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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *et al.*,

Defendants.

Civil Action No. 4:20-cv-07331-JSW

DEFENDANTS' NOTICE OF MOTION AND CROSS-MOTION FOR SUMMARY JUDGMENT; MEMORANDUM IN SUPPORT THEREOF; OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Date: September 10, 2021
Time: 9:00 a.m.
Judge: Hon. Jeffrey S. White
Courtroom: 5

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on September 10, 2021, at 9:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 5 of the above-entitled Court, located at 1301 Clay Street, Oakland, California, or by video teleconference, Defendants United States Department of Homeland Security and Alejandro Mayorkas, in his official capacity as Secretary of Homeland Security (collectively, the "Defendants"), by and through undersigned counsel, will move for summary judgment, for the reasons more fully set forth in the accompanying Memorandum of Points and Authorities.

Dated: July 23, 2021

Respectfully submitted,

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SUMMARY OF ARGUMENT

The Department of Homeland Security's ("DHS's") final rule, Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H-1B Petitions, 86 Fed. Reg. 1,676 (Jan. 8, 2021) ("2021 Wage Prioritization Rule"), is procedurally valid, consistent with the statute, and within the agency's discretionary rulemaking authority, and therefore should be upheld.

I. The rule was properly issued by a duly authorized official. The rule was signed by Ian J. Brekke, to whom Acting Secretary of Homeland Security Chad F. Wolf had delegated the authority. 86 Fed. Reg. at 1,782. The service of both Acting Secretary Kevin McAleenan, who succeeded Secretary Kirstjen Nielsen after her resignation, and Acting Secretary Wolf, whom Mr. McAleenan designated as his replacement as Acting Secretary, were lawful and valid. Defendants acknowledge that this Court has already reached the preliminary conclusion that plaintiffs in a different case were likely to succeed on the same legal argument, but this Court is not bound by that decision. *Immigrant Legal Res. Ctr. v. Wolf*, 491 F. Supp. 3d 520, 533-35 (N.D. Cal. 2020).

II. The 2021 Wage Prioritization Rule comports with the Immigration and Nationality Act ("INA"). From 2013 to 2020, USCIS received more H-1B petitions in the first five days of filing than the annual numerical allocations provided in statute. Although the INA prescribes that H-1B visas be issued "in the order in which petitions are filed," 8 U.S.C. § 1184(g)(3), the INA is silent with respect to how to order such simultaneous submissions. If a "statute is silent or ambiguous with respect to the specific issue," the Court should defer to the agency's interpretation so long as it is "based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). In deciding how to order simultaneous or nearly simultaneous submissions, DHS turned to an important purpose of the H-1B visa program and reasonably determined that a wage-level-based selection process will implement that purpose of the statute and that nothing in the statute requires random selection.

III. Finally, in the course of the rulemaking at issue here, DHS adequately responded to all significant comments. Specifically, DHS addressed the issues raised in the comments highlighted by Plaintiffs concerning recent graduates and reliance interests with reasoned explanations.

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BACKGROUND

I. THE H-1B VISA PROGRAM

The Immigration and Nationality Act ("INA") provides for the admission of certain foreign nationals as nonimmigrants[1] on a temporary basis to perform work in the United States under the H-1B and other visa classifications. The H-1B program allows U.S. employers to temporarily employ foreign workers in specialty occupations, 8 U.S.C. § 1101(a)(15)(H)(i)(b), defined as occupations that require the "theoretical and practical application of a body of highly specialized knowledge[]" and a bachelor's or higher degree in the specific specialty, or its equivalent. *Id.* § 1184(i)(1).

Congress has established limits on the number of foreign workers who may be granted initial H-1B nonimmigrant visas or status each fiscal year ("FY"), commonly referred to as the "H-1B cap." 8 U.S.C. § 1184(g). The total number of foreign workers who may be granted initial H-1B nonimmigrant status during any FY currently may not exceed 65,000. *Id.* § 1184(g)(1)(A)(vii). Certain petitions are exempt from the 65,000 numerical limitation. The annual exemption from the 65,000 cap for H-1B workers who have earned a qualifying U.S. master's or higher degree may not exceed 20,000 foreign workers. *Id.* § 1184(g)(5)(C). H-1B petitions for aliens who are employed or have received offers of employment at institutions of higher education, nonprofit entities related to or affiliated with institutions of higher education, or nonprofit research organizations or government research organizations, are also exempt from the cap. *Id.* § 1184(g)(5)(A), (B). The limitation also generally does not apply to H-1B petitions filed on behalf of certain aliens who have previously been counted against the cap. *Id.* § 1184(g)(7).

II. THE CURRENT H-1B PETITION PROCESS

An employer desiring to employ an H-1B worker must file a petition with DHS's United States Citizenship and Immigration Service ("USCIS") to obtain classification of the foreign national

[1] There are two general categories of U.S. visas: immigrant and nonimmigrant. Immigrant visas are issued to foreign nationals who intend to live permanently in the United States. Nonimmigrant visas are for foreign nationals who enter the United States on a temporary basis—for tourism, medical treatment, business, temporary work, study, or other reasons. *See* U.S. Customs and Border Patrol, Requirements for Immigrant and Nonimmigrant Visas, *available at* https://www.cbp.gov/travel/international-visitors/visa-waiver-program/requirements-immigrant-and-nonimmigrant-visas (last visited July 23, 2021).

as an H-1B worker. *See* 8 U.S.C. § 1184(c)(1) (requiring an importing employer to file an H-1B petition and authorizing the Secretary[2] to "prescribe" how an importing employer may petition and the information that an importing employer must provide in the petition); 8 C.F.R. § 214.2(h)(2)(i)(A). DHS determines, among other things, whether the employer's position qualifies as being in a specialty occupation and, if so, whether the nonimmigrant worker is qualified for the position. *Id.* § 214.2(h)(4)(i)(B)(2).

