UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TAHIRIH JUSTICE CENTER, *et al.*, Plaintiffs, v. ALEJANDRO MAYORKAS, *et al.*, Defendants.	Civil Action No. 21-124 (TSC)

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

Page(s)

STATUTES AND LEGISLATIVE MATERIALS

OTHER AUTHORITIES

INTRODUCTION

In the waning days of the last administration, an official with no authority to helm the Department of Homeland Security tried to commit the Department to an overhaul of the nation's asylum system, approving a swath of changes that would decimate critical protections for individuals fleeing persecution and torture. Nearly four years later, the government has finally thrown in the towel, acknowledging that it cannot defend the legality of Chad Wolf's designation as DHS Acting Secretary or his approval of the Anti-Asylum Rule challenged here. And since Plaintiffs filed their motion for partial summary judgment, yet another court has found Wolf's appointment patently unlawful, calling the government's defense of that appointment "at best, untenable, and at worst, frivolous." *Gonzales & Gonzales Bonds & Ins. Agency, Inc. v. DHS*, 107 F.4th 1064, 1072 (9th Cir. 2024). At least a dozen federal judges have now weighed in on the dispute at the center of this case, and each has agreed with Plaintiffs that Wolf had no authority to be Acting Secretary or approve DHS policies like the Anti-Asylum Rule.

Although Defendants no longer contest the illegality of Wolf's tenure, they say there should be no consequences for this illegality, stirring up a flurry of objections to Plaintiffs' right to bring this suit and obtain relief. But nothing sticks.

Defendants' threshold objections are easily rejected. Binding precedent and Plaintiffs' unrebutted declarations establish Plaintiffs' standing to challenge the Rule. Plaintiffs have shown—without contradiction from Defendants—that implementing the Rule would "injure[] [each Plaintiff's] interest in promoting its mission" and lead each Plaintiff to "use[] its resources to counteract that injury," *ASPCA v. Feld Ent., Inc.*, 659 F.3d 13, 25 (D.C. Cir. 2011), making this a textbook case of organizational injury under D.C. Circuit precedent. *See PETA v. USDA*, 797 F.3d 1087, 1094 (D.C. Cir. 2015). Perhaps the most telling sign of how clearly Plaintiffs fall

within this settled framework is Defendants' effort to undermine that framework. Instead of disputing Plaintiffs' evidence or distinguishing it from precedent, Defendants attack the entire concept of organizational standing. But this Court is not at liberty to disregard that precedent. And, try as they might, Defendants cannot make *FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367 (2024), say what they want it to say. That decision reaffirmed that "organizations may have standing 'to sue on their own behalf for injuries they have sustained,'" including when illegal action has "directly affected and interfered with [their] core business activities," as here. *Id.* at 393, 395 (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)).

Defendants' other threshold objections are equally meritless. Plaintiffs easily satisfy the "lenient" zone-of-interests test, *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014), because their asserted interests are more than "marginally related" to the purposes of the Immigration and Nationality Act, *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012) (quoting *Clarke v. Secs. Indust. Ass'n*, 479 U.S. 388, 399 (1987)), and these interests "coincide systemically, not fortuitously with those of [the INA's] intended beneficiaries," *Twin Rivers Paper Co. LLC v. SEC*, 934 F.3d 607, 616 (D.C. Cir. 2019) (quotation marks omitted). Moreover, nothing in 8 U.S.C. § 1252 suggests any intent to "impliedly preclude" suits like this one.

Just as Plaintiffs are entitled to bring this suit and to prevail on the merits, they are entitled to relief. Again, precedent dictates the result. When agency rulemaking violates the law, "vacatur is the default response" under the Administrative Procedure Act. *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 985 F.3d 1032, 1052 (D.C. Cir. 2021); *see Long Island Power Auth. v. FERC*, 27 F.4th 705, 717 (D.C. Cir. 2022) (vacatur is "the normal remedy under the APA" for "unlawful agency action"). Defendants offer no basis for departing from the

normal remedy here, merely recycling their unsupported assertion that Plaintiffs "will not suffer harm" from prolonging the status quo. Defs.' Cross-Mot. & Opp. ("Opp.") at 31 (July 23, 2024) (ECF No. 59). *But see* Mem. Op. & Order at 8-9 (Mar. 4, 2024) (ECF No. 54) (disagreeing with that assertion). Equally unpersuasive is Defendants' novel argument—accepted by no court and already rejected by several—that vacatur is equivalent to an injunction, and that therefore the "[l]imit on injunctive relief" in 8 U.S.C. § 1252(f)(1) is also a limit on vacatur.

