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**UNITED STATES DISTRICT COURT**

**FOR THE NORTHERN DISTRICT OF CALIFORNIA**

**BEHRING REGIONAL CENTER LLC,**

Plaintiff,

v.

**CHAD WOLF**,
in his official capacity as Acting Secretary of the Department of Homeland Security

**KENNETH T. CUCCINELLI**,
in his official capacity as Senior Official Performing the Duties of Director of United States Citizenship & Immigration Services

**EDIE PEARSON**,
in her official capacity as Policy Branch Chief of the Immigrant Investor Program Office

Defendants.

CASE NO. 3:20-cv-09263-JSC

**PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION; MEMORANDUM OF POINTS AUTHORITIES IN SUPPORT**

[Filed concurrently with the Declaration of C. Behring and Proposed Order]

Date: January 28, 2021
Time: 9:00 A.M.
Courtroom: E, 15th Floor

Magistrate Judge Jacqueline Scott Corley

Complaint Filed: December 21, 2020
Trial Date: None Set

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**NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 28, 2021 at 9:00 a.m. at the San Francisco Federal Courthouse, Courtroom E, 15th Floor, 450 Golden Gate Avenue, San Francisco, California 94102, Plaintiff, Behring Regional Center LLC ("**Plaintiff**" or "**BRC**"), by and through its attorneys, will and hereby does respectfully move this Court for a preliminary injunction, pursuant to Fed. R. Civ. P. 65 and Civil L.R. 7-2, enjoining implementation by the Defendants of their rulemaking "EB-5 Immigrant Investor Program Modernization", which was published in the Federal Register. 84 Fed. Reg. 35,750 (July 24, 2019) (the "**Rule**").

As discussed below in the accompanying Memorandum of Points and Authorities, the Defendants have implemented the Rule in violation of the Administrative Procedure Act ("**APA**"), the Homeland Security Act ("**HSA**"), and Federal Vacancies Reform Act ("**FVRA**"), and otherwise, have acted arbitrarily and capriciously, in violation of the law, and in excess of their authority.

This motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities in support thereof, the Declaration of Colin Behring dated December 20, 2020 ("**Behring Decl.**"), all pleadings and papers on file in this action, all matters of which this Court may take judicial notice, and such other written or oral argument as may be properly presented to the Court at the hearing. In accordance with Civil L.R. 7-2, a proposed Order is also filed herewith.

**MEMORANDUM AND POINTS OF AUTHORITY**

## I. INTRODUCTION

In late 2019, DHS issued an arbitrary and capricious Rule in violation of federal law that has now had the result of effectively eliminating foreign investment in the EB-5 Immigrant Investor Program ("**EB-5**", the "**Program**", or the "**EB-5 Program**"). As a result, BRC has and will continue to suffer irreparable harm by permitting this Rule to continue. The EB-5 Program was an effective and essential program that provided an opportunity for foreign nationals and their families to become permanent United States residents in exchange for investing in American businesses that create jobs for American workers. The Program was originally created in 1990 to encourage job creation and foreign investment. It gained substantial popularity after developers had difficulty obtaining domestic funding in the wake of the 2008

recession. Foreign investment through the EB-5 Program allowed large-scale construction projects to continue despite the recession, which has led to substantial economic development and job growth in the last ten years.

Prior to November 21, 2019, the Program required that an investor make an investment of $1,000,000, or $500,000 for depressed areas of the country in locations called targeted employment areas ("**TEAs**"). These TEAs were either rural areas or those areas experiencing high unemployment. Individual states designated what areas within its borders constituted "high unemployment areas" as qualified TEAs. On November 21, 2019, the Department of Homeland Security ("**DHS**") issued a final rule amending its regulations for EB-5 to change some of the threshold requirements for participation in the Program (the "**Rule**"). This Rule proposed changes to the Program, the most salient of which are: (i) significant increases in the requisite investment levels; and (ii) a new TEA designation process that eliminates the input of the individual States in designating such areas in which investments are made.

BRC seeks preliminary relief from the Rule because of the irreparable harm Defendants have caused by implementing the Rule in violation of the APA, the HSA, and the FVRA. Investments in the program have dwindled to zero and thus BRC has had to rely on costly alternative funding sources to keep its ongoing development projects going. BRC simply cannot wait for this case to be heard on the merits-they need immediate action on the Rule to avoid irreparable harm. On the merits, BRC can establish that Defendants have acted arbitrarily and capriciously, in violation of the law, and in excess of their authority, in part, by failing to consider the Rule's devastating, irreparable impact on the EB-5 Program. BRC is likely to succeed, as demonstrated by multiple recent injunctions granted in several challenges to the unlawful appointment of the Acting Secretaries. DHS will suffer little to no harm and the public interest will be served from this Court granting this Motion because the public has an interest in ensuring that the government does not overstep its statutory authority in a manner that will have a negative economic impact on businesses and American consumers. Because of the detrimental effects the Rule has had and will continue to will have on Plaintiff, BRC respectfully requests that the Court grant this Motion.

## II. STATEMENT OF ISSUES TO BE DECIDED

The issues to be decided in this Motion are: i. whether Plaintiff is likely to succeed on the merits in this case and therefore, Defendants acted arbitrarily and capriciously, in violation of the APA, HSA,

and FVRA, and in excess of their statutory authority in implementing the Rule; ii. whether Plaintiff has shown that it is likely to suffer irreparable harm; and iii. whether the balance of the equities tip in the Plaintiff's favor and an injunction is in the public interest.

## III. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

### A. THE EB-5 VISA PROGRAM

The EB-5 Program was established as part of the Immigration Act of 1990, and provided the ability to obtain lawful permanent resident status for those foreign nationals who invest in a new commercial enterprise that would create at least ten full-time jobs for United States citizens or legal aliens. *See* 8 U.S.C. § 1153(b)(5). Prior to November 21, 2019, the minimum investment requirement was $1,000,000. *Id.* The Immigration and Nationality Act ("**INA**") provided a reduced investment threshold for economically depressed areas of the country, stating that "in the case of investment made in a targeted employment area, [the Secretary of Homeland Security may] specify an amount of capital required . . . that is less than (but not less than 1/2 of) the [standard investment amount] . . . ." *See* 8 U.S.C. § 1153(b)(5)(C)(ii). Prior to November 21, 2019, an area could qualify as a "targeted employment area" by being either: 1) a "a rural area," or 2) "an area which has experienced high unemployment (of at least 150 percent of the national average rate)." *See* 8 U.S.C. § 1153(b)(5)(B)(ii). The INA defines "rural area" to be "any area other than an area within a metropolitan statistical area or within the outer boundary of any city or town having a population of 20,000 or more (based on the most recent decennial census of the United States)." 8 U.S.C. § 1153(b)(5)(B)(iii). The agency originally set the minimum investment amount for TEAs at $500,000 in 1991, and the threshold remained unchanged until the Rule was implemented. Compl. ¶ 22. The determination as to whether an investor was required to make the reduced investment of $500,000 or the "standard" investment of $1,000,000 was largely contingent[1] upon an individual State's determination as to what areas within its borders constitute "high unemployment areas." *See* 56 Fed. Reg. 60897 (1991) at 8 C.F.R. § 204.6(i).

