meant the hearing to be a formal one."); *cf. Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12, 17 (1st Cir. 2006) (the words "public hearing" did not demonstrate "clear and unambiguous congressional intent" that the hearing be on the record).

These decisions reflect that the word "hearing," without more, at best leaves ambiguity as to whether Congress intended for such a hearing to be on the record. As a result, courts have deferred, under *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.,* 467 U.S. 837, 842 (1984), to agency regulations providing for informal adjudications under such circumstances. *See Dominion Energy*, 443 F.3d at 17–18; *Chem. Waste Mgmt.,* 873 F.2d at 1481–82. These holdings are significant because the standard for ambiguity for purposes of *Chevron* deference is virtually identical to the standard for ambiguity for purposes of strict construction of waivers of sovereign immunity. *Compare AFL–CIO v. FEC*, 333 F.3d 168, 174 (D.C. Cir. 2003) ("the fact that [a] provision can support two plausible interpretations renders it ambiguous for purposes of *Chevron* analysis") *with Cooper*, 566 U.S. at 290–91 ("Ambiguity exists [for purposes of construing a potential sovereign immunity waiver] if there is a plausible interpretation of the statute that would not authorize money damages against the Government.").[9] Thus, just as the mere reference to a "hearing" does not constitute unambiguous congressional intent to require formal, on-the-record proceedings for *Chevron* purposes, such a reference cannot, without more, waive sovereign immunity under EAJA.[10]

It is therefore unsurprising that none of the cases cited by either the majority or Respondent have concluded that the word "hearing," by itself, can trigger EAJA coverage. Rather, all of the

[9] I recognize that the Supreme Court recently granted certiorari on a case implicating the continued validity of *Chevron* deference. *See Loper Bright Enters. v. Raimondo*, Case No. 22-451. The cases cited herein are relevant not for their application of *Chevron* deference, but rather for their conclusions that statutes calling for adjudicative "hearing[s]" are ambiguous regarding whether such a hearing must be on the record.

[10] Two older non-EAJA decisions accepted the presumption advanced by Respondent. *See Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, 877 (1st Cir. 1978) ("presum[ing] that, unless a statute otherwise specifies, an adjudicatory hearing subject to judicial review must be on the record"); *Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1263 (9th Cir. 1977) (citing the APA Manual for the proposition that "if a statute provides for [an adjudicative] hearing," significant weight "should not typically be accorded to Congress' failure to specify that determinations must be made 'on the record'"). However, more recently, the First Circuit clarified that "*Seacoast* simply does not hold that Congress *clearly intended* the term 'public hearing' in [the applicable statute] to mean 'evidentiary hearing,'" characterizing the presumption applied in *Seacoast* as "antithetic to a conclusion that Congress's intent was clear and unambiguous." *Dominion Energy*, 443 F.3d at 17 (emphasis added). This compels a conclusion that in the First Circuit, a presumption that a "hearing" must be on the record would be inappropriate for EAJA purposes—a conclusion supported by the weight of the case law. I therefore do not find the Ninth Circuit's view in *Marathon Oil*, a non-EAJA case, persuasive.

appellate cases concluding that hearings were "on the record" for EAJA purposes examined specific statutory language that either described on-the-record proceedings or incorporated such descriptions by reference. *See Five Points Rd.,* 542 F.3d at 1126; *Aageson*, 500 F.3d at 1043–44; *Dantran*, 246 F.3d at 47; *Lane*, 120 F.3d at 109. If Respondent and the majority were correct that the mere reference to a "hearing" were sufficient to waive sovereign immunity, these cases' detailed textual analyses would have been entirely superfluous.

4. The nature of an H-2B enforcement proceeding does not make it an adversary adjudication within the meaning of EAJA.

I likewise disagree with the majority that caselaw under EAJA supports a conclusion that Congress intended for H-2B enforcement proceedings to be covered by EAJA because they are "quasi-judicial." To the contrary, as illustrated above, all of the relevant cases appropriately examined not only the nature of the proceeding at issue but the language of the statute authorizing the proceeding.

In *Ardestani*, the Supreme Court, concluding that INA deportation proceedings are not subject to EAJA, rejected the argument that EAJA applies to all "trial-type proceedings in which the Government is represented." 502 U.S. at 136. The three appellate cases concerning the NAD proceedings gave no indication that "inherently adjudicatory, quasi-judicial" proceedings are presumptively covered by EAJA; rather, they supported their conclusion that EAJA applies to NAD proceedings by carefully examining the detailed provisions in the NAD statute. *See Five Points Rd.,* 542 F.3d at 1126; *Aageson*, 500 F.3d at 1043–44; *Lane*, 120 F.3d at 109. While the First Circuit in *Dantran* did characterize an SCA debarment proceeding as "'exactly the kind of quasi-judicial proceeding for which the adjudicatory procedures of the APA were intended[,]'" it also analyzed the SCA text and concluded that it explicitly incorporated provisions requiring compliance with all of section 554's components.[11] 246 F.3d at 46 (quoting *Seacoast*, 572 F.2d at 876), 47. Similarly, while the D.C. Circuit stated in *Friends of the Earth* that the SWDA proceeding at issue in that case involved "legislative facts" for which section 554 proceedings were not intended, it also closely analyzed the statutory language authorizing the proceeding. *See* 966 F.2d at 693–94. And in *St. Louis Fuel*, the D.C. Circuit likewise focused on the text of the relevant enabling statute, the DOE Organization Act, in determining that Congress did not intend to require that the proceeding at issue be conducted on the record, and rejected the argument that EAJA "should be construed broadly to reach all agency proceedings like or resembling those 'under section 554.'" 890 F.2d at 448–50. [12] None of these cases found EAJA applicable *solely*

