IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs' opposition to Defendants' motion for summary judgment and cross-motion for summary judgment rests almost exclusively on this Court's September 11, 2020 decision providing preliminary relief. But these preliminary findings, made after a truncated briefing schedule, do not constitute law of the case and do 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). Since that time, Senate-confirmed Secretary Mayorkas has reviewed and ratified the Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I-765 Employment Authorization Applications. ("Timeline Repeal Rule"). This ratification cures any service-related defect in the Timeline Repeal Rule. Plaintiffs' argument that the Federal Vacancies Reform Act (FVRA) prohibits ratification is wrong because the FVRA only prohibits the ratification of nondelegable functions or duties, which do not encompass rulemaking. This is supported by the statutory definition, the legislative history, court decisions, and the U.S. Government Accountability Office.

Moreover, the Timeline Repeal Rule is wholly rational. DHS continues to offer employment authorization to asylum seekers, which is more than Congress requires. DHS merely removed a self-imposed adjudication deadline—consistent with processing for other types of applications for employment authorization. The Timeline Repeal Rule does not restrict USCIS from adjudicating employment authorization applications expeditiously and it does not restrict USCIS from utilizing other tools at its disposal to minimize the humanitarian concerns raised by Plaintiffs. Instead, the rule ensures that USCIS has sufficient time to receive, screen, and process requests for asylum application-based employment authorization and to reduce fraud. There is nothing irrational about this. Plaintiffs' argument rests, incorrectly, on the misunderstanding that DHS was required to prioritize particular humanitarian considerations above all else, including the competing humanitarian considerations of other populations served by DHS, as well as the agency's own operational needs. This is not so. Instead, DHS properly considered and balanced numerous policy considerations, including the humanitarian considerations identified by the plaintiffs before a final rule was promulgated. As such, summary judgment should be granted to Defendants upholding the Timeline Repeal Rule in all respects.

ARGUMENT IN REPLY AND OPPOSITION

I. SUMMARY JUDGMENT SHOULD BE GRANTED IN FAVOR OF DEFENDANTS UPHOLDING THE TIMELINE REPEAL RULE AND PLAINTIFFS' CROSS-MOTION DENIED

A. Senate-Confirmed Secretary Mayorkas' Ratification of the Timeline Repeal Rule is Consistent with the FVRA

The Federal Vacancies Reform Act (FVRA) is clear: ratification is barred only in situations where an officer performs a function or duty that is required to be performed by "only that officer."

5 U.S.C. § 3348(a)(2). The statutory text, its legislative history, numerous court decisions, and the U.S. Government Accountability Office all show that the correct interpretation of the statute's plain language is that ratification of *delegable* functions is not prohibited. If a function is delegable, it can be performed by other officers, and if it can be performed by other officers, then by definition, it is not a function that may be performed "only [by] that officer." *Kajmowicz v. Whitaker*, No. 2:19-CV-00187, 2021 WL 2200795, at *6 (W.D. Pa. June 1, 2021) ("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."). And here, rulemaking authority is not limited to *only* the Secretary, as other officers can indeed undertake rulemaking under the organizing DHS statutes and under the longstanding delegation of authority in the Department. The Court should reject Plaintiffs' attempt to re-write the plain language of the FVRA with an interpretation that stretches well beyond the ordinary meaning of the statutory text and would deviate from well-established vacancy law principles.

i. The Statutory Definition of "Function or Duty" is Narrow

"Statutory definitions control the meaning of statutory words…in the usual case." *Burgess v. United States*, 553 U.S. 124, 129-30 (2008) (*citing Lawson v. Suwannee Fruit & S. S. Co.*, 336 U.S. 198, 201 (1949)). Courts must follow a statute's definition "even if it varies from that term's ordinary meaning." *United States v. Nelson*, 484 F.3d 257, 260 (4th Cir. 2007) (*citing Stenberg v. Carhart*, 530 U.S. 914, 942 (2000)). The FVRA's anti-ratification provision applies to actions taken in the performance of a "function or duty of a vacant office," 5 U.S.C. § 3348(d), but the statute defines "function or duty" narrowly to mean only those functions or duties of the applicable officer that are "established by

statute [or regulation]" *and* "[are] *required* by statute [or regulation] to be performed by the applicable officer *(and only that officer)*." 5 U.S.C. § 3348(a)(2) (emphasis added).

