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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEHRING REGIONAL CENTER LLC,

Plaintiff,

v.

ALEJANDRO MAYORKAS,
Secretary of Homeland Security, *et al.*,

Defendants.

Case No. 3:20-cv-09263-JSC

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

This case is not time-sensitive. Behring Regional Center LLC ("Behring RC") is seeking the extraordinary relief of a preliminary injunction that would immediately invalidate the Final Rule modernizing the EB-5 immigrant investor visa program that the Department of Homeland Security ("DHS") published in the Federal Register 569 days ago on July 24, 2019, and made effective 120 days after that on November 21, 2019. *See EB–5 Immigrant Investor Program Modernization*, 84 Fed. Reg. 35,750-810 (Jul. 24, 2019) (the "Final Rule"). The Final Rule codifies existing EB-5 program policies and reforms certain aspects of the immigrant investor visa program in accordance with Congress' intent when it established the visa program in 1990. Behring RC had notice of the Final Rule since July 24, 2019 and it has waited to ask this Court for emergency injunctive relief 1 year and 34 days *after* the Final Rule took effect. Behring RC offers no explanation for its delay, and the Court should deny its request.

Behring RC cannot satisfy any of the requirements for a preliminary injunction. Behring RC has no likelihood of success on the merits because the Final Rule complies with the APA. After conducting a proper notice and comment rulemaking, DHS addressed the relevant public comments (one of which was submitted by Behring RC) and articulated a satisfactory explanation for reaching its decision to modernize aspects of the EB-5 program's rules to align with the congressional intent behind the immigrant investor visa program. Likewise, the relevant officials at DHS had the requisite authority to promulgate the Final Rule during the more than three-year-long rulemaking process. Behring RC has also failed to demonstrate that in the absence of preliminary injunctive relief, it will suffer an immediate, irreparable injury. Finally, Behring RC's request for preliminary injunctive relief is contrary to the public interest.

For these reasons, the Court should deny Behring RC's preliminary injunction motion.

ISSUE PRESENTED

Whether Behring RC is entitled to a preliminary injunction when it seeks the relief ultimately sought in its complaint, when there is no likelihood of success on the merits of its complaint, and when it has otherwise failed to satisfy the standard for a mandatory preliminary injunction.

BACKGROUND

A. The EB-5 Immigrant Investor Visa Program.

As part of the Immigration Act of 1990, Congress established the employment-based, fifth preference (EB-5) immigrant investor visa program. *See* Pub. L. No. 101-649, § 121(a) (Nov. 29, 1990) (codified at 8 U.S.C. § 1153(b)(5)). Under the EB-5 program, lawful permanent resident ("LPR") status is available to foreign nationals who invest at least $1.8 million in a new commercial enterprise ("NCE") that will create at least 10 full-time jobs in the United States. *See* 8 U.S.C. 1153(b)(5)(A); 8 C.F.R. § 204.6 (2019). Congress intended for the EB-5 visa program to provide a unique path for alien investors to immigrate permanently to the United States by making legitimate investments, creating new employment for U.S. workers, and infusing new, lawfully acquired capital into the country. *See* S. Rep. No. 101-55 at 2, 21 (1989). If a foreign national invests in an NCE located in a Targeted Employment Area ("TEA"), which includes certain rural areas and areas of high unemployment,[1] the minimum required investment is reduced to $900,000. 8 U.S.C. §§ 1153(b)(5)(B), (C); 8 C.F.R. § 204.6(f) (2019). The Immigration and Nationality Act ("INA") allocates 9,940 immigrant visas each fiscal year to foreign nationals participating in the EB-5 program, and at least 3,000 of the visas must be reserved for persons investing in TEAs. *See* 8 U.S.C. §§ 1151(d), 1153(b)(5)(B)(i).

B. The EB-5 Regional Center Program.

In 1992, Congress expanded the EB-5 program by establishing the regional center "pilot program," which authorized "regional center[s] in the United States … for the promotion of economic growth, including increased export sales, improved regional productivity, job creation, or increased domestic capital investment." *See* Departments of State, Justice, and Commerce, the Judiciary and Related Agencies Appropriations Act of 1992, Pub. L. No. 102-395, § 610(a) (Oct. 6, 1992) (codified at 8 U.S.C. § 1153). This program allows economic entities to seek regional

[1] The statute defines "targeted employment area" as, at the time of the investment, "a rural area or an area which has experienced high unemployment (of at least 150 percent of the national average rate)." 8 U.S.C. § 1153(b)(5)(B)(ii). "Rural area" is defined as "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)." *Id*. at 1153(b)(5)(B)(iii).

center status with U.S. Citizenship and Immigration Services ("USCIS") for the purpose of concentrating pooled investment in defined economic zones. *See id.*; 8 C.F.R. § 204.6(e). While all EB-5 petitioners go through the same petition process, those petitioners participating in the Regional Center Program may meet statutory job creation requirements based on economic projections of either direct or indirect job creation, rather than only on jobs directly created by the NCE. *See* 8 C.F.R. § 204.6(m)(3). In addition, Congress has authorized USCIS to give priority to EB-5 petitions filed through the Regional Center Program. See Pub. L. No. 102-395, § 601(d), as amended by Pub. L. No. 112-176, § 1 (Sept. 28, 2012).

C. The Notice of Proposed Rulemaking.

On January 13, 2017, DHS published a Notice of Proposed Rulemaking in the Federal Register. *See* EB–5 Immigrant Investor Program Modernization, 82 Fed. Reg. 4,738 (DHS) (Jan. 13, 2017) (the "NPRM"). The purpose of the NPRM was to "change the EB–5 program regulations to reflect statutory changes," codify "existing EB-5 program policies," and "change certain aspects of the EB–5 program in need of reform." *Id*. The NPRM solicited public comments on all aspects of the NPRM, including the economic analysis included in the NPRM for 90 days. *Id*. DHS received 849 comments to the NPRM, with 560 comments being letters submitted through a mass mailing, and 290 comments being unique submissions. *See* 84 Fed. Reg. 35,757.

D. The Final Rule.

On July 24, 2019, DHS published the Final Rule in the Federal Register. *See* EB–5 Immigrant Investor Program Modernization, 84 Fed. Reg. 35,750-810 (DHS) (Jul. 24, 2019) (the "Final Rule"). The Final Rule amended DHS's "regulations governing the [EB-5] immigrant investor classification and associated regional centers to reflect statutory changes and modernize the EB–5 program." *Id*. at 35,750. The Final Rule provides "priority date retention to certain EB-5 investors, increases the required minimum investment amounts, reforms targeted employment area designations, and clarifies USCIS procedures for the removal of conditions on permanent residence." *Id*.; *see also Fla. EB5 Investments, LLC v. Wolf*, 443 F. Supp. 3d 7, 10 (D.D.C. 2020). The Final Rule took effect on November 21, 2019, which was 120 days after DHS published the rule in the Federal Register. *Id*. at 35,750. DHS determined that a 120-day delayed effective date

was "reasonable to ensure that EB-5 petitioners and the EB-5 market has time to adjust their plans to the changes made under [the Final Rule]," responding to comments received that indicated concern about the implementation and timing of the rule on EB-5 petitioners. *Id*. at 35,755.

FACTS

Behring RC, is a for-profit administration business, incorporated in California that pools capital from foreign nationals seeking EB-5 visas to invest in, or to develop real estate projects through its affiliates. ECF No. 1-1 at 3, ¶¶ 1-5. Behring RC began its EB-5 administration business in 2012, when it learned of the demand for EB-5 visas from its Chinese partners. *Id.* at ¶ 5. The company purportedly serves as a bridge between developers in the U.S. and foreign nationals seeking EB-5 immigrant visas, and derives its revenue from "administrative fees" charged to each alien investor. *Id*. at 5, ¶8. Behring RC is not an individual seeking an EB-5 immigrant investor visa nor a business that creates new jobs for U.S. workers. *Id*. at ¶ 1.

On April 10, 2017, Mr. Colin Behring, Chief Executive Officer of the Behring RC, ECF No. 10-1, at 2, ¶ 1, submitted a comment to DHS in response to the NPRM, attached hereto as **Exhibit 1**. *See also* https://beta.regulations.gov/document/USCIS-2016-0006-0290 (last visited Feb. 11, 2021). Mr. Behring expressed concern about Behring RC's prospective alien investors either not being able to invest the increased minimum amount established by the Final Rule or not being able to properly document the lawful source of their investment funds (as required by 8 C.F.R. § 204.6(j)) for the increased amount. *Id*. Likewise, Mr. Behring commented that individuals seeking an EB-5 visa would be more willing to invest the lower minimum capital amount because "securing a greencard, American education, a safe environment, etc…" would make up for the low return on their investment. *Id*. Mr. Behring also commented that the increased minimum capital investment amount would necessitate an elevated rate of return from regional centers such as his, in order for its potential investors to consider the EB-5 regional center program a worthwhile opportunity. *Id.* Finally, Mr. Behring commented that the proposed rule's method for designating the TEAs was "inherently flawed" because it did not look at where potential beneficiaries of job creating projects may perform their job duties or reside. *Id.*

On December 23, 2020, which is 399 days after the Final Rule took effect, Behring RC filed its complaint, ECF No. 1, and its preliminary injunction motion, ECF No. 10. This lawsuit follows *Florida EB5 Investments, LLC v. Wolf et al*., Case 1:19-cv-03673-RJL (D.D.C. filed Nov. 26, 2019) ("Florida EB5"), a nearly identical challenge to the Final Rule filed by the same plaintiffs' counsel almost 14 months earlier in the District Court for the District of Columbia on behalf of a Florida-based LLC that operates as an EB-5 regional center. Defendants note that Florida EB5, which presents similar claims that Behring RC is advancing here, is still being litigated in the District Court for the District of Columbia, and have moved to transfer this case to the District of Columbia. *See* Defs.' Mot. to Transfer Venue, ECF No. 18.

