IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

CASA DE MARYLAND, INC., *et al*.

Plaintiffs,

v.

MAYORKAS, *et al*.

Defendants.

Civil No. 20-2118-PX

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT ON THE TIMELINE REPEAL RULE

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INTRODUCTION

Last fall, this Court concluded that Plaintiffs[1] were likely to succeed on their claim that the Department of Homeland Security ("DHS" or "the agency") violated the Administrative Procedure Act ("APA") in multiple ways when it repealed a rule requiring the agency to process asylum seekers' initial applications for work authorization within 30 days of receipt. *See* Mem. Opinion ("Opinion"), ECF No. 69 at 45-58; *see also* Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications ("Timeline Repeal Rule" or "the Rule"), 85 Fed. Reg. 37,502 (June 22, 2020). Now, in moving for summary judgment as to the Timeline Repeal Rule, Defendants do not cite a single document or make any legal argument that this Court has not already considered. *See* Mem. In Supp. of Defs.' Mot. for Partial Summary J. ("Defs.' Mot."), ECF No. 127-1 at 8-20. To the contrary, the full Administrative Record ("AR" or "the Record"), ECF No. 124, for the Rule, which Defendants have now produced, provides further support for the Court's analysis and conclusion. In short, there are no genuine disputes of material fact and Plaintiffs are entitled to judgment as a matter of law on their claim that the Timeline Repeal Rule was not the product of reasoned decisionmaking, and thus was promulgated in violation of the APA. *See* Compl., ECF No. 1 ¶¶ 274-81 (Count One). The Rule should be vacated on that basis.

If the Timeline Repeal Rule is vacated on the basis of Count One of the complaint, the Court need not reach Plaintiffs' additional claims directed to that Rule. Consideration of Plaintiffs' other Counts, which are based on Chad Wolf's lack of authority to issue the Timeline

[1] Plaintiffs are CASA de Maryland ("CASA"), the Asylum Seeker Advocacy Project ("ASAP"), Centro Legal de la Raza ("Centro Legal"), Oasis Legal Services ("Oasis"), and Pangea Legal Services ("Pangea").

Repeal Rule, would require the Court to analyze new facts and novel legal questions arising, *inter alia*, from Secretary Mayorkas's recent purported ratification of the Rule. If the Court reaches those claims, it should reject Defendants' narrow reading of the anti-ratification provision of the Federal Vacancies Reform Act ("FVRA"). Instead, this Court should join other courts in concluding that Defendants' proposed reading is both contrary to the statutory text and antithetical to Congress's purpose in enacting the FVRA, and grant Plaintiffs summary judgment on their statutory Appointments claims—or, at a minimum, deny Defendants' motion for summary judgment on these claims in view of triable issues of material fact.

BACKGROUND

I. DHS, Through Purported Acting Secretary Chad Wolf, Issued Two Rules Limiting Asylum Seekers' Access to Work Authorization

For twenty-five years, a federal regulation required Defendants to adjudicate asylum seekers' initial Form I-765(c)(8) applications for employment authorization ("EADs") within 30 days of receipt. The timeline requirement dates to 1994, and it reflects the agency's attempt to balance its interest in discouraging frivolous asylum applications with its recognition that bona fide asylum seekers must be able to support themselves while awaiting a decision on their asylum claims. *See* Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization, 59 Fed. Reg. 14,779, 14,780 (Mar. 30, 1994). When it imposed this timeline on itself, DHS explained that "it would not be appropriate to deny work authorization" to a person whose asylum claim remained pending for more than 150 days, and so applicants who reached that point should have their initial EAD applications promptly adjudicated. *Id.*; *accord Rosario v. U.S. Citizenship & Immigr. Servs.*, 365 F. Supp. 3d 1156, 1160 (W.D. Wash. 2018) ("[O]ne of the chief purposes of the 30-day deadline . . . was to ensure

that bona fide asylees are eligible to obtain employment authorization as quickly as possible") (internal quotations omitted). In July 2018, a certified class of asylum seekers obtained a court order enjoining DHS "from further failing to adhere to the 30-day deadline" in its regulation. *See Rosario*, 365 F. Supp. 3d at 1163. In accordance with the *Rosario* injunction, USCIS processed more than 96% of initial EAD applications within 30 days of receipt in FY2019. 85 Fed. Reg. at 37,531.

In September 2019, DHS proposed to eliminate this requirement, in part because the agency "[did] not want to continue [the] reallocation of resources" it implemented in order to comply with its 30-day timeline regulation. Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications ("Proposed Timeline Rule"), 84 Fed. Reg. 47,148, 47,149 (Sept. 9, 2019). During a 60-day comment period, DHS received hundreds of detailed comments that vigorously opposed the proposed Rule on legal, policy, economic, and ethical grounds. More than 300 comments suggested alternative solutions to the agency's described problems that did not involve eliminating any timeline for adjudication, and approximately 250 comments explained the impact that the rule would have on asylum seekers and their support networks. The agency dismissed 600 comments as "out of scope"—including those raising concerns about the combined impact of the proposed Rule and other proposed and anticipated rules that would also impact asylum seekers' access to work authorization. *See* Timeline Repeal Rule, 85 Fed. Reg. at 37,521; 37,526; 37,531.[2] DHS adopted the proposed Rule "without change." *Id.* at 37,531.

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[2] *See, e.g.*, Comment Letter from Kids in Need of Def. to USCIS (Nov. 8, 2019), ECF No. 124-7 at 2462-63, AR 3952-53 (expressing concerns about agency's failure to consider combined impact

Through a related but staggered rulemaking, DHS proposed and then finalized a separate rule imposing new restrictions on asylum seekers' eligibility for EADs. *See* Asylum Application, Interview, and Employment Authorization for Applicants ("Broader EAD NPRM"), 84 Fed. Reg. 62,374 (Nov. 14, 2019); Asylum Application, Interview, and Employment Authorization for Applicants ("Broader EAD Rule"), 85 Fed. Reg. 38,532 (June 26, 2020) (together with the Timeline Repeal Rule, the "Asylum EAD Rules").

II. This Court Granted Partial Preliminary Relief to Plaintiffs

Shortly after the Asylum EAD Rules were published, Plaintiffs commenced this action challenging both final rules on the grounds that they violated the APA and were promulgated by Chad Wolf without lawful authority to do so. Plaintiffs moved for preliminary relief, and the Court granted that relief in part, holding that: (i) Plaintiffs CASA and ASAP had associational standing to bring this suit on behalf of their members; (ii) Plaintiffs were likely to succeed on the merits of their APA and Homeland Security Act ("HSA") claims; (iii) an injunction was necessary to address the irreparable harm to Plaintiffs; and (iv) the balance of equities favored preliminary injunctive relief. *See generally* Opinion. The Court limited the scope of preliminary relief to the Timeline Repeal Rule and certain aspects of the Broader EAD Rule, as applied to members of Plaintiffs CASA and ASAP. *See generally* Pls.' Mot. for Summ. J. as to Broader EAD Rule or to Modify Prelim. Inj. ("Pls.' MSJ and MTM"), ECF No. 107-1 at 1-3 (discussing why the Court so limited the injunction, including the significance of the now vacated panel decision in *CASA de Maryland v. Trump*, 971 F.3d 220 (4th Cir. 2020)).