The number of H-1B cap-subject petitions, including those filed for the advanced degree exemption, regularly exceeds the annual H-1B numerical allocations. Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H-1B Petitions, 85 Fed. Reg. 69,236, 69,238 (Nov. 2, 2020). The INA provides that "[a]liens who are subject to the numerical limitations . . . shall be issued visas (or otherwise provided nonimmigrant status) in the order in which petitions are filed for such visas or status." 8 U.S.C. § 1184(g)(3). However, in each cap season from FY2014, which commenced in April 2013) to FY2020, which commenced in April 2019, USCIS received more H-1B petitions in the first five days of filing than the annual H-1B numerical allocations permit. 85 Fed. Reg. at 69,237-38. Indeed, each year USCIS received hundreds of thousands of complete H-1B petitions in the mail on the same day and had no reliable way to determine which petition was "filed" first based on when the petition was received. *Id.* at 69,238. Because all the petitions were in essence "filed" simultaneously, the agency could not follow the INA's command to issue H-1B visas or otherwise provide H-1B status in the order in which petitions were filed. *Id.*

In 2005, to address issues with simultaneous submissions, USCIS promulgated an interim rule allowing for the first time a random selection process, if necessary, to select between petitions received on the "final receipt date," *i.e.*, the date the number of petitions necessary to meet the statutory cap would be met. Allocation of Additional H-1B Visas Created by the H-1B Reform Act of 2004, 70 Fed Reg. 23,775, 23,778 (May 5, 2005). However, under that system, USCIS found that

[2] 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 (Nov. 25, 2002), 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).

employers spent significant effort and money to send petitions through overnight delivery to ensure they arrived on the first day that petitions were allowed, burdening employers, delivery services, and USCIS. Petitions Filed on Behalf of H-1B Temporary Workers Subject to or Exempt From the Annual Numerical Limitation, 73 Fed. Reg. 15,389, 15,391 (Mar. 24, 2008). In 2008**,** USCIS promulgated a new interim rule aimed at minimizing that burden by providing for random selection (commonly referred to as a lottery) from all applications received in the first five business days, if the number to meet the statutory cap was met in those five days. *Id.* at 15,392. Those that were considered filed would be processed while those that were rejected would be sent back to the petitioner. Nevertheless, the rejection and return of tens of thousands of petitions each year still presented an undue burden on the agency and on the public. Registration Requirement for Petitioners Seeking To File H-1B Petitions on Behalf of Cap-Subject Aliens, 84 Fed. Reg. 888, 890 (Jan. 31, 2019).

To further address these issues, in 2019, DHS promulgated a regulation establishing a registration process before any H-1B cap-subject petition can be filed. *See* 84 Fed. Reg. 888. Under this registration process, all petitioners seeking to file an H-1B cap-subject petition, including a petition eligible for the advanced degree exemption, must first electronically submit a registration, for which the cost and time to prepare is significantly less than a complete H-1B petition, during the registration period set by USCIS (a minimum of 14 days) for each beneficiary on whose behalf they seek to file such a petition, unless USCIS suspends the registration requirement. 8 C.F.R. § 214.2(h)(8)(iii)(A)(1), (3). At the conclusion of the initial registration period, if more registrations are submitted than projected as needed to reach the numerical allocations, under the 2019 rule USCIS randomly selects from among properly submitted registrations the number of registrations projected as needed to reach the H-1B numerical allocations. *Id.* § 214.2(h)(8)(iii)(A)(5)(ii). USCIS first selects registrations submitted on behalf of all beneficiaries, including those eligible for the advanced degree exemption. *Id.* USCIS then selects from the remaining registrations a sufficient number projected as needed to reach the advanced degree exemption. *Id.* § 214.2(h)(8)(iii)(A)(6)(ii). A prospective petitioner whose registration is selected is then eligible to file an H-1B cap-subject petition for the

selected registration during the associated filing period. *Id.* § 214.2(h)(8)(iii)(A)(1), (D)(1). When registration is required, a petitioner seeking to file an H-1B cap-subject petition is not eligible to file the petition unless the petition is based on a valid, selected registration for the beneficiary named in the petition. *Id.* § 214.2(h)(8)(iii)(D)(1).

III. THE 2021 WAGE PRIORITIZATION RULE

On January 8, 2021, DHS published a final rule further amending the process by which USCIS will select H-1B registrations for filing of H-1B cap-subject petitions (or H-1B petitions for any year in which the registration requirement will be suspended). Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H-1B Petitions, 86 Fed. Reg. 1,676 (Jan. 8, 2021) ("2021 Wage Prioritization Rule"). These revisions are currently set to become effective on December 31, 2021. *See* Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H-1B Petitions; Delay of Effective Date, 86 Fed. Reg. 8,543 (Feb. 8, 2021).

The revised regulations will allow for ranking and selection of registrations based on wage levels. Specifically, when applicable, USCIS will rank and select the registrations received during the registration period generally on the basis of the highest Occupational Employment Statistics ("OES") wage level that the proffered wage equals or exceeds for the relevant Standard Occupational Classification ("SOC") code in the area of intended employment, beginning with OES wage level IV and proceeding in descending order with OES wage levels III, II, and I. 86 Fed. Reg. at 1,676, 1,677, 1,732 *to be codified at* 8 C.F.R. § 214.2(h)(8)(iii)(A)(1)(i). (The proffered wage is the wage that the employer intends to pay the beneficiary. *Id.* at 1,677.) If USCIS receives and ranks more registrations at a particular wage level than the projected number needed to meet the applicable numerical allocation, USCIS will randomly select from all registrations within that wage level a sufficient number of registrations needed to reach the applicable numerical limitation. 86 Fed. Reg. at 1,717. This final rule will not affect the order of selection as between the regular cap and the advanced degree exemption. *Id.* The wage level ranking will occur first for the regular cap selection and then for the advanced degree exemption. *Id.*

ARGUMENT[3]

I. THE 2021 WAGE PRIORITIZATION RULE WAS PROMULGATED BY AN AUTHORIZED OFFICIAL

The 2021 Wage Prioritization Rule was properly issued by a duly authorized official. The rule was signed by Ian J. Brekke, to whom Acting Secretary of Homeland Security Chad F. Wolf had delegated the authority to sign the rule. 86 Fed. Reg. at 1,782. Plaintiffs argue that Chad Wolf "never lawfully occupied the position of Acting Secretary of Homeland Security" and that the 2021 Wage Prioritization Rule is therefore "unlawful because it was issued under [Chad Wolf's] . . . purported authority." Pls.' Mem. for Summary Judgment, 10, ECF No. 140 ("Pls.' Mem."). Under Plaintiffs' theory, Secretary Nielsen's April 2019 order regarding succession applied only to vacancies caused in emergency situations, and not to vacancies caused by resignations. *Id.* at 12. Thus, Plaintiffs argue that the service of Acting Secretary McAleenan, who succeeded Secretary Nielsen after her resignation, and Acting Secretary Wolf, whom McAleenan designated as his replacement, were unlawful. *Id.* at 11-12.