STANDARD OF REVIEW

A. Preliminary Injunctions.

Preliminary injunctions are "extraordinary and drastic" remedies that should never be "awarded as of right." *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008). The "purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. . . . [I]t is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits." *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). In order to be entitled to a preliminary injunction, the moving party must show "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 20 (2008).

"It is so well settled as not to require citation of authority that the usual function of a preliminary injunction is to preserve the status quo ante litem pending a determination of the action on the merits*." Larry P. v. Riles*, 502 F.2d 963, 965 (9th Cir. 1974). Thus, whereas here, a party seeks to change the status quo through action rather than merely to preserve the status quo "courts should be extremely cautious about issuing a preliminary injunction." *Stanley v. Univ. of S. Cal*., 13 F.3d 1313, 1319 (9th Cir. 1994). "Preliminary injunctions which change the status quo are 'viewed with hesitancy and carry a heavy burden of persuasion.'" *3570 East Foothill Blvd., Inc., v. City of Pasadena*, 912 F. Supp 1257, 1260 (E.D. Cal 1995) (internal citations omitted); *see also*

Marlyn Nutraceuticals, Inc v. Mucas Pharma Gmbh & Co., 571 F.3d 873, 879 (9th Cir. 2009) (noting that preliminary injunctions that will change the status quo are disfavored).

B. Review Under the Administrative Procedure Act.

Whether an agency complied with the governing APA standard is a question of law. *See Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001). The APA "sets forth the full extent of judicial authority to review executive agency action for procedural correctness." *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 513 (2009). It requires courts to "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This is a "deferential" standard, *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007), in which the agency's decision is entitled to a presumption of regularity, and bars a court from substituting its judgment for that of the agency. *San Luis & Delta-Mendota Water Authority v. Jewell,* 747 F.3d 581, 601 (9th Cir. 2014); *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Where an agency has considered the relevant factors and articulated a rational connection between the facts in found and the choices made, the decision is not arbitrary or capricious, and the court will affirm the agency decision. *Pacific Dawn v. Pritzker*, 831, F.3d 1166, 1173-74 (9th Cir. 2016) (quotations and citation omitted).

ARGUMENT

The Court should deny Behring RC's motion for a preliminary injunction. Behring RC does not have a likelihood of success on the merits because the Final Rule complies with the APA. DHS conducted proper notice and comment rulemaking; addressed the relevant comments; and articulated a satisfactory explanation for reaching its decision to modernize aspects of the EB-5 program's rules to align with Congress' intent behind the immigrant investor visa program. Behring RC also failed to demonstrate that it will suffer an immediate, irreparable injury absent preliminary injunctive relief. Finally, Behring RC's request for preliminary injunctive relief is contrary to public interest.

I. Behring RC has no likelihood of success on the merits.

A. DHS's Final Rule is not arbitrary or capricious.

Behring RC has no likelihood of success on the merits of its claim that "DHS arbitrarily and capriciously implemented" the Final Rule. ECF No. 10 at 16. DHS fully complied with APA notice and comment rulemaking procedures, which included the agency considering the comments it received, responding to them, and providing an explanation for why it reached the conclusions indicated in the Final Rule. Behring RC's claim amounts to nothing more than a complaint about the policy choices DHS made in the Final Rule, cloaked in a purported violation of the APA's arbitrary and capricious standard. Courts have found that a difference in policy preference is not in itself a basis to disturb an agency action. *See Worldcom v. FCC,* 238 F.3d 449, 461 (D.C. Cir. 2001); *Time Warner Entertainment Co., LP v. FCC*, 56 F.3d 151, 163 (D.C. Cir. 1995). Likewise, agency action is not subject to heightened or more searching standard of review simply because it represents a purported change in policy. *F.C.C. v. Fox Television Stations INC.,* 556 U.S. 502, 515-16 (2009).

1. There is no dispute that DHS fully complied with APA notice-and-comment rulemaking procedures when it promulgated its Final Rule. "The purpose of notice-and-comment rulemaking is to assure fairness and mature consideration of rules having a substantial impact on those regulated." *City of Arlington, Tex. v. FCC,* 668 F.3d 229, 245 (5th Cir. 2012), *aff'd* 133 S. Ct. 1863 (2013); *see also Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 96 1203 (2015) (describing the "three-step" rulemaking notice-and-comment process). An agency must give notice of proposed rulemaking, giving interested persons an opportunity to participate through submission of written data, views, or arguments, and the agency must consider and respond to significant comments received during the period for public comment. *See* 5 U.S.C. §§ 553(b), (c); *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971); *Mortgage Bankers Ass'n,* 575 U.S. at 96. In full compliance, the NPRM solicited comments from the public on the agency's proposed modernization of the EB-5 program rules. *See* 82 Fed. Reg.at 4,738. The Final Rule addressed the relevant comments, articulated DHS's thoughtful and reasoned analysis behind the agency's policy choices, and explained why the agency reached its decision to modernize the EB-5 program rule

in accordance with congressional intent. *See* 84 Fed. Reg. at 35,750. Nothing more under the APA was required by the agency, and Behring RC's claims to the contrary are meritless.

2. Behring RC asserts that "DHS did not consider the economic impact [the Final] Rule would have," and the agency "feigned ignorance to avoid grappling with the detrimental effects [the Final] Rule [would] have on the economy." ECF No. 10 at 16. But the plain text of the Final Rule, which addresses and responds to public comments on the economic impact of the rule, demonstrates otherwise.

The Final Rule indicates that DHS received comments that "discussed the data, estimates, and assumptions utilized by USCIS to ascertain the costs of the rule." 84 Fed. Reg. at 35,785. One comment stated that "stakeholders require additional time to provide data-based estimates regarding economic impacts of the new investment amounts and impacts on jobs." 84 Fed. Reg. at 35,785. Other comments "recommended that [the agency] withdraw the proposed rule so that the impacts of the rule can be more thoroughly studied, including how the proposed rule might hinder the job benefits estimated by a study conducted by the Commerce Department." *Id.* But after consideration, DHS disagreed with these comments. *Id.* The agency acknowledged that "EB–5 investment structures are complex and typically involve multiple layers of investment, finance, development, and legal business entities," and that "data limitations preclude a detailed analysis of the potential quantitative costs of [the Final Rule]," but the agency explained that extending the timeline for implementing the rule would not benefit the regulated public because "[a]dditional time would not allow DHS to estimate with accuracy how many investors or projects might be affected by the proposal." *Id.* The NPRM solicited comments for 90 days "on all aspects of the NPRM, including the economic analysis included in the NPRM." *Id.* DHS explained that the 90-comment period, which was "approximately 30 more days than recommended" by Section 6 of E.O. 12886—was adequate for all interested stakeholders to provide any "data-based estimates and information." *Id*. In fact, during this extended comment-submission window, "several stakeholders did submit "data based comments." *Id.* DHS indicated that it did not seek additional time because the agency's efforts to modernize the EB-5 program, as detailed and explained in the Final Rule, were too valuable to the visa program to effectuate any further delay. *Id.*

DHS did not "feign ignorance" in addressing public comments on the economic impact of the Final Rule. ECF No. 10 at 16. The NPRM solicited comments from "all interested parties" on "all aspects of the proposed amendments," and specifically on "the economic analysis supporting [the Final Rule]." 82 Fed. Reg. at 4,738. DHS addressed the comments it received regarding the economic impact of the amendments and adequately explained its reasons for making the amendments to the EB-5 program in the Final Rule. *See, e.g.,* 84 Fed. Reg. at 35,785-86. Behring RC may disagree with how DHS addressed these comments, but DHS's actions here complied fully with the APA. *See* 5 U.S.C. §§ 553(b), (c); *Mortgage Bankers Ass'n,* 575 U.S. at 96.