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of proposed Timeline Repeal Rule and anticipated Broader EAD NPRM); Comment Letter from Econ. Pol'y Inst. to USCIS (Nov. 8, 2019), ECF No. 124-9 at 315, AR 5339 (similar, and expressing concerns about resulting harms to asylum seekers).

In addressing the merits of Plaintiffs' HSA claim, the Court determined that Plaintiffs would likely show that Chad Wolf was not lawfully serving as the Acting DHS Secretary when the agency promulgated the Timeline Repeal Rule. *See* Opinion at 39-45.

III. Subsequent Procedural History

Defendants noticed an interlocutory appeal from the preliminary injunction order, ECF No. 88, and Plaintiffs noticed a cross-appeal, ECF No. 92. The parties voluntarily dismissed their appeals in April 2021. Plaintiffs promptly moved to modify the preliminary injunction and for partial summary judgment on their HSA claims, emphasizing the need for expeditious relief to address the continuing irreparable harm the Asylum EAD Rules are causing Plaintiffs. *See* Pls.' MSJ and MTM, ECF No. 107-1 at 4-5. Two weeks later, Secretary Mayorkas purported to ratify the Timeline Repeal Rule but took no action with respect to the Broader EAD Rule. *See* Ex. A to Defs.' Mot., "Ratification," ECF No. 127-2. Plaintiffs' motion to modify the preliminary injunction and their motion for summary judgment on their HSA claim directed to the Broader EAD Rule remain pending.[3]

ARGUMENT

I. Plaintiffs Have Standing to Challenge the Timeline Repeal Rule

All five Plaintiffs have organizational standing, and Plaintiffs CASA and ASAP have associational standing, to challenge the Timeline Repeal Rule. Plaintiffs hereby incorporate by reference their prior arguments and evidence in support of their standing. *See* Pls.' MSJ and

[3] Because the purported Mayorkas ratification raised issues potentially of first impression at the time, Plaintiffs withdrew that portion of their motion that sought summary judgment on their HSA claim insofar as it relates to the Timeline Repeal Rule. Pls.' Resp. to Defs.' Status Rep., ECF No. 117; Ltr. Order of May 11, 2021, ECF No. 118.

MTM, ECF No. 107-1 at 6-10; Pls.' Reply in Supp. of Mot. for Summ. J. as to Broader EAD Rule or to Modify Prelim. Inj. ("Pls.' MSJ and MTM Reply"), ECF No. 125 at 1-7; *see* CASA Decl., ECF No. 24-4; ASAP Decl. I, ECF No. 24-5; Centro Legal Decl. I, ECF No. 24-6; Oasis Decl. I, ECF No. 24-7; Pangea Decl. I, ECF No. 24-8; Centro Legal Decl. II, ECF No. 107-4; Pangea Decl. II, ECF No. 107-5; Oasis Decl. II, ECF No. 107-6; ASAP Decl. II, ECF No. 107-7; *see also* Pls.' Reply Mem. in Supp. of Mot. for Prelim. Inj. ("Pls.' PI Reply"), ECF No. 47 at 11-13; Pls.' Supp. Ltr. Br., ECF No. 59 at 1-3.

II. Plaintiffs Are Entitled to Summary Judgment on Their APA Claim

a. Legal Standard

Under the APA, courts must "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see* Opinion at 45-47. This inquiry must "be searching and careful, but the ultimate standard of review is a narrow one." *N.C. Wildlife Fed'n v. N.C. Dep't of Transp.*, 677 F.3d 596, 601 (4th Cir. 2012) (internal quotation marks omitted). A reviewing court must ensure that the agency has "'examine[d] the relevant data and articulate[d] a satisfactory explanation for its action, and must not reduce itself to a rubber-stamp of agency action." *Id.* (internal quotation marks omitted). Agency action is arbitrary and capricious where the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Additionally, where (as here) an agency is required to go through notice-and-comment rulemaking before finalizing a rule, after providing general notice of the proposed rulemaking and "giv[ing] interested persons an opportunity to participate . . . through submission of written data, views, or arguments," 5 U.S.C. § 553(b) & (c), the agency must "consider and respond to significant comments received during the period for public comment," *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015). In responding to significant concerns about the proposed Rule raised in comments, the agency must "'adequately analyz[e]' the consequences" of its actions; failure to do so, and thereby to consider an important aspect of the problem, is arbitrary and capricious. *Gresham v. Azar*, 950 F.3d 93, 103 (D.C. Cir. 2020) (quoting *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 932 (D.C. Cir. 2017) ("Nodding to concerns raised by commenters only to dismiss them in a conclusory manner is not a hallmark of reasoned decisionmaking."). "[I]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself," and that the "basis articulated by the agency" be in the administrative record, not subsequent litigation rationalizations. *N.C. Wildlife Fed'n*, 677 F.3d at 604.

In an APA case, summary judgment is determined "exclusively on the administrative record," *Richards v. INS*, 554 F.2d 1173, 1177 & n.28 (D.C. Cir. 1977), and "summary judgment is the mechanism by which the court decides as a matter of law whether the administrative record permitted the agency to make the decision it did," *Mayor & City Council of Baltimore v. Azar*, 439 F. Supp. 3d 591, 603 (D. Md. 2020), *aff'd*, 973 F.3d 258 (4th Cir. 2020), *cert. granted sub nom*, *Cochran v. Mayor & City Council of Baltimore*, 141 S. Ct. 1369 (Mem) (2021) (internal quotation marks omitted).

b. The Agency Violated the APA in Multiple Ways When It Promulgated the Timeline Repeal Rule

After complying with the *Rosario* court's injunction and processing more than 96 percent of initial (c)(8) EAD applications within 30 days, the agency informed the public that continuing to meet the 30-day timeline required an "untenable" reallocation of its resources, and thus it was eliminating any adjudication deadline whatsoever. 85 Fed. Reg. at 37,513. Hundreds of commenters sounded the alarm, providing concrete examples of the devastation that work authorization delays would wreak on asylum seekers' lives, their support networks, and the towns, cities, and states where they live. Commenters warned that without any adjudication timeline, asylum seekers would be unable to predict when, or even if, they would be able to work while their asylum claims were pending, described the burden of that uncertainty, and proposed various alternative policies designed to achieve the agency's stated goals without imposing harsh burdens on asylum seekers.[4] Even as the agency refused to hold itself to any processing timeframe, it refused to acknowledge that the proposed Rule represented a dramatic change in its policy or the devastating impact the rule would have on asylum seekers.[5]

This Court found that Plaintiffs were likely to succeed on their claim that the agency failed to engage in reasoned decisionmaking, as required by the APA, for at least six independent reasons: (i) the agency failed to consider an important factor—*i.e.*, the impact on asylum seekers;

[4] *See, e.g.*, Comment Letter from Alameda Cty. Bd. of Supervisors to USCIS (Nov. 8, 2019), ECF No. 124-10 at 32, AR 5502 ("[A]bsent any requirement of timeliness, it is possible that all or nearly all applicants will wait considerably longer than six months to receive the authority to work," and "some applicants may never receive the authority to work."); Comment Letter from Int'l Refugee Assis. Proj. to USCIS (Nov. 8, 2019), ECF No. 124-9 at 160-61, AR 5184-85 (explaining how proposed Rule "significantly" underestimated processing delays); *see infra* 15-16 & nn. 17-20.

[5] *See infra* 9-15 & nn. 6-12, 15-16.

