IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CASA DE MARYLAND, INC., et al Plaintiffs, v. Mayorkas, et al Defendant.	Civil No. 20-2118-PX

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

On June 22, 2020, the Department Homeland Security ("DHS") published a final rule titled Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications. ("Timeline Repeal Rule"). DHS and Alejandro Mayorkas, as Secretary of DHS ("Defendants") hereby move for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, on all of Plaintiffs' claims regarding the Timeline Repeal Rule.

FACTS

A. Development and Publication of the Final 30 Day-Timeline Repeal Rule

On September 9, 2019, USCIS proposed to amend the 30-day regulatory timeframe. 84 Fed. Reg. 47148 ("Proposed Timeline Rule"). During a 60-day comment period, DHS received over 3,200 comments. After review and analysis of public comments, on June 22, 2020, DHS published the Timeline Repeal Rule. 85 Fed. Reg. 37502.

The Timeline Repeal Rule was promulgated for multiple reasons. The 30-day timeline in 8 CFR 208.7(a)(1) was established more than 20 years ago when INS adjudicated EAD applications at local INS offices. *Id.* The 30-day timeframe does not account for the current volume of applications

and no longer reflects current operational realities. *Id.* at 37507-08. Increases in EAD applications have outpaced USCIS' resources over the last 20 years. *Id.* at 37508. The level of fraud sophistication and national security concerns posed today are more complex than they were 20 years ago. Changes in intake and document production to reduce fraud and address threats to national security, as well as the time necessary for appropriate vetting to address such concerns, are not reflected in the current regulatory timeframe. 85 Fed. Reg. 37518. Additionally, on May 22, 2015, plaintiffs in *Rosario v. USCIS*, No. C15-0813JLR (W.D. Wash.), brought a class action in the U.S. District Court for the Western District of Washington to compel USCIS to comply with the 30-day provision of 8 CFR 208.7(a)(1).

On July 26, 2018, the *Rosario* court enjoined USCIS from failing to adhere to the 30-day deadline for adjudicating EAD applications. Compliance with the court order has proven to place an extraordinary strain on already strained agency resources. *Id.* at 37510. The reallocation of resources necessary to meet the 30-day deadline removes resources from other competing work priorities in other product lines and adds delays to other time-sensitive adjudication timeframes. 85 Fed. Reg. 37502 at n. 1. Pre-*Rosario*, USCIS adjudicated approximately 78 percent of applications within 60 days. *Id.* A new regulatory timeframe was not set because USCIS is unable to plan its workload and staffing needs with the level of certainty that a binding timeframe may require, and has no way of predicting what national security and fraud concerns may be or what procedures will be necessary in the future. 85 Fed. Reg. 37502 at 37521. Thus, DHS proposed and finalized its rule to remove this temporal limitation. The change was intended to ensure USCIS has sufficient time to receive, screen, and process requests for asylum application-based employment authorization and to reduce fraud. 85 Fed. Reg. at 37502. This change brings the regulatory scheme by which these applications are processed in line with processing for other types of applications for employment authorization. 85 Fed. Reg. at 37515.

Alejandro Mayorkas was sworn in as Secretary of Homeland Security by President Biden on February 2, 2021. On May 4, 2021, Secretary Mayorkas ratified Timeline Repeal Rule, as well as the Proposed Timeline Rule. A copy of the ratification is annexed to Defendant's motion as Exhibit A.

ARGUMENT

I. SUMMARY JUDGMENT SHOULD BE GRANTED IN FAVOR OF DEFENDANTS UPHOLDING THE TIMELINE REPEAL RULE

A. Standard of Review

Summary judgment is the proper mechanism for reviewing agency action under the Administrative Procedure Act. *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1096 (D.C. Cir. 1996). Summary judgment shall only be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. Pro. 56(a); *Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003). A party must support a factual assertion by, *inter alia*, citing to particular parts of materials in the record, including affidavits or declarations. Fed. R. Civ. Pro. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). While this Court has made preliminary findings in this case, these findings do not constitute law of the case and does not preclude the parties from litigating the merits." *Metro. Reg'l Info. Sys. v. Am. Home Realty Network, Inc.,* 948 F. Supp. 2d 538, 551 (D. Md. 2013) (compiling cases).