Separate from APA vacatur, the Rule also must be held void under the Federal Vacancies Reform Act, which imposes unique sanctions for unlawfully wielding the duties of vacant offices. Under the FVRA's penalty provision, agency actions that violate the rules for acting appointments "shall have no force or effect" and "may not be ratified." 5 U.S.C. § 3348(d). Thus, "the general rule" is that "actions taken in violation of the FVRA are void *ab initio*," *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 298 n.2 (2017), a heightened penalty that safeguards the critical separation-of-powers constraints of the Appointments Clause. Although Defendants argue that this penalty applies only to "nondelegable" duties, that reading cannot be squared with the FVRA's text, structure, history, or purpose. Most notably, it would immunize virtually all FVRA violations from the FVRA's own enforcement mechanism. Here, for instance, because all duties of the DHS Secretary are delegable, *see* 6 U.S.C. § 112(b)(1), Defendants' position is that no illegal use of the Secretary's powers during a vacancy can *ever* be held void under the FVRA. Accepting that position "would eviscerate the FVRA's remedial scheme." *Asylumworks v. Mayorkas*, 590 F. Supp. 3d 11, 24 (D.D.C. 2022) (quotation marks omitted).

Finally, as Defendants do not seriously contest, Plaintiffs are entitled to a declaratory judgment that the Rule was issued unlawfully. This Court should provide that relief and vacate the Rule in its entirety, wiping this illegal measure off the books once and for all.

ARGUMENT

I. Defendants' Threshold Arguments Are Meritless.

A. Plaintiffs Have Standing.

Like an individual plaintiff, an organization can demonstrate standing to contest illegal action by showing an "actual or threatened injury in fact that is fairly traceable to the alleged illegal action and likely to be redressed by a favorable court decision." *Equal Rts. Ctr. v. Post Props., Inc.*, 633 F.3d 1136, 1138 (D.C. Cir. 2011) (quotation marks omitted). Defendants address only the first prong of this test, arguing that Plaintiffs "cannot establish a judicially cognizable injury." Opp. 9. But each Plaintiff has offered unrebutted evidence that if the Rule goes into effect, it will "injure[] [the organization's] interest in promoting its mission" and force each Plaintiff to "use[] its resources to counteract that injury." *ASPCA v. Feld Ent., Inc.*, 659 F.3d 13, 25 (D.C. Cir. 2011); *see* Pls.' Mot. for Part. Summ. J. ("MSJ") at 39-42 (May 31, 2024) (ECF No. 56-2). Those showings constitute a paradigmatic organizational injury under D.C. Circuit precedent. *See PETA v. USDA*, 797 F.3d 1087, 1094 (D.C. Cir. 2015).

Specifically, Plaintiffs have provided detailed declarations describing how the Rule's implementation would impair their missions of supporting asylum-seekers and providing legal and social services to low-income immigrants and immigrant survivors of gender-based violence. *See* Bangudi Decl. ¶ 3 (May 31, 2024) (ECF No. 56-5); Huang Decl. ¶¶ 4, 39 (May 31, 2024) (ECF No. 56-4). As Plaintiffs have explained, the Rule's "sweeping and devastating impact on the asylum eligibility of a majority of [Plaintiffs'] clients" would "increase the time and resources that [Plaintiffs'] attorneys must spend representing clients in asylum cases, evaluating potential new clients, and training pro bono partners." Bangudi Decl. ¶ 33; *see also* Huang Decl. ¶¶ 19-20, 22. For example, the Rule's attempt to eviscerate gender-based asylum claims would

"greatly complicate [Plaintiffs'] work, require new screening and evaluation techniques for [their] case intake procedures, and increase the number of hours that [their] staff and pro bono network must devote to each asylum case." Huang Decl. ¶ 23; *see also id.* ¶¶ 29-38 (similar effects from other provisions of the Rule).

This, in turn, would "reduce the number of asylum clients that [Plaintiffs] can represent," *id.* ¶ 22, divert resources from other priorities like supporting survivors of certain violent crimes, *id.* ¶¶ 19-20, 22, and jeopardize Plaintiffs' funding, *id.* ¶ 18; Bangudi Decl. ¶¶ 40-43. For instance, "[i]f the Rule went into effect," Tahirih "could lose the ability to assist survivors seeking asylum with [certain] grant funds" from restricted or reimbursement-based sources, "which would reduce [their] revenue, jeopardize [their] ability to keep receiving this funding, and in turn, jeopardize [their] ability to continue funding [their] operations." Huang Decl. ¶ 18. Ayuda would face a similar conundrum: it would be at risk of losing many competitive grants, including those "intended to serve specific population groups, like survivors of crime or domestic violence, who are not necessarily immigrants." Bangudi Decl. ¶ 40; *see also id.* (explaining that Ayuda competes "against organizations that provide different services to these populations that are unrelated to immigration relief," such as housing and protective orders).

Defendants do not dispute any of this, instead arguing that Plaintiffs "do not assert direct injury to themselves" because the harms that they assert are closely related to the harms that the Rule will inflict on their clients and other asylum-seekers. Opp. 10. But as the discussion above demonstrates, Plaintiffs do not assert third-party standing on behalf of their clients. *Cf.* Opp. 12 (citing *Kowalski v. Tesmer*, 543 U.S. 125, 130-34 (2004)). Nor do they claim that they have standing just because more of their clients may ultimately be denied asylum. Rather, Plaintiffs assert that the Rule will directly injure them by decreasing their fundraising abilities and making

it harder to conduct their own activities in service of their missions, including, but not limited to, serving their asylum-seeking clients. *See* MSJ 39-42.