Defendants acknowledge that this Court, in a different case and with a different set of plaintiffs, has already reached the preliminary conclusion that those plaintiffs were likely to succeed on their claim that Mr. McAleenan's service as Acting Secretary of Homeland Security and Mr. Wolf's subsequent service in the same position were invalid. *Immigrant Legal Res. Ctr. v. Wolf*, 491 F. Supp. 3d 520, 533-35 (N.D. Cal. 2020).[4] Defendants further acknowledge that the substance of Defendants' arguments here remain the same as those asserted in the prior case. Nevertheless, Defendants maintain the position that the April 2019 Order changed the order of succession even for vacancy scenarios. *Cf. United States v. Mendoza*, 464 U.S. 154, 160 (1984) ("A rule allowing nonmutual collateral estoppel against the government in . . . cases [against different parties which nonetheless involve the same legal issues] would substantially thwart the development of important questions of law by

[3] Plaintiffs' brief (p. 5, ll. 4-10) sets out the appropriate role for the Court in considering motions for summary judgment in an Administrative Procedure Act case decided on an administrative record.

[4] Every other district court to have addressed this issue has likewise rejected the Government's position. *See Casa de Md. v. Wolf*, 486 F. Supp. 3d 928, 957-60 (D. Md. 2020); *Batalla Vidal v. Wolf*, 501 F. Supp. 3d 117, 129-32 (E.D.N.Y. 2020); *La Clinica de la Raza v. Trump*, No. 19-CV-04980-PJH, 2020 WL 7053313, at *6–7 (N.D. Cal. Nov. 25, 2020); *Pangea Legal Servs. v. DHS*, No. 20-cv-09253-JD, ___ F. Supp. 3d ____, 2021 WL 75756, at *4 (N.D. Cal. Jan. 8, 2021).

freezing the first final decision rendered on a particular legal issue."). The Court's earlier decision is not binding here and does not prevent the Court from finding in the Government's favor in this case.

As Plaintiffs acknowledge (Pls.' Mem. 11), the Homeland Security Act allows the Secretary of Homeland Security to devise an order of succession that supersedes an order of succession issued under the Federal Vacancies Reform Act ("FVRA"). *See id.* (citing 6 U.S.C. § 113(g)(1), (2)); *see also* 5 U.S.C. § 3347(a)(1)(A) (recognizing an exception to the Federal Vacancies Reform Act for statutory provisions that "expressly . . . authorize[] . . . 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[]"). Then-Secretary Nielsen did just that in April 2019, using newly granted legislative authority to supersede an order of succession issued in 2016.

On December 9, 2016, the President issued an executive order under the FVRA that prescribed an order of succession for the office of Secretary of Homeland Security. *See* Exec. Order No. 13753, 81 Fed. Reg. 90667 (Dec. 9, 2016) ("EO 13753"). Six days later, then-Secretary Jeh Johnson signed a revision to a document the agency uses to compile orders of succession and delegations of authority for various positions in DHS. *DHS Orders of Succession and Delegations of Authorities for Named Positions*, DHS Delegation No. 00106, Revision No. 08 (Dec. 15, 2016) ("Revision 8") (signed at page 3), Ex. A hereto. In Part II.A of that revised document, Mr. Johnson stated that "[i]n case of the Secretary's death, resignation, or inability to perform the functions of the Office, the orderly succession of officials is governed by [EO] 13753." *Id.* at 1, pt. II.A. This was not an order of the Secretary (since at the time the Secretary lacked the authority to designate an order of succession); it only noted that the President's list in EO 13753 would control the order of succession. In Part II.B, Secretary Johnson separately exercised his delegation authority under 6 U.S.C. § 112(b)(1), "hereby delegat[ing]" to enumerated officials "[his] authority. . . in the event [he is] unavailable to act during a disaster or catastrophic emergency." *Id.* at 1, pt. II.B. The list of officials to whom Mr. Johnson delegated his authority was set out in Annex A to Delegation 00106. *Id.* at A-1.

When Secretary Johnson revised Delegation 00106, Congress had not yet given the Secretary the authority to designate an order of succession. It did so on December 23, 2016. Pub. L. No. 114-328, § 1903, 130 Stat. 2000, 2672 (Dec. 23, 2016). That designation authority was first exercised by a subsequent Secretary, Secretary Nielsen. On April 9, Secretary Nielsen issued an order titled "Amending the Order of Succession in the Department of Homeland Security." Designation of an Order of Succession for the Secretary (Apr. 9, 2019) ("April 2019 Order"), Ex. B hereto. The order states:

> 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:
>
> Annex A . . . of Delegation No. 00106 is hereby amended by striking the text of such Annex in its entirety and inserting the following in lieu thereof:
>
> Annex A. Order for Delegation of Authority by the Secretary of the Department of Homeland Security.
>
> [A numbered list of 18 officials appears here].
>
> No individual who is serving in an office herein listed in an acting capacity, by virtue of so serving, shall act as Secretary pursuant to this designation.

Id. at 2.

By its terms, the order "designate[s] the order of succession for the Secretary" under 6 U.S.C. § 113(g)(2), the provision that authorizes the Secretary to designate an order of succession for her office. It does so by revising the list of officials in Annex A, which previously had applied only to delegations of authority under § 112(b)(1), and by using the revised list as the new order of succession as well as delegation. The order thus harmonized the order of succession for vacancies with the order of delegation in cases of emergency.