Thus, Congress expressly limited the definition of function or duty to those "required" to be performed by "only that officer," and the Court must follow that definition. 5 U.S.C. § 3348(a)(2). The only functions or duties that are *required* to be performed by a particular officer and *only that officer* are functions and duties that are non-delegable. This reading is both compelled by the plain text and consistent with the legislative history. *See* S. Rep. No. 105-250, at 18 (1998) ("functions or duties of the office" are "defined as the non-delegable functions or duties of the officer").

Further, this reading is supported by multiple judicial decisions. *Guedes v. ATF*, 920 F.3d 1, 12 (D.C. Cir. 2019) (5 U.S.C. § 3348(d)(1)-(2) "only prohibit[s] the ratification of nondelegable duties"); *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 (NWIRP) 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" as defined in § 3348 when he took an action that relied on power that was not "exclusive[]" to the Secretary), *appeal dismissed*, No. 20-5369, 2021 WL 161666 (D.C. Cir. Jan. 12, 2021); *Stand Up for Cal.! v. United States DOI*, 298 F. Supp. 3d 136, 150 (D.D.C. 2018) (holding acting assistant secretary can perform non-exclusive responsibilities of the Secretary under the FVRA, even after the FVRA's initial 210-day period had run and the office was vacant, because non-exclusive responsibilities are not a function or duty under the FVRA); *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"). Additionally, this interpretation is supported by the U.S. Government Accountability Office. *See* Federal Vacancies Reform Act of 1998 – Assistant Attorney General for the Office of Legal Counsel, U.S. Department of Justice, B-310780 at 4 (GAO June 13, 2008) ("function or duty" under § 3348 are those that are "non-delegable"), https://www.gao.gov/assets/390/383258.pdf.

Here, the promulgation of the Timeline Repeal Rule was not "required by statute" to be performed by the Secretary "and only" the Secretary. To the contrary, Congress has expressly authorized the Secretary to "delegate any of the Secretary's functions to any officer, employee, or organizational unit of the Department," "except as otherwise provided by this chapter." 6 U.S.C. § 112(b). Thus, the Secretary's authority to issue immigration regulations, s*ee* 8 U.S.C. § 1103(a), may be delegated to any officer or employee of the Department. Accordingly, Secretary Mayorkas' ratification of the Timeline Repeal rule is not barred by the narrow anti-ratification provision of the FRVA.

ii. The *Behring* Decision is Contrary to the Plain Language of the Statute and is an Outlier Among Many Judicial Decisions

Plaintiffs argue that Congress creates a function or duty any time it vests an authority in a single Government official, *even if* that authority is delegable. *See* Opp. at 27. But that would read out the term "required" and the phrase "and only that officer" from the statutory definition. Plaintiffs cite just a single decision, *Behring Reg'l Ctr. LLC v. Wolf*, No. 20-cv-09263-JSC, 2021 WL 2554051, at *4 (N.D. Cal. June 22, 2021), that reads the phrase this way. The Court should not follow this flawed

decision, which is an outlier among the many decisions that have considered the issue and held otherwise.

The *Behring* court, apparently relying on the *expressio unius* canon, concluded that an authority is a function or duty when a statute names only one officer (as opposed to multiple) who can take that action. *See Behring Reg'l Ctr.*, 2021 WL 2554051, at *6 (noting the statute "provides that the Attorney General can specify the amount and does not identify any other official who can do so; in other words, it identifies the Attorney General and only the Attorney General"). But, as the D.C. Circuit has explained, "the *expressio unius* canon carries even less weight in the redelegation context, where the statute or regulation 'may mention a specific official only to make it clear that this official has a particular power rather than to exclude delegation to other officials.'" *Stand Up for Cal.! v. DOI*, 994 F.3d 616, 624 (D.C. Cir. 2021) (citation omitted). The *Behring* court's analysis also ignored—and directly contradicted—the presumption of delegability. *See, e.g.*, *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004) ("When 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."). And although the *Behring* court concluded it was "immaterial" "[t]hat the statute does not use the word 'only'" when stating which officer could take the action, *see* 2021 WL 2554051, at *6, the FVRA says a function or duty is one that is "required . . . to be performed by . . . *only* that officer," 5 U.S.C. § 3348(a)(2) (emphasis added).