Plaintiffs do not lose standing simply because the Rule *also* injures their clients. It has long been settled that a plaintiff organization may suffer harm in its own right even when a defendant's actions are directed at the organization's clients, members, or a general population that the organization serves. In the Supreme Court's paradigmatic organizational standing case, *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), the Court held that if the defendant's racial steering practices—directed at potential tenants, not the organization itself—frustrated the organization's efforts "to assist equal access to housing through counseling and other referral services" and caused the organization to divert resources to identifying and counteracting the unlawful practices, there "can be no question that the organization has suffered injury in fact." *Id.* at 379.

So too here. Plaintiffs have set forth undisputed evidence that the Rule undermines their missions of providing legal and social services to immigrant survivors of gender-based violence and low-income immigrants, and that it will impose new burdens and costs on Plaintiffs and impede their core activities in concrete ways. *See* MSJ 38-42. This Circuit has long recognized that such injuries are sufficient as a matter of law to establish an injury conferring standing. *See, e.g.*, *PETA*, 797 F.3d at 1094-97 (agency's allegedly unlawful action "perceptibly impaired" organization's work, requiring "staff attorney time not related to this litigation and related expenses"); *Abigail All. for Better Access to Devel. Drugs v. Eschenbach*, 469 F.3d 129, 132-33 (D.C. Cir. 2006) (organization's "counseling, referral, advocacy, and educational" efforts were allegedly "frustrated" by new agency requirements, resulting in diversion of time and resources); *Am. Anti-Vivisection Soc'y v. USDA*, 946 F.3d 615, 619 (D.C. Cir. 2020) (after agency allegedly

failed to issue legally required standards, organizations were "compelled to fill the void" by diverting resources to develop guidance and educational programs); *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 9 (D.C. Cir. 2016) ("new obstacles" stemming from changes in law "unquestionably [made] it more difficult for the [organizations] to accomplish their primary mission," requiring additional "expenditures"); *Action All. of Senior Citizens of Greater Phila. v. Heckler*, 789 F.2d 931, 937-38 (D.C. Cir. 1986) (allegedly unlawful regulations impeded organizations' "routine information-dispensing, counseling, and referral activities," resulting in "inhibition of their daily operations").

Perhaps recognizing that Plaintiffs' injuries are plainly cognizable under the case law in this Circuit, Defendants suggest that the Supreme Court's recent decision in *FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367 (2024), silently raised the bar for organizational standing. *See* Opp. 11. It did no such thing. *See Agostini v. Felton*, 521 U.S. 203, 207 (1997) ("lower courts" should never "conclude that [the Supreme Court's] more recent cases have, by implication, overruled an earlier precedent."). Rather, in *Alliance*, the Supreme Court applied long-established principles to hold that "an organization that has not suffered a concrete injury caused by a defendant's action cannot spend its way into standing simply by expending money to gather information and advocate against the defendant's action." 602 U.S. at 370. That has long been the rule in this Circuit. *See, e.g.*, *Abigail All.*, 469 F.3d at 133 ("[A]n organization is not injured by expending resources to challenge the regulation itself.").

Plaintiffs' expenditures in response to the Rule are of a different kind than those rejected in *Alliance*. Plaintiffs do not assert that money spent advocating or litigating a challenge to the Rule forms the basis for their standing; rather, they assert that the changes to the asylum

standards brought about by the Rule will force them to expend additional time and resources just to continue their core activities of providing legal and social services to immigrants.

Defendants dismiss these expenditures as "voluntary reallocation[s]," Opp. 12, but that is wrong as a matter of fact and irrelevant as a matter of law. To start, in providing the services to immigrants that are central to their missions, Plaintiffs will have no choice but to account for the changes to the asylum standards that the Rule effects. The Rule has "directly affected and interfered with [Plaintiffs'] core business activities," *Alliance*, 602 U.S. at 395, just as in *Havens* and the many D.C. Circuit cases recognizing standing in comparable circumstances.

Moreover, even assuming that such a diversion of resources would be "voluntary"—that Plaintiffs, if they wanted, could do nothing at all to address the sea change brought about by the Rule—that would "not automatically mean that it cannot [be] an injury sufficient to confer standing." *Equal Rts. Ctr.*, 633 F.3d at 1140; *see id.* (standing analysis does not "depend on the voluntariness or involuntariness of the plaintiffs' expenditures"). Rather, the question is whether Plaintiffs have shown that they will undertake "expenditures in response to, and to counteract, the effects of the defendants' alleged unlawful acts," *PETA*, 797 F.3d at 1097 (quotation marks omitted), as opposed to merely spending funds "in anticipation of litigation," *id.* (quoting *Equal Rts. Ctr.*, 633 F.3d at 1140). Here, Plaintiffs' undisputed declarations make clear that they have and will expend time and resources counteracting the effects of the unlawful Anti-Asylum Rule. That is a "'concrete and demonstrable injury' that suffices for purposes of standing." *PETA*, 797 F.3d at 1097 (quoting *Havens*, 455 U.S. at 379); *cf. FEC v. Cruz*, 596 U.S. 289, 297 (2022) (a financial injury "resulting from the application or threatened application of an unlawful enactment remains fairly traceable to such application, even if the injury could be described in some sense as willingly incurred").