Since the inception of the program in 1990, the required minimum investment amounts have never changed. 84 Fed. Reg. at 35,766. Displeased with the proposed increased amount, one commenter speculated that Final Rule "would effectively stop the flow of $2.5 billion in foreign direct investments to the United States." *Id*. at 35,785. DHS disagreed, and indicated that the commenter "provided no objective data to support [that claim]," and thus, it was mere "speculat[ion] as to precisely how the increases will affect the EB–5 market." *Id*. The agency explained that it was "reasonable to increase the minimum investment amount to account for inflation to ensure the required minimum investment amounts reflect the present-day dollar value of the investment amounts established by Congress." *Id*. DHS indicated that "[c]alculating a price elasticity of demand for the EB-5 visa would require that [the agency] know the ratio of the percent change in EB-5 visa demand to the percent change in the investment amount." *Id*. However, the agency recognized that "there are likely numerous factors that have influenced the growth of EB-5 investor applications over the past several decades," and explained that it "cannot develop a model that controls for all of the specific variables nor predicts future unforeseeable events." *Id*. As a result, DHS indicated that it "could not accurately measure the influence of the two investment levels on demand for past and future EB-5 investment applications." *Id.*

DHS noted that over the years multiple factors have contributed to fluctuating utilization of the visa program. *Id.* As a result, it explained that it could not precisely predict the effect that the increase to the minimum investment would have on demand for the EB-5 program. *Id.* DHS acknowledged that it was still "reasonable to assume some number of investors will be unwilling

or unable to invest at the increased investment amount," and that capital contributions from the investors who choose to not participate in the program "may very well be more than replaced by other investors investing at the higher minimum investment levels." *Id.* It reasoned that "given the oversubscription of the program[,] as long as a sufficient number of investors file petitions each year to account for the allotment of visas provided by Congress, the program's overall contribution of capital to the U.S. economy will increase." *Id.*

3. Behring RC's assertion that DHS ignored external studies including the Department of Commerce ("DOC") economic impact study is wrong. *See* ECF No. 10 at 18-19. DHS explicitly acknowledged the study and explained why it was ineffective in evaluating the economic impact of the Final Rule. *See* 84 Fed. Reg. at 35,786. Specifically, DHS recognized that one commenter "cited the Commerce Department study that analyzed the job-creating impact of the investor visa program, noting the study found 11,000 immigrant investors provided $5.8 billion in capital for the FY 2012 and FY 2013, supporting an estimated 174,039 jobs in the United States." *Id*. The comment also expressed concerned that "such increases would discourage investment in American job markets that need it most. Investors will have the option of going to Australia, or Canada—high income countries with lower visa monetary requirements." *Id.* In response, DHS indicated that, while the DOC study "did estimate that for FY 2012 and FY 2013, 11,000 immigrant investors provided $5.8 billion in capital that was expected to create an estimated 174,039 jobs," the "study was based on forecasts made in economic impact analyses provided by petitioners, and not verification of jobs actually created." *Id.* It further elaborated that because "the majority of EB–5 investments have been made through regional centers," which use "methodologies that rely on indirect job creation," such indirect job creation estimates "accrue to numerous downstream industries, and therefore, it was not possible to verify exactly how many new jobs could be attributed to a specific EB–5 investment once it is made" and that "it is also possible that indirect job forecasts may overstate actual job creation linked to any specific investment." *Id*.[2] DHS

[2] DHS also discussed how the DOC's study included jobs associated with non-EB–5 investor sources of capital. 84 Fed. Reg. at 35,786. Because jobs created by non- EB–5 funding can be credited to EB–5 investors, and many projects could still be viable without EB–5 funding given that such funding makes up only a portion of overall funding, DHS indicated that it does not

concluded that "the Commerce Department study was not helpful in evaluating the impacts of the final rule." *Id.* Thus, Behring RC cannot argue that DHS ignored the DOC economic impact study.

One data-based estimate that DHS was under no obligation to address and consider in the Final Rule was the study published by "Economic & Policy Resources Inc.," (the "EPR study"). Behring RC asserts that DHS "failed to examine the relevant data and articulate a satisfactory explanation," *see* ECF No. 10 at 18-19, but this claim ignores the fact that the study was not submitted to DHS during the 90-day comment period. Instead the EPR study was published more than 22 months after the NPRM's comment period closed. Behring RC vaguely asserts that the EPR study was "provided to DHS while the Rule was undergoing Office of Management and Budget review" at some unknown time, but, regardless, courts have long held that an agency is under no obligation to consider comments submitted after the public comment window closed. *See, e.g., Bd. of Regents of Univ. of Washington v. EPA*, 86 F.3d 1214, 1222 (D.C. Cir. 1996) (holding that "the EPA was under no obligation to consider [the] petitioners' comments [during rulemaking] in the first place, as they were submitted well after the close of the comment period."). Behring RC's assertion to the contrary, ECF No. 10 at 18-19, is thus incorrect.

For all of these reasons, Behring RC has no likelihood of success on the merits of its claim that DHS arbitrarily and capriciously implemented the Final Rule.

B. DHS conducted a proper analysis under the Regulatory Flexibility Act.

Similarly, Behring RC has no likelihood of success on the merits of its claim that DHS "failed to properly conduct a Regulatory Flexibility Act ("RFA") Analysis." ECF No. 10 at 21. DHS conducted a proper and complete final regulatory flexibility analysis ("FRFA") during its promulgation of the Final Rule.

1. The RFA, Pub. L. No. 96-354 (1980), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121 (1996) (codified at 5 U.S.C. §§ 601- 612),

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believe that "it is reasonable to assume that a certain loss of EB-5 investment necessarily translates to a commensurate loss of jobs." *Id*. In making this determination, DHS noted that "the Commerce Study does not conclude that the predicted number of jobs expected to be created through EB–5 funding would not be created but for the EB–5 funding." *Id*.

requires an agency to identify the potential significant economic impact of proposed and final rules on small entities. Under the RFA, when an agency promulgates certain rules it must either certify that the rule "will not, if promulgated, have a significant economic impact on a substantial number of small entities," or prepare a FRFA. *See* 5 U.S.C. §§ 604, 605. In this case, DHS opted for the latter approach. The FRFA generally must contain, among other things:

> 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.

5 U.S.C. § 604(a)(5).[3]

The RFA is purely procedural. *Nat'l Telephone Co-Op Ass'n v. FCC*, 563 F.3d 536, 540 (D.C. Cir. 2009); *see also, U.S. Cellular Corp. v. FCC*, 254 F.3d 78, 88 (D.C. Cir. 2001) ("Purely procedural … RFA section 604 requires nothing more than that the agency file a FRFA demonstrating a 'reasonable, good-faith effort to carry out [RFA's] mandate'") *citing* with approval *Alenco Communications, Inc. v. FCC,* 201 F.3d 608, 625 (5th Cir. 2000). The RFA "imposes no substantive constraints on agency decisionmaking." *Nat'l Telephone*, 563 F.3d at 540. Rather, it "requires agencies to publish analyses that address certain legally delineated topics." *Id.* If the agency addresses all of the required topics, the agency has complied with the procedural requirements of the RFA. *See, e.g., id.; U.S. Cellular Corp*., 254 F.3d at 88-89 ("Petitioners dispute neither that the Commission include a [final regulatory flexibility analysis] … nor that this statement addresses all subjects required by the RFA"). The RFA does not "give plaintiffs the authority to determine which alternative best meets the agency's goals." *Nat'l Coal. For Marine*

[3] A court's review of an agency's RFA analysis is based on a reasonableness test, as the statute does not define the term "significant economic impact," *see* 5 U.S.C. § 601, and the legislative history of the RFA indicates that a precise definition of the phrase would be "counterproductive," *see* 126 Cong. Rec. S10,943 (daily ed. Aug. 6, 1980). The legislative history indicates only that the phrase is neutral with respect to whether a significant economic impact is beneficial or adverse, so the agency should factor both costs and benefits to small entities when formulating a rule. *See* 126 Cong. Rec. H8468 (daily ed. Sept. 8, 1980). As there is no precise statutory definition of this phrase, courts only require an RFA analysis to be context-specific. *See Assoc. Fisheries of Maine, Inc. v. Daley*, 127 F.3d 104, 117 (1st Cir. 1997).

Conservation v. Evans, 231 F. Supp. 2d 119, 143 (D.D.C. 2002). Moreover, courts recognize that they "have limited capacity or capability to second-guess how an agency weighs a rule's possible impact on small businesses against other statutory objectives." *Nat'l Telephone*, 563 F.3d at 542.

2. Behring RC's RFA challenge fails, as a matter of law, because DHS provided a detailed explanation for how the agency satisfied each requirement of the RFA. *See* 84 Fed. Reg. at 35,803-06. Behring RC cannot identify any required topic that DHS purportedly failed to address in its FRFA. *See Nat'l. Telephone*, 563 F.3d at 540; *U.S. Cellular Corp*., 254 F.3d at 88-89. Behring RC does not dispute that DHS provided a FRFA, but instead contends that the agency did not perform its analysis with diligence and that the analysis was improper because it understated the likely economic impact of the Final Rule. ECF No. 1 at ¶¶ 107-108; *see also* 84 Fed. Reg. at 35,802-06. But such a claim fails because a court's review of an agency's compliance with the RFA is highly deferential, "particularly … with regard to an agency's predictive judgments about the likely economic effects of a rule." *Helicopter Ass'n Int'l, Inc. v. FAA*, 722 F.3d 430, 438 (D.C. Cir. 2013) citing *Nat'l Telephone*, 563 F.3d at 541.

In its FRFA, DHS recognized that the Final Rule had the potential to affect several types of businesses involved in the program, but found that there were significant challenges in determining the exact nature of the impact. *See* 84 Fed. Reg. at 35,802. Specifically, DHS acknowledged that changes could affect immigrant investors, regional centers, new commercial enterprises ("NCEs"), and job-creating entities ("JCEs"). *Id.* DHS concluded that individual investors did not meet the definition under the RFA of a small entity and therefore, DHS did not consider them further for purposes of the RFA. *Id.* Additionally, the multi-layered structure of most EB-5 investments, coupled with a lack of data concerning revenue and employment, makes it impossible for DHS to determine if NCEs and JCEs are considered small entities. *Id*. Although DHS sought public feedback on the topic, it did not receive data or information that could facilitate an appropriate analysis for these entities. *Id.* Despite data constraints, DHS obtained information to analyze the small entity status of regional centers and, therefore, was able to determine that a significant number of regional centers may be small entities. 84 Fed. Reg. at 35,802-03. However, DHS was still not able to conclusively determine the impact of the Final Rule on those small

entities. *Id*. at 35,804. Any complaint by Behring RC about this data analysis methodology falls outside the scope of RFA review. See *Helicopter Ass'n*., 722 F.3d at 438; *see generally*, *Chamber of Commerce v. SEC*, 412 F.3d 133, 142 (D.C. Cir. 2005) (explaining that an agency was under no obligation to produce new empirical evidence to support a new rule).