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[1] Individual applicants were also permitted to submit evidence directly to the United States Citizen & Immigration Services that their investment was in a high unemployment area, though this method was rarely utilized.

**B. DHS'S RULEMAKING AUTHORITY**

As a general matter, the "Secretary of Homeland Security [is] charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens." 8 U.S.C. § 1103(a)(1). The primary mission of the DHS is, in part, to "ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland . . ." *See* 6 U.S.C. § 111(b)(1)(F). Congress has directed the Secretary to "establish such regulations ... and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter." *Id.* § 1103(a)(3). With regard to the minimum investment requirement, the INA states that the Secretary of Homeland Security, "in consultation with the Secretary of Labor and the Secretary of State, may from time to time prescribe regulations increasing the dollar amount specified . . . " 8 U.S.C. § 1153(b)(5)(C). Before this Rule, DHS had never acted on such authority.

**C. THE RULE**

On January 13, 2017, DHS acting through the U.S. Citizenship and Immigration Services ("**USCIS**") published a proposed rule about the EB-5 Program and provided opportunity for comment. *See* Notice of Proposed Rulemaking, 82 Fed. Reg. 4738, 4758 (Jan. 13, 2017). On July 24, 2019, USCIS issued the final rule entitled "EB-5 Immigrant Investor Program Modernization", which was published in the Federal Register. 84 Fed. Reg. 35,750 (July 24, 2019). The Rule drastically changed several aspects of the EB-5 Program. First, the Rule increased the minimum investment amount from $1,000,000 to $1,800,000, *see* the Rule at 8 C.F.R. § 204.6(f)(1). Second, the Rule increased the minimum investment amount in a TEA from $500,000 to $900,000, *see* Rule at 8 C.F.R. § 204.6(f)(2); Third, the Rule eliminated state participation in the designation of TEAs and granted DHS the sole authority to designate TEAs, 84 Fed. Reg. at 35752; Rule at 8 C.F.R. § 204.6(i). Finally, the Rule restricted its designation of TEAs in favor of rural areas. Cities and towns with a population of 20,000 or more *within* a metropolitan statistical area ("**MSA**") (as designed by the Office of Management and Budget) can no longer qualify as a TEA, regardless if the city or town qualifies as a "high unemployment" area. *Id*. DHS asserted that its purported statutory authority for enacting these changes stems from the agency's mission statement to provide for "economic security" of the United States. 84

Fed. Reg. 35,750. The Rule took effect on November 21, 2019. DHS largely ignored negative information and abstained from performing the required Regulatory Flexibility Analysis, citing a lack of data as authority.

**D. DHS' LACK OF AUTHORITY TO PROMULGATE RULEMAKING**

There has been no Senate-confirmed Secretary leading DHS since April 10, 2019 and the Trump Administration has instead unlawfully appointed individuals to "acting" positions at the Agency. These "acting" appointments violate the HSA and FVRA.

The offices of USCIS Director and DHS Secretary are positions that must be filled by presidential appointment, with the advice and consent of the Senate. *See* 6 U.S.C. §§ 112(a)(1), 113(a)(1)(E), (J). The FVRA, 5 U.S.C. §§ 3345-3349, and the HSA, 6 U.S.C. § 113, limit which individuals may serve as acting officials within DHS and USCIS and the amount of time for which they may do so. The FVRA specifies that when a position requiring presidential appointment and Senate confirmation is vacant, then "the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity." 5 U.S.C. § 3345(a)(1). The FVRA further provides that certain actions "taken by any person who is not acting" lawfully under the statute "shall have no force or effect" and "may not be ratified." 5 U.S.C. § 3348.

The HSA works in concert with the FVRA, specifying which position serves as "first assistant" to the DHS Secretary and addressing the order of succession beyond the first assistant if needed. 6 U.S.C. § 113(g)(1), (2). The HSA creates the position of Deputy Secretary to be the first assistant to serve in case of a DHS Secretary vacancy pursuant to the FVRA. *Id.* In 2016, Congress amended the HSA to allow the Secretary to designate other officers in further order of succession to serve as the Acting Secretary. *Id.* The last lawfully appointed, Senate-confirmed DHS Secretary, Kirstjen Nielsen, resigned on April 10, 2019. Prior to her resignation, Secretary Nielsen purportedly amended the Order of Succession for DHS Secretary to move the Commissioner of Customs and Border Protection ("CBP") to third in line for succession to assume the position for Acting Secretary after Deputy Secretary and Under Secretary for Management. DHS Delegation No. 00106 (Revision No. 08.5), DHS Orders of Succession and Delegations of Authorities for Named Positions (Apr. 10, 2019) ("Order 00106"). However, her amendment to Order 00106 dealt exclusively with temporary vacancies occurring when

the Secretary is "unavailable to act during a disaster or catastrophic emergency," not following a resignation.[2] Kevin McAleenan was serving as the CBP commissioner at the time, and, because the offices of Deputy Secretary and Under Secretary for Management, the second succession position after Deputy Secretary, were both vacant, McAleenan purportedly became Acting Secretary upon Secretary Nielsen's resignation, pursuant to her amendment to the Order of Succession.

Then-Acting Secretary McAleenan resigned a few months later. On November 8, 2019, on his way out of office, then-Acting Secretary McAleenan again amended the Order of Succession to move the Under Secretary for Strategy, Policy, and Plans up to fourth on the DHS succession list, behind the Commissioner of the CBP. Department of Homeland Security, Amendment to the Order of Succession for the Secretary of Homeland Security (Nov. 8, 2019). On November 13, 2019, the Senate confirmed Defendant Wolf as the Under Secretary for Strategy, Policy, and Plans. Because all three of the positions ahead of Defendant Wolf's position were vacant, Defendant Wolf assumed the role of Acting Secretary of DHS pursuant to McAleenan's amendment of the succession list. Complaint, at ¶ 80.

The Government Accountability Office ("GAO") recently found that the appointments of McAleenan and Defendant Wolf to DHS Secretary were unlawful because they violated the HSA's succession order provision. GAO, Homeland Security, File B-332451 (Aug. 21, 2020), https://www.gao.gov/assets/710/708944.pdf ("GAO Report"). Following the GAO Report, DHS attempted to remedy its errors by having FEMA Administrator Peter Gaynor (the person who should be Acting Secretary according to the HSA succession list before Secretary Nielsen's improper amendment) delegate his duties as Acting Secretary to Defendant Wolf by again amending the line of succession. Department of Homeland Security, Amendment to the Order of Succession for the Secretary of Homeland Security (Nov. 14, 2020).