Not only is the *Behring* court's textual analysis flawed, but it would also create serious operational problems. Under the FVRA, when "an office other than the office of the head of an Executive agency is vacant" (for example, when the FVRA's initial 210-day service clock has run and no other provision allows acting service), "only the head of such Executive agency may perform any

function or duty of such office." *See* 5 U.S.C. § 3348(b)(2). Applying the *Behring* court's reading, any responsibility assigned to a single officer other than the agency head could be performed only by the agency head when the assigned office is vacant. The *Behring* court fundamentally misunderstood this consequence,[1] and its conclusion flies in the face of longstanding practice to preserve continuity of government operations during vacancies. *Cf. Stand Up for Cal.!*, 298 F. Supp. 3d at 137 (noting that "during presidential transitions, . . . thousands of senior political appointees exit the government, often leaving their positions vacant for months or even years," and concluding that, "in practice, there are very few duties that cannot be delegated" because very few duties are functions or duties under the FVRA.).[2]

iii. The Plain Language is Further Supported by Congressional Intent

Plaintiffs then try to fall back on congressional intent and argue that if only non-delegable functions and duties were subject to the anti-ratification bar, then the bar itself would become a nullity. *See* Opp. at 25. Plaintiffs cannot use alleged congressional intent or policy arguments to overcome the plain text. *See Montanile v. Bd. of Trustees of Nat. Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 661

[1] For example, the court noted that "[t]he government's lament at oral argument that Congress also recognized that the government cannot come to a halt when there is not a Senate confirmed officer to perform a function or duty and thus has allowed the Secretary of Homeland Security (and other cabinet-level secretaries) to delegate functions is not well-taken." 2021 WL 2554051, at *6. "If Secretary Nielsen had amended the proper order of succession there would be no issue here," the court reasoned; "the problem arises because she did not do so and as a result, Mr. McAleenan was not lawfully serving as the Acting Secretary of Homeland Security." *Id.* *7. The court misunderstood the Government's point—that the court's reading of function of duty in the context of ratification would have implications when certain offices are vacant because of 5 U.S.C. § 3348(b)(2).

[2] The *Behring* decision lacks any acknowledgement of the better-reasoned decision of the United States District Court for the Western District of Pennsylvania's decision in *Kajmowicz*, which concluded that delegable duties may be ratified.

(2016) ("[V]ague notions of a statute's basic purpose are . . . inadequate to overcome the words of its text regarding the specific issue under consideration." (citation omitted)). Plus, Plaintiffs' argument fails on its own terms because the Senate Report itself shows that Congress meant to define function or duty narrowly. *See* S. Rep. No. 105-250, at 18 (1998) (noting that "functions or duties of the office" are "defined as the non-delegable functions or duties of the officer" and explaining 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").

Plaintiffs' concern is overblown because Congress has clearly demonstrated that it knows how to limit a statutory grant of authority to *only* a given officer by using express statutory language. S*ee, e.g.*, 44 U.S.C. § 3553 (h)(3)(B) (intrusion and prevention capabilities to secure information systems "may not be delegated"); 10 U.S.C. § 1370(2) (authority to reduce service-in-grade requirement for officers retiring "may not be delegated"); 35 U.S.C. § 202(f)(1) ("The head of the agency may not delegate the authority to approve provisions or sign justifications required by this paragraph" related to assignment of patent rights); 31 U.S.C. § 1344(d)(3) (authority to make certain designations related to the use of personal carriers for official purposes "may not be delegated").