3. DHS explained the need for, and objectives of, the Final Rule and responded to the public's comments about the NPRM. *See* 84 Fed. Reg. at 35,803-04 (noting that "quantitative analysis is not required to comply with the RFA's analytical requirements"); *see also Alenco*, 201 F.3d at 625 (explaining that an agency is not required to engage in cost-benefit analysis or economic modeling when conducting regulatory flexibility analysis); *Assoc. Fisheries*, 127 F.3d at 114, 117 (explaining that courts are mindful of the fact that the RFA does not require a specific outcome or specific substantive measures and that the RFA does not require mathematical exactitude in an agency's consideration of alternatives to the proposed rulemaking). Although some commenters claimed that there would likely be significant costs to small entities, these commenters did not provide credible data or analysis to support the claim. *See* 84 Fed. Reg. at 35,804-06. While 5 U.S.C. § 609 instructs agencies to assure that small entities receive the opportunity to participate in the rulemaking , the method and manner of doing so is left primarily to the agency's sound discretion. *See Assoc. Fisheries*, 127 F.3d at 117. Because the public had an adequate opportunity to submit comments in response to DHS's proposed flexibility analysis, DHS complied with the public participation requirements of the RFA. Moreover, DHS considered a number of alternatives to reforming the TEA designation process and setting the TEA investment amount, finding that they were not acceptable for the reasons explained in the final RFA. 84 Fed. Reg. at 35,806. This is all that was required of DHS. *See, e.g., Nat'l Coal.,* 231 F. Supp. 2d at 143 (finding the agency "considered alternatives, including a 'no action' or 'status quo' alternative, to determine which combination of regulations would best achieve the agency's conservation goals, minimize the economic impact on fishing communities and fulfill its obligations under [the relevant statutes]"); *Assoc. Fisheries*, 127 F.3d at 117 (finding that the agency assessed the potential impact of the regulation, considered other options, and sought to strike the best balance between competing goals).

In sum, in reviewing an agency's compliance with the RFA, courts are mindful of the fact that the RFA does not require a specific outcome, nor does the statute require an agency to take specific substantive measures. *See Assoc. Fisheries*, 127 F.3d at 114. Behring RC may disagree with DHS's ultimate decision, but as long at the agency stated the basis for its conclusions and addressed the relevant comments and alternatives, it has met its burden under the RFA. *See U.S. Cellular Corp.,* 254 F.3d at 88-89; *see, e.g., Alfa Int'l Seafood v. Ross*, 264 F. Supp. 3d 23, 67 (D.D.C. 2017) (holding that "a court cannot find an agency violated the RFA merely because it disagrees" with the agency's determinations). Behring RC, therefore, cannot demonstrate a likelihood of success on its claim that DHS failed to conduct a proper RFA analysis.

C. DHS has the statutory authority to set standards for Targeted Employment Areas ("TEAs") and to "designate" them.

Likewise, Behring RC has no likelihood of success on the merits of its claim that DHS exceeded its statutory authority in designating TEAs or setting standards applicable to such designations. *See* ECF No. 10 at 22-25. As the Final Rule indicates, "[i]t is clear that the congressional intent of the TEA provision was to incentivize EB–5 investment in areas of actual high unemployment[,]" 84 Fed. Reg. at 35,774, by reducing the required minimum capital investment amount necessary for a foreign national who makes a qualifying investment in a targeted employment area ("TEA"). 8 U.S.C. § 1153(b)(5)(C)(ii). Congress has charged DHS with the authority to determine whether a foreign national can qualify for an EB-5 immigrant visa, and specifically for an EB-5 visa based on a reduced minimum capital amount invested into a project that creates the requisite number of jobs in a TEA. *See* 8 U.S.C. § 1153(b)(5)(B)(i).

Congress has explicitly bestowed upon DHS the broad statutory authority to administer and enforce all aspects of the EB-5 program, *see* 8 U.S.C. §§ 1103(a)(1), (3),[4] 1153(b)(5), this administration includes the authority to designate a TEA as part of determining whether a foreign

[4] As of March 1, 2003, in accordance with section 1517 of Title XV of the *Homeland Security Act of 2002* (HSA), Pub. L. No. 107-296, 116 Stat. 2135, any reference to the Attorney General in a provision of the INA describing functions which were transferred from the Attorney General or other Department of Justice official to the Department of Homeland Security by the HSA "shall be deemed to refer to the Secretary" of Homeland Security. *See* 6 U.S.C. § 557 (2003) (codifying HSA, Title XV, § 1517); 6 U.S.C. § 542 note; 8 U.S.C. § 1551 note.

national investor's EB-5 visa petition can be approved and an EB-5 immigrant visa can be made available to the foreign national in accordance with the EB-5 provisions of the INA.[5]

1. Analysis under *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 837 (1984) applies when a court must determine whether the agency has acted beyond its statutory authority. *See Tesoro Alaska Co. v. FERC*, 778 F.3d 1034, 1037 (D.C. Cir. 2015). Under *Chevron*, "[i]f Congress has directly spoken to [an] issue, that is the end of the matter." *Confederated Tribes of Grand Ronde Cmty. v. Jewell*, 830 F.3d 552, 558 (D.C. Cir. 2016). But if the statutory text is silent or ambiguous, courts must "determine if the agency's interpretation is permissible, and if so, defer to it." *Id*. "This inquiry, often called *Chevron* Step Two, does not require the best interpretation, only a reasonable one." *Van Hollen, Jr. v. FEC*, 811 F.3d 486, 492 (D.C. Cir. 2016).

Here, Congress has spoken directly to the issue by giving DHS the statutory authority to administer all aspects of the EB-5 program. This authority includes issuing EB-5 immigrant visas to foreign investors making qualifying investments at a reduced minimum capital amount that create the requisite number of jobs in a TEA. Congress defined a TEA as "a rural area or an area which has experienced high unemployment (of at least 150 percent of the national average rate)," 8 U.S.C. § 1153(b)(5)(B)(ii), and a "rural area" as "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). *Id.* at § 1153(b)(5)(B)(iii). Neither of these provisions, nor any other provision of the INA, has ever given TEA or "rural area" designation authority to any state government or state agency. *See, e.g*., 84 Fed. Reg. at 35,774 ("Regulations promulgated by the legacy Immigration and Naturalization

[5] Behring RC makes the incorrect assertion that DHS's designation of TEAs under the EB-5 visa program is "well outside the scope of [the agency's] knowledge." ECF No. 10 at 24. To the contrary, courts have recognized DHS's (through its sub-agency, USCIS) substantive expertise in administering the EB-5 program. *See e.g., Walker Macy LLC v. USCIS*, 243 F. Supp. 3d 1156, 1174 (D. Or. 2017), *appeal dismissed sub nom*. *Walker Macy LLC v. USCIS*, No. 17-35300, 2017 WL 4739302 at * 1 (9th Cir. June 23, 2017) (recognizing "the expertise of USCIS" in processing employment-based visa petitions); *Patel v. Johnson*, 2 F. Supp. 3d 108, 122 (D. Mass. 2014) (recognizing that USCIS interprets the INA, including the provisions for employment-based immigrant visas, on "a proactive day-to-day basis.").

Service (INS), the predecessor to USCIS, and not INA section 203(b)(5) [codified at 8 U.S.C. § 1153(b)(5)], authorized the role of states in the TEA designation process.").

Under the INA, EB-5 immigrant visas "shall be made available … to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise," who have "invested … or [are] actively in the process of investing" lawfully obtained capital "which will benefit the United States economy and create full-time employment" for at least ten qualifying U.S. worker-employees. *See* 8 U.S.C. § 1153(b)(5)(A). And "not less than 3,000" of the total number of EB-5 immigrant visas shall be made available each fiscal year to "qualified immigrants who invest in a new commercial enterprise … which will create employment in a targeted employment area." 8 U.S.C. § 1153(b)(5)(B)(i). The statute also explicitly authorizes the Secretary to adjust downward the required minimum capital investment amount necessary for a foreign national who makes a qualifying investment in a targeted employment area. *Id*. at § 1153(b)(5)(C)(ii).[6]

Congress has explicitly authorized DHS to administer and enforce all aspects of the EB-5 program, and to "establish such regulations" and "perform such other acts" necessary for carrying out this authority under the INA, *see* 8 U.S.C. §§ 1103(a)(1), (3), 1153(b)(5). In accordance with this clear statutory authority, USCIS has established regulations that enumerate the evidentiary requirements that an investor must satisfy before the agency can approve the investor's I-526 immigrant investor petition and obtain an EB-5 immigrant visa. *See* 8 C.F.R. §§ 204.6(j)(1) – (6). For investors seeking to invest a reduced minimum capital amount, he or she must provide USCIS specifically with evidence that the investment will create jobs in a targeted employment area. *Id*. at § 204.6(j)(6).7 After evaluating all of the evidence the investor provides, USCIS will make a determination to approve or deny the I-526 petition.