Secretary Nielsen's order superseded the order of succession previously prescribed by EO 13753 because it applied "notwithstanding" the FVRA. *See* 6 U.S.C. § 113(g)(2). Mr. McAleenan, the Senate-confirmed Customs and Border Protection Commissioner, became Acting Secretary

under Ms. Nielsen's order when Ms. Nielsen resigned.[5]

Ms. Nielsen exercised her authority to "designate the order of succession" under "6 U.S.C. § 113(g)(2)." April 2019 Order at 2. The order's signed transmittal memorandum confirms that a new order of succession was being established. The memorandum states: "By approving the attached document [the order], you will designate your desired order of succession for the Secretary of Homeland Security in accordance with your authority pursuant to Section 113(g)(2) of title 6, United States Code." *Id.* at 1; *see also id.* (noting Secretary's "approval of the attached document" will designate officers to serve as Acting Secretary under 6 U.S.C. § 113).

The fact that Annex A formerly applied only to emergency succession scenarios does not mean that EO 13753 controlled the order of succession when Secretary Nielsen resigned. This is because Secretary Nielsen's order harmonized the order of succession for vacancies with the order of delegation in cases of emergency. To be sure, DHS did not accurately update an internal delegation compilation—one key factor that led to the concerns about Mr. McAleenan's delegation. But the order and transmittal signed by Secretary Nielsen is the governing document, not the internal DHS compilation. The fact that the internal compilation was not accurately updated as an administrative matter to reflect that Secretary Nielsen's order superseded EO 13753—which it did as a matter of law—does not change the legal effect of her order.

Plaintiffs rely on other district court decisions that concluded that the list set out in EO 13753—not the list set out in Secretary Nielsen's April 9 order—controlled the order of succession when Ms. Nielsen resigned,[6] but this Court should not follow those decisions.[7]

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[5] The first two positions in Secretary Nielsen's order—the Deputy Secretary and Under Secretary for Management—were vacant at the time.

[6] *Casa de Md.*, 486 F. Supp. 3d at 957-60; *Immigrant Legal Res. Ctr.*, 491 F. Supp. 3d at 533-36; *Batalla Vidal*, 501 F. Supp. 3d at 129-32; *La Clinica de la Raza*, 2020 WL 7053313, at *6–7; *Pangea Legal Servs.*, 2021 WL 75756, at *4. *See also Nw. Immigrant Rts. Project v. USCIS ("NWIRP")*, No. 19-3283 (RDM), 2020 WL 5995206, at *14 (D.D.C. Oct. 8, 2020) ("assum[ing], without deciding," the same).

[7] Although the Government did not appeal those erroneous decisions, this Court should not hold that against the Government here. *See Mendoza*, 464 U.S. at 161 ("Unlike a private litigant who generally does not forego an appeal if he believes that he can prevail, the Solicitor General considers a variety of factors, such as the limited resources of the government and the crowded dockets of the courts, before authorizing an appeal.").

First, those decisions overlooked that Part II.A of DHS Delegation 00106 did not itself prescribe the order of succession; it merely identified the document (EO 13753) that did so. There was thus no need for Secretary Nielsen to amend the text of Part II.A.[8] By designating an order of succession under 6 U.S.C. § 113(g)(2), Secretary Nielsen's order superseded EO 13753 as a matter of law. Nothing more was required.

Second, those decisions concluded that Secretary Nielsen's order applied only when the Secretary was temporarily unavailable because of a disaster or emergency because the order merely revised Annex A of Delegation 00106—but in doing so, they conflated orders of succession and delegations of authority. When Secretary Nielsen issued her order, Annex A listed the officials to whom the Secretary had temporarily *delegated* authority under § 112(b)(1) during times of unavailability due to disaster or catastrophic emergency. *See* Revision 8 at 1, pt. II.B. But Secretary Nielsen's order put the list of officials in Annex A to an additional use under a different statutory authority. The order expressly made the revised Annex A the order of *succession* under § 113(g)(2), which applies in cases of "absence, disability, or vacancy in office," 6 U.S.C. § 113(g)(1). These district court decisions focus solely on the language of the order that amends Annex A and ignore the order's critical language. *See, e.g.*, April 2019 Order at 2 ("By the authority vested in me as Secretary of Homeland Security, *including . . . 6 U.S.C. § 113(g)(2), I hereby designate the order of succession* for the Secretary of Homeland Security *as follows . . . .*" (emphases added)); *id.* (noting the order is a "designation" of who "shall act as Secretary").

The intent of Secretary Nielsen's order was confirmed by actions surrounding its execution. Secretary Nielsen personally swore in Mr. McAleenan as Acting Secretary under her order,[9] and DHS

[8] When Acting Secretary McAleenan later issued a new order of succession on November 8, 2019, his order amended the text of Part II.A of Delegation 00106. Amendment to the Order of Succession for the Secretary (Nov. 8, 2019) ("November 2019 Order"), Ex. C. hereto. The amending language merely provided additional clarity about the operative order of succession; it did not (and could not) change the prior legal effect of Secretary Nielsen's order.

[9] The Border Observer, CBP Commissioner Kevin McAleenan sworn-in as the Acting DHS Secretary; Opens New DHS Headquarters, *available at* https://theborderobserver.wordpress.com/2019/04/11/cbp-commissioner-kevin-mcaleenan-sworn-in-as-the-acting-dhs-secretary/ (last visited July 23, 2021); Homeland Security, Farewell Message from Secretary Kirstjen M. Nielsen (Apr. 10, 2019), *available at* https://www.dhs.gov/news/2019/04/.10/farewell-message-secretary-kirstjen-m-

treated Mr. McAleenan as the Acting Secretary and identified § 113(g)(2) as the authority for the acting designation in its official notice to Congress of his acting service, *see* Letter from Neal J. Swartz, Associate General Counsel for General Law, DHS, to Hon. Michael R. Pence, President of the Senate (Apr. 11, 2019, Ex. D hereto). Even if the order's terms were ambiguous, that contemporaneous understanding would be entitled to significant weight. *Cf. Kisor v. Wilkie*, 139 S. Ct. 2400, 2415–18 (2019).