In sum, Plaintiffs' strained reading lacks textual support and conflicts with the body of case law that has interpreted function or duty. A function or duty under the FVRA is a non-delegable power that is made exclusive to a specific office. Here, the Secretary's rulemaking authority is delegable, and the ratification bar does not apply.

iv. The Secretary's Rulemaking Authority Has In Fact Been Delegated Since 2003

Not only is the Secretary's rulemaking authority delegable, it has in fact been delegated to the Deputy Secretary since 2003. *See* Defs.' Mot. at 7-8 (explaining the 2003 Delegation delegated rulemaking authority to the Deputy Secretary). Plaintiffs try to cast doubt on the 2003 Delegation, arguing that it did not actually delegate the Secretary's rulemaking authority. *See* Opp. at 28-29. Those attempts come up short.

Plaintiffs suggest, without any clear explanation, that the 2003 Delegation was not in effect when the Timeline Repeal Rule was issued. *See* Opp. at 29. But even if the 2003 Delegation were inoperative for some reason, that would be irrelevant. This is because the function-or-duty analysis turns on whether the authority is delegable at all or whether the function or duty is limited to "only" that officer. As explained, the 2003 Delegation merely provides further evidence that the authority is delegable. Regardless, Plaintiffs' argument is factually wrong: the 2003 Delegation "has remained in continuous effect since June 23, 2003." *See* Supplemental Declaration of Juliana Blackwell ("Blackwell Supp. Decl.") at ¶ 2, annexed hereto.

Plaintiffs also claim that the Deputy Secretary was only assigned the authority to "sign, approve, or disapprove" any proposed or final rule, which, according to Plaintiffs, is not the same as actually "establishing" a Rule under the statute. *See* Opp. at 28-29. The act of "signing" and "approving" (or "disapproving") a rule, however, is how an official establishes a rule. Plaintiffs are attempting to create an irrational distinction. It is thus unsurprising a court has rejected such an unnatural reading of the 2003 Delegation. *NWRIP*, 496 F. Supp. 3d at 59-60. As further evidence that Plaintiffs' reading is tortured, the Deputy Secretary of Homeland Security has, in fact, engaged in

rulemaking in the past. *See* Blackwell Supp. Decl. at ¶ 3. Some examples of where the Deputy Secretary engaged in rulemaking include:

- United States Visitor and Immigrant Status Indicator Technology Program (US-VISIT); Enrollment of Additional Aliens in US-VISIT; Authority to Collect Biometric Data from Additional Travelers and Expansion to the 50 Most Highly Trafficked Land Border Ports of Entry. 74 Fed. Reg. 2837.

- Establishing U.S. Ports of Entry in the Commonwealth of the Northern Mariana Islands (CNMI) and Implementing the Guam-CNMI Visa Waiver Program. 74 Fed. Reg. 2824.

- Designation of Malta for the Visa Waiver Program. 73 Fed. Reg. 79595.

- United States Visitor and Immigrant Status Indicator Technology Program (US-VISIT); Enrollment of Additional Aliens in US-VISIT; Authority to Collect Biometric Data From Additional Travelers and Expansion to the 50 Most Highly Trafficked Land Border Ports of Entry. 73 Fed. Reg. 77476.

- Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers. 73 Fed. Reg. 78103.

- Documents Acceptable for Employment Eligibility Verification. 73 Fed. Reg. 76505.

- Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status. 73 Fed. Reg. 75540.

- Changes to Requirements Affecting H-2A Nonimmigrants. 73 Fed. Reg. 76891.

Id.

Finally, Plaintiffs claim that even if the 2003 Delegation is still in effect, and even if it did delegate rulemaking authority, it does not apply here because the Office of the Deputy Secretary was vacant when the Timeline Repeal Rule was issued. *See* Opp. at 29. But there is no reason to think (and Plaintiffs certainly don't offer any) that the effectiveness of a delegation depends on whether someone occupies the delegated office.