Under prior EB-5 program rules, to comply with 8 C.F.R. § 204.6(j)(6), an investor could submit evidence to USCIS that his or her investment was creating jobs in a TEA in the form a letter issued by a state government or state agency. *See* 56 Fed. Reg. at 60,904 (indicating that a

[6] The statute also authorizes the Secretary to adjust upward the required minimum capital investment amount necessary for a foreign national who makes a qualifying investment in a high employment area. 8 U.S.C. § 1153(b)(5)(C)(iii).

petitioner could submit "a letter from an authorized body of a State government which certifies that a particular geographical or political subdivision within a nonrural area qualifies as an area of high unemployment"). Upon receiving the letter, USCIS would make a determination as to whether the State's determination complied with regulatory standards and supported eligibility for approval for an EB-5 visa based on a reduced minimum capital investment amount and requisite job creation in a TEA. *See* 8 U.S.C. § 1153(b)(5)(B)(i).

The Final Rule does not change this.[7] The authority to determine whether an area qualifies as a TEA for EB-5 eligibility remains with DHS. Instead, in order to "ensure consistency in TEA adjudications and better ensure that TEA designations more closely adhere to congressional intent," the Final Rule simply "eliminates the ability of a state to designate certain geographic and political subdivisions as high unemployment areas," 84 Fed. Reg. at 35,752, which means that DHS will no longer afford state governments and state agencies the ability to designate TEAs. By doing this, DHS can better "address inconsistencies between and within states in designating high unemployment areas, and better ensure that the reduced investment threshold is reserved for areas experiencing sufficiently high levels of unemployment, as Congress intended." *Id.* Congress, through the EB-5 provisions of the INA, has provided DHS with the clear statutory authority to continue making TEA designations as part of the agency's administration of all aspects of the EB-5 program. *See* 8 U.S.C. §§ 1103(a)(1), (3), 1153(b)(5). Consequentially, any argument suggesting that some other level of government or agency has this authority will fail at *Chevron* Step One.

2. If the Court finds that Congress has not directly spoken to issue, Behring RC still cannot prevail. DHS has reasonably interpreted the EB-5 statutory provisions to mean that the agency's congressionally-mandated authority to administer *all aspects* of the EB-5 program includes the authority to designate a TEA. This authority is necessarily incident to DHS's role in setting regulatory standards for the program and in determining whether an EB-5 visa petition, based on a reduced minimum investment amount and requisite job creation in a TEA, can be approved, and in turn whether an EB-5 immigrant visa may be available to the investor. This interpretation is

[7] *See, e.g.,* USCIS's current policy manual, found online at: https://www.uscis.gov/policy-manual/volume-6-part-g-chapter-2 (last visited on Feb. 11, 2021).

reasonable because it falls in line with the agency's congressionally-mandated authority to administer and enforce the EB-5 program, and it is consistent with Congress's intent behind incentivizing EB-5 program investments in actual high unemployment areas.

Similarly, USCIS's reasonably construed its mandate to administer and enforce all aspects of the EB-5 program as authorization to set standards for and designate a TEA as part of its determination of whether a foreign national investor's EB-5 visa petition can be approved and an EB-5 immigrant visa can be made available. *See* 8 U.S.C. §§ 1103(a)(1), (3), 1153(b)(5). One specific aspect of EB-5 program eligibility is whether an investor who seeks to invest a reduced minimum investment amount has complied with 8 C.F.R. § 204.6(j)(6) and provided USCIS with sufficient evidence that he or she invested in a project that creates the requisite number of jobs in a TEA. In addition to satisfying all other applicable evidentiary requirements, *see* 8 C.F.R. §§ 204.6(j)(1)- (5), USCIS must then determine whether an EB-5 immigrant visa "shall be made available" to that investor. 8 U.S.C. § 1153(b)(5)(A). No provision of the INA permits state governments or state agencies to make this determination.

DHS's interpretation is consistent with this congressional intent. The previous rule "authorized the role of states in the TEA designation process." 84 Fed. Reg. at 35,774; *see also* 56 Fed. Reg. at 60,903-904. However, DHS determined that "as a result of each state's interest in promoting investment with its borders, the states' role in designating high unemployment areas for purposes of the EB–5 program has resulted in instances when high unemployment area designations include areas far outside of actual distressed areas that many have called gerrymandered." 84 Fed. Reg. at 35,774 (quotations omitted).[8] Contrary to congressional intent, various states were applying inconsistent rules "in order to facilitate EB-5 funding to increase economic development within those states." *Id.* (citing "Is the Investor Visa Program an Underperforming Asset?", Hearing Before the H. Comm. on the Judiciary, 114th Cong. 62 (2016);

[8] As an example of "gerrymandering," the Final Rule cites Eliot Brown, "Swanky New York Condo Project Exploits Aid Program,'' Wall St. Journal, Oct. 13, 2015, http://www.wsj.com/articles/posh-tower-proposed-for-struggling-new-york-neighborhood-central-park-south-1444728781; Patrick McGeehan and Kirk Semple, "Rules Stretched as Green Cards Go to Investors," New York Times, Dec. 18 2011, https://nyti.ms/2FgZoQq. *See* 84 Fed. Reg. at 35,774.

"The Distortion of EB–5 Targeted Employment Areas: Time to End the Abuse," Hearing Before the S. Comm. on the Judiciary, 114th Cong. 12 (2016)).

To bring this type of EB-5 investment back in line with the congressional intent to incentivize EB-5 investment in areas of actual high unemployment, DHS indicated that it would "make high unemployment designation determinations based solely on publicly available data." 84 Fed. Reg. at 35,774. By doing this, DHS will "make[] the [TEA designation] process more transparent and uniform and less subject to political whims by eliminating the current political pressures within each state[.]" *Id*. Accordingly, USCIS's interpretation that EB-5 provisions of the INA provide it with the authority to designate TEAs is reasonable because it falls in line with the agency's congressionally-mandated authority to administer the EB-5 program and is consistent with Congress's intent behind incentivizing EB-5 program investments in actual high unemployment areas associated with the current process.

3. DHS did not exceed its authority by defining TEAs in a manner that contradicts the plain language of the EB-5 provisions of INA. Behring RC's assertion to the contrary, that the changes to the TEA designation process prevent the designation of high unemployment TEAs within metropolitan statistical areas (MSAs), is incorrect. *See* ECF No. 10 at 25.

The Final Rule provides that DHS can designate counties within MSAs as a high unemployment TEA if the county meets the unemployment rate threshold. *See* 84 Fed. Reg. at 35,777. This has not changed from the previous EB-5 rules. *Id.* ("The final rule continues the existing policy of allowing an entire MSA or county to be designated as a TEA."). In addition, the Final Rule provides that DHS may designate as an area of high unemployment a combination of census tracts which could also be within an MSA (*i.e.*, qualifying census tracts within an MSA may be designated as high unemployment TEAs). *Id.* Thus, Behring RC is incorrect to assert that the Final Rule "severely restricts the designation of TEAs … in an MSA." ECF No. 10 at 25.

Rather, the Final Rule continues to permit certain high unemployment areas within MSAs to qualify for high unemployment TEA designation while also providing a clearer definition of such areas to focus on the location of the job-creating activity. *See, e.g.,* 84 Fed. Reg. 35,776 (indicating that "DHS believes that the statutory incentive for the reduced investment amount in a

[TEA] is best effectuated by restricting its application to investments in new commercial enterprises that create jobs in the actual area experiencing high unemployment or rural area ….”). DHS made these changes to align the TEA designation for high unemployment area more closely with congressional intent. *See, e.g.*, 136 Cong. Rec. S17,106-01 (Oct. 26, 1990) (statement of Sen. Simon, indicating that “We are mindful of the need to target investments to rural America and areas with particularly high unemployment—areas that can use the job creation the most … America’s urban core and rural areas have special job creation needs.”). Accordingly, DHS did not define TEAs in a manner that contradicts the plain language of the EB-5 provisions of INA and thereby exceed its statutory authority.

4. Behring RC asserts that DHS impermissibly changed its policy regarding state agencies’ involvement in the TEA designation process, but this argument fails. It is long established that the APA permits an agency the freedom “to alter its past rulings and practices,” *Airmark Corp. v. FAA,* 758 F.2d 685, 691–92 (D.C. Cir. 1985), by providing a “reasoned explanation for its action” and a “display [of] awareness that it is changing [its] position*.” Fox Television*, 556 U.S. at 515 (emphasis in original). DHS complied with these requirements.

When an agency changes its practice, it need not demonstrate that the reasons for the new practice are better than the reasons for the old practice*, see Fox Television*, 556 U.S. at 515, but it cannot depart from a prior practice “*sub silentio* or simply disregard rules that are still on the books.” *Id.* Instead, the agency must at least “acknowledge” its seemingly inconsistent decisions and either offer a reason “to distinguish them” or “explain its apparent rejection of their approach,” *Tennessee Gas Pipeline Co. v. FERC*, 867 F.2d 688, 692 (D.C. Cir. 1989). Importantly, this standard “is not an especially high bar,” *Sw. Airlines Co. v. FERC*, 926 F.3d 851, 856 (D.C. Cir. 2019), as it suffices that the new practice “is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates.’” *Id*. (citing *Fox Television*, 556 U.S. at 515). And, the APA does not impose a heightened standard of review upon an agency to justify its departure from prior decisions. *See Dillmon v. Nat’l Transp. Safety Bd*., 588 F.3d 1085, 1089 (D.C. Cir. 2009) (citing *Fox Television*, 556 U.S. at 514).