Mr. McAleenan, as the designated Acting Secretary, was authorized to exercise all of the Secretary's authority because "an acting officer is vested with the same authority that could be exercised by the officer for whom he acts." *In re Grand Jury Investigation*, 916 F.3d 1047, 1055 (D.C. Cir. 2019); *see also Ryan v. United States*, 136 U.S. 68, 81 (1890). This included the Secretary's authority to "designate such other officers of the Department in further order of succession to serve as Acting Secretary." *See* 6 U.S.C. § 113(g)(2). Acting Secretary McAleenan acted under this authority when he amended the succession order, under which Mr. Wolf would become Acting Secretary upon Mr. McAleenan's resignation. *See* November 2019 Order.

Plaintiffs argue that even if Mr. McAleenan properly served under Secretary Nielsen's order, he still could not designate the succession order that Mr. Wolf began serving under in November 2019 because an Acting Secretary cannot designate an order of succession. Pls.' Mem. at 15 (relying on *Nw. Immigrant Rts. Project*, 2020 WL 5995206, at *24). The Government's position is that this argument is not correct, and instead an Acting Secretary may designate a new order of succession under § 113(g)(2).

An acting official is vested with *all* the authority of the vacant office. *See In re Grand Jury Investigation*, 916 F.3d at 1055. This includes authority under the Appointments Clause. *See id.* at 1054–55 ("Acting Attorney General Rosenstein was the 'Head of Department' *under the Appointments Clause* as to the matter on which the Attorney General was recused." (emphasis added)); *id.* at 1055 (holding that "an Acting Attorney General becomes the head of the Department when *acting in that capacity because an acting officer is vested with the same authority* that could be exercised by the officer for

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nielsen (last visited July 23, 2021) (Ms. Nielsen's farewell message to DHS noting that Mr. McAleenan "will now lead DHS as your Acting Secretary").

whom he acts[]" (emphasis added)). That same reasoning applies to an Acting Secretary under § 113(g)(2). Indeed, it would be unusual for an acting principal officer to be vested with every power of a vacant office *except* the power to appoint inferior officers.

The FVRA does not limit this authority. Relying on the FVRA's requirement that an agency-specific vacancy statute must "expressly" grant the head of a Department the power to designate successors, the *NWIRP* court concluded that an Acting Secretary cannot exercise the § 113(g)(2) authority because no statute expressly gives the Acting Secretary this authority. *See NWIRP*, 2020 WL 5995206, at *19. But § 113(g)(2) operates "[n]otwithstanding" the FVRA. *See* 6 U.S.C. § 113(g)(2). Thus, the FVRA, including its exclusivity rule in 5 U.S.C. § 3347(a), does not limit the authority conferred by § 113(g)(2). And even if § 3347 did apply, it does not support the court's conclusion. Section 113(g)(2) expressly authorizes the Secretary of Homeland Security, (the "head of an Executive department," 5 U.S.C. § 3347), to designate an acting official. That is all that is required for § 113(g)(2) to come within the exception to the FVRA's exclusivity. 5 U.S.C. § 3347(a)(1). The court was thus incorrect to conclude that "statutory language [must] expressly vest[] the acting official with [the same] authority" held by the Secretary. *See NWIRP*, 2020 WL 5995206, at *19. Indeed, an "acting officer is vested with the same authority that could be exercised by the officer for whom he acts," "by virtue of becoming the [a]cting" official, not because of a separate grant of statutory authority. *See In re Grand Jury Investigation*, 916 F.3d at 1055–56.

In sum, as the lawfully serving Acting Secretary, Mr. McAleenan had the power to designate an order of succession under § 113(g)(2), *see* Am. Compl. ¶ 83; *see also* November 2019 Order, and Mr. Wolf lawfully was designated as Acting Secretary under this order.[10] Mr. Wolf's delegation of signatory authority to Mr. Brekke was therefore valid, rendering the 2021 Wage Prioritization Rule valid under the HSA and the FVRA.

[10] Defendants do not here rely on various designations made by Mr. Gaynor that followed court rulings rejecting the designation of Mr. Wolf. *See* Pls.' Mem. 13-16.

II. THE 2021 WAGE PRIORITIZATION RULE COMPORTS WITH THE INA[11]

When faced with evaluating an agency's interpretation of a statute it is charged with administering, the Court should apply the two-step framework of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).[12] First, the Court must determine whether "Congress has spoken to the precise question at issue." *Id.* at 842. "If the intent of Congress is clear, that is the end of the matter" and both the court and the agency "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. If, however, "the statute is silent or ambiguous with respect to the specific issue," the court should defer to the agency's interpretation so long as it is "based on a permissible construction of the statute." *Id.* at 843. That is true "even if the agency's reading differs from what the court believes is the best statutory interpretation." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005); *see also Or. Rest. & Lodging Ass'n*, 816 F.3d at 1086 (citations omitted) ("Even if we believe the agency's construction is not the *best* construction, it is entitled to 'controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute.'") (citations omitted).

A. The INA Is Silent With Respect to How to Order Simultaneous Submissions in an Environment Where Demand for H-1B Visas Far Exceeds Numerical Limitations.

Plaintiff argues that the 2021 Wage Prioritization Rule must be set aside because it "irreconcilably conflicts with the plain text of the INA," Pls.' Mem. 5, but the INA is silent on the particular issue that the 2021 Wage Prioritization Rule intends to address: how to handle simultaneous submissions. *See Walker Macy LLC v. USCIS*, 243 F. Supp. 3d 1156, 1170 (D. Or. 2017) ("The relevant question is whether the statute unambiguously directs how to handle multiple submissions received on the same day or at the same time. The statute does not. It provides no guidance on how to 'order' simultaneous submissions."). Rather, the statute sets annual limitations on the number of aliens who may be issued initial H-1B visas or otherwise provided H-1B nonimmigrant status, and it

[11] Because an adverse decision on the FVRA issue would be dispositive of the case, the Court need not reach Plaintiffs' other arguments if it disagrees with Defendants' argument regarding the validity of Mr. Wolf's service as Acting Secretary of Homeland Security.