B. Defendants Incorporate By Reference Arguments Made In Opposition to Plaintiffs' Motion for Summary Judgment

Defendants incorporate by reference the arguments made with respect to standing and the Homeland Security Act Claim as set forth in Defendants' opposition to Plaintiffs' motion for summary judgment on their Homeland Security Act Claim as to the Broader EAD Rule. (ECF No. 123-1).

C. Senate-Confirmed Secretary Mayorkas Lawfully Ratified the Timeline Repeal Rule Curing Any Service-Related Defect in the Rule

"Ratification occurs when a principal sanctions the prior actions of its purported agent." *Moose Jooce v. FDA*, 981 F.3d 26, 28 (D.C. Cir. 2020), (petition for cert. filed) (citations omitted). "[A] properly appointed official's ratification of an allegedly improper official's prior action…resolves the claim on the merits by remedying the defect (if any) from the initial appointment." *Guedes v. ATF*, 920 F.3d 1, 13 (D.C. Cir. 2019); *see also CFPB v. Gordon*, 819 F.3d 1179, 1190–92 (9th Cir. 2016) (holding an agency head's "valid appointment, coupled with … ratification, cures any initial" service-related defect in a challenged action); *Kajmowicz v. Whitaker*, No. 2:19-cv-00187, 2021 WL 2200795, at *8 (W.D. Pa. June 1, 2021) (holding Attorney General Barr validly ratified rule issued by then-Acting Attorney General Matthew Whitaker). While Defendants maintain that Former Acting Secretary Wolf was lawfully serving when he authorized the Final Timeline Repeal Rule on June 22, 2020 (ECF No. 123-1), Secretary Mayorkas' May 4, 2021 ratification (Ex. A) cures any alleged defect in the rule arising from Mr. Wolf's service.

The Federal Vacancies Reform Act (FVRA), while prohibiting some ratifications, does not prohibit the ratification of the Timeline Repeal Rule. Section 3348(d) provides that "[a]n action taken by any person" not properly acting under the FVRA provisions "in the performance of any function or duty of a vacant office . . . shall have no force or effect," and that such an action "may not be ratified." 5 U.S.C. § 3348(d)(1), (2). The term "function or duty" is defined narrowly, however, as any function or duty of the applicable office that is:

> (A)
>
> (i) established by statute; and
>
> (ii) is *required* by statute to be performed by the applicable officer (*and only that officer)*; or

> (B)
>
> (i)
>
> (I) is established by regulation; and
>
> (II) is *required* by such regulation to be performed by the applicable officer (*and only that officer*); and
>
> (ii) includes a function or duty to which clause (i) (I) and (II) applies, and the applicable regulation is in effect at any time during the 180-day period preceding the date on which the vacancy occurs.

5 U.S.C. § 3348(a)(2) (emphasis added). Thus, the definition of "function or duty" for purposes of § 3348(d) does not encompass functions or duties that may be delegated to other officials. Rather, it covers only non-delegable duties. *See Kajmowicz,* 2021 WL 2200795, at *6 ("The natural reading of the FVRA's definition of 'function or duty' is that it only applies to nondelegable functions made exclusive to the specific office by a statute (or by a regulation so long as the applicable regulation was in effect at any time during the 180-day period preceding the vacancy)"); *Nw. Immigrant Rights Project v. United States Citizenship & Immigration Servs.,* 496 F. Supp. 3d 31, 53 (D.D.C. Oct. 8, 2020) (Secretary of Homeland Security did not perform a function or duty when he took an action that relied on power that wasn't "exclusive[]" to the Secretary), *appeal dismissed*, No. 20-5369, 2021 WL 161666 (D.C. Cir. Jan. 12, 2021); *Guedes*, 920 F.3d at 12 (recognizing that "function or duty" applies "only" to "nondelegable duties"); *United States v. Harris Cty.*, No. 4:16-CV-2331, 2017 WL 7692396, at *3 n.5 (S.D. Tex. Apr. 26, 2017) (authorization of complaint by Principal Deputy Assistant Attorney General was not "function or duty" because "the relevant duties of the [office] are delegable"); *United States v. Tinley Park*, No. 1:16-cv-10848, 2017 U.S. Dist. LEXIS 234517, at *10 (N.D. Ill. July 17, 2017) ("holding that "function or duty . . . does not include a delegable duty that could be performed by another officer"). That is because if a function or duty is lawfully delegable, then necessarily, the statute or regulation creating that function or duty does not "require" it to be performed only by the vacant

