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' REPLY MEMORANDUM IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT ON THE TIMELINE REPEAL RULE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ARGUMENT

Plaintiffs' opening brief established that the Administrative Record provides further support for the Court's initial conclusion that the Timeline Repeal Rule was not the product of reasoned decisionmaking. Defendants' summary judgment motion did not identify any record evidence or arguments that the Court had not already considered at the preliminary posture. Defendants' reply memorandum in support of their motion for summary judgment and in opposition to Plaintiffs' cross-motion ("Defs.' Opp'n"), ECF No. 134, similarly fails to identify any additional record evidence and is otherwise unpersuasive. Defendants now contend—for the first time and contrary to statutory text and binding precedent—that the APA did not require the agency to give *any* consideration to the humanitarian impact of the Timeline Repeal Rule.[1] Apart from advancing that incredible (and meritless) position, Defendants' brief just sets up and knocks down multiple strawman arguments, ignoring the actual arguments and issues before the Court.

The parties' collective briefing underscores that the Court got it right the first time: the agency failed to consider relevant factors, to acknowledge or explain its change in policy, to consider reasonable alternatives, or to provide the public with an opportunity to participate in notice-and-comment rulemaking, and it relied on an explanation that ran counter to the Record. *See* Opinion, ECF No. 69 at 45-58. In sum, the agency did not follow the minimum procedures required for reasoned decisionmaking under the APA, and Plaintiffs are entitled to summary judgment on their APA claim. The Rule should be vacated on that basis.

Defendants continue to restate their implausible interpretation of the FVRA, which is

[1] The abbreviations and short form citations herein are the same as those used in Plaintiffs' opening brief. *See* Pls.' Mem. in Opp'n to Defs.' Mot. and in Supp. of Pls.' Cross-MSJ ("Pls.' Mot."), ECF No. 130-1.

contrary to the statutory text and which would render the FVRA ineffective as a congressional check on excessive Executive delegation—the statute's very purpose. If the Court reaches this issue, Plaintiffs are entitled to summary judgment on it as well; at minimum, Defendants have failed to carry their burden on their motion, which should be denied.

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

a. DHS Was Required to Consider the Timeline Repeal Rule's Humanitarian Impact

Defendants concede agency failures that doom the Timeline Repeal Rule: namely, the agency failed to consider *at all* the Rule's impact on asylum seekers' ability to seek asylum; on asylum seekers who lack support networks; or on asylum seekers who are or would be abused or exploited if forced to rely exclusively on their support networks. *Compare* Pls.' Mot. at 9-12 (arguing agency failed to consider these specific impacts), *with* Defs.' Opp'n at 15-16 (responding only that agency considered impact on "certain" asylum seekers and their support networks).[2]

Trying a new tack, Defendants claim—for the first time—that these failures were inconsequential because they implicate humanitarian concerns, and Congress simply did not direct the agency to consider the humanitarian impact of the Rule at all.[3] *Compare* Defs.' Opp'n at 13-15 (agency not required to consider humanitarian factors), *with, e.g.*, Defs.' Mot., ECF No. 127-1 at 19 ("DHS explicitly recognized . . . humanitarian concerns in the proposed rule" and "[t]hus, DHS considered the relevant factors"), *and* Opinion at 53 (noting the Government "does not

[2] As this Court has held, to the limited extent the agency referenced humanitarian concerns at all, it simply "paid lip service to a certain degree of economic hardship that the new rules inflict." Opinion at 55; *see id.* (agency failed to acknowledge Rule would "actually discourage and reduce legitimate claims for asylum"); *see also* Pls.' Mot. for PI, ECF No. 23-1 at 18-19.

[3] Defendants also repeatedly claim that Plaintiffs take issue with the "weight" the agency gave this factor, but this is a red herring, as Plaintiffs have made no such argument. *See infra* § I(b).

dispute" that the agency's consideration of the effects of the rule on asylum seekers "is of paramount importance"). Defendants' new legal argument is wrong.

i. The Agency Was Required to Consider the Humanitarian Purpose of the Statutory Scheme

First, it is beyond dispute that the U.S. asylum system was created to serve a humanitarian purpose. Congress's express purpose in adopting the Refugee Act of 1980—which amended the Immigration and Nationality Act ("INA") to, *inter alia*, create the first statutory procedure for applying for asylum in the United States—was to implement the "historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands." Refugee Act of 1980, § 101(a), Pub. L. No. 96–212, 94 Stat. 102; *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 424 (1987) (a "primary purpose[]" of the 1980 Act "was to bring United States refugee law into conformance with the 1967 [U.N.] Protocol Relating to the Status of Refugees"). The resulting statutory provision, 8 U.S.C. § 1158, was subsequently amended to expressly authorize the Executive to grant work authorization to asylum seekers. *See* Pub. L. No. 103-322, 108 Stat. 2028 (1994). When amending the INA to permit expedited deportation of noncitizens who lack documentation authorizing their entry, Congress was careful to honor our country's commitment to those seeking safe harbor by creating a screening process to ensure that individuals who might be eligible for asylum would avoid expedited removal, such that "there should be no danger that an alien with a genuine asylum claim will be returned to persecution." H.R. Rep. No. 104-469, pt. 1, at 158 (1996); *see Grace v. Whitaker*, 344 F. Supp. 3d 96, 106–08 (D.D.C. 2018), *aff'd in relevant part*, *Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020) (describing Congress's balancing of priorities in this context); 85 Fed. Reg. 37,502, 37,512, 37,514 (June 22, 2020) (comments discussing relevance and importance of Congress's humanitarian purpose).