Recognizing that Plaintiffs have standing to sue under these circumstances does not mean that "law firms may sue any time the law changes in a way that requires them to alter their business strategy." Opp. 12. Just as "there is no Article III doctrine of 'doctor standing,'" *Alliance*, 602 U.S. at 391, there is no Article III doctrine of lawyer standing. The Supreme Court had no trouble rejecting that "novel" argument, *id.*, while at the same time reaffirming that organizations "have standing to sue on their own behalf for injuries they have sustained," *id.* at 394 (quotation marks omitted), including when illegal action frustrates an organization's mission in ways that require corresponding expenditures. *See id.* at 395 (citing the example of *Havens*, where the defendant's actions "perceptibly impaired [the organization's] ability to provide counseling and referral services for low- and moderate-income homeseekers").

Indeed, in cases markedly similar to this one—challenges to rules brought by immigration legal service providers on the basis that such rules "directly conflict[] with [the] mission of providing a broad array of legal services to low-income immigrants and will impose new burdens and costs on the organization," *Nw. Immigrant Rts. Project v. USCIS*, 496 F. Supp. 3d 31, 46 (D.D.C. 2020)—courts have repeatedly found organizational standing. *See, e.g.*, *id.* (Ayuda as plaintiff); *Cap. Area Immigrants' Rts. Coal. (CAIR) v. Trump*, 471 F. Supp. 3d 25, 38-42 (D.D.C. 2020) (Tahirih as plaintiff); *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 663 (9th Cir. 2021).

In short, as the Supreme Court and D.C. Circuit have repeatedly held, illegal actions may give rise to judicially cognizable injuries when they directly undermine an organization's mission and burden its ability to carry out its basic activities. *See, e.g.*, *PETA*, 797 F.3d at 1094; *Abigail All.*, 469 F.3d at 132-33; *Am. Anti-Vivisection Soc'y*, 946 F.3d at 619; *League of Women Voters*, 838 F.3d at 8-9. Plaintiffs have met that standard here. At bottom, Defendants' quarrel

is with the well-established concept of standing for legal nonprofits, not with any of the undisputed facts regarding Plaintiffs' injuries in this case.

B. Plaintiffs' Claims Fall Within the Zone of Interests of the INA.

Defendants also argue that Plaintiffs' injury "does not fall within the zone of interests of 8 U.S.C. §§ 1101, 1158, 1225, 1229a, or 1231, the statutes that Plaintiffs seek to enforce." Opp. 12. This argument is meritless.

When a plaintiff invokes a statutory cause of action, courts may "consider whether [the plaintiff's] alleged injuries are 'arguably within the zone of interests to be protected or regulated by the statute.'" *CSL Plasma Inc. v. U.S. Customs & Border Prot.*, 33 F.4th 584, 589 (D.C. Cir. 2022) (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012)). For claims arising under the APA, the zone-of-interests test looks to "the 'substantive provisions' of the underlying statute, the 'alleged violations of which serve as the gravamen of the complaint.'" *Id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 175 (1997)). The test is "not jurisdictional," *id.* at 588, and the Supreme Court has made clear that, "in keeping with Congress's evident intent when enacting the APA to make agency action presumptively reviewable," it also "is not meant to be especially demanding," *Patchak*, 567 U.S. at 225 (quotation marks omitted). Rather, the test "forecloses suit only when a plaintiff's 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" *Id.* (quoting *Clarke v. Secs. Indust. Ass'n*, 479 U.S. 388, 399 (1987)).

Here, Plaintiffs' interests are plainly not "inconsistent" with the purposes of the INA. Nor are they "so marginally related" to those purposes that it is unreasonable to believe that Congress intended to permit this suit. As discussed above, Plaintiffs are nonprofit organizations

whose missions are to provide free or low-cost legal and social services to immigrant populations. Tahirih offers "free holistic services to women, girls, and all immigrant survivors of gender-based violence seeking legal immigration status under U.S. law," Huang Decl. ¶ 4, and Ayuda "strives to provide holistic, wrap-around services," including "legal, social services, and language access services[,] to low-income immigrants in Washington, D.C., Maryland, and Virginia," Bangudi Decl. ¶ 3. These interests fall squarely—and certainly "arguably"—within the zone of interests of the INA. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014) ("we have often conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff" (quotation marks omitted)).

Defendants claim otherwise because various INA provisions "focus on the interests of noncitizens applying for asylum or being removed . . . without evincing any desire to protect the interests of organizations that provide legal help to those noncitizens." Opp. 13. But the "zone of interests test does not require that the statute directly regulate the plaintiff, nor does it require specific congressional intent to benefit the plaintiff." *CSL Plasma*, 33 F.4th at 589. Instead, "the salient consideration . . . is whether the challenger's interests are such that they in practice can be expected to police the interests that the statute protects." *Amgen Inc. v. Smith*, 357 F.3d 103, 109 (D.C. Cir. 2004) (quotation marks omitted).