(ii) the agency failed to acknowledge, let alone explain, its change in prior policy; (iii) the agency failed to consider reasonable alternatives to its proposed repeal of any timeline whatsoever; (iv) the agency's explanation for its action ran counter to the evidence before it; (v) the agency failed to consider the combined impact of the Broader EAD Rule and the Timeline Repeal Rule; and (vi) with respect to each of the above, the agency failed to consider and respond to significant comments raising these issues, thereby depriving the public of its opportunity to participate in rulemaking in violation of the agency's notice-and-comment obligations. Opinion at 47-58. Nothing has changed that undermines the Court's conclusions in September 2020. Indeed, in their motion for summary judgment, Defendants do not raise a single new argument or rely on a single document from the Record that the Court has not already considered—and understandably so, because the full Record provides even *more* support for the Court's conclusion that the Timeline Repeal Rule was not the product of reasoned decisionmaking, as explained below.

c. First, the Rule Is Arbitrary and Capricious Because the Agency Failed to Consider Its Impact on Asylum Seekers

Approximately two hundred and fifty commenters expressed concerns about the impact of the rule on asylum seekers and their support networks. *See* 85 Fed. Reg. at 37,526-27. Specifically, commenters raised concerns that the proposed Rule would make it substantially harder, if not impossible, for asylum seekers to pursue claims for asylum, because they would be unable to afford counsel as well as the "hidden costs necessary to pursue valid asylum claims." Opinion at 55-56.[6] Commenters also raised concerns that asylum seekers, who are often destitute

[6] *See, e.g.*, Comment Letter from Make the Road New York to USCIS (Nov. 8, 2019), ECF No. 124-9 at 116, 118-19, AR 5140, 5142-43 (describing travel and health care costs that could interfere with ability to apply for asylum); Comment Letter from Kino Border Initiative to USCIS

and arrive without any documentation, would be unable to meet their basic needs—including housing, medical care, and travel over even short distances—if the proposed Rule went into effect.[7] Moreover, commenters expressed concern that families with children in particular struggle to obtain food and shelter, and noted that harms to children resulting from even brief periods of homelessness and hunger can be long-lasting.[8] And commenters described the lasting psychological toll that being unable to legally work has on asylum seekers, many of whom suffered significant trauma before they arrived in the United States.[9]

This Court correctly held that the agency failed to consider the impact of the Proposed Timeline Repeal Rule on asylum seekers, and therefore failed to consider a factor "of paramount

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(Nov. 7, 2019), ECF 124-7 at 2155, AR 3645 (describing burdens on asylum seekers and immigration court system); *see also* Pls.' Mem. In Supp. of Mot. for Prelim. Inj. ("Pls.' Mot. for PI"), ECF No. 23-1 at 17-20.

[7] *See, e.g.*, Comment Letter from Student Immigr. Law Coalition, Univ. of Denver to USCIS (Nov. 3, 2019), ECF No. 124-7 at 184 n. 21, AR 1674 (describing difficulties facing asylum seekers living near U.S.-Mexico border who lack documentation needed to clear checkpoints); Comment Letter from Hum. Rts. First to USCIS (Nov. 8, 2019), ECF No. 124-9 at 387, AR 5411 (describing problems asylum seekers without documentation face obtaining housing, health insurance, marriage licenses, accessing government facilities, and traveling domestically); *see also* Comment Letter from Jessica Wallace to USCIS (Nov. 8, 2019), ECF No. 124-7 at 2475, AR 3965 (without documentation, asylum seekers cannot rent a hotel room, attend a parent-teacher conference, or obtain medications).

[8] *See, e.g.*, Comment Letter from Hum. Rts. First to USCIS (Nov. 8, 2019), ECF No. 124-9 at 387, AR 5411 (discussing the "particularly acute" difficulties asylum-seeking families have finding housing); Comment Letter from Kids in Need of Def. to USCIS (Nov. 8, 2019), ECF No. 124-7 at 2460, AR 3951-52 (similar); Comment Letter from Maine Equal Just. to USCIS (Nov. 8, 2019), ECF 124-9 at 393, AR 5417 (describing the lifelong negative educational consequences of childhood food insecurity); Comment Letter from Kino Border Initiative to USCIS (Nov. 7, 2019), ECF No. 124-7 at 2154, AR 3644 (describing the long-term behavioral consequences of childhood homelessness).

[9] *See, e.g.*, Comment Letter from Hum. Rts. First to USCIS (Nov. 8, 2019), ECF No. 124-9 at 388, AR 5412 (describing psychological toll).

importance" to its decision. Opinion at 53 (citing *Judulang v. Holder*, 565 U.S. 42, 55 (2011)). Specifically, the agency "never wrestled" with the fact that delaying work authorization "will inevitably affect [asylum seekers'] ability to afford the costs of seeking asylum, including hiring legal counsel."[10] *Id.* at 56 (citing 85 Fed. Reg. at 37,527-28 (asserting rule did not "change" asylum eligibility requirements)). The agency also "simply paid lip service" to commenters' concerns that the rule would "destabiliz[e] the financial and health situation" of applicants and their families, 85 Fed. Reg. at 37,526. Opinion at 54-55 (citing *Mayor and City Council of Baltimore v. Azar*, 973 F.3d 258 (4th Cir. 2020), *cert. granted*, 141 S. Ct. 1369 (2021)). For example, the agency failed to meaningfully consider commenters' concerns that many asylum seekers lack support networks to help them avoid hunger, homelessness, and other dire outcomes,[11] and for others, the inability to legally work leaves them vulnerable to domestic violence, sexual exploitation, and other abuse.[12] *See, e.g.*, 85 Fed. Reg. at 37,526 (acknowledging only

[10] *See, e.g.*, Comment Letter from Just. Ctr. of Se. Mass. to USCIS (Nov. 8, 2019), ECF No. 124-9 at 240 & n.7, AR 5264 (citing study showing access to counsel makes asylum seekers three times more likely to be granted asylum and expressing concern that Rule would "undermin[e]" asylum seekers' access to counsel).

[11] *See, e.g.*, Comment Letter from Int'l Refugee Assis. Proj. to USCIS (Nov. 8, 2019), ECF No. 124-9 at 167-69, 171-72, AR 5191-93, 5195-96 (explaining proposed Rule's impact on asylum seekers' ability to access emergency shelters and medical care); Comment Letter from Tahirih Just. Ctr. to USCIS (Nov. 7, 2019), ECF No. 124-7 at 2222, AR 3712 (asylum seekers "who have little or no support network" will face "the chronic threat or lived reality of homelessness, and the hunger and health problems that accompany it for both themselves and their children").

[12] *See, e.g.*, Comment Letter from Asylum Seeker Adv. Proj. to USCIS (Nov. 8, 2019), ECF No. 124-8 at 772-73, AR 5005-06 (describing proposed Rule's impact on asylum seekers in abusive living situations); Gurbir S. Grewal, N.J. Att'y Gen, et al. to USCIS (Nov. 8, 2019), ECF No. 124-7 at 2691-92, AR 4180-81 (describing "dangerous work-place situations" asylum seekers confront when they have no choice but to participate in the shadow economy); Comment Letter from Tahirih Just. Ctr. to USCIS (Nov. 7, 2019), ECF No. 124-7 at 2222, AR 3712 (describing how lack of work authorization makes asylum seekers "highly vulnerable" to exploitation in the shadow economy and domestic violence).