The agency therefore must consider the humanitarian purpose of the statutory scheme when promulgating agency policy thereunder. *See Judulang v. Holder*, 565 U.S. 42, 55 (2011) (agency action must reflect "the purposes of the immigration laws" or the "appropriate operation" of the system). For example, in *Grace v. Barr* (a case Defendants cite, *see* Defs.' Opp'n at 14), the D.C. Circuit held that USCIS failed to adequately explain its asylum-related policy change where its reasoning was responsive only to the INA's efficiency goals (of deporting certain noncitizens expeditiously) and did not take into account the statute's "second, equally important" purpose of "ensuring that individuals with valid asylum claims are not returned to countries where they could face persecution"; the agency's failure to consider the statute's humanitarian purpose rendered the policy arbitrary and capricious, regardless of whether the policy was substantively permissible under the statutory scheme. 965 F.3d 883, 902–03 (D.C. Cir. 2020); *see also* Pls.' Mot. for PI, ECF No. 23-1 at 18-19; *accord Sierra Club v. Dep't of the Interior*, 899 F.3d 260, 293-94 (4th Cir. 2018) (failure to explain decision, particularly given record evidence that it was inconsistent with purposes of statutory scheme, rendered agency's action arbitrary and capricious).

Defendants' argument that Congress cannot have a humanitarian purpose where a benefit is granted as a matter of discretion, *see* Defs.' Opp'n at 14, turns existing law on its head. Congress frequently marries humanitarian purposes with discretionary authority, as epitomized by the Refugee Act itself. For example, the purpose of asylum is to "protect [refugees] with nowhere else to turn," *E. Bay Sanctuary Covenant v. Garland*, 994 F.3d 962, 977 (9th Cir. 2020) (quoting *Matter of B-R-*, 26 I. & N. Dec. 119, 122 (BIA 2013)), yet the Act makes the Secretary's decision to grant asylum in any individual case a discretionary one, *see* Refugee Act of 1980, Pub. L. No.

96–212, 94 Stat. 105.[4] In short, humanitarian statutory purposes can and do coexist with discretionary exercises of authority, as they do in this case.

ii. The APA Requires That the Agency Consider Important Aspects of the Problem Even Where They Are Not Expressly Identified in a Statute

Second, and independent of the statutory purpose, the APA required the agency to consider the extensive evidence in the Record, ECF No. 124, related to the impact of the Timeline Repeal Rule on asylum seekers. Defendants cannot dispute that hundreds of commenters brought humanitarian concerns about the Rule to the agency's attention. *See* Pls.' Mot. at 9 (citing 85 Fed. Reg. at 37,526-27); *see also* Pls.' Mot. for PI at 18-19. Rather, Defendants attempt to graft a novel limitation onto *State Farm*, arguing that an agency need only consider the "important aspect[s] of the problem" that Congress explicitly enumerates in a statute. Defs.' Opp'n at 13-15. *State Farm* says no such thing, and Defendants' case law stands only for the proposition that the agency *must* consider factors identified by Congress, *see id*. at 13-14; it does not stand for the proposition that agency consideration may be limited to those factors.

Indeed, in *State Farm*, the Supreme Court held that the Department of Transportation's rescission of its automobile safety regulation was arbitrary and capricious because the agency failed to consider modifying the regulation to require airbags in all cars—notwithstanding that the relevant statute made no mention of airbags and its purpose was to promote automobile safety generally. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 33, 46-51 (1983). The Court held that the agency was required to consider airbags in its new rulemaking because the agency's prior rule was based in part on its "judgment . . . that airbags are

[4] Other Refugee Act provisions confer discretionary authority on the Executive, notwithstanding the statute's expressly humanitarian purpose. *See, e.g.*, 8 U.S.C. § 1157(c)(1) (decision to admit refugees discretionary); 8 U.S.C. § 1157(a), (b) (annual cap on refugee admissions discretionary).

an effective and cost-beneficial life-saving technology." *Id.* at 51. Similarly, in *Roe v. Department of Defense*, the Fourth Circuit held that an agency policy categorically banning deployment of HIV-positive servicemembers was arbitrary and capricious because the Department failed to consider the medical literature and expert opinion in the record relating to current HIV treatment and transmission risks—notwithstanding that these important factors were not enumerated by statute. *See* 947 F.3d 207, 225-28 (4th Cir. 2020). The Fourth Circuit held that the Department's "'complete failure to reasonably reflect upon the information contained in the record and grapple with contrary evidence . . . disregard[ed] entirely the need for reasoned decision-making.'" *Id*. at 228 (quoting *Sierra Club*, 899 F.3d at 293).