Plaintiffs easily pass this "lenient" test. *Lexmark*, 572 U.S. at 130. The Anti-Asylum Rule shapes asylum eligibility criteria, and a large portion of Plaintiffs' work is dedicated to helping immigrants apply for and obtain asylum, as well as educating other service providers on this issue. *See* Huang Decl. ¶ 17 (nearly 40% of Tahirih's clients have asylum claims); Bangudi Decl. ¶ 19 (Ayuda has nearly 300 open asylum cases). Thus, Plaintiffs are "parties whose interests coincide 'systemically, not fortuitously' with those of [the INA's] intended

beneficiaries." *Twin Rivers Paper Co. LLC v. SEC*, 934 F.3d 607, 616 (D.C. Cir. 2019) (quoting *Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918, 924 (D.C. Cir. 1989)).

Indeed, as other courts in this District have explained, "Congress plainly had as an objective under the INA to optimize the availability of pro bono or low-cost counsel to persons subject to removal," like many of Plaintiffs' clients. *Cath. Legal Immigr. Network, Inc. v. Exec. Off. for Immigr. Rev.*, 513 F. Supp. 3d 154, 171 (D.D.C. 2021); *see, e.g.*, 8 U.S.C. § 1229a(b)(4)(A) (establishing right to counsel in removal proceedings); *id.* § 1229(a)(1)(E), (b)(2) (requiring Attorney General to maintain and regularly update list of "persons who have indicated their availability to represent pro bono aliens in [removal] proceedings," and requiring this list be provided with any written notice of removal). Thus, "[o]n its own terms," the "INA contemplates an important role for organizations like Plaintiffs." *Nw. Immigrant Rts. Project*, 496 F. Supp. 3d at 52. Plaintiffs' interest in fulfilling the role that the INA contemplates for organizations like them is not "marginally related to or inconsistent with the purposes implicit in the statute." *Patchak*, 567 U.S. at 225; *see Clarke*, 479 U.S. at 401 (courts conducting a zone-of-interests analysis are "not limited to considering the [specific] statute under which [the plaintiff] sued, but may consider any provision that helps [them] to understand Congress' overall purposes" in the statute).

Without precedent on their side, Defendants cite Justice O'Connor's admittedly "speculative" and non-binding in-chambers opinion in *INS v. Legalization Assistance Project of Los Angeles County*, 510 U.S. 1301, 1304 (1993) (O'Connor, J., in chambers), positing that a legal services organization for immigrants fell outside the zone of interests of the Immigration Reform and Control Act of 1986. *But see E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 769 n.10 (9th Cir. 2018) (rejecting this precise argument); *CAIR*, 471 F. Supp. 3d at 43-44

(same). Even Justice O'Connor later conceded that the Supreme Court ultimately adopted "a quite different approach to the zone-of-interests test" than the one she had advanced. *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 505 (1998) (O'Connor, J., dissenting).

C. Plaintiffs' Claims Are Not "Impliedly Precluded" by 8 U.S.C. § 1252.

Defendants' half-hearted assertion that certain provisions of 8 U.S.C. § 1252 "impliedly preclude" Plaintiffs' claims is similarly without merit. Opp. 14. In analyzing preclusion arguments of this sort, courts "begin with 'the strong presumption in favor of judicial review'" of administrative action. *Make the Rd. N.Y. v. Wolf*, 962 F.3d 612, 623 (D.C. Cir. 2020) (quoting *SAS Inst., Inc. v. Iancu*, 584 U.S. 357, 370 (2018)). The Supreme Court has "'consistently applied' the presumption of reviewability to immigration statutes," *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 229 (2020) (quoting *Kucana v. Holder*, 558 U.S. 233, 251 (2010)), including those relied on by Defendants, because the presumption is "so embedded in the law that it applies even when determining the scope of statutory provisions specifically designed to limit judicial review," *Make the Rd.*, 962 F.3d at 624.

But reliance on that presumption is not even necessary in this case. Section 1252, entitled "Judicial review of orders of removal," prescribes various means by which individuals in deportation proceedings may challenge their removal. The provisions of Section 1252 that Defendants cite are relevant only to claims that are "inextricably linked" to an order of removal, not claims—like Plaintiffs' here—that are "independent of or collateral to the removal process." *E. Bay Sanctuary Covenant*, 993 F.3d at 666. Section 1252(a)(5) provides that "a petition for review filed with an appropriate court of appeals . . . shall be the sole and exclusive means for judicial review *of an order of removal*." 8 U.S.C. § 1252(a)(5) (emphasis added). Section

1252(b)(9) similarly consolidates "[j]udicial review of all questions of law and fact . . . *arising from any action taken or proceeding brought to remove an alien from the United States*" into an action for judicial review of a final removal order. *Id.* § 1252(b)(9) (emphasis added); *see DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1, 19 (2020) (holding that Section 1252(b)(9) does not preclude suit when "the parties are not challenging any removal proceedings"). And Section 1252(e)(3)—cited without any explanation whatsoever by Defendants—addresses challenges to *expedited* removal under 8 U.S.C. § 1225(b) and channels "[j]udicial review of determinations under section 1225(b)" into this Court.