"distributional impacts" on "the applicant's support network" and dismissing those concerns); *id.* at 37,511 (same and insisting the Rule "does not make changes to [work authorization] eligibility requirements"). The agency thus failed to acknowledge the full scope of the harms caused by the Rule, let alone to explain why such harms were outweighed by the agency's other concerns. The agency's failure to consider "an important aspect of the problem" was arbitrary and capricious, and violated the APA. *Gresham*, 950 F.3d at 99 (quoting *State Farm*, 463 U.S. at 43).

Defendants' motion for summary judgment recycles the arguments they presented at the preliminary injunction stage, all of which this Court has considered and rejected. Specifically, Defendants again argue that the agency acknowledged that the rule "may delay" asylum seekers' entry into the work force and, "during any period of delay, the applicant's support network would be required to provide additional assistance." Defs.' Mot. at 11 (citing 85 Fed. Reg. at 37,526); Defs.' Opp'n to Pls.' Mot. for Prelim. Inj ("Defs.' Opp'n to PI"), ECF No. 41 at 16 (same); *see also* Tr. of Aug. 28, 2020 Oral Arg., ECF No. 56 at 92-95. Defendants then argue that the agency "explicitly recognized its past regulatory history . . . and humanitarian concerns," with measures such as "'last in, first out' (LIFO)" processing. *See* Defs.' Mot. at 19 (citing 85 Fed. Reg. at 37,513); *see* Tr. of Aug. 28, 2020 Oral Arg., ECF No. 56 at 98:2-12 (describing LIFO as an efficiency measure designed to address humanitarian concerns). And Defendants attempt to minimize the harm to asylum seekers by arguing that these individuals have no statutory right to employment authorization.[13] Defs.' Mot. at 18; *see* Tr. of Aug. 28, 2020 Oral Arg., ECF No. 56

[13] Defendants' argument that the Court "cannot impose a nonstatutory procedural requirement upon an agency," Defs.' Mot. at 18, misses the point: the question is whether the agency's new rule was promulgated in violation of the APA and must be vacated, which would in practice restore the agency's own prior rule. *See* Opinion at 62 n.17.

at 91:17-19 (same). The Court has considered and rejected each of these arguments, relying on the same documents that Defendants cite again, and should reach the same conclusion as before. *See* Opinion at 54-56 (concluding that the agency "never wrestled with the fundamental implications of deferring or denying advance work authorization"); *see also* Pls.' Mot. for PI, ECF No. 23-1 at 17-20; Pls.' PI Reply, ECF No. 47 at 3-5.

d. Second, the Rule Is Arbitrary and Capricious Because the Agency Changed Its Policy Without Explanation or Even Acknowledgement

In the past, the agency balanced the humanitarian concern that bona fide asylum seekers obtain work authorization "as quickly as possible" against its interest in discouraging frivolous asylum applications, and it adopted a policy—the 30-day timeline—that reflected the agency's "balanc[ing] of equities" in favor of "expedient adjudication of initial EAD applications." *Rosario*, 365 F. Supp. 3d at 1160-61 (citation omitted); *see* Opinion at 48 (citing *Rosario*); *see also* Pls.' Mot. for PI, ECF No. 23-1 at 24.[14] Specifically, the agency selected 150 days as the period "'beyond which it would not be appropriate to deny work authorization to a person whose [asylum] claim has not been adjudicated,'" and adopted the 30-day deadline "to cabin what was already—in the agency's view—an extraordinary amount of time to wait for work authorization." Opinion at 48 (quoting *Rosario*, 365 F. Supp. 3d at 1161 (quoting 59 Fed. Reg. at 14,779)).

Responding to the Proposed Timeline Repeal Rule, commenters emphasized that the rule, if adopted, would represent a significant policy change that the agency had failed to acknowledge

[14] *See also Grace v. Barr*, 965 F.3d 883, 902 (D.C. Cir. 2020) (recognizing "important" humanitarian goal of asylum-related provisions of INA and holding agency's policy change was arbitrary and capricious where it failed to acknowledge and explain departure from past practice that served humanitarian statutory goal).

or explain.[15] For example, the Attorneys General of eighteen states and the District of Columbia highlighted that the agency's plan to bring (c)(8) EAD adjudication "in line with" other EAD adjudications (for which the agency had previously eliminated a processing timeline), *see* 85 Fed. Reg. at 37,510, failed to acknowledge the agency's prior policy prioritizing the expedient adjudication of asylum seeker EADs for humanitarian reasons. Comment Letter from Gurbir S. Grewal, N.J. Att'y Gen, et al. to USCIS (Nov. 8, 2019), ECF No. 124-7 at 2701, AR 4191. Other commenters explained why humanitarian concerns unique to the asylum-seeking population warrant prompt processing: asylum seekers are unable to access most federally-funded social benefits and work authorization is one of their only means of support, and they have fled persecution and often lack ties to family and community in the United States that could provide aid.[16]

The agency's response consisted of "wholly unsatisfactory" and "conclusory" assertions that failed to acknowledge, let alone explain, that the agency's repeal of the 30-day timeline and elimination of any timeline whatsoever represented a dramatic change in its 25-year-old policy of prioritizing humanitarian concerns. Opinion at 50-51; *see, e.g.*, 85 Fed. Reg. 37,513 (agency purporting to "fully acknowledge[]" past practice and humanitarian concerns, but failing to recognize that its prior policy prioritized the expedient adjudication of asylum seeker EADs for humanitarian reasons or to explain why its new policy no longer prioritized humanitarian

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[15] *See, e.g.*, Comment Letter from Just. Ctr. of Se. Mass. to USCIS (Nov. 8, 2019), ECF No. 124-9 at 242, AR 5266 (agency's explanation "simply disregards the original intent of the deadline").

[16] *See, e.g.*, Comment Letter from Hum. Rts. First to USCIS (Nov. 8, 2019), ECF No. 124-9 at 386, AR 5410; Comment Letter from Refugees Int'l to USCIS (Nov. 8, 2019), ECF No. 124-9 at 415-16, AR 5439-40; Comment Letter from Just. Ctr. of Se. Mass. to USCIS (Nov. 8, 2019), ECF No. 124-9 at 240, AR 5264.

concerns). In short, the agency "has not 'display[ed] awareness' of the *extent* to which it is 'changing position,' and so its responses do not provide a 'reasoned' basis for departing from the 'circumstances that underlay . . . the prior policy.'" *See* Opinion at 55 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)); *see also* Pls.' Mot. for PI, ECF No. 23-1 at 24-25 (collecting case law related to agency failure to acknowledge a change in policy).

In their motion for summary judgment, Defendants again recycle arguments they used to oppose a preliminary injunction and rely on the same documents they relied on before. Specifically, they attempt to relitigate the purpose of the 30-day timeline rule, arguing it was not, in fact, humanitarian. Defs.' Mot. at 15; *see* Defs.' Opp'n to PI, ECF No. 41 at 3-4 (same). And they argue that the agency did, in fact, balance the interests of asylum seekers against other agency interests, rather than ignoring the former. Defs.' Mot. at 15; *see* Defs.' Opp'n to PI, ECF No. 41 at 16 (same). Defendants' arguments are no more persuasive today than they were in September 2020. *See* Opinion at 49-50, 53-58; *see also* Pls.' Mot. for PI, ECF No. 23-1 at 24-25.

e. Third and Fourth, the Rule Is Arbitrary and Capricious Because the Agency Did Not Consider Reasonable Alternatives and Its Explanation Ran Counter to the Record

More than 300 commenters asked the agency to consider policy alternatives to eliminating a timeline for adjudicating initial EADs for asylum seekers. 85 Fed. Reg. at 37,520. Most notably, commenters requested that the agency consider (i) replacing the 30-day timeline with a 90-day or longer timeline;[17] (ii) hiring additional staff to assist with adjudications;[18] and (iii)

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[17] *See, e.g.*, Comment Letter from Kids in Need of Def. to USCIS (Nov. 8, 2019), ECF No. 124-7 at 2458-59, AR 3948-49.