[12] Before turning to *Chevron*'s two-step framework, the court must first determine whether the agency interpretation at issue is one to which *Chevron* applies. *See Or. Rest. & Lodging Ass'n v. Perez*, 816 F.3d 1080, 1086 n.3 (9th Cir. 2016).

provides that noncitizens "shall be issued [H-1B] visas (or otherwise provided nonimmigrant status) in the order in which petitions are filed for such visas." 8 U.S.C. § 1184(g)(3). Plaintiffs characterize this as an "unmistakable statutory command," and criticize DHS for failing to issue visas in the order in which petitions are filed. But Plaintiffs' argument glosses over the fact that because "an indiscriminate application of this statutory language would lead to absurd or arbitrary results[,]" "the longstanding approach to implementing the numerical limitation has been to project the number of petitions needed to reach the numerical limitation" rather than issuing visas in a strict order. 86 Fed. Reg. at 1,695. Plaintiffs do not appear to seriously challenge that longstanding approach,[13] but rather read into the statute an unspoken command that DHS may not rely on any substantive criteria when ordering simultaneous submissions. But the INA contains no such command. In fact, the statute does not specify how petitions must be selected and counted toward the numerical allocations when USCIS receives (or expects to receive) more petitions on the first day than are projected as needed to reach the H-1B numerical allocations. In light of that statutory silence, "USCIS has discretion to decide how best to order those petitions," *Walker Macy*, 243 F. Supp. 3d at 1176, and the 2021 Wage Prioritization Rule is an exercise of that discretion.

For at least the last decade, H-1B petitions have consistently exceeded the number needed to reach the cap for such visas. *See* 85 Fed. Reg. at 69,237; *see also id.* at 69,239 (discussing the "rush of simultaneous submissions at the beginning of the H-1B petition period"). From 2013 to 2020, USCIS received more H-1B petitions in the first five days of filing than the annual H-1B numerical allocations. *Id.* In such circumstances, "[a] rote interpretation of" the INA's requirement that visas be issued in the order in which petitions are filed "is impossible" because of the sheer volume of simultaneous applications. *Id.* at 69,238 (explaining that "under the prior selection process, . . . USCIS received hundreds of thousands of full H-1B petitions in the mail on the same day and had no legitimate way to determine which petition was 'filed' first").

[13] Plaintiffs broadly claim that the INA's statutory command that noncitizens shall be issued H-1B visas in the order in which petitions are filed "leaves no room for agency discretion," Pls.' Mem. 6, but Plaintiffs do not appear to challenge the agency's prior reliance on random selection as a means of handling simultaneous submissions, nor the registration requirement.

Over the years, DHS has taken several steps to facilitate the selection of H-1B cap-subject petitions in such circumstances. As explained above, in 2005, USCIS promulgated an interim rule allowing for the first time a random selection process, if necessary, to select between petitions received on the "final receipt date." 70 Fed Reg. at 23,778. Then in 2008**,** USCIS promulgated a new interim rule providing for random selection from all applications received in the first five business day, if the number to meet the statutory cap was met in those five days. 73 Fed. Reg. at 15,392. In 2019, DHS promulgated a final rule implementing the current H-1B registration process to facilitate the selection of H-1B cap-subject petitions. *See generally* 84 Fed. Reg. 888. Under that rule—which Plaintiffs do not challenge here—petitioners seeking to file H-1B petitions subject to the regular cap must first electronically register with USCIS during a designated registration process. *Id.* at 888. "[O]nly those whose registrations are selected . . . will be eligible to file an H-1B cap-subject petition for those selected registrations during the associated filing period." *Id.* at 889. The registration requirement reduces the burden to both petitioners and the government of an oversubscribed visa system in which petitions submitted in the early days of the relevant period can far exceed the number of available visas. Specifically, the registration system benefits petitioners who are not selected by allowing them to avoid the costly and time-intensive preparation and filing of an entire H-1B petition only to be rejected. *Id.* at 890. It also benefits the agency, which no longer has to "receive, handle, and return large numbers of petitions that are currently rejected because of excess demand." *Id.* And the registration period avoids the race for H-1B petitioners to submit their petitions in the first days of the filing period or risk being shut out of the program.

With the registration requirement in place, if the number of registrations does not exceed the number projected as needed to reach the numerical limitations, USCIS will select all properly submitted registrations. In the event that registrations exceed the number projected as needed to reach the numerical limitations (which is to be expected given the oversubscription of the program for the past ten years), however, the agency selects registrations and only those prospective petitioners with valid, selected registrations will be eligible to file H-1B cap-subject petitions for the beneficiary named in their selected registration(s). Indeed, that is precisely what occurred the first time the

registration system was implemented in 2020, when USCIS received far more H-1B registrations in the initial registration period than projected as needed to reach the annual H-1B numerical allocations. *See* 85 Fed. Reg. at 69,237-38.[14] Accordingly, the 2021 Lottery Rule prioritizes certain registrations (or petitions, if the registration requirement is suspended) only where the agency is already tasked with choosing between what would otherwise be simultaneous submissions—in other words, where the INA's silence shows that "Congress left to the discretion of USCIS how to handle simultaneous submissions[.]" *Walker Macy*, 243 F. Supp. 3d at 1176.

Plaintiffs may try to argue that an electronic system would allow the agency to more easily order submissions by time of receipt than a system that relies on mailed-in petitions, and thus that the agency should select registrations based solely on submission time. But as the agency explained in its proposed rule and affirmed in the 2021 Wage Prioritization Rule, such a requirement is still "impossible to apply under the current electronic registration system because it would result in hundreds of thousands of registrants uploading registration information online at the exact same moment, at best leaving computer speed as the determinant as to who registered first." 85 Fed. Reg. at 69,238; *see also* 86 Fed. Reg. 1,695 n.71 ("The availability of electronic submission of H-1B registrations has not alleviated this issue as multiple registrations can still be submitted simultaneously."). As anyone who has ever tried to purchase in-demand concert tickets online knows well, there is an inherent arbitrariness to who is able to successfully load the same website as thousands of other people simultaneously, and there is no reason to preference such arbitrariness over another selection process. *Cf. Walker Macy*, 243 F. Supp. 3d at 1175 (discussing the arbitrariness of "taking the petitions (or portion of the petitions) that by chance were sent by the [common] carrier that just happened to deliver them first on a particular day").