[2] Under Section II(A) of Order 00106, "In case of the Secretary's . . . resignation, . . . the orderly succession of officials is governed by Executive Order 13753." Executive Order 13753, in turn, lists sixteen DHS officials who are authorized to take over as Acting Secretary during a vacancy, in the sequence provided. *See* Exec. Order No. 13753, § 1, 81 Fed. Reg. 90,667 (Dec. 14, 2016). Under Delegation 00106, therefore, that list of officials, in that order, are to serve as Acting Secretary following a Secretary's resignation. Under Executive Order 13753, and therefore, under Section II.A of Delegation 00106, the Commissioner of Customers and Border Protection was seventh in line to become Acting Secretary following a resignation. *See* Exec. Order No. 13753, *supra*, § 1. Nevertheless, McAleenan purported to take over as Acting Secretary even though other officials higher in the line of succession were available to serve.

The Trump Administration announced that it would nominate Defendant Cuccinelli as Director of USCIS. *Id.* When it became clear that Defendant Cuccinelli would face a tough Senate confirmation process, the Trump Administration sought to circumvent Senate confirmation by appointing Defendant Cuccinelli to a newly-created position of Principal Deputy Director of USCIS on June 10, 2019. According to the Trump Administration, this new position allowed Defendant Cuccinelli to serve as Acting Director of USCIS for purposes of the FVRA. Congress has not, either in the HSA or elsewhere, authorized the establishment "by Law" of the office of Principal Deputy Director of USCIS, or designated that office as the first assistant to the office of the Director. Therefore, this is in contravention of the FVRA's principle that the "first assistant" shall be the Acting Director in the case of a vacancy.

In their acting positions, McAleenan, Defendant Cuccinelli, and Defendant Wolf performed functions or duties related to such positions, as defined in the FVRA. 5 U.S.C. § 3348. The DHS Secretary's functions or duties include issuing regulations and delegating the secretary's functions to others. *See* 6 U.S.C. § 112(b)(1), (e); 8 U.S.C. § 1103(a)(3). The USCIS Director's "[f]unctions" include establishing policies and overseeing the administration of such policies. 6 U.S.C. § 271(a)(3)(A), (B), (D). Then-Acting DHS Secretary McAleenan signed the final Rule in the C.F.R. on July 21, 2019. In doing so, then-Acting Secretary McAleenan was performing the function or duty of Acting DHS Secretary in violation of the FVRA and HSA. Defendant Wolf was Acting Secretary when the final Rule took effect on November 21, 2019 and is enforcing the Rule. In doing so, he was and is performing the function or duty of Acting DHS Secretary in violation of the FVRA and HSA. USCIS, through Defendant Cuccinelli, issued the final Rule on July 24, 2019 and is overseeing the administration of the Rule. In doing so, Defendant Cuccinelli was performing the function or duty of Acting Director of USCIS in violation of the FVRA and HSA.

**E. PLAINTIFF BEHRING REGIONAL CENTER LLC**

BRC, formerly known as Berkeley Regional Fund LLC, in conjunction with other affiliates, acts as the sponsor, manager, or General Partners of various real estate investments, property developments, and new commercial enterprises established for pooling qualified EB-5 capital contributions to be invested in real estate projects. As a regional center, BRC works in tandem with its affiliated project

developers, like Behring Capital LLC, and uses capital investments from the investors seeking a visa through the EB-5 Program to invest in or to develop residential real estate development projects for TEAs in the Bay Area. Behring Decl. at ¶ 4.

After the Rule was implemented on November 21, 2019, the EB-5 market collapsed. *Id*. at ¶ 9. Prior to the Rule, BRC and its affiliates successfully subscribed 89 investors during 2019 and earned $1,924,695 in gross administrative fees. *Id*. After the Rule, BRC and its affiliates have subscribed zero investors and its annual income from EB-5 administrative fees have dropped 100% to zero dollars. *Id*. At the same time, since the Rule's implementation, according to USCIS published data, the EB-5 industry as a whole filed only 61 new I-526 petitions from January 2020, an astonishing 99.07% drop from the performance in 2019.[3] *Id*. at ¶ 13.

In the past year, BRC and its affiliates have seen the EB-5 Program diminish to the point of near extinction because of the Rule's changes. *Id*. at ¶ 13. First, the higher investment requirement mandated by the Rule has deterred foreign investors from participating in the Program. *Id.* at ¶¶ 12—13. Contrary to DHS's assertions when drafting the Rule, overall investment has decreased substantially, and the higher minimum investment threshold has not offset the number of investors choosing not to invest to make up for these losses. *Id.* at ¶ 13. Second, the TEA system, the *de facto* investment amount, is now unworkable and deters investors even further. Since investors cannot receive assurance that their TEA investment will be accepted by DHS before they invest, investors are simply choosing not to use the Program. *Id.* at ¶¶ 15–17.

BRC and its affiliates have attempted to work within the new system that the Rule created. *Id.* at ¶ 21. However, the changes to the Program have made the system unworkable. Investors do not want to invest in the Program because of the investment level increases, especially if they do not know that TEAs will be accepted by USCIS prior to submission and adjudication of their EB-5 application. BRC and its affiliates have seen a vast majority of foreign investors abandon the Program. *Id.* BRC and its affiliates have kept their business afloat in the past year by working vigorously to source third-party financing and capital loans from their own principals. *Id*. at ¶¶ 21—22. However, third-party financing is much more expensive, increasing budgets through increased fees, higher interest, and significantly

[3] Calendar year 2019, not Federal Fiscal Year.

higher upfront capitalized interest reserves. *Id*. This third-party financing is not sustainable because BRC's business relies on EB-5 funding to succeed because its investment platform is based on serving international clientele and providing a dynamic solution for investment, diversification, and immigration. *Id*. Without EB-5 investments, BRC and its affiliates' unique value proposition to potential projects is reduced substantially. *Id*. In turn, BRC and its affiliates continue to see depressed profits since the Rule has taken effect. All of the active EB-5 projects it develops stopped raising money from the Program because of the attrition of foreign investors.[4] *Id.* at ¶ 22.

## IV. LEGAL STANDARD AND ARGUMENT

A preliminary injunction is a matter of equitable discretion. *California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018) (quoting *Winter v. NRDC*, 555 U.S. 7, 22 (2008)). "A party can obtain a preliminary injunction by showing that (1) it is 'likely to succeed on the merits,' (2) it is 'likely to suffer irreparable harm in the absence of preliminary relief,' (3) 'the balance of equities tips in [its] favor,' and (4) 'an injunction is in the public interest.'" *Id*. (quoting *Disney Enters., Inc. v. VidAngel, Inc*., 869 F.3d 848, 856 (9th Cir. 2017) (alteration in original)). When the government is a party, the last two factors merge. *Id*. (citing Drakes *Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014)).