Because Plaintiffs are not challenging any individual's removal, but rather a regulation that harms their organizational activities, entertaining this suit would not "'severely disrupt' the INA's 'complex and delicate administrative scheme,'" Opp. 14-15 (quoting *Block v. Cmty. Nutrition Inst*., 467 U.S. 340, 348 (1984)), for adjudicating removals. Simply put, Plaintiffs are not challenging the kind of agency orders—removal orders—that Section 1252 addresses. Moreover, the Supreme Court has rejected this overbroad theory of preclusion extrapolated from *Block*, explaining that "in authorizing one person to bring one kind of suit seeking one form of relief," Congress does not "bar[] another person from bringing another kind of suit seeking another form of relief." *Patchak*, 568 U.S. at 223; *see also id.* ("We have never held, and see no cause to hold here, that some general similarity of subject matter can alone trigger" a particular "statute's preclusive effect."). Defendants never explain how claims challenging the standards for asylum and related protections on the basis of an invalid appointment could possibly disrupt Congress's review scheme for contested removals.

II. The Anti-Asylum Rule Is Void Under the FVRA.

Because Chad Wolf had no right to act as Homeland Security Secretary while the office was vacant, his approval of the Anti-Asylum Rule is void under the FVRA. When someone performs a function or duty of a vacant office without complying with the FVRA's rules, that person's action "shall have no force or effect" and "may not be ratified." 5 U.S.C. § 3348(d).

Defendants all but concede that Wolf's appointment violated the FVRA, but they argue that this violation is exempt from the FVRA's penalty provision. In fact, they argue that virtually *all* violations of the FVRA are exempt from the FVRA's penalty provision. According to Defendants, "the FVRA applies only to nondelegable duties." Opp. 21. But as they admit, every duty of every federal officer is delegable, with only a few scattered exceptions across the U.S. Code. Defendants' counterintuitive reading thus deprives the penalty provision—one of the FVRA's key innovations—of any force. And this reading is wrong: the FVRA's penalty provision covers all duties that are assigned by statute to only a single office. Consistent with the statute's overall structure and purpose, this means that when an office is vacant, the duties assigned by statute to that office may be performed only by a valid acting officer.

To be sure, "federal courts have diverged in their interpretations of this statute." *Gonzales & Gonzales Bonds & Ins. Agency, Inc. v. DHS*, 107 F.4th 1064, 1082 (9th Cir. 2024) (Johnstone, J., concurring). Judge Howell, Judge Contreras, and other district judges have agreed with Plaintiffs, recognizing that the FVRA's text "does not limit the functions and duties subject to [its penalty] to only those denominated as 'nondelegable,'" *Asylumworks v. Mayorkas*, 590 F. Supp. 3d 11, 23 (D.D.C. 2022) (quoting *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 33 (D.D.C. 2020)), and that "such a permissive reading would render the FVRA all but meaningless," *Pub. Emps. for Env't Resp. v. Nat'l Park Serv.*, 605 F. Supp. 3d 28, 45 (D.D.C.

2022); *accord Behring Reg'l Ctr. LLC v. Wolf*, 544 F. Supp. 3d 937, 946 (N.D. Cal. 2021); *see Bullock v. U.S. Bureau of Land Mgmt.*, 489 F. Supp. 3d 1112, 1126 (D. Mont. 2020) ("The President cannot shelter unconstitutional 'temporary' appointments for the duration of his presidency through a matryoshka doll of delegated authorities."). The Third and Federal Circuits have agreed with Defendants. *See Kajmowicz v. Whitaker*, 42 F.4th 138 (3d Cir. 2022); *Arthrex, Inc. v. Smith & Nephew, Inc.*, 35 F.4th 1328 (Fed. Cir. 2022). And in a recent Ninth Circuit decision, three judges all expressed different views: one maintained that the FVRA's plain language supports Defendants' position, *Gonzales Bonds*, 107 F.4th at 1074; one maintained that it supports Plaintiffs' position, *see id.* at 1086 (Christen, J., dissenting); and one found the statute "ambiguous," choosing Defendants' position based on his reading of the legislative history and deference to agency views, *see id.* at 1081 (Johnstone, J., concurring).

Notwithstanding this disagreement, Plaintiffs have the better reading of the statute: the FVRA's penalty provision covers every function and duty that is assigned by statute to only one officer. It is not confined to "nondelegable" functions and duties, a restriction that would all but erase the FVRA's enforcement mechanism from existence. Only Plaintiffs' interpretation unites the FVRA's various provisions into a harmonious whole that fulfills the statute's purpose. By contrast, Defendants' reading puts the statute at odds with itself and "renders the FVRA a near-dead letter." *Id.* at 1086 (Christen, J., dissenting).

Defendants' invocation of delegation authority to support their narrow reading is particularly egregious because, as explained below, the use of delegation to circumvent the rules of vacancies legislation was *the* problem the FVRA was enacted to solve.