The 2003 Delegation necessarily dooms Plaintiffs' reliance on Judge Randolph Daniel Moss' decision in *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1 (D.D.C. Mar. 1. 2020). *See* Opp. at 26-27.[3] In *L.M.-M.*,[4] Judge Moss concluded that a power is a "function or duty" under § 3348 if it is assigned by statute or regulation to a particular office *and* has not been reassigned by "the department head . . . at least 180 days before the vacancy occurred." 442 F. Supp. 3d at 34. In a later decision, Judge Moss applied that conclusion to facts that are nearly identical to the facts here. *See NWIRP*, 496 F. Supp. 3d at 53, 59. Plaintiffs in *NWIRP*, like Plaintiffs here, challenged a final rule and argued the rule could not be ratified because the Secretary's rulemaking authority is a function or duty. *Id.* at 53, 58-59. Relying on the *exact same* 2003 Delegation that Defendants have pointed to in this case, Judge Moss rejected the Plaintiffs' function-or-duty argument. *See id.* at 59 ("[B]ecause the Secretary delegated the authority to issue Department rules in 2003, that power is not vested exclusively in the Secretary and is therefore

[3] Although Plaintiffs don't come right out and say it, they are asking this Court to adopt the *L.M.-M.* Court's conclusion about congressional intent while also asking this Court to reject the *L.M.-M.* Court's ultimate conclusion that a power is a function or duty under § 3348 if it is assigned by statute or regulation to a particular office and has not been reassigned by the department head at least 180 days before the vacancy. *Compare* Opp. at 27 (favorably citing *L.M.-M.* for its conclusion about legislative intent), *with id.* at 28 (arguing it is irrelevant whether the Secretary's rulemaking authority has been delegated).

[4] Plaintiffs' reliance on *L.M.-M.* is misplaced for other reasons as well. For example, in that case, Judge Moss noted that "the question of ratification is hypothetical and not ripe for consideration." 442 F. Supp. 3d at 30. Then, in *NWIRP*, Judge Moss called the argument that the Secretary's rulemaking authority was the type of function or duty that was barred by regulation a "dead end." 496 F. Supp. 3d at 34.

not the type of action that is voided under the FVRA.").[5] Despite citing *NWIRP* for other propositions, Plaintiffs—tellingly—ignore Judge Moss's ultimate decision in *NWIRP*.

In sum, the FVRA's ratification bar is narrow and applies only to non-delegable functions or duties. The Secretary's rulemaking authority is delegable and thus not a function or duty. And because this authority has been delegated since 2003, it is not a function or duty under Judge Moss' reading of the phrase in *L.M.-M.* and *NWIRP*. Thus, Secretary Mayorkas lawfully ratified the Timeline Repeal Rule, and the Court should grant summary judgment in Defendants' favor on this claim.

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

Plaintiffs argue that the Timeline repeal rule is arbitrary and capricious for "six independent reasons." *See* 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 ("Opp.") at 8 (ECF No. 130-1). All six articulated reasons are rooted in the incorrect assumption that DHS was required to afford a greater weight to the particular humanitarian concerns identified by plaintiffs than DHS is required to do. This false assumption justifies this Court to revisit its September 11, 2020 decision and find that the Timeline Repeal Rule complies with the mandates of the APA. Generally, the court may only set aside agency action where the agency: (1) relied on factors which *Congress has not intended it* to consider; (2) *entirely* failed to consider an important aspect of the

[5] In trying to distinguish *NWIRP*, the *Behring* Court suggested that Judge Moss only relied on 5 U.S.C. § 3348(a)(2)(B), which deals with functions or duties created by regulation, as opposed to those created by statute. 2021 WL 2554051, at *8. But that is wrong: the Secretary's rulemaking authority—which is created by statute, meaning § 3348(a)(2)(A) was the relevant FVRA provision—was clearly at issue in *NWIRP*. *NWIRP*, 496 F. Supp. 3d at 53, 58-59. This is yet another flaw in the *Behring* decision's analysis.