### A. BRC IS LIKELY TO SUCCEED ON THE MERITS OF ITS CLAIMS.

Plaintiff is likely to succeed on the merits of its claims. First, the Rule is arbitrary and capricious because DHS failed to properly consider data detailing the devastating impact of the Rule change, evidence which it had before it issued the final Rule increasing the minimum investment amounts and changing the TEA designation rules. Second, DHS failed to properly conduct a Regulatory Flexibility

[4] The lack of investment during 2020 was not due to the COVID-19 pandemic, but to the implementation of the Rule. Multifamily apartments are more insulated as an asset class compared to the rest of the commercial real estate industry. *Id*. at ¶ 18. Moreover, the nature of investment is a forward-looking activity. For example, BRC and its affiliates' current EB-5 debt investments have a 5-year term for immigration and investment. *Id*. COVID-19 is not a 5-year event and is expected to largely be resolved by the end of 2021. A 2020 Investor should target a successful return of capital and exit by year 2025 or 2026. As a concrete example of sustained confidence in BRC and its affiliates' activities, one of its major projects located in downtown Oakland closed on senior construction financing in the amount of $175,000,000 on March 20, 2020, in the midst of COVID-19. *Id*. The response from investors and lenders was simply that projects expecting delivery in 2023 need not consider COVID-19. *Id*. If anything, the muted pipeline of apartment units to deliver would further support the case for a faster absorption and successful lease-up. *Id.* at ¶ 19. Furthermore, debt investments have developer equity as their security. For BRC and its affiliates' debt investments, internal underwriting shows that property values would have to drop historically unprecedented amounts even in the financial crisis to burn through equity and threaten EB-5 investment capital. *Id*.

Analysis when implementing the Rule. Third, DHS exceeded its statutory authority in implementing the Rule because DHS does not have the statutory authority to designate TEAs or create a TEA standard that runs afoul of statutory authority. Fourth, DHS violated the FVRA and HSA.

**1. DHS Arbitrarily and Capriciously Implemented the Rule.**

Plaintiff is likely to succeed on the merits of its claim that DHS arbitrarily and capriciously implemented this Rule. DHS did not consider the economic impact this Rule would have, despite having the information available to it to analyze such effects. Instead, DHS feigned ignorance to avoid grappling with the detrimental effects this Rule will have on the economy; effects that came to fruition following the Rule's effective date and continue to this day.

In determining whether an action was arbitrary and capricious, a reviewing court "must consider whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989) (internal quotation marks and citation omitted). At a minimum, the agency must have considered relevant data and articulated an explanation establishing a "rational connection between the facts found and the choice made." *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 626 (1986) (internal quotation marks and citation omitted). An agency action usually is arbitrary or capricious if:

> the agency has relied on factors which Congress has not intended it to consider, 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).

DHS acknowledged in the Rule's notice of proposed rulemaking ("**NPRM**") that the agency lacked data regarding the potential effects of the proposed changes to the EB-5 Program. In the NPRM, DHS proposed the minimum investment amount for TEAs to be $1.3 million. However, in recommending $1.3 million, DHS acknowledged it did not have data regarding the effects such increase would have:

> In summary, DHS believes that the proposed increase in the minimum investment amount would bring the nominal investment amounts in line with real values and increase the investment amounts in areas where it is needed most. However, DHS

> recognizes that some of the investment increase benefits could be offset if some investors are deterred from investing at the higher amounts. DHS does not have the data or information necessary to attempt to estimate such mitigating effects. It is reasonable to conclude that the higher investment amounts could deter some investors from EB-5 activity and therefore, negatively impact regional center revenue in some cases, although the magnitudes and net effects of these impacts cannot be estimated. However, it is also possible that the higher investment amounts could attract additional capital overall and stimulate projects to get off the ground that otherwise might not. Due to the complexity of EB-5 financial arrangements and unpredictability of market conditions, DHS cannot forecast with confidence how many projects could be affected by the increased investment amounts through a change in the number of individuals investing through the EB-5 program. However, it is possible that some projects could be forgone and that others would proceed with a higher composition of non-EB-5 capital, with resultant changes in profitability and rates of return to the parties involved. An overall decrease in investments and projects would potentially reduce some job creation and result in other downstream effects.

*See* Notice of Proposed Rulemaking, 82 Fed. Reg. at 4758 (emphasis added).

DHS did not remedy its purported lack of data in the two years while the Rule was pending. Instead, in the explanation of the final rule, DHS referenced and discussed its purported lack of reliable information on the Rule's economic impacts. *See* Rule, at 35,791, Col. 1. Just some of these admissions included:

- DHS made a good faith effort to analyze the impacts of this rule. DHS reviewed numerous studies and requested comment from the public but *received no credible data or information that would provide a more accurate estimate of the impacts*." Rule, at 35,791, Col. 1;
- "*DHS cannot predict with accuracy* changes in demand for the program germane to the major categories of revisions that increase the investment amounts and reform the TEA designation process. *DHS has no way to assess* the potential increase or reduction in investments either in terms of past activity or forecasted activity, and *cannot therefore quantitatively estimate any impacts* concerning job creation, losses or other downstream economic impacts driven by these major provisions." *Id.* at 35,792, Col. 2-3;
- "As discussed further in the FRFA, *DHS cannot estimate the exact impact* to small entities." *Id.* at 35,792, Col. 3;
- *Potential* reduced numbers of EB-5 investors *could* prevent certain projects from moving forward due to lack of requisite capital." *Id.* at 35,793, Col. 3.
- "However, *DHS is unable to estimate* the potential reduction in investments either in terms of past activity or forecasted activity, and *cannot therefore estimate any impacts concerning* job creation, losses or other downstream economic impacts driven by the investment amount increases." *Id.* at 35,797, Col. 1;
- *DHS therefore cannot estimate* how many past investors would have been unable or unwilling to have invested at the new amounts, and hence *cannot make extrapolations to potential future investors and projects* . . . However, the net effect on regional center costs is *not something DHS can forecast with accuracy*." *Id.* at 35,797, Col. 2;

- "There are numerous ancillary services and activities linked to both regional center and direct investments, such as, but not limited to, business consulting and advising, finance, legal services, and immigration services. However, *DHS is not certain* how the rule will affect these services. Similarly, *DHS does not have information* on how the revenues collected from these types of activities contribute to the overall revenue of the regional centers or direct investments." *Id.* at 35,797, Col. 3;
- "DHS recognizes that some of the investment increase benefits could be offset if some investors are deterred from investing at the higher amounts. *DHS does not have the data or information necessary to attempt to estimate* such mitigating effects . . . Due to the complexity of EB–5 financial arrangements and unpredictability of market conditions, *DHS cannot forecast with confidence* how many projects would be affected by the increased investment amounts through a change in the number of individuals investing through the EB–5 program." *Id.* at 35,798, Col. 1;
- "DHS is not able to predict how many investors and projects will be affected, nor can we predict the impact to the capital available for projects." *Id.* at 35,798, Col. 1-2.
- "While DHS has determined, via the preceding analysis, that a significant share of regional centers may be considered small entities, DHS does not have enough data to determine the impact that this rule may have on those entities. Therefore, while many regional centers may be small entities, DHS cannot determine whether this rule will have a substantial impact, positive or negative, on those small entities." *Id.* at 35,806.