office. That conclusion is compelled by the plain text. *Cf. Kajmowicz,* 2021 WL 2200795, at *6 ("begin[ning] with the text of the provision" and reading the definition of function or duty in this way). If a function or duty is lawfully delegable, then necessarily, the statute or regulation creating that function or duty does not "require" it to be performed only by the applicable officer. *See id.* ("The FVRA provides that the statute must 'require' the function or duty to be performed 'only' by the applicable officer. That a function or duty is lawfully delegable necessarily means that the source of that function or duty, whether statute or regulation, does *not* 'require' the action to be performed 'only' by the applicable officer."). Rather, the statute or regulation permits other individuals to perform that function or duty by delegation.

That plain-text reading is confirmed by the Senate Committee Report accompanying the bill that became the FVRA. *Kajmowicz,* 2021 WL 2200795, at *6. That Report, addressing a definition of "function or duty" materially identical to that now found in § 3348(a)(2), says that "functions or duties of the office" are "defined as the non-delegable functions or duties of the officer." S. Rep. No. 105-250, at 18 (1998). The narrowness of that definition preserves a critical Government interest by ensuring that "[d]elegable functions of the [vacant] office could still be performed by other officers or employees," such that "[a]ll the normal functions of government thus could still be performed." *See id.*; *accord id.* at 31 (views of supporting Senators); *id.* at 36 (views of opposing Senators). Moreover, the Executive Branch has understood the FVRA to operate in this manner since its enactment. *See Guidance on Application of Federal Vacancies Reform Act of 1998*, 23 Op. O.L.C. 60, 72 (1999) [hereinafter "*OLC Guidance*"] (recognizing that FVRA "permits non-exclusive responsibilities to be delegated to other appropriate officers and employees in the agency" to ensure that "the business of the government [w]ould [not] be seriously impaired").

Here, the Immigration and Nationality Act (INA) provides the general authority authorizing the Secretary to administer and enforce the immigration and nationality laws and to establish such regulations as he deemed necessary for carrying out such authority. 8 U.S.C. § 1103(a); *see also* 6 U.S.C. § 271(a)(3)(A), (b). The specific authority for issuing the Timeline Repeal rule is also found in the INA, which provides that an applicant for asylum is not entitled to employment authorization, and may not be granted asylum application-based employment authorization prior to 180 days after filing of the application for asylum, but otherwise authorizes the Secretary to prescribe by regulation the terms and conditions of employment authorization for asylum applicants. 8 U.S.C. § 1158(d)(2).

The responsibility issue a rule like the Timeline Repeal is delegable and thus not a function or duty under the FVRA. Indeed, Congress has explicitly authorized the Secretary to delegate his authority except where statutes prohibit it. 6 U.S.C. § 112(b)(1) (general authorization of delegations). Here, no statute prevents the Secretary from delegating the power to issue rules. Congress knows how to specify when certain authorities are to be exercised *only* by the Secretary of Homeland Security, *see, e.g.*, 31 U.S.C. § 1344(d)(3), and it did not do so here. Moreover, "[w]hen a statute delegates authority to a federal officer or agency, subdelegation to a subordinate federal officer or agency is presumptively permissible absent affirmative evidence of a contrary congressional intent. *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004). Nothing overcomes that presumption here.

More than simply being delegable, the duty to issue rules like the Timeline Repeal rule has in fact been delegated for almost two decades. In 2003, the Secretary delegated rulemaking authority to the Deputy Secretary. *See* Decl. of Juliana Blackwell ¶ 2, Exhibit 1, *Delegation to Deputy Secretary,* DHS Delegation No. 00100.2, ¶ II.G (June 23, 2003 ("2003 Delegation"), annexed to Defendants' motion as Exhibit B; *Nw. Immigrant Rights Project,* 496 F. Supp. 3d at 31 ("because the Secretary delegated the authority to issue Department rules in 2003, that power is not vested exclusively in the Secretary and

is therefore not the type of action that is voided under the FVRA."). Thus, there can be no doubt that the promulgation of the Proposed and Final Timeline Rule is not a function or duty as defined by § 3348(a)(2) and thus not subject to the FVRA's ratification bar. As such, Secretary Mayorkas' May 4, 2021 ratification cures any service-related defect in the Timeline Repeal Rule.