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) (emphases added). Here, (1) Congress has not mandated DHS to consider *any* factors, let alone directed DHS to ignore its own operational needs; (2) DHS did not fail to consider any aspect of the problem, let alone *entirely* fail to do so; (3) DHS's explanation for its decision is supported by the Agency's own historical data and its expertise; and (4) DHS's explanation is wholly rational and certainly not *implausible*. For the reasons set forth below, and as set forth in Defendants' moving papers, the Timeline Repeal Rule was wholly rational and promulgated in accordance with the mandates of the APA.

i. DHS Provided All the Consideration Required Concerning the Impact the Timeline Repeal Rule Would Have on Asylum Seekers

An agency's consideration of the public comments it receives and how it assesses the potential effects of its actions will necessarily be guided by the organic statute. *Cf., e.g.*, *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 510 (1981) ("When Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute."). For example, Plaintiffs rely on *Gresham v. Azar* for the proposition that "the agency must 'adequately analyz[e] the consequences' of its actions.'" 950 F.3d 93, 103 (D.C. Cir. 2020) (citation omitted). In *Gresham*, the agency approved a state Medicaid demonstration request. There, the statute only permitted the Secretary to approve demonstration requests "insofar as they are 'likely to assist in promoting the objectives' of Medicaid." *Id.* at 98 (quoting 42 U.S.C. § 1315(a)). Thus, because the Agency was bound by a Congressional mandate to consider whether its decision would promote the objectives of Medicaid, the Court was

required to consider this mandate and found that the Agency failed "to account for loss of coverage, which is a matter of importance under the statute." *Id.* at 102; *see also Michigan v. EPA*, 576 U.S. 743, 753 (2015) (concluding that statute directing EPA to determine whether "regulation is appropriate and necessary" required consideration of cost to industry); *Grace v. Barr,* 965 F.3d 883, 901 (2020) (holding agency failed to "grapple with how [the new] policy affected its statutory…mandate.").

Here, Congress does not require DHS to weigh *any* factors when exercising its discretion related to employment authorization for asylum applicants. In contrast, Congress has expressly stated that "[a]n applicant for asylum is *not* entitled to employment authorization." 8 U.S.C. § 1158(d)(2) (emphasis added). In fact, Congress granted DHS the discretionary authority to provide for such authorization with one limitation to the *detriment* of asylum applicants—an asylum applicant may not be granted work authorization (unless otherwise eligible) prior to 180 days after the date of filing of the application for asylum. 8 U.S.C. § 1158(d)(2). As such, Congress did not direct DHS to consider whether employment authorization was necessary to assist an asylum seeker with her claim for asylum. Congress did not direct DHS to consider whether employment authorization was necessary to ensure that an asylum seeker could afford housing. And Congress did not direct DHS to consider whether employment authorization was necessary for the psychological benefit of an asylum seeker. As such, it would be incorrect, as a matter of law, for the Court to impose such a mandate, let alone dictate how DHS should weigh such considerations in the final analysis. Similarly, the "problem" that the Timeline Repeal Rule addresses is to ensure USCIS has sufficient time to receive, screen, and process employment authorization document (EAD) applications. 85 Fed. Reg. 37502, 37502-37503. The Timeline Repeal Rule reflects consideration of a range of policy interests, but at bottom it can be described as prioritizing USCIS's discretion to allocate resources as it deems necessary to fulfill its

mission. Thus, it would be error to conclude that the agency was required to afford any particular weight to the humanitarian concerns raised, regardless of how important plaintiffs, the Court, or USCIS may believe they may be. *See, e.g.*, *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 971 (D.C. Cir. 1999) ("when an agency must balance a number of potentially conflicting objectives…judicial review is limited to determining whether the agency's decision reasonably advances at least one of those objectives and its decisionmaking process was regular"); *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021) ("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. 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."). And importantly, while the purpose of the Timeline Repeal Rule is not to address humanitarian issues, the Timeline Repeal Rule also does not preclude USCIS from adjudicating employment applications in an expedited fashion and it does not preclude USCIS from addressing humanitarian concerns through other means, such as reducing asylum adjudication times by returning to the processing of affirmative asylum applications on a "last in, first out" (LIFO) basis, which would make the need for employment authorization moot for any asylum seekers. 85 Fed. Reg. at 37513.