Under this and other binding precedent, an agency must "examine the *relevant* data" in the record, and articulate a "satisfactory explanation" for its action on that basis—regardless of whether such relevant considerations are enumerated by statute.[5] *See State Farm*, 463 U.S. at 43 (emphasis added); Opinion at 46-47 (agency required to "'consider . . . significant comments received'" and to "actually give meaningful consideration to these concerns" (quoting *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015))). And there can be no question that humanitarian concerns are *relevant* to the agency's promulgation of rules governing how quickly asylum seekers may obtain work authorization, as the government itself has stated unequivocally. *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); Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal

[5] *Michigan v. EPA*, upon which Defendants rely, Defs.' Opp'n at 14, supports Plaintiffs' position, as it demonstrates that the "relevant factors" that an agency must consider under *State Farm* are not limited to those enumerated by statute. *See* 576 U.S. 743, 752 (2015).

Proceedings; Asylum Procedures, 62 Fed. Reg. 10,312, 10,318 (Mar. 6, 1997).

iii. To Meet Its Obligation to Acknowledge and Explain the Change in Its Prior Policy, the Agency Needed to Consider the Humanitarian Impact

Third, putting aside the statute's purpose and the record evidence of humanitarian impact, the agency was required to consider the Rule's impact on asylum seekers in order to comply with its obligation to recognize and explain its change in policy. *See* Pls.' Mot. at 13-15. As discussed *infra* § I(b)(i), "a central principle of administrative law is that, when an agency decides to depart from decades-long past practices and official policies, the agency must at a minimum acknowledge the change and offer a reasoned explanation for it." *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 923-24 (D.C. Cir. 2017) (citing, *inter alia*, *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016)). Here, the agency's prior policy explicitly balanced humanitarian and other concerns 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 v. U.S. Citizenship & Immigr. Servs.*, 365 F. Supp. 3d 1156, 1161 (W.D. Wash. 2018)).

At minimum, the agency was thus required to "display awareness that it *is* changing position"—*i.e.*, that it would no longer prioritize the expedient adjudication of asylum seeker EADs for humanitarian reasons. Pls.' Mot. at 14-15 (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). And where the "new policy rests upon factual findings that contradict those which underlay its prior policy"—such as the agency's prior finding that the resulting hardships would make it inappropriate to require asylum seekers to wait more than 150 days for work authorization—the agency must provide "a more detailed justification." *Fox*, 556 U.S. at 515; *see also CASA de Maryland v. U.S. Dep't of Homeland Sec.*, 924 F.3d 684, 704 (4th Cir. 2019) (rescission of prior policy arbitrary and capricious where agency "changed course without

any explanation for why [government's prior analysis supporting policy] was faulty" and thereby "'disregard[ed] facts and circumstances that underlay . . . the prior policy'"); *Encino Motorcars*, 136 S. Ct. at 2126 ("[A]n unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice." (cleaned up)).

For each of the foregoing reasons, the agency had to actually acknowledge the human impact of the Timeline Repeal Rule and "explain[] the 'good reasons for the new policy.'" *Encino Motorcars*, 136 S. Ct. at 2127 (quoting *Fox*, 556 U.S. at 515). The agency's failure to do so renders the Rule arbitrary and capricious. *See id.*

b. Defendants Mischaracterize and Fail to Respond to Plaintiffs' Other Arguments

Defendants spend much of their brief creating and attempting to knock down two strawman arguments. First, Defendants suggest that Plaintiffs have asked the Court to ignore the change in procedural posture between the preliminary injunction and this motion, and to treat the earlier ruling as if it had determined the final relief. *See* Defs.' Opp'n at 1. Not so. Plaintiffs argued that Defendants have no new record evidence and no new arguments since the preliminary injunction ruling that would undercut the Court's prior findings, and indeed, the Record provides additional evidence that supports the Court's earlier conclusion that the agency violated the APA.