D. The Final Timeline Repeal Rule Was Promulgated Pursuant to Proper Procedure, Reflects Reasoned Decision-making, and is Not Arbitrary or Capricious

In this Court's September 11, 2020 decision, it found that Plaintiffs demonstrated a likelihood of success on the merits as to their challenge to the Timeline Repeal Rule. ECF No. 69 at 47-51. The Court's concern appears not to be with a need to modify the 30-day timeline rule at all, ECF No. 69 at 50 ("the agency's difficulty in complying with the 30-day deadline supports extending the timeline"), but instead, appears based on the agency's decision not to impose an alternative longer timeframe by which initial C8 EAD applications must be adjudicated. ECF No. 69 at 50 ("it hardly explains why there should be no timeline at all."). For the reasons set forth below, the agency's promulgation of the Timeline Repeal Rule (and Mayorkas' ratification of it) was based upon a reasoned analysis grounded in the agency's own expertise and understanding in how to best carry out its mandate, not just to asylum seekers, but to all applicants seeking immigration benefits.

i. Judicial Review is Limited and the Agency Must be Afforded Deference

An agency final rule may be set aside if the rule is found to be "without observance of procedure required by law." 5 U.S.C. § 706(2)(D). When an agency intends to establish a binding legislative rule via informal rulemaking, it must have statutory authority to do so and follow the notice-and-comment procedures as applicable. *See* 5 U.S.C. § 553(b)-(c); *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-20 (1979). Informal rulemaking generally requires an agency to publish notice of proposed rulemaking in the Federal Register, solicit comments, and in the preamble to the final rule, respond to

significant comments and provide a concise statement of the rule's basis and purpose. 5 U.S.C. § 553(b)-(c); *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367, 2384 (2020). The Court may not impose procedural requirements beyond what the APA or the enabling act requires. *Little Sisters of the Poor,* 140 S. Ct. at 2385 ("we have repeatedly rejected courts' attempts to impose 'judge-made procedur[es]' in addition to the APA mandates.").

An agency final rule may also be set aside if the rule is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "Judicial review under [the arbitrary and capricious] standard is deferential, and a court may not substitute its own policy judgment for that of the agency." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). Instead, "[a] court simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." *Id.* When "an agency is called upon to make complex predictions within its areas of special expertise, a reviewing court must be at its *most* deferential." *Nat'l Audubon Soc'y v. United States Army Corps of Eng'rs,* 991 F.3d 577, 583 (4th Cir. 2021) (citations omitted). An agency rule is arbitrary or and capricious if the agency: (1) relied on factors which Congress has not intended it to consider; (2) entirely failed to consider an important aspect of the problem; (3) offered an explanation for its decision that runs counter to the evidence before the agency; or, (4) offered an explanation so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.,* 463 U.S. 29, 43 (1983). Where a rule changes agency policy, the change need not "be justified by reasons more substantial than those required to adopt a policy in the first instance." *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502 (2009). And the agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one." *Id.* at 515 (emphasis in original). Instead, "it suffices that the new policy is permissible

under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *Id.* (emphasis in original). For rules like this one, which does not involve an ambiguous statutory authority but rather invokes an express grant of authority to prescribe rules and standards, as long as the deferential arbitrary and capricious standard is met, the "agency's promulgations are entitled to more than mere deference or weight; rather, they are entitled to legislative effect." *See City of Los Angeles v. Barr*, 929 F.3d 1163, 1177 (9th Cir. 2019).

ii. The Agency Responded to Significant Comments and Provided a Concise Statement of the Rule's Basis and Purpose

The Timeline Repeal Rule was promulgated after a 60-day public comment period, is consistent with the agency's clear statutory authority, and is sufficiently rational in all respects. As noted above, the purpose of the Timeline Repeal Rule is to ensure USCIS has sufficient time to receive, screen, and process the EAD applications and to protect the security-related processes undertaken for each EAD application. 85 Fed. Reg. 37502, 37502-37503. To meet the self-imposed 30-day deadline, "USCIS dedicated as many resources as practicable to these adjudications, but continues to face a historic asylum application backlog[1], which in turn increases the numbers of applicants eligible for pending asylum EADs." 85 Fed. Reg. 37502 at n. 1. The agency explained that it "does not want to continue this reallocation of resources as a long-term solution because it removes resources from other competing work priorities in other product lines and adds delays to other time-