Here, DHS acknowledged its previous practice of involving state governments in the TEA designation process and provided a detailed explanation for why it decided to eliminate involvement of the states. DHS indicated that its purpose for changing the process was to make "the [TEA designation] process more transparent and uniform and less subject to political whims by eliminating the current political pressures within each state associated with the current process." 84 Fed. Reg. at 35,774. Importantly, DHS proposed this change in the NPRM and responded to public comments it received on the issue. *See, e.g.*, 84 Fed. Reg. at 35,774. DHS noted that the state designation process was causing "the application of inconsistent rules by various states in order to facilitate EB–5 funding to increase economic development within those states," but notably, DHS did not receive any comments on the proposed change from any state government. *Id*. at 35,774 n.72.

In 1991, the former INS indicated that "the enterprise of assembling and evaluating the data necessary to select target 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." 56 Fed. Reg. at 60,903. Since those comments made from more than 28 years ago, DHS determined that with "each state's interest in promoting investment with its borders, the states' role in designating high unemployment areas for purposes of the EB–5 program has resulted in instances when high unemployment area designations include areas far outside of actual distressed areas that many have called gerrymandered." 84 Fed. Reg. at 35,774. DHS further explained that the state designation process was causing "the application of inconsistent rules by various states in order to facilitate EB–5 funding to increase economic development within those states." *Id*.

For instance, in 2015, a GAO report indicated that 97 percent of all EB-5 petitions were filed within state-designated high unemployment areas, and "the vast majority of EB–5 petitioners who purported to invest in areas of high unemployment had invested in projects physically located in a census tract or tracts with unemployment levels below the 150% of the national unemployment rate threshold for high unemployment." *Id*. DHS explained that this example is evidence of a process that has become "inconsistent with clear congressional aims in enacting the EB–5 program

and therefore warrants a change in policy mandating high unemployment area designations by DHS rather than by the states." *Id*. DHS concluded that all of this amounted to a process of designating TEAs that was contrary to the congressional intent behind the TEA provision of the EB-5 statute "to incentivize EB–5 investment in areas of *actual* high unemployment." *Id*. As a result, DHS determined that it would eliminate the state designation of high unemployment areas.

Accordingly, DHS acknowledged its previous practice, provided a reasoned explanation for its action and displayed its awareness that it was changing its position. *See Fox Television*, 556 U.S. at 515. The agency thus complied with the APA and any argument to the contrary by Behring RC necessarily fails.

D. DHS issued the Final Rule under lawful, valid authority.

Behring RC has no likelihood of success on the merits of its claim that the Final Rule is invalid because "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." ECF No. 10 at 19-20.

1. Behring RC's assertions regarding Mr. Wolf and Mr. Cuccinelli are erroneous and fall outside the scope of DHS's promulgation of the Final Rule, because neither former government official was involved with the promulgation of the NPRM (signed and published on January 13, 2017) or the Final Rule (signed and published on July 24, 2019) during their time at DHS. Behring RC's recitation of district court decisions enjoining agency rules enacted specifically by Mr. Wolf, or because of actions taken specifically by Mr. Cuccinelli, ECF No. 10 at 21, does not support its claim here because neither Mr. Wolf, nor Mr. Cuccinelli were in DHS positions that Behring RC challenges on July 24, 2019. Both Mr. Wolf and Mr. Cuccinelli assumed the positions at DHS that Behring RC challenges on November 13, 2019, which was *1,035 days after* DHS published the NPRM, and *113 days after* DHS published the Final Rule. Mr. Cuccinelli did not exercise any authority over the promulgation of the NPRM or Final Rule, and Mr. Wolf did not ratify the Final Rule. The Court can thus reject Behring RC's assertions that the Final Rule is invalid because "[Mr.] Cuccinelli's appointment to a newly-created position of Principal Deputy Director of

USCIS was also invalid," ECF No. 10 at 21, and that "[Mr. Wolf's] ratification attempts cannot give the Rule the effect of law" ECF No. 10 at 20. *See* https://www.dhs.gov/sites/default/files/publications/20_0113_undersecretary-wolf-ratification-elegable-prior-actions.pdf (last visited Feb. 11, 2021).

2. Behring RC's claim that the Final Rule is invalid because Former Acting DHS Secretary McAleenan's service was unlawful, ECF No. 10 at 20, fares no better. This is because Former Acting Secretary McAleenan served under a valid 6 U.S.C. § 113(g)(2) order of succession that applied in the event of a vacancy.

Since its amendment in 2016, DHS's organic statute—that is, the Homeland Security Act (HSA)—gives the DHS Secretary the power to "designate such other officers of the Department in further order of succession to serve as Acting Secretary." 6 U.S.C. § 113(g)(2). In April 2019, former DHS Secretary Kirstjen M. Nielsen[9] exercised this congressionally-mandated power and designated an order of succession for the office of the Secretary in the event of a vacancy: "By the authority vested in me as Secretary of Homeland Security, including the Homeland Security Act of 2002, 6 U.S.C. § 113(g)(2), I hereby designate the *order of succession* for the Secretary of Homeland Security as follows …." *See* **Exhibit 2**, Designation of an Order of Succession for the Secretary (Apr. 9, 2019) ("April 2019 Order") (emphasis added). That new order of succession, in turn, made the Commissioner of U.S. Customs and Border Protection (CBP) third in line to serve as Acting Secretary of Homeland Security. April 2019 Order at 2.

That signed order constituted the controlling order of succession when Ms. Nielsen resigned the following day in April 2019. *See* **Exhibit 3**, Letter from Neal J. Schwartz, Associate General Counsel for General Law, DHS, to Hon. Michael R. Pence, President of the Senate (Apr. 11, 2019). When Ms. Nielsen resigned, the first two offices in the succession order were vacant, *see* **Exhibit 4**, Letter from Neal J. Swartz, Associate General Counsel for General Law, DHS, to Hon. Michael R. Pence, President of the Senate (Apr. 16, 2018) (vacancy in the office of Deputy

[9] Kirstjen M. Nielsen was nominated by the President to serve as the Secretary of Homeland Security on October 11, 2017, confirmed by the Senate on December 5, 2017, and sworn into the office on December 6, 2017.

Secretary); **Exhibit 5**, Letter from Neal J. Swartz, Associate General Counsel for General Law, DHS, to Hon. Michael R. Pence, President of the Senate (Apr. 11, 2019) (vacancy in the office of Under Secretary for Management). Thus, as the next official in line, the CBP Commissioner—who at the time was Kevin McAleenan[10]—began serving as Acting DHS Secretary.

Behring RC asserts that "Secretary Nielsen's 'amendment' of the DHS Order of Succession did not have the force of law to appoint McAleenan to Acting Secretary" because she "amended the wrong succession order, which only delineated DHS succession following a catastrophic emergency." ECF No. 10 at 20. But this is incorrect. Former Secretary Nielsen's April 2019 order expressly stated *five* times that she was designating a new "order of succession," employing unqualified language. *See* April 2019 Order. As the DHS Secretary, Ms. Nielsen was the only person within DHS with the authority to designate an order of succession. *See* 6 U.S.C. § 113(g)(2). Thus, her signed order controlled the order of succession when she resigned.

Beyond Secretary Nielsen's use of unqualified language, the statutory authority she relied upon—Section 113(g)(2) of the HSA—shows that she changed the order of succession for all vacancies in the office of Secretary of Homeland Security. Section 113(g)(2) empowers the Secretary to designate an "order of succession" for officers to serve as Acting Secretary in the event of a vacancy. Secretary Nielsen's order expressly cites this statutory authority three times.

Secretary Nielsen's official actions taken after the issuance of the April 2019 order further confirm that she designated a new order of succession under which McAleenan would serve as Acting Secretary. She issued the order just one day before resigning. On her last day, she issued a press release announcing that Mr. McAleenan "will now lead DHS as your Acting Secretary"[11] and personally swore McAleenan into that role.[12]

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[10] Kevin McAleenan was nominated by the President to serve as the Commissioner of U.S. Customs and Border Protection on May 22, 2017, confirmed by the Senate on March 19, 2018, and sworn into office on March 20, 2018.

[11] Press Release, DHS, Kirstjen M. Nielsen, Secretary of Homeland Security, Farewell Message from Secretary Kirstjen M. Nielsen (Apr. 10 2019), https://www.dhs.gov/news/2019/04/10/farewell-message-secretary-kirstjen-m-nielsen.

[12] *CBP Commissioner Kevin McAleenan sworn-in as the Acting DHS Secretary; Opens New DHS Headquarters*, Border Observer, https://theborderobserver.wordpress.com/2019/04/11/cbp-

3. Behring RC attempts to bolster their claim by citing to the following for support: *Immigrant Legal Res. Ctr. v. Wolf*, No. 20-cv-05883-JSW, 2020 WL 5798269 (N.D. Cal. Sept. 29, 2020), *Northwest Immigrant Rights Project, et al., v. USCIS, et al*., No. 19-3283, 2020 WL 5995206 (D.D.C. 2020), *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 35-36 (D.D.C. 2020), *Casa de Maryland v. Wolf*, No. 8:20-cv-02118-PX, 2020 WL 5500165 (D. Md. Sept. 11, 2020), *Vidal, et al. v. Wolf, et al*., 16-cv-04756 (E.D.N.Y. Nov. 14, 2020), and a GAO report, File B-331650 (Aug. 14, 2020). *See* ECF No. 10 at 21. But the GAO report is erroneous (and it binds neither DHS, nor this Court), and those district court decisions are inapposite, because they confused orders of succession and delegations of authority. Delegations of authority, which simply allow an official to exercise certain powers of the office of the Secretary, are different from orders of succession, which are lists of officials who may become Acting Secretary in the event of a vacancy. Indeed, we note that one district court that studied this issue at length declined to rule on the basis of an ineffective designation by Secretary Nielsen. *See NWIRP v. USCIS*, No. 19-cv-3283, 2020 WL 5995206, at *11 (D.D.C. Oct. 8, 2020) (Moss, J.).