[14] During the initial registration period, USCIS received 274,237 H-1B registrations and initially selected 106,100 registrations (the number projected as needed to reach the numerical limit); USCIS later selected an additional 18,315 registrations. Overall, the number of registrations received (274,237) was more than double the total number selected (124,415). *See* AR003489-90; *see also* USCIS, H-1B Electronic Registration Process, *available at* https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-electronic-registration-process (last visited July 23, 2021).

B. The 2021 Wage Prioritization Rule Provides a Reasonable Mechanism for Ordering Simultaneous Submissions.

As DHS explained in the 2021 Wage Prioritization Rule, implementing random selection is one reasonable way to order these registrations. 86 Fed. Reg. at 1,677. But DHS determined that so too is prioritizing registrations based on wage levels. DHS reached that conclusion after determining that such prioritization is more considerate of what it viewed as the dominant purpose of the H-1B visa program.[15] As explained above, 8 U.S.C. § 1184(g)(3) offers no guidance on how USCIS should prioritize H-1B petitions (or registrations) when the agency receives a deluge of simultaneous or near-simultaneous submissions that far exceed the statute's numerical limitations. In the absence of such guidance, DHS turned to what it viewed as an overarching purpose of the H-1B visa program: "help[ing] U.S. employers fill labor shortages in positions requiring highly skilled workers." 86 Fed. Reg. at 1698; *see also id.* at 1697 ("By changing the selection process, for these years of excess demand, from a random lottery selection to a wage-level-based selection process, DHS will implement the statute more faithfully to its dominant legislative purpose, increasing the chance of selection for registrations or petitions seeking to employ beneficiaries at wages that would equal or exceed the level IV or level III prevailing wage for the applicable occupational classification."); *see also* 86 Fed. Reg. at 1698 ("While the random lottery selection process is a reasonable solution, DHS believes that an allocation generally based on the highest OES prevailing wage level that the proffered wage equals or exceeds better fulfills Congress' stated intent that the H-1B program help U.S. employers fill labor shortages in positions requiring highly skilled workers."). In reaching that conclusion, DHS considered legislative history and, based on that review, concluded at that time that selection by corresponding wage level is more faithful to its interpretation of legislative intent and the purpose of

[15] Plaintiffs note that in 2019, DHS stated in response to a comment on the Registration Rule that "DHS believe[d] . . . that prioritization of selection on other factors, such as salary, would require statutory changes." 84 Fed. Reg. at 914. But, as DHS explained in the 2021 Lottery Rule, that statement was not accompanied by further analysis regarding that conclusion and "upon further review and consideration of the issue . . . , DHS concluded that the statute is silent as to how USCIS must select H-1B petitions, or registrations, to be filed toward the numerical allocations in years of excess demand." 86 Fed. Reg. at 1,695. An administrative agency is not forbidden from changing its mind upon further review and consideration, and DHS has explained why it now believes it has the authority to issue this rule. *Cf. Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) ("Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.").

the H-1B program. *See* 86 Fed. Reg. at 1697 n.84 (quoting H.R. Rep. 101-723(I) (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6710, 6721).

Looking to the policy aims that inform a statute is a reasonable means of choosing between a range of options. The analysis here is quite different from the cases cited by Plaintiffs, *see* Pls.' Br. 9, because this is not a case where a clear statutory provision runs up against the statute's fundamental purpose—rather, as explained above, this is case where the statute is silent on how best to handle this specific scenario, and the agency has discretion to choose among reasonable options. *See Chevron*, 467 U.S. at 843. In that case, it is entirely reasonable for an agency to choose among reasonable courses of action based on its interpretation of—and prioritization among—the statute's various policy goals.

"Congress left to the discretion of USCIS how to handle simultaneous submissions," *Walker Macy*, 243 F. Supp. 3d at 1176, and DHS determined that prioritizing and selecting applications based on OES wage levels is a reasonable exercise of such discretion in years where the number of H-1B visas sought exceeds the numerical limitations imposed by statute.

III. DHS RESPONDED SUFFICIENTLY TO THE PUBLIC COMMENTS

In the course of the rulemaking at issue here, DHS adequately responded to all "significant" comments, that is, "those which 'raise relevant points, and which, if adopted, would require a change in the agency's proposed rule.'" *Safari Aviation Inc. v. Garvey*, 300 F.3d 1144, 1151 (9th Cir. 2002) (quoting *Am. Mining Cong. v. EPA*, 965 F.2d 759, 771 (9th Cir. 1992)); *see* 86 Fed. Reg. at 1,679. Plaintiffs highlight two comments that, they allege, DHS failed to adequately address. Pls.' Mem. 17-19. However, contrary to Plaintiffs' contentions, DHS did address the issues raised by those comments with reasoned explanations. That is all that it was required to do. While an agency's response to significant public comments must do more than simply "[n]od[ ] to concerns raised by commenters only to dismiss them in a conclusory manner," *Gresham v. Azar*, 950 F.3d 93, 103 (D.C. Cir. 2020), this obligation "is not 'particularly demanding,'" *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 441–42 (D.C. Cir. 2012) (quoting *Pub. Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993)). "The agency's explanation must simply enable a reviewing court to see what major

issues of policy were ventilated by the informal proceedings and why the agency reacted to them the way it did." *Alvarado Cmty. Hosp. v. Shalala*, 155 F.3d 1115, 1122 (9th Cir. 1998) (citation omitted). An agency need not "discuss every item of fact or opinion included in the submissions made to it." *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 16 (D.C. Cir. 2015) (citation omitted).