[18] *See, e.g.*, Comment Letter from Econ. Pol'y Inst. to USCIS (Nov. 8, 2019), ECF No. 124-9 at 314-15, AR 5338-39.

allowing asylum seekers to file initial EAD applications earlier to give the agency more time—before 150 days from filing of the asylum case—to process them.[19] These alternatives would address the agency's stated concerns about its processing capacity while better serving the humanitarian concerns the agency had recognized as significant in adopting the timeline in the first place.[20] *See* 85 Fed. Reg. at 37,513. Commenters proposing a 90-day timeline noted that the agency had reassured the public that it "expect[ed]" a return to the pre-*Rosario* processing times, such that 92% of all applications would be processed in 90 days. Opinion at 49 (citing 85 Fed. Reg. at 37,503, 37,513). And commenters proposing that the agency increase capacity through hiring noted that the agency's own Ombudsman had identified "insufficient staffing" as one of the main challenges preventing the agency from timely adjudicating initial EADs and had recommended hiring more adjudicators to address the problem.[21]

As this Court held, the agency's rejection of the suggested 90-day alternative timeline relied on "wholly unsatisfactory" and "conclusory" assertions. Opinion at 50-51. The agency thus "failed to consider any legitimately raised policy alternatives," *id*. at 51, which fell squarely within the "ambit of the existing policy," and its action was arbitrary and capricious, *see Dep't of*

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[19] *See, e.g.*, Comment Letter from Plaintiffs' Counsel in *Rosario v. U.S. Citizenship & Immigr. Servs.* to USCIS (Nov. 8, 2019), ECF No. 124-8 at 672, AR 4905; Comment Letter from Kino Border Initiative to USCIS (Nov. 7, 2019), ECF 124-7 at 2155, AR 3645.

[20] *See, e.g.*, Comment Letter from Gurbir S. Grewal, N.J. Att'y Gen, et al. to USCIS (Nov. 8, 2019), ECF No. 124-7 at 2700-01, AR 4190-91 (describing humanitarian concerns motivating 1994 rule and agency's failure to consider whether alternative timeline would address its stated concerns now).

[21] *See, e.g.*, Comment Letter from NYC Mayor's Off. of Immigr. Affs. to USCIS (Nov. 8, 2019), ECF No. 124-9 at 202, AR 5226; Comment Letter from Sen. Gillibrand to USCIS (Nov. 4, 2019), ECF No. 124-7 at 698, AR 2188; Comment Letter from William Haeberle to USCIS (Nov. 6, 2019), ECF No. 124-7 at 933, AR 2423 (citing additional report recommending "substantial investments . . . in staffing").

Homeland Sec. v. Regents of the Univ. of Cal., ___ U.S. ___, 140 S. Ct. 1891, 1913 (2020) (internal quotation marks and brackets omitted). Likewise, the agency's explanations for rejecting the other reasonable alternatives—to hire more adjudicators or to accept applications earlier—were wholly unsatisfactory, conclusory, and/or ran counter to the record.[22] *See, e.g.*, 85 Fed. Reg. at 37,523 (asserting hiring "would increase the cost-burden on the agency," notwithstanding that the agency failed to estimate the cost of hiring); *compare id.* at 37,522 (rejecting hiring because it would not provide a "short term fix"), *with* 84 Fed. Reg. 47,148 (initiating 11-month rulemaking process to repeal 30-day timeline).[23]

In addition, the agency's sole explanation for rejecting the 90-day timeline—that it "'cannot predict' the processing times for future applications"—ran "counter to its findings and reassurances elsewhere" in the record that predicted a return to processing within 90 days for 92 percent of applications. Opinion at 49 (quoting 85 Fed. Reg. at 37,519-21). This is an independent and sufficient reason that the agency's action was arbitrary and capricious. *See State Farm*, 463 U.S. at 43 (agency action that "offer[s] an explanation for its decision that runs counter to the evidence before the agency" is arbitrary and capricious).

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[22] Defendants cannot use post-Record factors to demonstrate the reasonableness of the agency's decisionmaking, *see* Defs.' Mot. at 17 (claiming that "recent events," like the pandemic, support the decision not to adopt a processing timeline), as the inquiry is limited to the record before the agency at the time it made the decision, *see, e.g.*, *Dow AgroSciences LLC v Nat'l Marine Fisheries Serv.*, 707 F.3d 462, 467-68 (4th Cir. 2013) (holding that it is an abuse of discretion to consider post hoc reasoning for challenged agency action); *accord State Farm*, 463 U.S. at 50; *N.C. Wildlife Fed'n*, 677 F.3d at 604.

[23] *See* Comment Letter from Asylum Seeker Adv. Proj. to USCIS (Nov. 8, 2019), ECF No. 124-8 at 778, AR 5015 (rulemaking "will almost certainly" take longer than reasonable alternative of hiring employees).

With respect to the agency's failure to consider the 90-day alternative timeline, Defendants again rehash arguments that the Court already rejected. Specifically, they rely on the same "wholly unsatisfactory" and "conclusory" agency assertions, *see* Opinion at 50-51, insisting that the agency considered alternative timelines, Defs.' Mot. at 15; *see* Defs.' Opp'n to PI, ECF No. 41 at 17 (same); that it determined its ability to meet pre-*Rosario* timelines "might in the future be affected by circumstances outside its control," Defs.' Mot. at 16; *see* Defs.' Opp'n to PI, ECF No. 41 at 17-18 (same); and that it concluded elimination of a timeline was necessary to provide the agency with "flexibility" to "manage [its] workload" and direct resources to other application types, Defs.' Mot. at 17; *see* Defs.' Opp'n to PI, ECF No. 41 at 18 (same). And Defendants argue that the agency determined no timeline was necessary for agency "accountability and transparency" because its reports of processing times provide "some level of predictability," and asylum seekers have redress, such as by filing individual mandamus lawsuits to compel individual adjudications. Defs.' Mot. at 18; *see* Defs.' Opp'n to PI, ECF No. 41 at 17 (same). These arguments remain unpersuasive.[24] *See* Opinion at 47-51.

Defendants also spill much ink suggesting—but not actually arguing—that the Court was insufficiently deferential to the agency when it concluded at the preliminary injunction stage that the agency failed to consider reasonable alternatives. *See* Defs.' Mot. at 8-10, 14, 17-18 (citing *Nat'l Audubon Soc'y v. U.S. Army Corps of Eng'rs*, 991 F.3d 577 (4th Cir. 2021), and *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150 (2021)). As an initial matter, this Court demonstrated

[24] Defendants confuse the issue when they argue that the essential question before the agency was how to craft a policy accommodating its FY2017 throughput and processing rate. *See* Defs.' Mot. at 15-16 (arguing, *inter alia*, that it would have been "irrational" to adopt a 90-day processing timeline when 8 percent of applications processed in FY2017 took longer than 90 days).

that it was well aware of the deference to be given the agency when evaluating its decisionmaking, and the Court applied the appropriate standard. *See* Opinion at 53-54 (discussing relevant legal standard and concluding "[e]ven with this appropriate deference, the Court finds little evidence that the agency" engaged in the reasoned decisionmaking required by the APA).