The HSA recognizes that basic proposition. One of its other provisions, 6 U.S.C. § 112(b)(1), empowers the Secretary to *delegate* her authority to other officials in the agency, even when the Secretary continues to occupy her office. If Secretary Nielsen had intended only to amend the order for delegated authority during an emergency, she would have had no reason to invoke Section 113(g)(2) (which she cited three times in her order of succession). *Compare* 6 U.S.C. § 112(b)(1) (allowing Secretary to delegate authority), *with id.* § 113(g)(2) (allowing Secretary to designate a further order of succession); *see also Stand Up for California! v. DOI*, 298 F. Supp. 3d 136, 141 (D.D.C. 2018).

4. Even if the Court favors Behring RC's claim (it should not), the de facto officer doctrine militates against invalidating this agency rule. A court may instead treat the "acts of an officer de facto" as "valid and binding," even if he was not "an officer de jure." *Phillips v. Payne*, 92 U.S. 130, 132 (1876). The Supreme Court has applied this doctrine dozens of times – even with respect

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commissioner-kevin-mcaleenan-sworn-in-as-the-acting-dhs-secretary/ (last visited Feb. 11, 2021).

to appointments that violate the Constitution.[13] It serves "considerations of policy and necessity." *Norton v. Shelby Cnty.*, 118 U.S. 425, 441 (1886). First, the doctrine safeguards "the foundations of law and order and the stability of government" by preventing the chaos that could result if a defect in an officer's appointment required the mass invalidation of the officer's past acts. *Briggs v. Voss*, 85 P. 571, 572 (Kan. 1906). Second, the doctrine ensures that members of the public who transact business with an officer need not "investigate his title, but may safely act upon the assumption that he is a rightful officer." *Waite v. City of Santa Cruz*, 184 U.S. 302, 323 (1902). Third, the doctrine protects "innocent men, who have dealt with officers upon the faith of a public appointment," from "difficulty and losses." *State of Ohio ex rel. Newman v. Jacobs*, 17 Ohio 143, 152 (1848) (in bank). Here, this rule was in place for over a year before this challenge was brought and has been and continues to be relied upon by the public. It was issued after notice and comment from the public as required by the APA. The public is entitled to rely upon it given that federal rulemaking results in rules that bind the community at large. This doctrine is particularly appropriate in an APA challenge like this one, which focuses on review of "agency action," not the action of any particular agent or office-holder. *See* 5 U.S.C. §§ 702, 706. And this is not a case involving a judge or other adjudicator, where the de facto doctrine normally does not apply. *See Ryder v. United States*, 515 U.S. 177 (1995). Finally, the regional center has made no showing of prejudicial error by DHS. *See Air Canada v. DOT*, 148 F.3d 1142, 1156 (D.C. Cir. 1998) (indicating that the burden to demonstrate prejudicial error is on the party challenging agency action); *PDK Labs., Inc. v. U.S. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) ("If the agency's mistake

[13] *See*, *e.g.*, *Buckley*, 424 U.S. at 142 (members of administrative agency); *United States v. Royer*, 268 U.S. 394, 396-398 (1925) (army major); *Tulare Irrigation Dist. v. Shepard*, 185 U.S. 1, 13-14 (1902) (irrigation district); Waite v. City of Santa Cruz, 184 U.S. 302, 322-324 (1902) (mayor); *Nofire v. United States*, 164 U.S. 657, 661 (1897) (clerk); *Starr v. United States*, 164 U.S. 627, 631 (1897) (circuit-court commissioners); *Wright v. United States*, 158 U.S. 232, 238 (1895) (deputy marshal); *Lyons v. Woods*, 153 U.S. 649, 669 (1894) (territorial legislators); *In re Delgado*, 140 U.S. 586, 590 (1891) (county commissioners); *Gonzales v. Ross*, 120 U.S. 605, 619 (1887) (land commissioner*); Hussey v. Smith*, 99 U.S. 20, 24 (1879) (marshal); *United States v. Insurance Cos.*, 89 U.S. (22 Wall.) 99, 101-103 (1875) (state legislators); *Cocke ex rel. Commercial Bank of Columbus v. Halsey*, 41 U.S. (16 Pet.) 71, 87 (1842) (clerk of court).

did not affect the outcome, if it did not prejudice the petitioner, it would be senseless to vacate and remand for reconsideration.").

In sum, Behring RC cannot demonstrate a substantial likelihood of success on the merits.

II. Behring RC has failed to demonstrate that it faces immediate and irreparable injury absent Court action.

Behring RC fails to show it will suffer irreparable injury absent injunctive relief. Behring RC asserts that they require immediate, emergency injunctive relief from the Court because the Final Rule, which the regional center has had notice of since 2017, and which has been in effect for 399 days, "threatens the existence of [its] business." ECF No. 10 at 22. Not only is this claim of harm based on speculation, but Behring RC does not, and cannot clearly attribute its purported irreparable economic injury directly to DHS's promulgation of the Final Rule. In *Fla. EB5 Investments, LLC v. Wolf*, the court denied preliminary injunctive relief to an EB-5 regional center challenging DHS's Final Rule, finding that the plaintiff regional center failed to demonstrate concrete, irreparable economic harm and that the delay in seeking a preliminary injunction undercut its claims of purported harm. *See* 443 F. Supp. 3d 7, 13 (D.D.C. 2020). The Court should reach the same conclusion here.

A court may not issue "a preliminary injunction based only on a possibility of irreparable harm … [since] injunctive relief [i]s an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22 (emphasis added). "[P]laintiffs must establish that irreparable harm is likely, not just possible, in order to obtain a preliminary injunction." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011); *see also Caribbean Marine Servs. Co., Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (a speculative injury is not an irreparable injury sufficient for a preliminary injunction). Harm is irreparable when, as name suggests, it cannot be undone by a later order by the court. *See id*. "Mere injuries, however substantial, in terms of money, time and energy necessarily expended are not enough" to constitute irreparable injury. *Sampson v. Murray*, 415 U.S. 61, 90 (1974).

Behring RC claims that its reduced revenue "from administrative fees earned through professional services," Behring Decl., ECF No. 10-1 at ¶ 8, threatens the existence of its *entire*

business and this is attributable solely to the Final Rule. There are at least two reasons why the Court can reject this assertion of purported harm.

First, Behring RC makes no mention of any other revenue it derives from its admitted diverse business ventures. For instance, Behring RC asserts that "in conjunction with other affiliate entities," it "operate[s] as the sponsor, manager, or managing member of various affiliates that are the General Partners of various real estate investments, property developments and new commercial enterprises established for pooling qualified EB-5 Immigrant Investor Program capital contributions to be invested in real estate projects." *Id*. at ¶ 2. Behring RC also asserts that "it 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 in the Bay Area." *Id*. at ¶ 4. Behring RC further asserts that it "also works with third party developers to fund outside projects to promote job creation and economic growth." *Id*. But despite this portfolio of business, Behring RC provides no concrete evidence that a purported reduction in "administrative fees" alone threatens the entirety of its business operations. *See Wisconsin Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam) (indicating that economic harm may constitute irreparable injury when "the loss threatens the very existence of the movant's business"); *Colo. River Indian Tribes v. Town of Parker*, 776 F.2d 846, 850 (9th Cir. 1985) ("Recoverable monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business"); *see also GEO Specialty Chemicals*, 923 F. Supp. 2d at 148 ("Only where a plaintiff establishes that the economic loss is so severe as to threaten the very survival of its business can economic harm qualify as irreparable"); *Bill Barrett Corp. v. U.S. Dep't of Interior*, 601 F. Supp. 2d 331, 335 (D.D.C. 2009) ("[I]t is well-settled that monetary loss constitutes irreparable harm only where the loss threatens the very existence of the movant's business") (citations and quotations omitted).

Second, Behring RC fails to demonstrate that its purported injury stemming from less "subscribed investors" is directly attributable to DHS's promulgation of the Final Rule. It fails to acknowledge the other factors that occurred between July 24, 2019 (the date DHS published the Final Rule) and December 23, 2020 (the date Behring RC filed its complaint) that can be attributed

to a reduced number of alien investors willing to subscribe to projects within its regional center. These factors include the effects of the COVID-19 pandemic on foreign markets and individual investors.