Despite its purported lack of data, DHS asserted, without evidence, that the increased investment requirement and new TEA designation process were unlikely to have a substantial adverse effect on investment or affect the economy by $100 million.[5] *Id.* at 35,802. It relied on this bald assertion, ignoring its own admissions to the contrary, to justify the changes to the minimum investment requirement and TEA designation process. DHS's assertion was belied by simple math and logic. The Rule's high-dollar per investment requirement necessarily meant that attrition from even relatively few investors had a substantial effect on the economy.

But one need not rely on simple logic. External studies provided to DHS *confirm* that the Rule's impact on investment and the economy will exceed over $100 million per annum or have a substantial adverse effect. A study prepared by Economic & Policy Resources Inc. (provided to DHS while the Rule was undergoing Office of Management and Budget review) examined the benefits that the pre-Rule EB-5 Program, using lower investment levels, had on the United States economy (the "**EPR Study**").[6] The EPR Study estimated that during FY2014-2015, an unconstrained EB-5 Regional Center

[5] The significance of the $100 million level affects the designation of the Rule as a "major rule," which requires further procedural hurdles for DHS, such as Congressional approval. By stating that this Rule does not have a substantial effect on the economy, DHS was attempting to avoid additional scrutiny by Congress.

[6] *See Assessment of the Economic Value and Job Creation Impacts of EB-5 Project Capital Investment*

Program's economic benefits and job creation contributions to the U.S. economy were nearly $11 billion, which represented 2% of all foreign direct investment net flows into the U.S. economy for that period. More than 335,000 jobs were created during that same period, accounting for roughly 6% of all jobs gains for that time. The EPR Study also found that the Program resulted in nearly $55 billion, or 3%, added to U.S. economic output and more than $23 billion in labor income.

Other studies by Invest In The USA (the "**IIUSA Study**") and the U.S. Department of Commerce (the "**DOC Study**") support this conclusion as well. The IIUSA Study, provided to DHS, noted that capital investment through the Program contributed over $2.6 billion to the U.S. gross domestic product and created or supported 33,000 American jobs during FY 2010-2011.[7] Compl. ¶ 49. Similarly, many commenters during the notice-and-comment period directed DHS to the DOC Study from January 2017, which concluded that the Program created almost 170,000 American jobs between FY2012 and FY2013.[8] The DOC Study further concluded that, for that same period, more than 11,000 immigrant investors provided $5.8 billion in capital, equating to roughly 35% of the total investment ($16.7 billion) for 562 EB-5 related projects active in FY2012.

By ignoring these studies showing the success of the Program on an unconstrained market, DHS failed to examine the relevant data and articulate a satisfactory explanation for increasing the minimum investment requirement and changing the TEA designation standards. *State Farm*, 463 U.S.at 43. The Rule's reasoning failed to include a rational connection between data showing substantial adverse effects on the economy (or even DHS's admitted lack of reliable data regarding such effects) on one hand, and the choice to enact an increased minimum investment threshold and restrictive TEA designation, on the other hand. *See* 8 U.S.C. § 1153(b)(5)(A). DHS's failure to make such a connection means the agency "entirely failed to consider an important aspect of the problem" and made a "decision that runs counter to the evidence before the agency." *State Farm*, 463 U.S.at 43. Thus, the Rule must be vacated.

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*Activity Under the EB-5 Regional Center Program*, ECONOMIC & POLICY RESOURCES, INC. (Feb. 28, 2019)).

[7] *See EB-5 Economic Impact*, INVEST IN THE USA, http://iiusa.org/eb5-economicimpactmap/.

[8] *Estimating the Investment and Job Creation Impact of the EB-5 Program*, U.S. DEPT. OF. COMM., https://www.commerce.gov/sites/default/files/migrated/reports/estimating-the-investment-and-job-creation-impact-of-the-eb-5-program_0.pdf.

In addition, DHS failed to consider that its new TEA process would deter investors. With this labyrinthine system, the practical effect of the new TEA process is that developers who seek to fund projects using EB-5 investments will be essentially locked out from building in larger cities or towns that contain economically depressed areas, unless they can find foreign investors willing to invest $1.8 million in a project. Since the lower TEA requisite investment has historically been the *de facto* standard for EB-5 investors, the Rule disincentivizes economic development in cities and towns within MSAs. To obtain the benefit of the lower investment requirement, foreign investors must now fund projects in non-urban areas, viability of which is riskier than developments in urban areas.

The Rule does not give investors and developers clarity regarding which areas qualify as a TEA prior to investment. Before the Rule, developers could give assurance that a particular project would qualify as part of a TEA before seeking investors by receiving a TEA designation letter from the state in which the project was located. Now, investors must guess based on the Rule's convoluted nationwide standard whether a particular investment will be TEA-approved through the years-long, Kafkaesque adjudication process, with the risk that DHS may reject this TEA guesswork after the investor has already made his or her investment. Behring Decl. at ¶ 15.

Commenters noted that in order to make the Program function, "TEA designations should be available to projects prior to filing of the Form I–526 or Form I–924." 84 C.F.R. 35773. In response, DHS stated, without evidence, that the TEA adjudication process "should not add a significant additional burden to petitioners or to DHS in the adjudication process" and that it "is committed to providing timely TEA designation decisions as part of the adjudication process." *Id*. It steadfastly refused to provide a definitive TEA designation letter prior to an investor's application, despite commenters warning the agency of the risks to the Program. Under the new Rule, TEA status of a project is only determined upon adjudication of a project's I-924 petition and each individual investor's I-526 petition. Behring Decl. at ¶ 15. Processing times for I-924 petitions are averaging nearly 5 years. *Id.* Processing times for I-526 petitions are averaging 30.5 to 50 months. *Id*. BRC and its affiliates' own projects' I-924 petitions are languishing in USCIS backlogs. *Id.* Therefore, it is clear DHS did not consider the appropriate data in promulgating the Rule.