Nevertheless, DHS did respond to, and considered, concerns related to how the rule may delay an applicant's entry into the workforce 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. In addition, the Agency also considered its operational capacity and 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."). That Plaintiffs do not like the final rule, or that others may believe a different policy is preferable, does not render the rule arbitrary or capricious. And it certainly cannot be said that the Agency "entirely" failed to consider the impact the rule may have on certain asylum seekers. 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. As such, DHS provided all the consideration it was required to regarding the impact the proposed rule would have on asylum seekers.

ii. DHS Properly Explained the Basis for Repealing a Rule That Was Promulgated Over 20 Years Ago

Agency regulations are not intended to "last forever" and "an agency must be given ample latitude to 'adapt their rules and polices to the demands of changing circumstances.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 42 (1983). Where an agency changes its approach "no . . . special explanation" is required. *Westar Energy v. FERC*, 568 F.3d 985, 989 (D.C. Cir. 2009).

Here, there is no dispute that the 30-day timeline set forth in 8 CFR 208.7(a)(1) was no longer tenable due to the demand of changing circumstances. The 30-day timeline was established more than 20 years ago when INS adjudicated EAD applications at local INS offices. Plaintiffs do not dispute the Agency's historical data or how those data have been analyzed and interpreted. Plaintiffs' concede, as they must, that increases in asylum applicant EAD applications have outpaced USCIS' resources over the last 20 years. *Id.* at 37508. Plaintiffs do not dispute that the level of fraud sophistication and national security concerns posed today are more complex than they were 20 years ago. And Plaintiffs do not dispute that 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. As such, there can be no reasonable dispute that circumstances have significantly changed amply warranting the agency to revise the 30-day timeline set forth in 8 CFR 208.7(a)(1).

When the 30-day timeline was set in 1994, the primary purpose of the rule was "to discourage applicants from filing meritless claims solely as a means to obtain employment authorization." 59 Fed. Reg. at 62290. Even in 1994, the Agency 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. As such, Plaintiffs' suggestion for a court-imposed requirement that humanitarian concerns must be given significant, or more, weight is inconsistent with the very Rule that Plaintiffs seek to revive. In short, just as was done in 1994, DHS in 2020 balanced the interests of asylum applicants with the administrative burdens of proposed alternatives. *FCC v. Fox Television Stations*, 556 U.S. 502, 514-15, 19 (2009) (agency is not required to justify its policy change by reasons more substantial than those required to adopt a policy in the first instance.). And in doing so, DHS expressly addressed it prior policies and explained its rationale:

> DHS explicitly recognized its past regulatory history on this issue and humanitarian concerns in the proposed rule. DHS has tried to find ways to reduce adjudication times for this population, such as returning to the processing of affirmative asylum applications on a "last in, first out" (LIFO) basis. DHS has further considered humanitarian factors submitted by commenters, but as noted in the proposed rule, the existing 30-day timeframe has become untenable. DHS proposed and is finalizing a solution in this rulemaking that is intended to balance the agency's core missions with providing an avenue for asylum applicants to obtain employment authorization. DHS is committed to adjudicating these applications as quickly as possible in a transparent and sustainable manner.

85 Fed. Reg. 37502 at 37513. This is all the APA requires.

iii. DHS Considered Alternative Timelines and Rationally Declined to Adopt One Based Upon Historical Data and the Agency's Experience

It cannot be said that the Agency failed to consider adopting alternative timelines. *See* 85 Fed. Reg. at 37513, 37521. The agency specifically addressed the alternatives of 45, 60, or 90-day timeframes. *Id.* Instead, plaintiffs merely disagree with the ultimate decision not to adopt an alternative timeline. This is not grounds for vacating a rule. *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016) ("A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives.").

First, while Plaintiffs reargue that a 90-day timeline would have been reasonable, they do not dispute (nor could they dispute) that the agency was unable to adjudicate all applications within 90 days in FY 2017. Thus, reasonable or not, it cannot be said that a 90-day timeline was the *only* reasonable modification to the rule.

Second, Plaintiffs do not dispute Defendants' contention that the decision not to adopt an alternative timeline is consistent 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, when based on historical experience USCIS predicted that it would not be able to adjudicate approximately 8 percent of applications within 90 days under FY2017 conditions, the decision not to self-impose a 90-day timeline cannot be held irrational.