[1] From FY 2013 to FY 2017, there was a "221.15 percent increase of affirmative asylum receipts" which "has directly contributed to the increase in (c)(8) EAD receipts 84 Fed. Reg. at 47153-47154. And USCIS received 41,021 initial EAD applications from individuals with pending asylum applications in FY 2013, 62,169 in FY 2014, 106,030 in FY 2015, 169,970 in FY 2016, and 261,782 in FY 2017. 84 Fed. Reg. at 47154. This along with an increase in renewal EAD applications "coupled with the growing asylum backlog has grossly outpaced Service Center Operations resources, specifically because USCIS has had to reallocate resources from other product lines to adjudicate these EAD applications." *Id.*

sensitive adjudication timeframes, and thus is finalizing this rule." *Id.* DHS properly considered and responded to the comments. For example, DHS responded to concerns related how the rule may delay in an applicant's entry into the work force and that during any period of delay, the applicant's support network would be required to provide additional assistance. 85 Fed. Reg. 37502 at 37526. And DHS properly considered and responded to comments related to the potential impact of the Broader EAD Rules on the Timeline Repeal Rule. *See* 85 Fed. Reg. at 37504. This is all the APA requires.

iii. The Agency Was Not Required to Consider the Timeline Repeal Rule and the Broader EAD Rule Together in One Rulemaking Process

It was both procedurally proper and wholly rational for the agency to initiate two separate notice and comment periods for two rules that were promulgated for different purposes, and that effectuated two different sets of policy results. The purpose of the Timeline Repeal Rule is to ensure USCIS has sufficient time to receive, screen, and process the EAD applications. 85 Fed. Reg. 37502, 37502-37503. The Timeline Repeal Rule reflects consideration of a range of policy interests, but at bottom it is focused on USCIS's discretion to allocate resources as it deemed necessary to fulfill its mission. In contrast, the separate NPRM that DHS published in November 2019 titled Asylum, Application, Interview, and Employment Authorization for Applicants ("Broader EAD NPRM") had different purposes. 84 Fed. Reg. 62374 (Nov. 14, 2019). As noted in the Broader EAD NPRM, that NPRM was intended to respond to then-President Trump's "Presidential Memorandum on Additional Measures to Enhance Border Security and Restore Integrity to Our Immigration System." *Id.* at 62383. As the Broader EAD NPRM explained, that Presidential Memorandum referred to an "immigration and asylum system . . . in crisis" and directed "the Secretary of Homeland Security to propose regulations to bar aliens who have entered or attempted to enter the United States unlawfully from

receiving employment authorization prior to being approved for relief and to immediately revoke the employment authorization of aliens who are denied asylum or become subject to a final order of removal." *Id.* One of the purposes for the Broader EAD NPRM was to "reduc[e] incentives for aliens to file frivolous, fraudulent, or otherwise non-meritorious asylum application intended primarily to obtain employment authorization." *Id.* at 62383. Another purpose was to "reduce incentives for aliens to intentionally delay asylum proceedings in order to extend the period of employment authorization based on the pending application." 42 Fed. Reg. at 62375. Another purpose was to "disincentiviz[e] illegal entry into the United States by proposing that any alien who entered or attempted to enter the United States at a place and time other than lawfully through a U.S. port of entry be ineligible to receive [an asylum applicant] EAD, with limited exceptions." *Id.* at 62383. And another purpose was to "expand the [criminal] bars to" asylum applicant EADs. *Id.* at 62390. Finally, DHS proposed a range of procedural reforms to "ease some of the administrative burdens USCIS faces in accepting and adjudicating applications for asylum and related employment authorization." *Id.* DHS noted that the proposed changes, if enacted, along with other measure DHS was taking, "will lead to meritorious [asylum] applications being granted sooner—resulting in immediate work authorization." 42 Fed. Reg. at 62388-62389.

DHS provided ample notice of both proposals and did not fail to adequately consider impacts of the Broader EAD Rule when it promulgated the Timeline Repeal Rule. In addition to the notice of the Broader EAD Rule provided by the aforementioned Presidential Memorandum, the Proposed Timeline Rule provided ample notice of the existence of two separate rulemakings related to asylum applicant EADs. Specifically, in the Public Participation section of the Proposed Timeline Rule, DHS advised the public of the impending Broader EAD Rulemaking. *See* 84 Fed. Reg. at 47148. DHS repeated this advisory and described the potential impacts of the Broader EAD Rulemaking on the

Proposed Timeline Rule's regulatory analysis, in the Proposed Timeline Rule's Executive Summary, *see id.* at 47150, and regulatory analysis under Executive Orders 12866 and 13563, *see id.* at 47156, 47157, 47164, 47166.