Second, Defendants fault Plaintiffs and the Court for relying on "the incorrect assumption that DHS was required to afford a greater weight to the particular humanitarian concerns identified by plaintiffs," Defs.' Opp'n at 12; *see also id*. at 2, 14-15, 17, but Plaintiffs and the Court have neither made nor relied upon any such assumption, *see* Opinion at 45-57; Pls.' Mot. at 8-24. That is the lone argument that Defendants make in urging the Court to deviate from its prior conclusions, *see* Defs.' Opp'n at 12, and it is meritless. Plaintiffs' actual argument is directed to the agency's failure to follow the minimum procedures required for reasoned decisionmaking under the APA—

and specifically, that the agency failed to consider relevant factors, failed to acknowledge or explain its change in policy, failed to consider reasonable alternatives, failed to provide the public with an opportunity to participate in notice-and-comment rulemaking, and relied on an explanation that ran counter to the Record. *See* Pls.' Mot. at 8-24. On these five separate violations of the APA, Defendants (still) have no answer.

i. Defendants Mischaracterize and Ignore Plaintiffs' Argument That the Agency Failed to Acknowledge and Explain Its Change in Policy

Defendants spill considerable ink arguing that the agency had rational reasons for changing the 30-day timeline, *see* Defs.' Opp'n at 16-17, but they do not respond to Plaintiffs' actual argument: that notwithstanding the agency's asserted reasons for changing the prior rule, the APA required the agency to *acknowledge* that its repeal of the 30-day timeline and elimination of any timeline whatsoever represented a significant change in its policy, and to *explain* why it had decided that asylum seekers need not receive work authorization expeditiously after all, *see* Pls.' Mot. at 13-15 (citing Opinion at 50-51). The agency failed to do either.

The agency's failures were directly relevant to its ability to engage in reasoned decisionmaking. Even accepting the agency's premise that the 30-day timeline was no longer sustainable, the agency was required to separately decide what new policy to adopt. *See* Opinion at 50 ("[T]he agency's difficulty in complying with the 30-day deadline . . . hardly explains why there should be no timeline at all."). Because the agency failed to even acknowledge the humanitarian purpose that previously motivated it to bind itself with a short timeline, *see* Pls.' Mot. at 13-14, it failed to recognize the import of that purpose to its decisionmaking process. The agency did not attempt to balance the humanitarian purpose against operational concerns, and rather made clear that the sole purpose of the Timeline Repeal Rule was to "afford [the agency]

greater flexibility." Opinion at 49; *see* Defs.' Opp'n at 17 (citing 85 Fed. Reg. at 37,513). Nor, as noted *supra* § I(a)(iii), did the agency attempt to explain why it had abandoned its prioritization of the humanitarian purpose that motivated its prior policy. *See* Pls.' Mot. at 13-15.

Plaintiffs do not contend that the agency was required to adopt any particular substantive policy. Nor do Plaintiffs make any argument that the agency was required to give particular weight to any particular factor in making its decision. Plaintiffs simply argue, and the APA provides, that the process of reasoned decisionmaking requires the agency—at minimum—to consider humanitarian concerns (which are a relevant factor, *see supra* § I(a)(ii)), to acknowledge its earlier policy's prioritization of these concerns, and to explain its decision to abandon that prioritization and the underlying factual findings, *see supra* § I(a)(iii); Pls.' Mot. at 13-15.

ii. The Agency Did Not Consider Reasonable Alternatives and Its Explanation Ran Counter to the Record

Defendants recast Plaintiffs' moving papers into arguments that Plaintiffs never made: that "a 90-day timeline was the *only* reasonable modification to the rule"; that the agency "was required to rely on its ability to hire more officers"; and that "USCIS' concern" about adjudicating other benefits applications was "irrational." Defs.' Opp'n at 18-20. Plaintiffs argued no such things. *See* Pls.' Mot. at 15-20. Rather, Plaintiffs argued that commenters identified three distinct reasonable alternatives to address both the agency's stated concerns about its capacity *and* humanitarian concerns, such that these alternatives "fell squarely within the 'ambit of the existing policy.'" Pls.' Mot. at 16-17 (quoting *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020)). The agency's failure to consider these alternatives was arbitrary

and capricious, *see id*. at 16-18, and Defendants again fail to respond to Plaintiffs' arguments.[6]

As an initial matter, Defendants confuse the issue when they argue that the essential question before the agency was how to craft a policy that would accommodate the FY 2017 volume of initial asylum seeker EAD applications and the agency's processing rate of those applications. *See* Defs.' Opp'n at 18; *see also* Pls.' Mot. at 18 n.24 (noting Defendants' confusion). The question before the agency was, however, a different one: even assuming the agency reasonably concluded that the 30-day timeline was no longer feasible, it had to decide what new policy to adopt in its place. As an alternative to repealing the timeline, commenters urged the agency to instead extend the timeline, hire more adjudicators, or allow applicants to submit their applications earlier. Pls.' Mot. at 15-18. The agency was not required to adopt any one of these options. But the APA did require the agency to meaningfully consider each of these alternatives. *See* Opinion at 47-50 (an agency's "conclusory" response to a reasonable alternative "reflects a total failure to consider" it). The agency failed to do so. *Id*.