In addition to considering alternative adjudication timelines, Plaintiffs also note that the agency's "Ombudsman has identified 'insufficient staffing' as one of the main challenges preventing the agency from timely adjudicating initial EADs and has recommended hiring more adjudicators to address the problem." *See* Opp. at 16. The suggestion of hiring more officers was in fact considered and responded to by DHS. The Agency explained, in part, that "simply hiring more officers is not always feasible due to budgetary constraints and the fact that USCIS conducts notice and comment rulemaking to raise fees and increase revenue for such hiring actions." 85 Fed. Reg. 37502 at 37503. The Agency then explained that "[t]here is currently no fee for asylum applications or the corresponding initial EAD applications, and the cost to the agency for adjudication is covered by fees paid by other benefit requesters." 85 Fed. Reg. 37502 at 37503; see also 85 Fed. Reg. 37502 at 37525 ("While USCIS strives to maintain the staffing necessary to timely process all benefit request types and continuously analyzes workload trends and production, simply hiring more people does not provide a short term fix and, even when new hires are working at full competency, shifting demands and priorities continuously present new challenges that are even more difficult to adjust to with a processing timeline in place."). Thus, it cannot be said that the Agency was required to rely on its ability to hire more officers. Of course, the Timeline Repeal Rule does not prevent additional officers from being hired to permit applications to be adjudicated more expeditiously. [6]

[6] The Agency finalized a rulemaking in 2020 that would have increased fees and provided resources to hire additional staff, but the rulemaking was enjoined. *See Immigrant Legal Res. Ctr. v. Wolf*, No. 20-cv-05883-JSW, 491 F.Supp.3d 520, (Sept. 29, 2020); *Nw. Immigrant Rts. Project v. United States Citizenship & Immigr. Servs.*, 496 F. Supp. 3d 31 (D.D.C. 2020), *appeal dismissed*, No. 20-5369, 2021 WL 161666 (D.C. Cir. Jan. 12, 2021).

Moreover, Plaintiffs do not dispute that drastic spikes in applications have occurred in the past and therefore it is reasonable to conclude that similar spikes may occur in the future. *See* 85 Fed. Reg. at 37518. Thus, the agency reasoned 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. Accordingly, this is further undisputed evidence supporting the rationale for not adopting a self-imposed timeline to adjudicate all applications within a set period of time.

Finally, there is nothing irrational about USCIS' concern with its duty to adjudicate other time-sensitive adjudications apart from initial EADs based on pending asylum applications (C8 applications) that do not have similar self-imposed adjudication deadlines. Once again, while the Timeline Repeal Rule does not prohibit USCIS from prioritizing initial C8 applications, it does provide 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."). USCIS' decisions regarding management of its various workflows are decisions that ought to be 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) (holding in case challenging adjudication times with respect to H-4 EAD renewals 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 – or in this case, a rule that simply reclaims USCIS' authority to *make* such management decisions – cannot be said to be arbitrary or capricious. And as with any adjudication, USCIS posts processing times for initial C8 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."). As such, there is nothing contrary to any Congressional mandate, and nothing irrational or inconsistent in the decision by DHS not to adopt an alternative timeframe to adjudicate these applications.

iv. DHS Properly Considered Any Impact of the Broader EAD Rule and the Public Was not Deprived of the Right to Comment

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. 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 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."); 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."). DHS rationally concluded that the Timeline Repeal Rule should be promulgated despite any additional impacts from the Broader EAD Rule. Again, this is all the APA requires.

Moreover, as noted in Defendants' moving papers, and not challenged by Plaintiffs, in some respects, the Broader EAD Rule was expressly intended to improve processing efficiency, thereby potentially reducing processing timeframes in individual cases. And as addressed above, DHS has other initiatives and tools at its disposal to decrease any adverse impact this, or any other rule, may have on asylum applicants. The rule does not prohibit USCIS from adjudicating employment authorization applications expeditiously and it is not intended to be the only tool for USCIS to carry out its mission. For these reasons, and for all the reasons set forth in Defendants' moving papers, the Timeline Repeal Rule is rational and must be upheld.

CONCLUSION

For the forgoing reasons, and for the reasons set forth in their moving papers, Defendants respectfully requests that this Court grant its Motion for Partial Summary Judgment and deny Plaintiffs' cross-motion in its entirety.

Respectfully submitted,

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/s/

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