A. The FVRA's Penalties Are Designed to Prevent Agencies from Exploiting Their Delegation Authority to Evade Limits on Acting Appointments.

As Plaintiffs have explained, *see* MSJ 4-6, the FVRA was enacted "as a reclamation of the Congress's Appointments Clause power," *SW Gen., Inc. v. NLRB*, 796 F.3d 67, 70 (D.C. Cir. 2015), in response to the executive branch's defiance of the existing Vacancies Act. Before the FVRA, the executive branch claimed it could avoid the statutory limits on who could temporarily fill vacant offices by simply delegating the powers of vacant offices to other personnel. *See The Vacancies Act*, 22 Op. O.L.C. 44, 44 (1998). Thus, individuals "who were ineligible for appointment as acting officers under the terms of the Vacancies Act were frequently 'delegated' the title and duties of precisely the same office, meaning the act's restrictions had become largely toothless." Thomas A. Berry, S.W. General*: The Court Reins in Unilateral Appointments*, 2017 Cato Sup. Ct. Rev. 151, 155; *see* S. Rep. No. 105-250, at 7-8 (1998).

To eliminate this workaround and reassert the primacy of Senate confirmation, Congress expressly made the FVRA "the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office." 5 U.S.C. § 3347(a). If a vacant office has not been filled pursuant to the FVRA's rules, therefore, Congress required that this office "shall remain vacant." *Id*. § 3348(b)(1). And to thwart the tactic that prompted the FVRA's passage, Congress explicitly prohibited agencies from using their delegation authority to skirt these limits: the FVRA specifies that laws giving "general authority to the head of an Executive agency . . . to delegate duties" do not permit deviation from the FVRA's rules on acting service. *Id.* § 3347(b).

In addition to banning the use of delegation to fill vacant offices, the FVRA's other innovation was its addition of an enforcement provision. *See* 5 U.S.C. § 3348. Although unlawful agency actions could already be vacated under the APA or other statutes, Congress deemed these remedies insufficient in light of the significant constitutional ramifications of the

evasion of Senate confirmation. The FVRA therefore imposes heightened penalties for violating its rules. If someone performs a function or duty of a vacant office without complying with the FVRA, that action "shall have no force or effect." *Id.* § 3348(d)(1). Put differently, "the general rule" is that "actions taken in violation of the FVRA are void *ab initio*." *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 298 n.2 (2017). By making such actions "void" and not merely "voidable," this penalty forecloses defenses such as harmless error that are available under the APA. *See SW Gen.*, 796 F.3d at 79.

The FVRA further provides that an action deemed void also "may not be ratified." 5 U.S.C. § 3348(d)(2); *see* S. Rep. No. 105-250, *supra*, at 19 ("A lawfully serving acting officer cannot ratify the actions of a temporary officer whose service does not comply with the Vacancies Reform Act."). After all, if another official could simply ratify the actions of someone who unlawfully wielded an office's powers during a vacancy, "then no consequence will derive from an illegal acting designation," which "undermines the constitutional requirement of advice and consent." *Id.* at 8.

B. The FVRA's Enforcement Provision Covers All Duties that Are Assigned by Statute to a Single Office.

Defendants maintain that even if Chad Wolf had no authority whatsoever to approve the Anti-Asylum Rule and its myriad changes to the Code of Federal Regulations, his lawless action cannot be vacated under the FVRA "because the Secretary's rulemaking authority is delegable." Opp. 21. This reading "is inconsistent with both the plain terms and purpose of the FVRA." *Asylumworks*, 590 F. Supp. 3d at 22. Text, structure, purpose, and history all refute it.

1. Text

If anyone performs any "function or duty" of a vacant office without authorization by the FVRA, that person's action "shall have no force or effect" and "may not be ratified." 5 U.S.C.

§ 3348(d). The term "function or duty," which is the crux of the dispute, means "any function or duty of the applicable office that is established by statute and is required by statute to be performed by the applicable officer (and only that officer)." *Id.* § 3348(a)(2)(A) (punctuation omitted). That standard is satisfied here. "The plainest reading of this text is that where Congress directs an officer to perform a duty, and does not also direct one or more other officers to perform it, Congress has required that officer—and only that officer—to perform the duty." *Gonzales Bonds*, 107 F.4th at 1089 (Christen, J., dissenting).

As no one disputes, approving immigration-related regulations is a function and duty "established by statute" and "required by statute to be performed by" the DHS Secretary. 5 U.S.C. § 3348(a)(2)(A). Under the Homeland Security Act and the INA, the Secretary is "charged with the administration and enforcement of . . . all . . . laws relating to the immigration and naturalization of aliens," 8 U.S.C. § 1103(a)(1), and with "[e]stablishing national immigration enforcement policies and priorities," 6 U.S.C. § 202(5). To that end, the Secretary "shall establish such regulations . . . as he deems necessary for carrying out his authority." 8 U.S.C. § 1103(a)(3); *see* 6 U.S.C. § 112(e).