In addition, DHS rationally concluded that the Timeline Repeal Rule should be promulgated despite any additional impacts from the Broader EAD Rule. During the public comment period for the Timeline Repeal NPRM, approximately 10 submission were received that provided comments on the Broader EAD proposed rule. The Agency considered and responded to these comments and rationally explained why the Broader EAD NPRM, if promulgated, was not material to whether or not the Timeframe Rule should be promulgated. *See* 85 Fed. Reg at 37530-31 (explaining that even if the Broader EAD Rule is promulgated, thereby reducing the volume of asylum applicants eligible for EADs, "USCIS would still receive many EAD filings….In reality, because of the added criteria under the broader proposed rule, adjudication may become more complex."). The Agency further considered and discussed the impact that the Broader EAD Rule, if promulgated, could have on its analysis. *See* 85 Fed. Reg. at 37504. ("USCIS recognizes that the impacts of this final rule could be overstated if the provisions of…the broader asylum EAD NPRM would limit or delay eligibility for employment authorization for certain asylum applicants. Accordingly, if the population of aliens is less than estimated as a result of the broader asylum EAD rule, the estimated impacts of this rule could be overstated because the population affected may be lower than estimated in this rule.").

In its preliminary decision, the Court expressed concern about the "cumulative impact of the rules on bona fide asylum seekers." (ECF No. 69 at 53). But in the Timeframe Repeal Rule, DHS considered and discussed the impacts of the Timeline Repeal Rule on all asylum seekers at length, including an extensive response to comments and a detailed analysis of effects on asylum seekers, employers, and support networks. *See id.* at 37531-37543. DHS's consideration of the effects of the

Timeframe Repeal Rule on these populations, as well as on USCIS and the many other persons and entities that rely on USCIS' services, was more than sufficient. But in any event, it would incorrect to conclude that the Timeline Repeal Rule and the Broader EAD Rule would necessarily produce cumulative effects that harm bona fide asylum seekers. As noted above, in some respects, the Broader EAD Rule was expressly intended to improve processing efficiency, thereby potentially reducing processing timeframes in individual cases. And even with both Rules in place, the agency has other initiatives and tools at its disposal to decrease any adverse impact this, or any other rule, may have on asylum applicants. 84 Fed Reg. at 62389 ("DHS also believes that the [365-day waiting period], coupled with last-in, first-out (LIFO) asylum-adjudication scheduling discussed below, will lead to meritorious applications being granted sooner—resulting in immediate work authorization conferred on asylees by INA section 208(c)(1)(B)). And finally, of course, the Timeline Repeal Rule does not prevent USCIS from adjudicating EAD applications expeditiously.

Moreover, as noted below, the Timeframe Repeal Rule reflects adequate consideration of a range of considerations uniquely within DHS's expertise. USCIS also has the duty to adjudicate other time-sensitive adjudications apart of initial C8 EAD applications that do not have similar self-imposed deadlines to be adjudicated. Thus, while the agency considered the interests of asylum applicants, it also considered the interests of other individuals seeking immigration benefits. 85 Fed. Reg. at 37511 ("this rule focuses on USCIS' operational capacity and the resources required to maintain the 30-day processing timeline….continuously increasing resources allocated to a particular adjudication type negatively impacts production for other benefit request types."). The agency is in the best position to determine how best to allocate its resources at any given time to prioritize the various requests for immigration benefits that it receives.

Finally, it is important to recognize, as addressed in more detail below, that the primary purpose of the prior rule in imposing a 150-day waiting period along with the 30-day adjudication period was "to discourage applicants from filing meritless claims solely as a means to obtain employment authorization." 59 Fed. Reg. at 62290. And when the agency promulgated this rule in 1994, it too balanced the interests of asylum applicants with the administrative burdens of proposed alternatives along with its policy interest of deterring fraudulent claims. 59 Fed. Reg. at 62290-62291. This is exactly what the agency did here too. Here, the agency considered the interest of asylum seekers, along with its other interests, and determined that the self-imposed 30-day timeline for adjudications was no longer warranted for the reasons addressed below.