With respect to the longer timeline alternative, Defendants recycle their arguments that the agency could not meet the 90-day timeline in all cases; that it could not predict what would happen in the future; and that it sought "flexibility." Defs.' Opp'n at 18, 20; *see* Pls.' Mot. at 18 & n.24. But this Court already considered and rejected those arguments as "wholly unsatisfactory" and "conclusory," reasoning that the agency failed to explain why its need for greater flexibility was incompatible with a longer timeline (including longer than 90 days), particularly where it had committed to processing the "lion's share" of applications within 90 days. Opinion at 49-51; *see*

[6] Defendants also rely on the same inapposite case law and fail to respond to Plaintiffs' argument that to the extent the case law has any relevance, it supports Plaintiffs' position. *Compare* Defs.' Opp'n at 15, 20, *with* Pls.' Mot. at 19-20 & n.25.

Pls.' Mot. at 16-18. In addition, Defendants did not respond *at all* to Plaintiffs' argument, based on the Court's conclusion, that to the extent the agency considered the 90-day timeline alternative, its sole explanation for rejecting this alternative "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." Pls.' Mot. at 17 (quoting Opinion at 49). The agency's failure to adequately consider the longer timeline alternative and its explanation that ran counter to the Record are each independent and sufficient reasons that the Timeline Repeal Rule is arbitrary and capricious. *See* Pls.' Mot. at 16-17; Opinion at 47-51; *accord Regents*, 140 S. Ct. at 1913.

Defendants likewise ignore Plaintiffs' argument that the agency failed to consider the reasonable alternative to allow asylum seekers to submit their applications earlier. *See* Pls.' Mot. at 16-17. And with respect to hiring more adjudicators, Defendants do not dispute that the agency did not even attempt to estimate the cost of this alternative, and their citations to the Timeline Repeal Rule only illustrate the agency's failure to consider the alternative. *See* Defs.' Opp'n at 19. Specifically, the agency's handwringing that unspecified "new challenges" could arise "when new hires are working at full competency," *id.* (quoting 85 Fed. Reg. at 37,525), is every bit as "conclusory" as the agency language this Court already held to be inadequate, *see* Opinion at 49-51. That the cost of adjudication of asylum seekers' initial EAD applications is "covered by fees paid by other benefit requesters," *see* Defs.' Opp'n at 19 (quoting 85 Fed. Reg. at 37,503), reflects a long-standing policy decision that is irrelevant to the stated purpose of and justification for the Timeline Repeal Rule.[7] In any event, the agency simultaneously engaged in rulemaking

[7] This justification is, however, strikingly similar to those the Trump Administration offered in support of related rule changes, which were subsequently invalidated under the APA. *See, e.g.*, U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other

to impose fees on initial EAD applications and increase fees on renewal applications, *see id.* at 19 n.6, but nonetheless failed to consider the combined impact of these related rules, just as it failed to estimate the cost of hiring more adjudicators.

iii. Defendants Otherwise Fail to Respond to Plaintiffs' Arguments

Defendants do not respond at all to Plaintiffs' argument that the agency ignored its obligation to provide the public with the opportunity to participate in the rulemaking process when it failed to consider comments about the humanitarian impact of the proposed rule, the agency's change in policy, or reasonable alternatives. Pls.' Mot. at 22-23. Each of these reflects an independent failure to honor the APA's public participation requirement. *See id.*

With respect to the combined impact of the Timeline Repeal Rule and the Broader EAD Rule, Defendants do not dispute—nor could they—that the combined impact was an important factor that the agency was required to consider. Defs.' Opp'n at 21-22; *see* Pls.' Mot. at 20-22. Nor do they dispute that the agency directed commenters not to comment on the Broader EAD rulemaking, staggered the two rulemakings, and dismissed comments discussing the combined impact of the rules as "out of scope." *See* Pls.' Mot. for PI at 11-17. Reviewing these facts, this Court has already concluded that the agency "decline[d] to address 'the interaction or overlap' between the rules," and thereby "sidestep[ped] this fundamental concern." Opinion at 52; *see* Pls.' Mot. at 20-22. Nevertheless, Defendants rehash the same deficient arguments they have been making since the preliminary injunction stage. Defs.' Opp'n at 21-22; *see* Pls.' Mot. at 22 (quoting Defs.' Mot. at 11, 13-14 and Defs.' Opp'n to PI, ECF No. 41 at 13-14).

Immigration Benefit Request Requirements, 85 Fed. Reg. 46,788, 46,795, 46,820 (Aug. 3, 2020) (expressing concern that immigration benefits applicants "pay their fair share of costs"); *accord* Defs.' Opp'n at 19 n.6 (collecting cases enjoining that rule).

The agency's failures with respect to the interacting rules constitute two independent violations of the APA. First, DHS failed to meet its obligation to "give interested persons an opportunity to participate in the rule making," 5 U.S.C. § 553(c), when it refused to receive and later refused to consider comments related to the rules' interaction, *see* Pls.' Mot. at 20-23; Pls.' Mot. for PI at 11-17. DHS could not "properly consider[]" comments relating to the combined impact of the rules where it had impermissibly restricted the content of the rules and commenters had not seen the actual text of the proposed Broader EAD Rule, Defs.' Opp'n at 21; nor did the agency properly respond to comments relating to the combined impact of the rules when it deemed those comments to be "out of scope." *See* Pls.' PI Reply, ECF No. 47 at 2.