[11] To the extent Respondent or the majority contend that *Dantran* supports application of EAJA based solely on a proceeding's "quasi-judicial" nature, *Dantran* relied on *Seacoast* and predated *Dominion Energy*, which, as discussed above, concluded that a statutorily-required adjudicative "hearing" does *not* reflect clear, unambiguous intent for such a proceeding to be on the record. *See supra* n. 10.

[12] *St. Louis Fuel* is particularly instructive, as the D.C. Circuit still concluded that the SDWA did not contain the requisite evidence of Congressional intent to apply section 554 of the APA to withdrawal proceedings under that statute even though the SDWA set forth significantly greater and more specific procedural protections than the H-2B enforcement provision. *See* 890 F.2d at

by virtue of a proceeding ostensibly being a "quasi-judicial" adjudication, the result the majority and Respondent urge here.[13]

Finally, the majority erred in concluding that the potential "immediate economic consequences" and "disputed individual rights" involved in an H-2B proceeding and "due process concerns" require application of APA section 554 and therefore EAJA. DO 15–18. The Supreme Court rejected such reasoning in circumstances involving an even more significant infringement on liberty or property interests—deportation from the United States. *See Ardestani*, 502 U.S. at 138 (concluding that even though "the broad purposes of the EAJA would be served by making the statute applicable to deportation proceedings" and despite "the enormity of the interests at stake," it could not "extend the EAJA to administrative deportation proceedings when the plain language of the statute, coupled with the strict construction of waivers of sovereign immunity, constrain us to do otherwise"). And the *Friends of the Earth* court found the "substantial" "nature of the interests at stake in" the withdrawal proceeding at issue to be "hardly . . . dispositive of the question whether Congress intended to require a section 554 hearing." 966 F.2d at 693.

As the Chief Judge correctly noted, "a litigant's right to due process does not necessarily require a formal adversarial adjudication of the type contemplated by APA section 554 in all instances." DO 46 (citing, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976); *2-Bar Ranch Ltd. P'ship v. U.S. Forest Serv.*, 996 F.3d 984, 994–95 (9th Cir. 2021) and *Smedberg Machine & Tool, Inc. v. Donovan*, 730 F.2d 1089, 1093 (7th Cir. 1984)). Indeed, "Congress permits the Secretary of

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448 (noting that the statute at issue provided "the opportunity to participate through the submission of briefs, oral or documentary evidence, and oral arguments; cross-examination . . . ; and the issuance of an order, based on findings of fact, which constitutes a final agency action subject to judicial review"). Here, the H-2B statute's *only* reference to procedure consists of the short phrase "notice and an opportunity for a hearing." While the Department's H-2B regulations require proceedings that can be described as quasi-judicial, as the majority acknowledged, DO 11 n.44, only Congress, not an agency, can waive sovereign immunity, and these seven words do not do so.

[13] The majority also found support for its conclusion that section 554's requirements are presumed to apply to quasi-judicial proceedings in the Supreme Court's decision in *United States v. Allegheny-Ludlum Steel Corp.*, which, analyzing a rulemaking hearing, stated that "'[b]ecause the proceedings under review were an exercise of legislative rulemaking power rather than adjudicatory hearings . . . and because the [statute] does not require a determination 'on the record,' the provisions of [the APA] were inapplicable.'" DO 15 (quoting 406 U.S. 742, 757 (1972)). According to the majority, the Court thus "suggested that if the matter had been an adjudication it would have viewed the absence of 'on the record' language differently when deciding whether formal APA procedures . . . were required." *Id.* I agree with the Chief Judge that this is a misreading of the decision, which "did not indicate that the distinction [between rulemaking and adjudication] was essential to its decision, did not definitively hold that it would have reached a different result if the proceedings at issue had been adjudicatory in nature, and did not state that adjudicatory proceedings are presumed to be 'on the record' and subject to the APA even absent a clear expression of congressional intent[.]" DO 42 n.171. Additionally, even if *Allegheny-Ludlum* could support the proposition the majority suggested, it would still be distinguishable because it did not involve a potential waiver of sovereign immunity.

Labor to impose monetary penalties, debar violators, and impose other administrative remedies" under the Davis-Bacon Act "without even conducting a hearing[.]" *Id.* at 45 (citing *Cody-Ziegler,* 2003 WL 23114278, at *11; *Roderick Constr. Co.*, WAB Case No. 88-39, 1990 WL 484319, at *5 (WAB Dec. 20, 1990)). Thus, the nature of H-2B enforcement proceedings does not mandate a conclusion that Congress intended that the proceedings be on the record or for EAJA to apply.