iv. The Agency Rationally Decided Not to Include an Alternative Longer Timeframe

After determining that the 30-day adjudication rule was untenable and needed to be modified, the agency then considered whether a longer timeframe should be established or whether the adjudication timeline should be repealed and treated similar to other types of time-sensitive applications for employment authorization (and other immigration benefits). DHS carefully analyzed the data, considered alternatives, balanced the competing interests, and provided a detailed rational explanation for the final rule. The agency specifically addressed the alternatives of 45, 60, or 90 day timeframes. 85 Fed. Reg. at 37513, 37521. Important to the Court's analysis is the fact that an asylum applicant is not entitled to employment authorization by statute. 8 U.S.C. § 1158(d)2).

First, the determination to not adopt an alternative timeline is not internally inconsistent with USCIS's expectation to return to the pre-*Rosario* timeframe. While in FY 2017 the agency was able to adjudicate 92 percent of applications within 90 days, other applications took as long as 810 days. 85 Fed. Reg. at 37541 ("USCIS has found that certain applications inherently cannot be processed in a

specific number of days due to vetting procedures and background checks that simply require additional time."). As such, it would have been irrational for the agency to impose an adjudication deadline of 90 days wherein, based upon its experience, it would not be able to adjudicate approximately 8 percent of applications within this timeframe under FY2017 conditions. At the same time, almost all applications are adjudicated within a time period along the line of the requested alternative. Nor can it be said that the *only* rational choice was for the agency to set an adjudication deadline of 120 days or more. *Prometheus Radio Project*, 141 S. Ct. at 1158 ("a court may not substitute its own policy judgment for that of the agency."). Indeed, the agency rationally explained that its expectation that it would be able to meet FY2017 adjudication timelines might in the future be affected by circumstances outside its control. And this understanding was not premised on a mere hypothetical, but instead upon its experience over the 20-plus years that the 30-day adjudication timeline was in place. Indeed, the agency explained that:

> DHS has seen a drastic increase in asylum applications in recent years, and this increase was not anticipated, and therefore could not have been considered when the former INS promulgated the 30-day timeframe more than 20 years ago. To promulgate another timeframe could lead to similar results and delays should volumes increase further in the future.

85 Fed. Reg. at 37513; *see also* 85 Fed. Reg. at 37519 ("the situation created by unforeseen and sustained spikes in application volumes highlighted that such specific regulatory timeframes can cause significant operational burdens when circumstances outside USCIS' control and ability to anticipate occur. [In the proposed rule,] USCIS acknowledged that it could not predict how administrative measures and external factors, such as immigration court backlogs and changes in country conditions, would affect total volumes."). The raw numbers from past years demonstrate that drastic spikes in applications have occurred and therefore it is reasonable to conclude that similar spikes may occur in the future. In 1993, 1994, and 1995, for example, the INS received between 90,883-176,041 initial C8 applications

each year. 85 Fed. Reg. at 37518. In 1996, this number dropped to below 50,000 for several years. *Id.* By 2018, however, the number of applications substantially increased to 262,965. 85 Fed. Reg. at 37518. And one need only look to recent events to find support that even short-term unexpected events can adversely impact adjudication times. For example, USCIS has been operating under a hiring freeze, the COVID-19 pandemic led to increased absences among its workforce, technological and training issues arose when implementing a new electronic system, and in February 2021, Texas was affected by winter weather that led to closures and delays in mail delivery and processing. (ECF No. 108-3 at 8). These events endorse the agency's well-founded concern that unexpected events can impact adjudication times and thus caution against a self-imposed adjudication timeline that USCIS may not be able to meet.

Second, USCIS has the duty to adjudicate other time-sensitive adjudications apart of initial C8 EAD applications that do not have similar self-imposed deadlines to be adjudicated. Thus, repealing the timeline rule for initial C8 applications provides USCIS with "the flexibility it needs to effectively manage [its] workload while continuing to provide timely and accurate decisions across the many other types of benefit requests it receives." 85 Fed. Reg. at 37510; *see also* 85 Fed. Reg. at 37515 (rule "brings the regulatory scheme by which these applications are processed in line with processing for other types of applications for employment authorization."); 85 Fed. Reg. at 37503 ("USCIS finds this reallocation of resources unsustainable as a long-term solution because it removes resources from competing work priorities in other product lines and adds delays to other time-sensitive adjudication timeframes. By eliminating the 30-day adjudicative timeframe, USCIS is better able to prioritize status-granting workloads based on agency and department priorities."). USCIS' decisions regarding management of its workflow in consideration of all of its important obligations are decisions that are afforded great deference. *Nat'l Audubon Soc'y,* 991 F.3d at 583; *see also Muvvala v. Wolf*, No. 1:20-CV-02423, 2020 WL