Second, the agency failed to consider the interaction between the two rules, which was a relevant and important consideration. *See* Pls.' Mot. for PI at 11-15, 17. Defendants' citations, Defs.' Opp'n at 21-22, show only passing acknowledgement that the two rules interact, and fail to demonstrate that the agency rationally analyzed their combined impact, even where Defendants should have known that the Broader EAD Rule would have a substantial impact on EAD processing. *See* Pls.' Mot. for PI at 14-15; Pls.' PI Reply at 1-3. Indeed, even as the agency speculated that EAD adjudication "may become more complex" due to the Broader EAD Rule, Defs.' Opp'n at 21 (quoting 85 Fed. Reg. at 37,530-31), it failed to incorporate consideration of that complexity into its estimate of adjudication times, and thereby, failed to acknowledge or consider the full burden the Timeline Repeal Rule would impose on asylum seekers and others, *see, e.g.*, 85 Fed. Reg. at 37,511 (minimizing commenters' concerns about harms to asylum seekers where the rule would result in only "potential minor increases in processing times"); *see also* Pls.' Mot. at 20-22; Pls.' PI Reply at 1-3. The agency thus failed to consider how the interaction of the rules bore on its policy. Pls.' Mot. at 20-22; Pls.' PI Reply at 1-3; *see State Farm*, 463 U.S.

at 43 (requiring "rational connection between the facts found and the choice made" (cleaned up)).

* * *

"If men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them." *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1485-86 (2021) (courts are not entitled to "denigrate . . . as some empty formality" statutory requirements, even where they may seem trivial). Adherence to the APA's minimum requirements is essential to ensure that unelected agencies wielding vast power remain accountable to the public and that agencies make informed, rational decisions based on the record before them and reasonably explain their actions. *See State Farm*, 463 U.S. at 48 ("Expert discretion is the lifeblood of the administrative process, but unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion." (internal quotation marks omitted)); *see also Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 192 (4th Cir. 2009) (arbitrary and capricious standard "is not meant to reduce judicial review to a rubber-stamp of agency action" (internal quotation marks omitted)). Here, each of the agency's multiple violations of the APA provides a sufficient basis upon which to grant summary judgment in Plaintiffs' favor and to vacate the Timeline Repeal Rule. *See* Pls.' Mot. at 24.

II. Secretary Mayorkas's Purported Ratification of the Timeline Repeal Rule Is Invalid

If the Court reaches the Appointments claims, it should reject Defendants' ratification argument, which is predicated on a cramped interpretation of the FVRA's anti-ratification provision—a position that is contrary to the statute's text and that would effectively eliminate the statute as a congressional check on excessive Executive delegation.

a. The FVRA Prohibits Ratification of the Timeline Repeal Rule

Defendants' ratification argument would rewrite the FVRA's text to prohibit ratification of only explicitly "non-delegable" functions and duties, Defs.' Opp'n at 3, but the FVRA does not define a "function or duty" of a vacant office in terms of what could be delegated. *See* 5 U.S.C. 3348(a)(2) (defining a "function or duty" as one "established by statute" and "required . . . to be performed by the applicable officer (and only that officer)"). A more straightforward reading of the FVRA's plain text is that it applies to all statutorily prescribed functions of a given office that, "by statute," are assigned to "only that officer." *Behring Reg'l Ctr., LLC v. Wolf*, No. 20-cv-09263-JSC, 2021 WL 2554051, at *6 (N.D. Cal. June 22, 2021) ("The FVRA does not define function or duty as required by 'a statute that designates one officer to perform a *non-delegable* duty or function.'"). Here, the relevant statutes assign both general rulemaking authority and the specific authority to regulate asylum seekers' access to work authorization to the DHS Secretary alone. *See* 8 U.S.C. § 1103(a) (general rulemaking authority); 8 U.S.C. § 1158(d)(2) (specific rulemaking authority for work authorization). Under the most natural reading of the statute's text, these rulemaking authorities fall within the scope of the FVRA's anti-ratification provision.

Congress knows how to use express language and could have defined specific functions or duties in the FVRA to mean only "non-delegable" duties. *See* Defs.' Opp'n at 8. Congress did not do so, however, because such a limited definition would eviscerate the FVRA's remedial scheme. *See* Pls.' Mot. at 26-27. Virtually *all* the functions or duties of the DHS Secretary (and other major cabinet offices) are delegable, so Defendants' interpretation would render the FVRA

inapplicable in nearly all circumstances,[8] defeating not only the purpose of the anti-ratification provision, but the statute's overall enforcement mechanism. *See L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 34 (D.D.C. 2020); *accord Behring Reg'l*, 2021 WL 2554051, at *5-7; *see also SW Gen., Inc. v. NLRB*, 796 F.3d 67, 70 (D.C. Cir. 2015) (FVRA enacted to curb Executive reliance on delegation authority and to "recla[im] . . . [the] Appointments Clause power").