First, Plaintiffs reference two comments asserting that the 2021 Wage Prioritization Rule, by prioritizing relatively higher-paid noncitizens, will have the effect of preferencing late-career individuals over early-career, but potentially more highly skilled, individuals, contrary to DHS's own stated goal of "prioritizing noncitizens by skill level." Pls.' Mem. 17-18. As Plaintiffs acknowledge however, DHS did respond to these comments. *Id.* at 18 (citing 86 Fed. Reg. at 1,682). And that response was not, as Plaintiffs assert, a "conclusory dismissal." DHS agreed that, "in years of excess demand, relatively lower-paid or lower-skilled positions will have a reduced chance of selection." 86 Fed. Reg. at 1,682. However, DHS reasonably noted that an employer could choose to offer a recent foreign graduate a higher wage, either to increase the chances of selection or simply because of market forces. *Id.* That this statement was a reasonable response, and not a conclusory brush-off, is emphasized by the fact that this possibility, that recent graduates could garner higher salaries, is an option raised as a reality by another commenter. *See id.* at 1,680 (describing commenter "knowing firsthand that new graduates regularly receive job offers at level II wages or above from large technology companies."). Moreover, as DHS explained later, "a random selection is not optimal," *id.* at 1,682, and that, "with the current random selection process, even the most talented foreign student may have less than a 50 percent chance of selection." *Id.* at 1,684. DHS reasoned that, by moving away from random selection, "[t]his rule will increase the chance of employment at the higher wage levels and thus may facilitate the selection of the best and brightest students for cap-subject H-1B status." *Id.* In addition, DHS suggested that recent foreign graduates "can gain the necessary skills and experience to warrant prevailing wage levels II or above" through participation in Optional Practical Training ("OPT"), *id.* at 1,680, a one-year (or longer for STEM graduates) period in which a student is able to work under a student visa and which is unaffected by the new rule, and, further, that the "selection order increases the chance of selection" for people "who have earned a master's

or higher degree from a U.S. institution of higher education." *Id.* at 1,682. Thus, DHS reasonably responded that the rule does not, as Plaintiffs contend, necessarily exclude recent graduates.

In any event, to the extent it reduces the chance of selection for recent graduates who will be paid entry-level wages, DHS reasoned that wage prioritization was more considerate of what it viewed as the primary purpose of the H-1B visa program, "help[ing] U.S. employers fill labor shortages in positions requiring highly skilled workers." *Id.* at 1,698; *see id.* at 1,682 (stating "selection based on the highest wage level that a proffered wage equals or exceeds is more consistent with the primary purpose of the statute"). DHS reasonably concluded that wage prioritization selection is more likely to reach higher skilled workers than a not-"optimal" random selection. Moreover, "employers that might have petitioned for a cap-subject H-1B worker to fill relatively lower-paid, lower-skilled positions, may be incentivized to hire available and qualified U.S. workers for those positions." *Id.* at 1,687.

DHS was not required to provide more explanation than this in responding to these comments. "[A]cknowledg[ing] the comments" and "provid[ing] a reasoned response," as it did, was all DHS was required to do. *Safari Aviation Inc.*, 300 F.3d at 1151. The Court "may not set aside agency action simply because the rulemaking process could have been improved; rather, [it] must determine whether the agency's path may reasonably be discerned." *Altera Corp. & Subsidiaries v. Comm'r*, 926 F.3d 1061, 1080 (9th Cir. 2019) (quotation marks and citation omitted), *cert. denied*, 141 S. Ct. 131 (2020). At bottom, Plaintiffs simply disagree with the policy choices made by DHS. But that is not a basis to overturn those policies. *See, e.g., Oberdorfer v. Bureau of Land Mgmt.*, 343 F. App'x 243, 244 (9th Cir. 2009); *see also Am. Whitewater v. Tidwell*, 770 F.3d 1108, 1116 (4th Cir. 2014) ("[T]he APA does not give us license to second-guess an agency's well-reasoned decision simply because a party disagrees with the outcome.").

Second, Plaintiffs contend that DHS did not respond to assertions of widespread reliance interests on the previous, random-lottery-based system for issuing H-1B visas. Pls.' Mem. 19. However, Plaintiffs overstate the nature of the cited comments on this issue. To the extent these letters raised reliance interest issues, such concerns were either embedded within arguments about

potential impacts to recent graduates, *see* Compete America Comment, at 4, ARPC001894, or part of a generalized statement regarding the overall effect of "government heavy-handedness" in this and other immigration regulations, *see* Baselice Comment, at 6, ARPC002171. DHS was not required to extract from these incidental remarks, and then respond to, a specific concern about reliance interests.

In any event, DHS, adequately addressed the reliance interests. First, it proactively addressed reliance in its notice of proposed rulemaking, concluding that "the importance of prioritizing selection generally based on the highest prevailing wage level that a proffered wage equals or exceeds outweighs any reliance interests of petitioners in a random H-1B cap selection process." 85 Fed. Reg. at 69,244; *see Safari Aviation Inc.*, 300 F.3d at 1152 (holding that agency's "failure to examine [plaintiff's] comments before promulgating the final rule is harmless" where, *inter alia*, the issues "were adequately addressed during previous rulemaking proceedings"). Second, in the rule itself, DHS explained that "[t]his rule does not affect current H-1B employees (unless such workers become subject to the H-1B numerical allocations in the limited circumstance that their cap-exempt employment terminates) nor does the rule change the eligibility criteria to qualify for an H-1B visa." 86 Fed. Reg. at 1,688. Finally, DHS further addressed reliance issues when it delayed the effective date of the rule so that the new system would most likely not apply until FY 2023. *See* 86 Fed. Reg. at 8,546. In that notice, DHS agreed that "providing the regulated public with only 60 days (with a current effective date of March 9, 2021) to adapt to new regulatory requirements and modifications of the H-1B registration system before the FY 2022 H-1B cap registration season would cause confusion and very likely would significantly disrupt the orderly administration of the H-1B cap," *id.,* and that it was advisable to delay implementation to ensure "the regulated public has enough time to adjust to the new registration selection process." *Id.* at 8,547.

Contrary to Plaintiffs' assertion, therefore, DHS did adequately address the reliance interests of affected parties. The Supreme Court has held that, when an agency changes its policy, it must "be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" *Encino Motorcars, LLC*, 136 S. Ct. at 2126. In such circumstances, the agency

must give a "reasoned explanation . . . of the Department's change in position." *Id.* That standard is met here.

In sum, DHS articulated a thoughtful and comprehensive rationale for adopting the 2021 Lottery Rule challenged by Plaintiffs, and that methodology is consistent with the discretion provided to DHS under the relevant statutory provisions. DHS considered and responded to significant comments. The 2021 Lottery Rule and the rulemaking record thus demonstrate that 2021 H-1B Lottery Rule is reasonable, and not arbitrary and capricious.

CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment should be granted, and Plaintiffs' motion for summary judgment should be denied.

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Respectfully submitted,

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