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**2. DHS Failed to Properly Perform an RFA Analysis**

DHS also failed to properly conduct a Regulatory Flexibility Act ("RFA") Analysis. The RFA, 5 U.S.C. §§ 601–612 requires Federal agencies to consider the potential impact of regulations on small entities during the development of their rules. The term "small entities" comprises small businesses, not-for-profit organizations that are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. 5 U.S.C. § 601. An agency's compliance with the RFA is subject to judicial review by an "adversely affected or aggrieved" small entity, including 5 U.S.C. § 604. *See* 5 U.S.C. 611; *see also AFL-CIO and Chamber of Commerce of the United States v. Chertoff*, 552 F. Supp. 2d 999 (N.D. Cal. 2007) (entry of preliminary injunction enjoining implementation of rule due to a violation of the Regulatory Flexibility Act); *Nat'l Ass'n of Psychiatric Health Sys. v. Shalala*, 120 F. Supp. 2d. 33 (D.D.C. 2000) (concluding that the Secretary failed to conduct an RFA analysis as required).

In part, 5 U.S.C. § 604(a) requires that an agency's final RFA contain:

> ". . . (4) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available; (5) a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; (6) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected; and (7) 1 for a covered agency, as defined in section 609(d)(2), a description of the steps the agency has taken to minimize any additional cost of credit for small entities."

DHS stated in the Rule that it was not able to assess small businesses impacted. Specifically, it stated:

> DHS is not sure how many, if any, investors will be deterred from the EB-5 program due to the increased investment amounts and the new TEA requirements.
> …
> While DHS has determined, via the preceding analysis, that a significant share of regional centers may be considered small entities, DHS does not have enough data to determine the impact that this rule may have on those entities. Therefore, while many regional centers may be small entities, DHS cannot determine whether this rule will have a substantial impact, positive or negative, on those small entities."

*Id*. at 35,806. DHS did not use diligence in performing this RFA. As stated above, DHS had a plethora of information before it, yet stated that it is unsure what effects this Rule will have. *Nat'l Ass'n of Psychiatric Health Sys.*, 120 F. Supp. 3d at 43 (finding violation of RFA when DHS did not make a good faith effort to "obtain data or analyze available data on the impact of the final rule on small entities"). Thus, DHS has not properly conducted an RFA consistent with 5 U.S.C. § 604.

**3. DHS Exceeded its Statutory Authority in Designating TEAs.**

DHS has exceeded its statutory authority in exclusively authorizing itself as the body which will designate TEAs, thereby divesting states of the ability to designate TEAs. In addition, by eliminating qualification for cities in metropolitan areas as TEAs, DHS contradicted the statutory definition of TEA, thereby acting in excess of the authority granted by Congress.

Under the Administrative Procedure Act ("**APA**"), the Court must set aside agency action that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). When a plaintiff challenges an agency's authority to act, a court analyzes the agency's interpretation of the authorizing statute using the **two-step** procedure set forth in *Chevron, U.S.A., Inc. v. Natural Resource Defense Council, Inc*., 467 U.S. 837 (1984). Such deference may apply when an agency interprets jurisdictional statutes regarding their own scope of authority. *See City of Arlington, Tex. V. F.C.C.*, 569 U.S. 290 (2013). The *Chevron* doctrine first determines "whether Congress has directly spoken to the ... issue." *Chevron*, 467 U.S. at 842. If the statute "is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id*. at 842-43. If Congress was silent or has not squarely addressed the issue, *Chevron* then requires a determination as to whether the agency's interpretation of its authority "is based on a permissible construction of the statute." *Id*. at 843.

"It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp*., 488 U.S. 204, 208 (1988). *See Gonzales v. Oregon*, 546 U.S. 243, 258-59 (2006). "Rulemaking authority is legislative power" which can only be delegated to an agency by Congress. *Whitman v. American Trucking Ass'n, Inc*., 531 U.S. 457, 488 (2001) (Stevens, Souter, JJ, concurring) (internal quotations omitted). If Congress explicitly leaves a gap in a statute for an agency to fill, "there is an express delegation of

authority to the agency to elucidate a specific provision of the statute by regulation." *Chevron*, 467 U.S. at 843-44. An administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress. And "'in [its] anxiety to effectuate the congressional purpose of protecting the public, [courts] must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop." *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 161 (2000).

DHS cited various statutes as the source of its legal authority allowing them to replace the TEA designation process. DHS cited Section 103(a) of the INA, which states that the Secretary of Homeland Security "shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens . . ." DHS also cited Section 101(b)(1)(F) of the Homeland Security Act ("**HSA**"), which states that one of the primary missions of the DHS is to "ensure that overall *economic security* of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland." (emphasis added). Both sources of purported statutory authority fail step one of *Chevron*; neither statute directly addresses how a TEA should be designated nor how the TEA process should operate.[9] Therefore, *Chevron* step two requires that this Court determine whether DHS's interpretations were reasonable. Both DHS's interpretation of its inherent authority and its interpretation of a TEA exceeded the scope of its delegation from Congress.

i. DHS Does Not Have Authority to Create Standards for TEAs

DHS relied on its mission to preserve "economic security" in order to grant itself authority to designate TEAs pursuant to a new, national standard. 84 Fed. Reg. at 35751. However, "economic security" does not mean "economic development" in underserved areas, which is the purpose of TEAs. Rather, it means protecting the homeland, as confirmed by a review of DHS's other statutorily prescribed missions. *See* 6 U.S.C. § 111(b)(1). Moreover, the only function of DHS as it pertains to "economic security" is to ensure that it "is not diminished by efforts, activities, and programs aimed at

[9] Prior to the Rule, DHS recognized that it did not have the requisite expertise to classify TEAs in metropolitan areas. *Employment-Based Immigrants*, 56 Fed. Reg. 60897 (November 29, 1991). ("With respect to geographic and political subdivisions of this size, however, the Service believes that the enterprise of assembling and evaluating the data necessary to select targeted areas, and particularly the enterprise of defining the boundaries of such areas, should not be conducted exclusively at the Federal level without providing some opportunity for participation from state or local government.").

securing the homeland." 6 U.S.C. § 111(b)(1)(F). The foregoing powers and descriptions all share the common thread of protection.

The D.C. district court limited DHS's "economic security" mission statement as authority to protect American workers from an influx of visa holders overflowing the labor market. In *Washington Alliance of Tech. Workers v. U.S. Dep't of Homeland Security*, the Court interpreted economic security to be inherent in DHS's "authority to "regulate the terms and conditions of a nonimmigrant's stay, include its duration." 156 F.Supp. 3d 123 (D.D.C. 2015), *judgment vacated, appeal dismissed sub nom. Washington All. of Tech. Workers v. United States Dep't of Homeland Sec.*, 650 F. App'x 13 (D.C. Cir. 2016) (vacated as moot). In support of DHS's authority, the court held that "a significant purpose of immigration policy is to balance the productivity gains that aliens provide to our nation against the potential threat to the domestic labor market" and it seeks to "safeguard[] American workers." *Id*. Therefore, the definition of "economic security" did not extend to directing investments to create economic development, as TEAs do.