Judicial authority on whether a "function or duty" is limited to non-delegable duties is split, and the issue has yet to be substantively considered by any Court of Appeals. Notably, however, none of the cases cited by Defendants addresses how an interpretation of "function or duty" as limited to non-delegable duties would impact the FVRA's overall remedial scheme. *See* Defs.' Opp'n at 4-5. Indeed, no court that has ostensibly endorsed Defendants' view has addressed how that interpretation can avoid limiting the FVRA's applicability to only a handful of cases; or more generally, how it can be squared with Congress's purpose in enacting the FVRA.

Defendants' primary objection to the *Behring Regional* court's analysis of the anti-ratification provision boils down to an argument that compliance with the FVRA may be inconvenient in some cases. Defendants claim that—because the FVRA requires that functions or duties of a specific office be performed only by the head of an agency when the office is vacant—the *Behring Regional* court's analysis would disrupt "the continuity of government operations during vacancies." Defs.' Opp'n at 7. But Defendants ignore entirely that, as long

[8] The limited examples of "non-delegable" duties Defendants are able to identify reveal the absurdity of their position. *See* Defs.' Opp'n at 8. With respect to the DHS Secretary, Defendants suggest that the only "functions or duties" of the office within the meaning of the FVRA concern the ability to reassign certain contracts with third-party vendors (35 U.S.C. § 202(f)(1)), and the regulation prescribing which government officials can receive free rides to work from their residences (31 U.S.C. § 1344(d)(3)). The only other examples Defendants identify are not examples of the authority of the DHS Secretary. *See* Defs.' Opp'n at 8.

as a validly serving *acting* official occupies the vacant position, that official may perform all of its attendant functions or duties. *See* 5 U.S.C. §§ 3345, 3348(b). In cases of Presidential transition, the FVRA also explicitly relaxes its timing provisions to allow an acting official to serve an additional 90 days in addition to the 210-day period typically authorized for acting service. *See id.* § 3349a(b). Moreover, as long as a nomination for a vacant office remains pending before the Senate, acting officials may serve indefinitely. *See id.* § 3346. Indeed, Congress designed the FVRA precisely to balance the need for continuity of government with the importance of preserving the Senate's Advice and Consent power. *See* Br. of Morton Rosenberg as Amicus Curiae in Supp. of Pls.' Mot. for Prelim. Inj., ECF No. 40-1 at 2-4, 8-13. Defendants' interpretation would upend that balance: under Defendants' interpretation virtually all agency actions are beyond the reach of the FVRA's remedy provision, meaning that executive agencies could function indefinitely without even submitting nominations for PAS positions to the Senate.

b. The 2003 Delegation Does Not Support Defendants' Position

Even if the Court does not agree with *Behring Regional*, it should, at minimum, adopt the analysis of the *L.M.-M.* court, under which Plaintiffs also prevail. Judge Moss's careful analysis in *L.M.-M.* reads the FVRA to require that statutorily delegable duties—like rulemaking duties—be delegated at least 180 days prior to the agency action in question. 442 F. Supp. 3d at 33 (noting FVRA requires "regulatory" duties to be delegated at least 180 days in advance). Defendants argue that the Secretary's rulemaking authority "has in fact been delegated," Defs.' Opp'n at 9, but, for two independent reasons, they are still unable to convincingly support this position and lack the compelling evidentiary support necessary to prevail at summary judgment.

First, even on its face, the 2003 Delegation does not do what Defendants claim. The 2003 Delegation delegates to the Deputy Secretary the authority to take merely ministerial actions

related to rules. *See* 2003 Delegation, ECF No. 127-3 at 4 ("Acting for the Secretary, to sign, approve, or disapprove any proposed or final rule, regulation or related document"); *see also* Pls.' Mot. at 28. Even accepting Defendants' bald assertion that these actions are tantamount to establishing the substantive content of rules, *see* Defs.' Opp'n at 9, the 2003 Delegation still does not delegate this authority wholesale: instead, this authority (and only this authority) is delegated only when "[a]cting for the Secretary." *See* Pls.' Mot. at 28-29.[9] Defendants invite the Court to excise that prefatory language but offer no justification for doing so, even though it is the government's burden alone to prove the act and significance of the purported ratification.[10]

Second, Defendants have also failed to establish that the 2003 Delegation was operative when the Timeline Repeal Rule was issued. *See* Pls.' Mot. at 29. As Plaintiffs argued, *see id.*,