Defendants' cases do not support a different conclusion and are inapposite. *National Audubon* involved a challenge to the Army Corps' permitting decision following its assessment of substantial data on various alternatives, and where the plaintiff challenged the data the Corps relied upon as well as its rejection of analysis by two outside experts. 991 F.3d at 583-89. The Fourth Circuit affirmed summary judgment to the Corps, emphasizing that the decision fell within the Corps' "special expertise" and its data and analysis were reasonable. *Id.* at 583-90 (explaining that a court "must be at its *most* deferential" when reviewing "complex predictions within [an agency's] area of special expertise" because courts lack "the mandate [and] the technical expertise to sit as a scientific body" (internal quotation marks omitted)). And *Prometheus* involved a challenge to the FCC's decision, based on a "thorough[] examin[ation]" of the record evidence, to repeal certain media ownership rules. 141 S. Ct. at 1158. The Supreme Court held that the agency acted reasonably, and it rejected the plaintiff's arguments that the data in the record was flawed and incomplete, where the FCC "acknowledged the gaps in the data," "repeatedly ask[ed] for data" from the public and received none, and "therefore relied on the data it had (and the absence of *any* countervailing evidence)" in making its decision.[25] *Id.* at 1159 (emphasis added).

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[25] Defendants cite an additional unpublished, out-of-circuit district court opinion—*Muvvala v. Wolf*, No. 20-cv-02423-CJN, 2020 WL 5748104 (D.D.C. Sept. 25 2020)—that is even further afield: in a case seeking to compel adjudication of an individual's immigration-related applications, the court declined to issue a mandatory preliminary injunction upon concluding the

Here, unlike in *National Audubon* and *Prometheus*, this Court concluded that the agency acted unlawfully because it failed to meaningfully consider reasonable alternatives *at all*, including the 90-day timeline alternative, notwithstanding that commenters raised such alternatives, and the record showed that the 90-day timeline was "sustainable" in the "lion's share" of cases. Opinion at 46, 49-50.

What is more, even if the Court were insufficiently deferential with regard to the specific issue of reasonable alternatives—and for the reasons noted, the Court gave all the deference that was due—that conclusion would do nothing to change the outcome here, given the multitude of independent grounds (discussed herein) for holding that the agency violated the APA.

f. Fifth, the Rule Is Arbitrary and Capricious Because the Agency Refused to Consider the Impact of the Contemporaneous Broader EAD Rule

Commenters also raised concerns about the combined impact of the proposed Rule and related rules that the Trump Administration had formally or informally proposed.[26] The agency dismissed these comments as "out of scope" of the proposed Rule and refused to consider them, *see* 85 Fed. Reg. at 37,531. But these comments were not out of scope; the combined impact of the rules was an important factor that the agency was required to consider. *See* Opinion at 51-53; *see also Portland Cement Ass'n v. EPA*, 665 F.3d 177, 187 (D.C. Cir. 2011) (agency had

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plaintiff was not likely to succeed in proving an unreasonable delay, where there was no regulatory processing timeline, no evidence of atypical delay, and no reason the plaintiff's applications should receive "preferential treatment" simply by virtue of the lawsuit. *Id.* at *3-4. To the extent *Muvvala* illustrates anything of relevance here, it is that where there is no regulatory processing deadline, the possibility of individuals getting redress through mandamus actions is a fig leaf, *contra* Defs.' Mot. at 18, particularly where delays are systemic.

[26] *See, e.g.*, Comment Letter from Kids in Need of Def. to USCIS (Nov. 8, 2019), ECF No. 124-7 at 2462-63, AR 3952-53.

"obligation to acknowledge and account for a changed regulatory posture the agency creates– especially when the change impacts a contemporaneous and closely related rulemaking."); *Off. of Commc'n of United Church of Christ v. FCC*, 707 F.2d 1413, 1441-42 (D.C. Cir. 1983) (finding it "seriously disturbing" and "almost beyond belief" that an agency would undertake rulemaking that undercuts another "concurrent" rulemaking process); Pls.' Mot. for PI, ECF No. 23-1 at 14-17. Here, the agency refused to consider the combined impact of the Timeline Repeal Rule and the proposed Broader EAD Rule on asylum seekers,[27] even as it recognized that the Broader EAD Rule could make (c)(8) EAD adjudications "more complex," 85 Fed. Reg. 37,530-31—and thus, presumably more time-consuming. As is now clear, and as should have been obvious to the agency at the time,[28] the Broader EAD Rule did in fact have a significant impact on initial EAD processing—increasing by threefold the time adjudicators needed to adjudicate each initial EAD application, *see* Pls.' MSJ and MTM Reply, ECF No. 125 at 16 & n.16. Nonetheless, the agency refused to consider whether the proposed Broader EAD Rule called into question its repeated assertions that "the FY 2017 timeframes are sustainable and USCIS expects to meet these timeframes," *see, e.g.*, 85 Fed. Reg. at 37,531, and thus, whether the Timeline Repeal Rule would impose a much greater burden on asylum seekers, their support networks, and others than the

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[27] The agency "delayed . . . any meaningful consideration of the rules' interaction" when it promulgated the Timeline Repeal Rule, Opinion at 52, asserting that it would consider their interplay "if it finalize[d] the broader rule," 85 Fed. Reg. 37,530. But the agency again failed to meaningfully consider the rules' combined impact when it promulgated the Broader EAD Rule. Opinion at 52-53.

[28] 85 Fed. Reg. 37,530-31; 85 Fed. Reg. at 38,589 (recognizing that as a result of the Broader EAD Rule, "some applications could take longer to process, as some of the conditions in the rule could require more resources and add complexity to adjudicative review").

agency acknowledged, *see, e.g.*, 85 Fed. Reg. at 37,521 (acknowledging the rule "may lead to short processing delays").

In their motion for summary judgment, Defendants conclusorily assert—as they did at the preliminary stage—that the agency considered the potential impact of the Broader EAD Rules on the Timeline Repeal Rule. Defs.' Mot. at 11 (citing 85 Fed. Reg. at 37,504); *see* Defs.' Opp'n to PI, ECF No. 41 at 13-14. Such "consideration," however, was limited to "recogniz[ing]" that the agency's estimates of the cost to asylum seekers "could be overstated," and that under the Broader EAD Rule, "adjudication may become more complex." Defs.' Mot. at 13 (citing 85 Fed. Reg. at 37,504, 37,530-31); *see* Defs.' Opp'n to PI, ECF No. 41 at 13-14 (same). And Defendants argue that the combined impact of the rules would not "necessarily . . . harm bona fide asylum seekers" because the Broader EAD Rule was "intended to improve processing efficiency" and the agency had other tools, such as "last-in, first-out (LIFO)" processing, to "decrease any adverse impact." Defs.' Mot. at 14; *see* Tr. of Aug. 28, 2020 Oral Arg., ECF No. 56 at 87:17-90:7 (Broader EAD Rule expected to increase efficiency); *id.* at 98:2-12 (discussing LIFO as efficiency measure). These arguments have no more support and are no more persuasive today than they were a year ago. *See* Opinion at 51-53; *see supra* 9-13; *see also* Pls.' Mot. for PI, ECF No. 23-1 at 11-17; Pls.' PI Reply, ECF No. 47 at 1-3.