Behring RC asserts that "[s]ince the rule was implemented on November 21, 2019, the EB-5 market plummeted" and sustained a "99.07% drop from the performance during 2019." ECF No. 10-1 at ¶ 13. Behring RC bases this assertion on "calendar year 2019," but data from that calendar year is distorted because DHS incorporated a 120-day delayed effective date for the Final Rule, *see* 84 Fed. Reg. at 35,755, which naturally resulted in increased applications from investors seeking to take advantage of the lower investment requirement prior to November 2019, and that correspondingly artificially elevated Behring RC's profits for that same calendar year. Calendar year 2019, which ended one month after the promulgation of the Final Rule thus cannot serve as a basis for comparison with calendar year 2020 because the data for last quarter of the calendar year 2020 is part of the FY 2021, which has not yet been published. A comparison of the last two fiscal years shows that the market did not crash, rather, it is adjusting to the Final Rule. The data shows that in FY 2019, USCIS received a similar number of applications as FY 2020, hovering over 4,000. *Compare* https://www.uscis.gov/sites/default/files/document/reports/Quarterly_All_Forms_FY2019Q4.pdf (last visited Feb. 11, 2021) *with* https://www.uscis.gov/sites/default/files/document/reports/Quarterly_All_Forms_FY2020Q4.pdf (last visited Feb. 11, 2021). The vast majority of applications for FY 2020 were received in the first quarter around the time before the Final Rule was implemented. The remaining quarters in FY 2020 show an upward trend of recovery with applications nearly tripling from the second to the fourth quarter. While these are small numbers, this upward trend in applications contradicts Behring RC's self-serving, downward forecast that they have "no reasonable expectation of signing new EB-5 investors going forward." ECF No. 10 at 28.

Further, Behring RC fails to account for the impact of the COVID-19 pandemic beyond its effect in the Bay Area housing market. The COVID-19 pandemic may have affected foreign markets and individual investors resulting in their unwillingness or inability to participate in the EB-5 program. Neither does Behring RC address the basic economic principle that inflation has

a tendency to make people change their spending habits. Here, the Final Rule increases the minimum investment amount to account for inflation for the first time since Congress set the investment threshold in 1990. While foreign investors may choose to invest in other ventures where the rate of inflation favors them, as the FY 2020 data shows, EB-5 applications have continued to increase after DHS implemented the Final Rule, demonstrating that foreign investors are adjusting to the new minimum investment amounts.

Accordingly, Behring RC fails to demonstrate that its purported economic injuries are concrete, irreparable, and directly attributable to DHS's promulgation of the Final Rule. The Court should deny Behring RC's request for preliminary injunctive relief. *See Fla. EB5 Investments, LLC*, 443 F. Supp. 3d at 13.

III. Behring RC's request for preliminary injunctive relief is contrary to the public interest.

The balance of harms and the public interest elements of the injunctive relief test merge when the Government is the opposing party. *Nken v. Holder*, 556 U.S. 418, 435 (2009). Courts must "pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982). Here, Behring RC's request that the Court invalidate the Final Rule, a rulemaking process that the agency has thoughtfully undertaken over the past four years, and require USCIS to administer the EB-5 program using the 30-year old outdated rules that are inconsistent with congressional intent – is contrary to the public interest.

1. A threshold issue weighing against the entry of preliminary injunctive relief is Behring RC's unexplained delay in commencing this litigation. *See Fla. EB5 Investments, LLC*, 443 F. Supp. 3d at 13 (indicating that "Plaintiff's delay in seeking a preliminary injunction also undercuts its asserted harms."). Behring RC concedes that it had notice of DHS's proposed changes to the EB-5 program when the agency issued the NPRM more than four years ago, *see* 82 Fed. Reg. 4,738 (Jan. 13, 2017), and indeed submitted a comment. *See* **Exhibit 1**. Behring RC waited until 399 days after the effective date of the Final Rule to ask this Court for emergency relief in the form of a preliminary injunction. *See* ECF No. 10. The Ninth Circuit has repeatedly held that this type

of unexplained and voluntary procrastination weighs heavily against the entry of a preliminary injunction. *Oakland Tribune, Inc. v. Chronicle Pub. Co*., 762 F.2d 1374, 1377 (9th Cir. 1985) ("Plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm."); *Lydo Enters. v. City of Las Vegas,* 745 F.2d 1211, 1213-14 (9th Cir. 1984) ("A delay in seeking a preliminary injunction is a factor to be considered in weighing the propriety of relief."). This fact alone is sufficient to deny preliminary injunctive relief.

2. The Supreme Court has found that an injunction that prohibits an agency from enforcing a statute enacted by the people's elected representatives constitutes an irreparable injury that weighs heavily against entry of injunctive relief. *See New Motor Vehicle Bd. v. Orrin W. Fox Co*., 434 U.S. 1345, 1351 (1977); *see generally*, *Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d 1211, 1221 (D.C. Cir. 1981) ("The Supreme Court has recognized that the public interest in enforcement of the immigration laws is significant") (collecting cases). Moreover, courts have elaborated on this concern specifically in the immigrant context, as it applies to the request for a preliminary injunction in an employment-based visa program. *See Fla. EB5 Investments, LLC*, 443 F. Supp. 3d at 14 (explaining that the "Government has a strong interest in the uniform and proper application of its regulations governing the granting of visas to foreign nationals"); *Int'l Internships Programs*, 798 F. Supp. at 100 (indicating that entry of a preliminary injunction "would severely undermine the Congress' plenary power over the admission of aliens … and USCIS's authority to make regulatory determinations about the issuance of [employment-based] visas ….").

These same concerns apply in the present case. Behring RC is asking for special treatment from our nation's immigration laws so that it can use 30-year old EB-5 program rules that are inconsistent with congressional intent in order to maximize its profits. Congress established the EB-5 program and explicitly bestowed upon the Secretary of DHS the broad authority (as exercised through USCIS) to administer and enforce the EB-5 program and to "establish such regulations" and "perform such other acts" necessary for carrying out its authority under the INA. *See* 8 U.S.C. §§ 1103(a)(1), (3), 1153(b)(5). DHS has a strong interest in duly promulgated regulations being applied in a uniform manner, *Fla. EB5 Investments, LLC*, 443 F. Supp. 3d at 14;

New Motor Vehicle, 434 U.S. at 1351, especially because one of major purposes of the agency's modernization of the EB-5 program rules is to bring program requirements in line with Congress's intent. *See* 82 Fed. Reg. at 4,745.

An order enjoining the Final Rule would also harm foreign investors who have complied with the Final Rule and have filed an I-526 petition on or after the rule's effective date of November 21, 2019. An important provision of the Final Rule not previously part of the old EB-5 rules is the provision that generally allows foreign investors to retain his or her priority date (his or her place in the line for an immigrant visa or "green card") from any previously-filed and approved EB-5 immigrant visa petition and apply it to any future-filed petition. *See* 84 Fed. Reg. at 35,751. DHS indicated that "[EB-5] priority date retention may become increasingly important due to the strong possibility that the EB-5 category will remain oversubscribed for the foreseeable future." *Id.* Without this provision, a foreign investor currently stuck in a backlogged visa category, would not be able to do so in order to move forward with the lawful permanent residence process.

In an attempt to counter these equities weighing against the entry of a preliminary injunction, Behring RC asserts a red-herring claim that relies on *East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1282 (9th Cir. 2020), for the proposition that that the Government's interest "is less compelling where, as here, DHS is in violation of the plain Congressional intent." ECF No. 10 at 29. But the plain text of the Final Rule demonstrates that this is simply not true. DHS promulgated the Final Rule to bring the EB-5 program back in line with Congress' intent when it established the investor visa program in 1990. *See* 82 Fed. Reg. at 4,745 (indicating that increasing the level of capital investment would "account for inflation since creation of the EB-5 program" and would "ensure a level of capital investment in the United States that more closely adheres to congressional intent"); 84 Fed. Reg. at 35,772-73 (indicating that "TEA designations made by states under the [pre-modernization EB-5 program rules] do not reliably fulfill the congressional intent of the program to incentivize the investment of EB–5 capital in actual high unemployment areas.").

Moreover, Behring RC's reliance on *East Bay Sanctuary Covenant* is misplaced because the issue in that case was the effect of a presidential proclamation on asylum eligibility coupled

with an interim final rule ("IFR") that did not go through the notice-and-comment rulemaking process. Neither factor is present here. This case does not involve any presidential proclamation or an IFR. Instead, Behring RC is challenging the EB-5 program Final Rule, promulgated through notice and comment rulemaking across multiple administrations that provide critical and long needed updates for this program. *See* 84 Fed. Reg. 35,757 (indicating that the comment period was open for 90-days and DHS received 849 comments).

The harm to DHS's "mandate to regulate the admission of foreign nationals [under the EB-5 immigrant investor visa program]" that would result if the Court granted a preliminary injunction "outweighs the potential harm to [Behring RC's] and other regional centers' business in the absence of injunctive relief[,]" and thus the balance of equities and the public interest weigh against granting Behring RC any preliminary injunctive relief. *See Fla. EB5 Investments, LLC*, 443 F. Supp. 3d at 14. For these reasons, the public interest does not weigh in favor of a preliminary injunction prohibiting USCIS from administering the EB-5 program under its duly promulgated Final Rule in accordance with its congressional mandate.

CONCLUSION

For these reasons, the Court should deny Behring RC's motion for a preliminary injunction.

Dated: February 11, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on February 11, 2021, I electronically filed the foregoing document with the Clerk of the Court by using the CM/ECF system, which will provide electronic notice and an electronic link to this document to all attorneys of record.

I declare under penalty of perjury under the laws of the United States of America that the following is true and correct.

Executed on February 11, 2021, at San Diego, CA.

By: *s/Vanessa Molina*
VANESSA MOLINA
Trial Attorney
United States Department of Justice
Civil Division