---

[9] Defendants' supposed examples of the Deputy Secretary exercising rulemaking authority do little to support their position. Each cited rule relies on the rulemaking authority of the DHS Secretary under 8 U.S.C. § 1103, and none makes explicit reference to the 2003 Delegation as the basis for the Deputy Secretary signing. The record in each example is also not as straightforward as Defendants suggest; for example, in most cases cited, the Secretary was principally involved in the rulemaking process. *See, e.g.*, US-VISIT; Enrollment of Additional Aliens in US-VISIT, 73 Fed. Reg. 77,473 (Dec. 19, 2008) (Notice of Proposed Rulemaking initially signed by then-DHS Secretary Michael Chertoff, *see* 71 Fed. Reg. 42,605, 42,658 (July 27, 2006)); Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers, 73 Fed. Reg. 78,104 (Dec. 19, 2008) (Notice of Proposed Rulemaking signed by then-DHS Secretary Michael Chertoff, *see* 73 Fed. Reg. 49,109, 49,122 (Aug. 20, 2008)); Documents Acceptable for Employment Eligibility Verification, 73 Fed. Reg. 76,505 (Dec. 17, 2008) (interim final rule, with final rule signed by then-DHS Secretary Janet Napolitano, *see* 76 Fed. Reg. 21,225, 21,232 (Apr. 15, 2011)); Changes to Requirements Affecting H-2A Nonimmigrants, 73 Fed. Reg. 76,891 (Dec. 18, 2008) (Notice of Proposed Rulemaking signed by then-DHS Secretary Michael Chertoff, *see* 73 Fed. Reg. 8,230, 8,247 (Feb. 13, 2008)); Designation of Malta for the Visa Waiver Program, 73 Fed. Reg. 79,595 (Dec. 30, 2008) (amendment to rule adding additional countries to visa waiver program signed by then-DHS Secretary Michael Chertoff, *see* 73 Fed. Reg. 67,711, 67,713 (Nov. 17, 2008)).

[10] The differential burden explains why Defendants' reliance on the *NWIRP* opinion's treatment of the 2003 Delegation is misplaced: because the issue arose in the context of a motion for preliminary relief, the plaintiffs bore the burden of proof, and thus could not benefit from the document's ambiguities, as Judge Moss noted. *See Nw. Immigrant Rts. Project v. U.S. Citizenship & Immigr. Servs.*, 496 F. Supp. 3d 31, 59 (D.D.C. 2020).

the 2016 Johnson Order replaced and superseded the 2003 Delegation. *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 (clarifying and consolidating DHS list of delegation authority and making no mention of the delegation of rulemaking authority to the Deputy Secretary). To try to rebut this argument, Defendants submitted a declaration from the official "responsible for maintaining official documents approved or signed by the Secretary and Deputy Secretary," which avers that the 2003 Delegation "has not been rescinded or revoked," ECF 134-1, but that assertion says nothing about the legal effect of the Johnson Order. What is more, *every* example the government provides of the Deputy Secretary ostensibly "engag[ing] in rulemaking," *see id.*; *see also* Defs.' Opp'n at 10, occurred during a 35-day period spanning December 2008 and January 2009—*i.e.*, years before the Johnson Order and in the middle of a presidential transition—which is not a particularly compelling historical record on which to base anything.

* * *

In sum, the FVRA prohibits Secretary Mayorkas's purported ratification, and therefore Plaintiffs are entitled to summary judgment on their Appointments claims as well; but at minimum, should the Court reach these claims, it should deny Defendants' motion.

CONCLUSION

Plaintiffs respectfully request that the Court grant their motion for summary judgment, deny Defendants' motion for summary judgment, and vacate the Timeline Repeal Rule.

Dated: July 27, 2021

Respectfully submitted,

/s/
Linda Evarts (*pro hac vice*)
Geroline A. Castillo (*pro hac vice*)
Kathryn Austin (*pro hac vice*)
Mariko Hirose (*pro hac vice*)
INTERNATIONAL REFUGEE ASSISTANCE PROJECT
One Battery Park Plaza, 4th Floor
New York, NY 10004
Tel: (516) 838-1655
Fax: (929) 999-8115
levarts@refugeerights.org
gcastillo@refugeerights.org
kaustin@refugeerights.org
mhirose@refugeerights.org

/s/
Justin B. Cox (Bar No. 17550)
INTERNATIONAL REFUGEE ASSISTANCE PROJECT
P.O. Box 170208
Atlanta, GA 30317
Tel: (516) 701-4233
Fax: (929) 999-8115
jcox@refugeerights.org

Counsel for Plaintiffs

/s/
Zachary Manfredi (*pro hac vice*)
ASYLUM SEEKER ADVOCACY PROJECT
228 Park Avenue S. #84810
New York, NY 10003-1502
Tel: (305) 484-9260
Fax: (646) 968-0279
zachary.manfredi@asylumadvocacy.org

Richard W. Mark (*pro hac vice*)
Joseph Evall (*pro hac vice*)
Katherine Marquart (*pro hac vice*)
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166-0193
Tel: (212) 351-4000
Fax: (212) 351-4035
RMark@gibsondunn.com
JEvall@gibsondunn.com
KMarquart@gibsondunn.com