5748104, at *3-6 (D.D.C. Sept. 25, 2020) (case challenging adjudication times with respect to H-4 EAD renewals and holding that "Court intervention would impermissibly interfere with the agency's unique and authoritative [] position to view its projects as a whole, estimate the prospects for each, and allocate resources in the optimal way"). Other than in the most exceptional circumstances, such management decisions cannot be said to be arbitrary or capricious.

Third, USCIS rationally concluded that it could still maintain both accountability and transparency absent a self-imposed adjudication timeline. "As with any adjudication, USCIS posts processing times for these applications so that applicants can understand what to expect." 85 Fed. Reg. 37502 at 37511; see also 85 Fed. Reg. 37502 at 37505 ("Applicants would rely on up-to-date processing times, which provide accurate expectations of adjudication times."). Thus, contrary to the Court's preliminary finding, asylum applicants will have "some level of predictability." And "[a]pplicants have avenues to address excessive delays through case status inquiries, expedite requests when circumstances warrant, and even judicial redress through filing a mandamus action to compel a decision." *Id.* Indeed, an agency does not need to impose a hard deadline upon itself in order to hold itself accountable. 85 Fed. Reg. at 37513 ("DHS is committed to adjudicating these applications as quickly as possible in a transparent and sustainable manner.").

Finally, the fact that Congress has not mandated USCIS to adjudicate these applications within any period of time (and in fact has not mandated that EAD authorization be issued at all) further supports upholding the agency's rule. Indeed, Courts cannot impose a nonstatutory procedural requirement upon an agency. *See Prometheus Radio Project,* 141 S. Ct. at 1161 (unanimous decision) (Thomas, concurring). And there is nothing mandated by Congress that requires DHS to afford any particular weight to the burden that the new rule may have on asylum applicants.

In its preliminary decision, the Court characterized the purpose of the 30-day adjudication timeline as follows: "to limit asylees' waiting time once they became work-eligible, to ensure the application process has some level of predictability, and to hold the agency accountable in its timely processing of these applications." (ECF No. 69 at 49-50). It is important to note, however, that prior to the promulgation of the 30-day Timeline Rule in 1994, asylum applicants were immediately able to file an EAD application and the applications could be adjudicated within 90 days. 59 Fed. Reg. 62284, 62290. It was in 1994 that the Agency imposed both a 150-day waiting period along with the 30-day adjudication period, to obtain EAD authorization. The primary purpose of these two changes was "to discourage applicants from filing meritless claims solely as a means to obtain employment authorization." 59 Fed. Reg. at 62290. And when the agency promulgated this rule in 1994, it too was required to balance the interests of asylum applicants with the administrative burdens of proposed alternatives along with its policy interest of deferring fraudulent claims. For example, at the time, the Agency rejected recommendations to provide an alternative means to adjudicate employment authorization based upon the merits of the claim or on the economic situation of the asylum applicant to permit some applicants to obtain EAD benefits sooner due to the administrative burdens such provisions would impose. 59 Fed. Reg. 62284, 62290-62291.

Here, DHS explicitly recognized its past regulatory history on this issue and humanitarian concerns in the proposed rule, and explained that DHS has other ways to try and reduce adjudication times for this population, such as returning to the processing of affirmative asylum applications on a "last in, first out" (LIFO) basis. 85 Fed. Reg. at 37513. Thus, DHS considered the relevant factors and determined that a self-imposed deadline is no longer warranted. There is nothing impermissible with an agency changing its mind. *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., Inc.*, 545 U.S. 967 (2005); *see also Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016); *Mayo Found. v.*

United States, 562 U.S. 44, 53-55 (2011); *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1038 (D.C. Cir. 2012). Moreover, an agency is not required to justify its policy change by reasons more substantial than those required to adopt a policy in the first instance. *See Fox Television Stations*, 556 U.S. 502, 514-15, 19 (2009).

CONCLUSION

For the forgoing reasons, Defendants respectfully requests that this Court grant its Motion for Partial Summary Judgment.

Respectfully submitted,

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