g. Sixth, the Agency Deprived the Public of Its Right to Comment Because the Agency Failed to Consider and Respond to Significant Comments

For each of the reasons described above that the agency's action is arbitrary and capricious, the agency also failed to meet its notice-and-comment obligations—an independent violation of the APA. The agency was "obligated to identify and respond to relevant, significant issues raised" during notice-and-comment proceedings, *N.C. Growers' Ass'n v. United Farm Workers*,

702 F.3d 755, 769 (4th Cir. 2012); 5 U.S.C. § 553(c), as "the opportunity to comment is meaningless unless the agency responds to significant points raised by the public," *ACLU v. FCC*, 823 F.2d 1554, 1581 (D.C. Cir. 1987). But, in failing to consider important factors, to acknowledge or explain its change in policy, and to consider reasonable alternatives, the agency also failed to respond to significant comments raising each of these issues. Opinion at 53-58; *see also id.* at 51-52 (agency's staggering of the rulemaking "first delayed, then denied, any meaningful consideration of the rules' interaction"). Indeed, the agency "simply paid lip service" to commenters' concerns and "responded with a series of non-sequiturs and generalized 'understandings' of the commenters' positions." *Id.* at 54-55. The agency's responses were not meaningful, as the APA requires, and its failure to respond to relevant, significant issues commenters raised violated its obligation to provide the public with an opportunity to participate in the rule making process. *See United Farm Workers*, 702 F.3d at 769; 5 U.S.C. § 553(c).

Just as above, Defendants in their motion for summary judgment simply repeat arguments that this Court already rejected, asserting that the agency responded to commenters' concerns that the rule "may delay" asylum seekers' entry into the work force and, "during any period of delay, the applicant's support network would be required to provide additional assistance." Defs.' Mot. at 11 (citing 85 Fed. Reg. at 37,526); Defs.' Opp'n to PI, ECF No. 41 at 16 (same); *see also* Tr. of Aug. 28, 2020 Oral Arg, ECF No. 56 at 93:16-95:15. As before, this argument remains unpersuasive. *See supra* 10-12.

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Any one of these violations is a sufficient basis upon which to grant judgment in Plaintiffs' favor and vacate the Timeline Repeal Rule. *See* 5 U.S.C. § 706(2); Opinion at 65 (citing *Sierra Club v. U.S. Army Corps of Eng'rs*, 909 F.3d 635, 655 (4th Cir. 2018)).

III. Although the Court Need Not Reach Plaintiffs' Appointments Claims, Plaintiffs Are Also Entitled to Summary Judgment on Those Claims

a. Chad Wolf Lacked Lawful Authority to Issue the Timeline Repeal Rule

As this Court has already preliminarily held, Chad Wolf did not lawfully assume the office of Acting DHS Secretary, and he therefore lacked authority to issue the Timeline Repeal Rule. *See* Opinion at 44-45. Plaintiffs incorporate by reference their earlier arguments on this issue in support of their motion for summary judgment as to the Broader EAD Rule, *see* Pls.' MSJ and MTM, ECF No. 107-1 at 10-13; Pls.' MSJ and MTM Reply, ECF No. 125 at 7-9; *see also* Defs.' Mot. at 3 (likewise incorporating by reference prior briefing and adding nothing on this issue), and add only that since that prior briefing concluded, yet another court adopted this Court's analysis and conclusion that Kevin McAleenan and Chad Wolf did not lawfully serve as Acting DHS Secretary, *see Behring Reg'l Ctr. LLC v. Wolf*, No. 20-cv-09263-JSC, 2021 WL 2554051, at *4 (N.D. Cal. June 22, 2021).

b. The FVRA Prohibits Ratification of the Timeline Repeal Rule

Defendants now assert that Secretary Mayorkas's purported ratification of the Timeline Repeal Rule "cures any alleged defect in the rule arising from Mr. Wolf's service." Defs.' Mot. at 4. Defendants are wrong, however, as the purported ratification (ECF No. 127-2) cannot overcome Congress's explicit prohibition on the ratification of actions first performed by officials who lack any lawful authority. *See* 5 U.S.C. § 3348(d)(2).

(i) Defendants' Interpretation of the FVRA Is Not Supported by the Statute's Text or Purpose

In relevant part, the FVRA provides that where, as here, a challenged action was taken "in the performance of a[] function or duty of a vacant office" to which the FVRA applies, but by a person who is *not* properly acting under the FVRA provisions, that action "shall have no force or effect" and "may not be ratified." 5 U.S.C. § 3348(d)(1), (2). It is undisputed here that the DHS Secretary is an office requiring Presidential appointment and Senate confirmation (a "PAS" office) to which the FVRA's anti-ratification provision applies. *See* 6 U.S.C § 112(a)(1) (DHS Secretary is a PAS office); 5 U.S.C. § 3348(d)(1) (FVRA's anti-ratification provision applies to all the "vacant offices" governed by its various sections); *accord Nw. Immigrant Rts. Project v. U.S. Citizenship & Immigr. Servs*., 496 F. Supp. 3d 31, 59 (D.D.C. 2020) ("There is no doubt that the FVRA applies to the Office of the Secretary, and thus its provision giving 'no force or effect' to the actions of acting officials serving unlawfully applies to McAleenan and Wolf."), *appeal dismissed*, No. 20-5369, 2021 WL 161666 (D.C. Cir. Jan. 12, 2021).

Notwithstanding this clear command, Defendants assert that the FVRA's anti-ratification provision does not apply here because, they claim, "it covers only non-delegable duties," and promulgating regulations (they further contend) is, in fact, a delegable duty. *See* Defs.' Mot. at 4-7. This interpretation of the FVRA is not supported by the statute's text or purpose and, as other courts have already held, would effectively render the FVRA's enforcement provision a nullity. *See Behring Reg'l*, 2021 WL 2554051, at *5-7 (discussing the same interpretation proffered by Defendants here and concluding that "[t]he Court is not persuaded that the FVRA is so weak"); *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 34 (D.D.C. 2020) (concluding that Defendant's "sweeping" view of "non-delegable" functions and duties is "at odds with the

statutory purpose of the FVRA"), *appeal dismissed*, No. 20-5141, 2020 WL 5358686 (D.C. Cir. Aug. 25, 2020).

Under Defendants' view, *any* function or duty of an office that *could* be delegated is insulated from the FVRA's remedial provision. *See* Defs.' Mot. at 5-6; *see also Behring Reg'l*, 2021 WL 2554051, at *6 ("Under the government's theory, because all of the Secretary's functions are delegable, none qualify as a duty or function under the FVRA because the ability to be delegated means that each is not required by statute to be performed *only* by that officer."). The text of the statute, however, does not define "function or duty" as limited to only "non-delegable" duties; instead, the FVRA's definition of "function or duty" focuses on duties established by statute and regulation—and the source of authority for the Timeline Repeal Rule mentions only the DHS Secretary. *See* 8 U.S.C. § 1158(d)(2); *see also* 85 Fed. Reg. at 37,503 (citing 8 U.S.C. 1103(a) and 8 U.S.C. § 1158(d)(2) as the basis of DHS Secretary's authority to "establish" the Timeline Repeal Rule).[29] As explained in *Behring Regional*, "[t]hat the statute does not use the world 'only' is immaterial," because (as relevant here) § 1158(d)(2) provides that the DHS Secretary can promulgate the regulation "and does not identify any other official who can do so." 2021 WL 2554051, at *6.