Taking the entire mission statement of DHS in context and utilizing interpretive case law, DHS's interpretation of "economic security" to apply to TEA designations is unreasonable. Determining which geographic areas in the United States are high-unemployment or deserving of economic development is distinct from regulating an EB-5 investor's length of stay or seeking to implement measures to protect American workers. Rather, DHS unilaterally directed foreign investments to areas it deemed worthier of investment, all without input from the states themselves.

In addition, the evaluation and consideration factors underlying the parameters for a TEA—specifically, consideration of where persons reside versus where their jobs are located, as well as commuter patterns for such areas—are well outside the scope of DHS knowledge. Instead, the expertise and powers needed to make such determinations have already been bestowed by Congress upon other governmental agencies, including, not surprisingly, the Department of Labor and the Department of Commerce. *See* 29 U.S.C. § 551 ("The purpose of the Department of Labor shall be to foster, promote, and develop the welfare of the wage earners of the United States, to improve their working conditions, and to advance their opportunities for profitable employment."); 29 U.S.C. § 2 (mandating the Bureau of Labor Statistics "collect, collate, and report at least once each year . . . full

and complete statistics of the conditions of labor and the products and distribution of the products of the same"); 15 U.S.C. § 1512 (noting the Department of Commerce mission to "foster, promote, and develop the foreign and domestic commerce, the mining, manufacturing, and fishery industries of the United States . . . ."). Thus, DHS's action to unilaterally designate TEAs was not based on a reasonable construction of the statute.

ii. The TEA Standard Runs Afoul of the Plain Language of the Statute

DHS also exceeded its authority by defining TEAs in a way that contradicts the plain meaning of the INA. DHS's new national standard articulated in the Rule severely restricts the designation of TEAs in high unemployment areas contained within a metropolitan statistical area, or MSA. 4 Fed. Reg. at 35752. However, the INA defines a TEA as either a rural area *or* an area experiencing high unemployment. 8 U.S.C. § 1153(b)(5)(B)(ii). The statute does not limit qualification for a high-unemployment TEA by population size or whether the city is included within a metropolitan area, nor does the statute give preference to rural areas. The Rule changed the criteria to make it more difficult to designate a TEA in an MSA, and gives preference to rural areas, against the express intent of Congress. DHS's interpretation exceeds its statutory authority by limiting the Program in a way Congress did not intend. Therefore, DHS's interpretation fails the second *Chevron* requirement; DHS's interpretation is not only unreasonable, it expressly contradicts and limits the plain meaning of the statute. *East Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922, 939 (9th Cir. 2019) (citations omitted) ("Thus, an agency interpretation that is 'inconsisten[t] with the design and structure of the statute as a whole,' does not merit deference . . . Ultimately, the regulation 'fails if it is "unmoored from the purposes and concerns' of the underlying statutory regime."'"). Thus, DHS's new TEA designation process exceeded its statutory authority and is otherwise not in accordance with law.

**4. DHS Violated the APA Because McAleenan, Wolf, and Cuccinelli Did Not Have the Authority to Promulgate the Rule**

The Rule was promulgated "not in accordance with law," "in excess of statutory … authority," or "without observance of procedure required by law" under the APA, 5 U.S.C. § 706(2)(A), (C), (D), because DHS adopted them in violation of restrictions on which individuals can serve in acting positions within DHS in violation of the FVRA and HSA. Former Acting DHS Secretary Kevin McAleenan, Acting DHS Secretary Chad Wolf, and Acting Director of USCIS Ken Cuccinelli were not properly

serving in their respective positions when they promulgated the final Rule in July 2019, which took effect in November 2019.

Prior to Secretary Nielsen's resignation in April 2019, Secretary Nielsen's "amendment" of the DHS Order of Succession did not have the force of law to appoint McAleenan to Acting Secretary because Secretary Nielsen's amended the wrong succession order, which only delineated DHS succession following a catastrophic emergency. Delegation No. 00106. McAleenan's ascension to Acting Secretary was inconsistent with the correct, unmodified succession list, E.O. 13753, because other officials higher in the line of succession in E.O. 13753 were available to serve. Therefore, McAleenan could not promulgate the final Rule in July 2019 because any actions he took while serving unlawfully as Acting Secretary are "without force or effect." 5 U.S.C. § 3348(d).

This includes then-Acting Secretary McAleenan's November 2019 amendment to the order of DHS succession to handpick Defendant Wolf as Acting Secretary. First, only a presidentially appointed, Senate-confirmed Secretary, which McAleenan was not, can designate an order of succession. 6 U.S.C. § 113. The FVRA only authorizes "the President, a court, or the head of an Executive department, to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity." 5 U.S.C. §3347(a)(1). The HSA, consistent with the FVRA, states that the "Secretary" may designate an order of succession and does not expressly vest that power in an "Acting Secretary." Second, McAleenan's appointment to Acting Secretary was invalid itself, so he could not lawfully execute any duties of the Secretary, such as amending the order of succession to choose his successor as Defendant Wolf. Therefore, Wolf's appointment was unlawful. His enforcement of the Rule is without "force or effect" and must be declared invalid. 5 U.S.C. § 3348(d).

Though Defendant Wolf tried to ratify his past actions once, these ratification attempts cannot give the Rule the effect of law. First, Gaynor, the FEMA Director who should have been Acting Secretary, could not amend the DHS succession list to install Defendant Wolf as Acting Secretary. Gaynor's attempt at amending the line of succession suffers from the same deficiencies as McAleenan's failed attempt to appoint Defendant Wolf to Acting Secretary; an Acting Secretary cannot amend the

DHS succession list. 6. U.S.C. § 113(g)(2).[10] In addition, DHS never submitted notice to Congress regarding Mr. Gaynor's purported appointment as required by 5 U.S.C. § 3349(a). Moreover, despite Defendant Wolf attempts to then "ratify" his past actions when he was acting *ultra vires* as Acting Secretary, he did not "ratify" the actions of his predecessor, Acting Secretary McAleenan. In addition, Defendant Wolf could not "ratify" his nor McAleenan's past *ultra vires* acts because FVRA states that actions of individuals who are not in compliance will have "no force or effect" and "may not be ratified." 5 U.S.C. § 3348(d).[11] As such, the functions and duties carried out by these individuals while in these positions are void, including this Rule.

Further, Cuccinelli's appointment to a newly-created position of Principal Deputy Director of USCIS was also invalid. Congress has not, either in the HSA or elsewhere, authorized the establishment "by Law" of the office of Principal Deputy Director of USCIS, or designated that office as the first assistant to the office of the Director. Therefore, his appointment is in contravention of the FVRA's principle that the "first assistant" shall be the Acting Director in the case of a vacancy.