In sum, the majority's failure to focus on the text of the H-2B enforcement provision, and its reliance on presumptions rooted in legislative history, were in error. Since the H-2B enforcement provision contains no evidence of Congressional intent to require that H-2B enforcement proceedings be conducted on the record—and certainly no clear and unequivocal intent to this effect—the majority erred in concluding that H-2B enforcement proceedings must be conducted on the record and are thus subject to EAJA's waiver of sovereign immunity.

D. I adopt the ARB's Conclusion that the Administrator's position was substantially justified.

Although the conclusion above renders it unnecessary to reach the question of whether the Administrator's position was substantially justified, to the extent that a reviewing court were to conclude that EAJA applies to H-2B proceedings, I adopt the ARB's unanimous conclusion that the Administrator's position in this matter was substantially justified, and that the ALJ erred in reaching the opposite conclusion and awarding attorney's fees and costs to Respondent. *See* DO 23–36.[14] This conclusion is well-supported and based on a thorough analysis of the record.

As the ARB noted, the Supreme Court has defined substantially justified as "'justified in substance or the main—that is, justified to a degree that could satisfy a reasonable person," *id.* at 26–27 (quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)), and thus "'the government must show that its position had a reasonable basis in both law and fact,'" *id.* at 27 (quoting *FEC v. Pol. Contributions Data, Inc.*, 995 F.2d 383, 386 (2d Cir. 1993)). Based on a de novo review of the "administrative record, as a whole," 5 U.S.C. § 504(a)(1), the ARB correctly concluded that the Administrator's position—that requiring an employer to reimburse H-2B employees for outbound transportation expenses constitutes "imposing owed 'wages' and not 'penalties,' such that no limitations period would bar the action"—was reasonable, and thus substantially justified, for multiple reasons. DO 34–35. First, this question was an issue of first impression before the Board. *Id.* at 34 (citing *Johnson v. McDonald*, 28 Vet. App. 136, 146-50 (U.S. Ct. of Vet. Claims 2016), *aff'd sub nom. Butts v. Wilkie*, 721 F. App'x 988 (Fed. Cir. 2018)). Second, the Administrator had taken the same position in other matters before Department ALJs with some success. *Id.* at 34–35. Finally, the Administrator had "relied on longstanding caselaw" holding that "there is no binding limitations period for administrative actions unless a federal statute

[14] My adoption of the ARB's conclusion in this issue includes my agreement with the Board's determinations that the Administrator did not waive any argument regarding the substantial justification issue by initially failing to respond to Respondent's EAJA petition before the ALJ, and that even to the extent that any waiver or forfeiture occurred, it was appropriate and consistent with Board precedent for the Board to consider this issue on appeal given that it presented a novel issue of law relevant to other cases currently pending before the Department and with no need for additional factfinding. DO 24–26.

creates one." *Id.* at 35 (citing *BP Am. Production Co. v. Burton*, 549 U.S. 84, 95–96 (2006); *Badaracco v. Comm'r*, 464 U.S. 386, 391 (1984)).

As the ARB unanimously concluded, in finding otherwise, the ALJ committed two errors. First, "the ALJ hyper-focused on the conduct of the Agency's counsel with respect to specific procedural matters and in so doing failed to properly analyze the Agency's position[.]" *Id.* at 30. As the ARB noted, the agency's "position" for purposes of the substantial-justification inquiry was not "the procedural cooperativeness of Agency's counsel" but rather the Administrator's citation of Respondent under the H-2B program for owing $16,560 in outbound transportation expenses from more than five years in the past. *Id.* at 31–32. Second, "the ALJ failed to 'reexamine the legal and factual [basis of the Administrator's position] from a different perspective' but instead merely restated her merits analysis[.]" *Id.* at 33 (quoting *United States v. Hallmark Constr. Co.*, 200 F.3d 1076, 1080 (7th Cir. 2000)). As the Board explained, "[w]hile the ALJ's ultimate conclusion that the Administrator's assessments were penalties and thus barred by [a] five-year limitations period prevailed before the ARB, that legal conclusion is not determinative of the issue of whether the position was substantially justified[.]" *Id.* I agree with the Board that "the importance and novelty of the legal issue presented and the lack of contrary binding precedent sufficiently establish that the Administrator's position on outbound transportation costs was substantially justified" even though the position did not prevail. *Id.* at 36. While not restating it here, I adopt the Board's analysis on this issue, *id.* at 23–36, as my determination in this matter.

IV. Conclusion

For the foregoing reason, the decision of the Board is REVERSED IN PART AND AFFIRMED IN PART.

ORDER

1. The ARB's conclusion that EAJA applies to H-2B enforcement proceedings is REVERSED.

2. The ARB's conclusion that the Administrator's position in this matter was substantially justified is AFFIRMED.

3. Respondent's application for fees and costs under fees is DENIED.

Signed in Washington, DC this 9th day of August 2023,

JULIE A. SU
Acting Secretary of Labor