As Judge Moss analyzed at length in *L.M.-M.*, Congress enacted the FVRA precisely to curb the reliance on broad delegation statutes to circumvent the Senate's advice and consent power. *L.M.-M.*, 442 F. Supp. 3d at 34; *see also Behring Reg'l*, 2021 WL 2554051, at *7 (discussing and adopting *L.M.-M.*'s analysis); *see also* S. Rep. No. 105-250, at 8 (1998) (evincing Congress's

[29] Section 1158(d)(2) refers to the Attorney General, but Congress later transferred that authority to the DHS Secretary. *See* 6 U.S.C. § 557.

intent to curb the abuse of statutory delegation authority); Br. of Morton Rosenberg as Amicus Curiae In Supp. of Pls.' Mot. for Prelim. Inj., ECF No. 40-1 at 2-3, 8-13 (discussing the history and purpose of the FVRA and Congress's focus on limiting the abuse of broad delegation authority).

Recognizing that nearly all relevant agency statutes contain a broad delegation provision, Judge Moss correctly rejected Defendants' interpretation of the FVRA because it would contravene congressional intent by exempting virtually all actions of PAS officers from the FVRA's remedy provision.[30] *L.M.-M.*, 442 F. Supp. 3d at 34; *accord Behring Reg'l*, 2021 WL 2554051, at *6-7.

Rather than accept Defendants' implausible construction of the FVRA, the Court should adopt the analysis of the Court in *Behring Regional* or *L.M.-M.* *Behring Regional* held that because the relevant source of statutory authority vests rulemaking authority in just one government official—as § 1158(d)(2) does here—then that statutory power is a "duty or function" within the meaning of the FVRA, even if it is delegable. 2021 WL 2554051, at *5-6. The *L.M.-M.* court, meanwhile, read the FVRA text and legislative history to establish a requirement that, where a PAS officer did not (in fact) delegate a duty or function of their office at least 180 days before the vacancy at issue occurred, that function is a "function or duty" of the vacant office within the meaning of the FVRA's remedy provision. 442 F. Supp. 3d at 34; *see also Nw. Immigrant Rts. Project*, 496 F. Supp. 3d at 57-59.

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[30] The government argues that "Congress knows how to specify when certain authorities are to be exercised only by the Secretary of Homeland Security," but tellingly, the only example it provides of an action to which the FVRA's anti-ratification provision would apply concerns which government officials can get free rides to work from their residences. *See* Mot. at 7 (citing 31 U.S.C. § 1344(d)(3)).

(ii) The Authority to Issue the Timeline Repeal Rule Was Not Delegated by the 2003 Delegation to the Deputy Secretary

Anticipating this argument, Defendants claim that "the duty to issue rules like the Timeline Repeal [R]ule has in fact been delegated," Defs.' Mot. at 7, pointing to a 2003 "Delegation to Deputy Secretary" ("2003 Delegation"), ECF No. 127-3. But even if that contention were relevant—and it is not, for the reasons discussed above—Defendants' proffered evidence establishes no such proposition, and in fact points in the opposite direction. By its own terms, the 2003 Delegation does not purport to delegate authority to initiate rulemaking or to determine the content of rules. Instead, it grants authority "to sign, approve or disapprove" proposed or final rules, *see id*. § II.G, which is notably distinct from the statutory authority of the Secretary at issue here, which provides for the power to "establish such regulations . . . as he deems necessary for carrying out his authority under the provisions of this chapter." 8 U.S.C. § 1103(a)(3). Nor does the 2003 Delegation use any language of the formative functions of rulemaking such as "establishing," "promulgating," or "prescribing" rules that are typically set out in statutory rulemaking authority; instead, it limited the delegation to the ministerial action of signing or approving a proposed or final rule. *Compare* 2003 Delegation, § II.G *with, e.g.*, 8 U.S.C. § 1103(a)(3) (Secretary "shall establish regulations"); 10 U.S.C. § 10202(b) (Secretary "shall prescribe . . . regulations"); 40 U.S.C. § 1315(c)(1) ("may prescribe regulations"); P. L. 108-176, Title VI, § 612(b), 117 Stat. 2490 ("the Secretary of Homeland Security shall promulgate an interim final rule").

Even if the language of "sign, approve, or disapprove" could be construed as equivalent to the authority to establish new rules, the 2003 Delegation does not actually delegate that authority to the Deputy Secretary as a function or duty of *their* office. Crucially, unlike the other

delegations of authority in the same document, the provision relating to signing or approving a final rule is preceded with the condition that it be done "[a]cting for the Secretary." 2003 Delegation, § II.G. Properly construed, this provision of the 2003 Delegation is nothing but a gap-filling measure, i.e., the Deputy Secretary may exercise the ministerial function of signing regulations *on behalf* of the Secretary. If anything, the 2003 Delegation establishes the opposite of what the government contends—that the Secretary of Homeland Security has *not* delegated rulemaking authority.

(iii) The 2003 Delegation Was Not in Effect at the Time the Timeline Repeal Rule Was Issued

What is more, regardless of its effect, the 2003 Delegation does not appear to have been in effect at the time that Chad Wolf issued the Timeline Repeal Rule. As Defendants acknowledge, the 2016 order issued by then-DHS Secretary Johnson established the delegation of authority and orders of succession at DHS and appears to have been designed to consolidate and clarify the existing delegation of authorities. *See* Ex. A to Defs.' Opp'n to Pls.' MSJ and MTM, "DHS Orders of Succession and Delegations of Authorities for Named Positions," ECF No. 121-1. That delegation does not mention any authority relating to rulemaking. *Id*. at 1-3. And even if the 2003 Delegation *were* still in effect, and regardless of the authority it purported to delegate to the Deputy Secretary, "[t]his delegation . . . does not apply as there was no Deputy Secretary of Homeland Security for which the authority to sign the [challenged] Rule could be delegated." *Behring Reg'l*, 2021 WL 2554051, at *7 (explaining why "The 2003 Delegation Does Not Apply").

In sum, Defendants have not—and cannot—carry their burden of proving that the Timeline Repeal Rule is exempt from the FVRA's anti-ratification provision. Accordingly, should the

Court reach the Appointments claim as to the Timeline Repeal Rule, it should deny Defendants' motion for summary judgment and grant it to Plaintiffs, because the Timeline Repeal Rule was void *ab initio*. *See* 5 U.S.C. § 3348(d)(1)-(2); *see also SW Gen., Inc. v. N.L.R.B.*, 796 F.3d 67, 70-71 (D.C. Cir. 2015), *aff'd* ___ U.S. ___,137 S. Ct. 929 (2017); *Behring Reg'l*, 2021 WL 2554051, at *9.[31] At a minimum, triable issues of material fact remain as to the scope, meaning, and current status of the 2003 Delegation on which Defendants rely, which precludes Defendants' request for summary judgment.

CONCLUSION

Plaintiffs respectfully request that the Court grant their motion for summary judgment, deny Defendants' motion for summary judgment, ECF No. 127, and vacate the Timeline Repeal Rule.

[31] Even if the "void-ab-initio and no-ratification rules" of the FVRA do not apply, the Timeline Repeal Rule is still "voidable" under "general principles of administrative law." *L.M.-M.*, 442 F. Supp. 3d at 35-36; *see also SW Gen.*, 796 F.3d at 79.

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Respectfully submitted,

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