Since the Rule's implementation in November 2019, several courts have held that these individuals filling "acting" positions at DHS were not properly appointed pursuant to the FVRA and HSA and enjoined DHS enforcement of actions these individuals took while appointed. *Immigrant Legal Res. Ctr. v. Wolf*, No. 20-cv-05883-JSW, 2020 WL 5798269 (N.D. Cal. Sept. 29, 2020) (enjoining rule enacted by Wolf); *Northwest Immigrant Rights Project, et al., v. USCIS, et al*., No. 19-3283, 2020 WL 5995206 (D.D.C. 2020) (enjoining rule enacted by Wolf); *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 35-36 (D.D.C. 2020) (nullifying action taken by Cuccinelli); *Casa de Maryland v. Wolf*, No. 8:20-cv-02118-PX, 2020 WL 5500165 (D. Md. Sept. 11, 2020) (same); Memorandum & Order, Dkt. 342, *Vidal, et al. v. Wolf, et al*., 16-cv-04756 (E.D.N.Y. November 14, 2020) (finding on summary judgment that Mr. Wolf was not lawfully appointed and could not ratify his past actions); *see also* GAO, *Homeland Security*, File B-331650, at 4-11 (Aug. 14, 2020), https://www.gao.gov/assets/710/708830.pdf. (finding that McAleenan's and Wolf's appointments were invalid).

[10] Mr. Gaynor's attempt at amendment also may have been futile. Mr. Gaynor may have issued his amendment to the succession list *before* Mr. Wolf was officially nominated for Secretary, which makes this amendment procedurally deficient under the FVRA. Compl. at ¶ 86, n. 4.

[11] The FVRA applies here because Wolf and McAleenan were not appointed lawfully under the HSA, which would provide an exception to the HSA framework.

Therefore, Plaintiff is likely to succeed on the merits.

**B. BRC WILL SUFFER IRREPARABLE HARM UNLESS THE COURT GRANTS THIS MOTION.**

The Rule has deterred investors from using the Program because of the increases in minimum investment amounts and the DHS designation of TEAs. As a result, BRC and its affiliates have lost significant investment in its ongoing projects and the ability to raise EB-5 capital for any new projects.

"The basis for injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Sampson v. Murray*, 415 U.S. 61, 88 (1974). First, the injury must be both certain and great; it must be actual and not theoretical. *Id*. Irreparable harm is "harm for which there is no adequate legal remedy, such as an award for damages." *East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1280 (9th Cir. 2020) (quoting *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014)). For this reason, economic harm is not generally considered irreparable. *Id*. But where parties cannot typically recover monetary damages flowing from their injury—as is often the case in APA cases—economic harm can be considered irreparable. *Id*. (citing *Azar*, 911 F.3d at 581).

This Rule threatens the existence of BRC's business. BRC is the sponsor and manager for various affiliates that act as the manager or General Partners of various real estate investments, property developments and new commercial enterprises established for pooling qualified EB-5 capital contributions to be invested in real estate projects. Without the EB-5 capital contributions, BRC and its affiliates lack the funds to further invest in these projects. Since the Rule was implemented on November 21, 2019, the EB-5 market plummeted as petitioners filed only 61 new I-526 petitions since January 2020, a 99.07% drop from the performance in 2019. Prior to the Rule, BRC and its affiliates successfully subscribed 89 investors during 2019 and earned $1,924,695 in gross administrative fees. Behring Decl. at ¶ 9. After the Rule, however, BRC and its affiliates have subscribed zero investors, and BRC's annual income from EB-5 administrative fees have dropped to nothing. *Id*. In addition to having suffered real harm as a result of this Rule upon which BRC can never recover, and having no reasonable expectation of signing new EB-5 investors going forward, BRC will likely have to terminate its EB-5 operation, absent suspension of the Rule. *Id*. at ¶ 20–22. In addition, despite the harm it suffers because of this illegal Rule, BRC cannot recover these losses from DHS.

A similar injunction challenging the Rule was filed in the District of Columbia in late 2019. Judge Leon denied the injunction because the harm was not "concrete" and was "speculative" without addressing whether the plaintiff would succeed on the merits. *Florida EB5 Invs., LLC v. Wolf*, 443 F. Supp. 3d 7, 11–13 (D.D.C. 2020). Judge Leon stated:

> "Plaintiff's claim of irreparable economic harm relies on the Rule eliminating or significantly reducing foreign investment through the EB-5 Program, such that plaintiff's annual fees and administration fees associated with Program demand would significantly decline. Only then would the loss "threaten[] the very existence of the movant's business." . . . This relationship has simply not been shown to be "certain" and "actual," rather than merely "theoretical."'"

*Id.* As the effects of the Rule have presented themselves over the course of the last year, it is clear that these harms, i.e. decreased investor participation, are not "theoretical" and that the plaintiff's "theoretical" harms have manifested themselves into concrete harms as demonstrated by the real lack of investor participation.

BRC has made the requisite showing that it has and will likely continue to suffer irreparable harm.

### C. THE BALANCE OF HARMS WEIGHS DECIDEDLY IN FAVOR OF GRANTING BRC'S MOTION AND SERVES THE PUBLIC INTEREST

While BRC will suffer immediate and irreversible harm, DHS will not. While DHS has a compelling interest in ensuring that injunctions—such as the one granted here—do not undermine separation of powers by blocking the Executive's lawful ability to regulate immigration, that interest is less compelling where, as here, DHS is in violation of the plain Congressional intent. *See East Bay Sanctuary Covenant*, 950 F.3d at 1282. The role of the judiciary in reviewing such policies is narrow. *Id.* It is merely to ensure that executive procedures do not violate principles of due process or "displace congressional choices of policy." *Id*. This executive deference, then, is closely linked with the court's determination on the substantive validity of the Rule. *Id*. Essentially, the weight courts ascribe to this factor depends on the extent to which it agrees that the Rule overrides plain congressional intent. *Id*. Because this Rule is invalid under the APA, the INA, the HSA, and the FVRA, this Court should not place much weight on this factor. By contrast, an injunction is necessary immediately. BRC and its affiliates have already suffered real harm as a result of this Rule and there is no sign that more investors

are going to invest in the EB-5 Program. Preserving the status quo, that is keeping the TEA designations and investment minimums at the pre-Rule amounts is less disruptive under the circumstances.

The issuance of equitable relief in the instant case is clearly in the public interest. Businesses reliant on the EB-5 program are suffering and will continue to suffer under the current Rule through reduced interest from investors and developers who do not think the Program is worth the risk. It is in the public interest to promote rather than cripple legitimate businesses and to have an independent arbiter determine whether this action is lawful before its implementation. In addition, as the Ninth Circuit has instructed, "[t]he public interest is served by compliance with the APA." *Id.* at 1280 (quoting *Azar*, 911 F.3d at 581). DHS has overstepped its bounds under the governing statutes in attempting to exercise its authority to increase the minimum investment levels and designate TEAs.

## V. CONCLUSION

For the foregoing reasons, Plaintiff requests that this Court grant this Motion for a Preliminary Injunction to preserve the status quo.

Dated: December 23, 2020

Respectfully submitted,

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