Not only is this function and duty required to be performed by the Secretary, it is also required to be performed by "only that officer." 5 U.S.C. § 3348(a)(2)(A). No statute assigns this function and duty to any other officer; thus, Congress has required the Secretary, and no one else, to perform it. Therefore, this is a function and duty "required by statute to be performed by the [Secretary] (and only that officer)." *Id.* § 3348(a)(2)(A); *see Behring*, 544 F. Supp. 3d at 945-46 ("the statute . . . provides that the Attorney General can [perform a specific duty] and does not identify any other official who can do so; in other words, it identifies the Attorney General and only the Attorney General").

In short, the FVRA's penalties apply whenever a function or duty is "assigned by statute to the office" and "not assigned by statute to any other office." *L.M.-M.*, 442 F. Supp. 3d at 30. The enforcement provision thus covers "all statutorily prescribed functions of a given office" that are not shared with other offices. *Asylumworks*, 590 F. Supp. 3d at 23 (quotation marks omitted). The statutes directing the DHS Secretary to establish immigration-related regulations meet this standard, because they "designate[] one officer and only that officer to perform the duty or function." *Behring*, 544 F. Supp. 3d at 946.

This straightforward reading makes perfect sense. It ensures that when Congress has assigned specific duties to a specific office that becomes vacant, an agency cannot avoid Senate confirmation simply by reassigning those duties to someone else. The penalty provision thus guarantees that the FVRA remains "the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office." 5 U.S.C. § 3347(a). But if Congress has assigned a function to an agency without assigning it to a particular office, or has assigned it to multiple offices, then other officials may continue to carry out that function during a vacancy.

Defendants and the decisions they cite read Section 3348 differently. Indeed, they largely read it out of existence, giving it a "vanishingly small" scope, *Kajmowicz*, 42 F.4th at 151 (quoting *Arthrex*, 35 F.4th at 1337), that applies to almost no responsibilities of any office in government. Based entirely on four words in parentheses—"and only that officer," 5 U.S.C. § 3348(a)(2)(A) —they interpret the FVRA's penalty as applying only to "nondelegable functions and duties," Opp. 18. But nearly all duties of all agency officials are delegable, either through express statutory language or through the judge-created doctrine of implied delegability. As a result, Defendants' reading "excludes nearly every statutory function or duty in the United States Code." *Gonzales Bonds*, 107 F.4th at 1090 (Christen, J., dissenting).

The text of the penalty provision, however, does not refer to delegation or limit the covered functions and duties "to only those denominated as 'nondelegable,' a word that appears nowhere in the statute." *Asylumworks*, 590 F. Supp. 3d at 23 (quotation marks omitted). It does not, for instance, refer to "a statute that designates one officer to perform a non-delegable duty or function." *Behring*, 544 F. Supp. 3d at 946; *see Gonzales Bonds*, 107 F.4th at 1082 (Johnstone, J., concurring) (conceding that "Congress could have simply referred to delegation by name in § 3348, but it did not," and that the words Congress actually used in the statute "do not obviously describe nondelegable duties").

The better reading of the parenthetical phrase "and only that officer" is that it merely "excludes instances in which Congress has directed more than one officer to perform a function or duty." *Gonzales Bonds*, 107 F.4th at 1089-90 (Christen, J., dissenting); *see, e.g.*, 18 U.S.C. § 2516(1); *id.* § 2332(d). When, as here, a statute directs a single officer to perform a specific function, then no one else may perform that function during a vacancy, except by complying with the FVRA. These functions are not exempt from the FVRA's penalties merely because the officer to whom they are assigned can enlist subordinates to help him execute them. Indeed, neither Defendants nor the decisions they cite explain why the FVRA would limit the scope of its penalties based on what an officer can delegate to a subordinate *when the office is filled*. The FVRA, after all, was enacted to respond to an entirely different type of "delegation," namely, the practice of reassigning the powers of *vacant* offices to other agency personnel instead of validly filling those offices through the Vacancies Act.

Defendants' interpretation also rests on a faulty premise—that when a single officer, "and only that officer," 5 U.S.C. § 3348(a)(2)(A)(ii), is required by statute to perform a duty, this means the officer cannot subdelegate that duty. Contrary to this premise, when an officer

employs subordinates to help carry out a statutory duty through subdelegation, the officer is performing that duty through these subordinates. The very delegation of rulemaking authority that Defendants rely on here illustrates the point. If DHS's Deputy Secretary approves rules under the 2003 delegation cited by Defendants, *see* Opp. 19, the Deputy does so "on behalf of the Secretary" and "[a]cting for the Secretary." Greer Decl., Ex. A, Ex. 1, ¶¶ 1, 2.G. Thus, an officer's ability to subdelegate is fully consistent with Congress having required "only that officer," 5 U.S.C. § 3348(a)(2)(A), to perform the duty. Exclusive duties, in other words, are not the same thing as "nondelegable" duties. *See SW Gen.*, 796 F.3d at 72, 80 (although the NLRB's general counsel "delegated his authority to investigate charges and issue complaints to [the agency's] regional directors," he "exercises general supervision of the regional directors" and retains "final authority" under the statute, so "if the General Counsel's office were vacant, the NLRB would not be issuing complaints" (quotation marks omitted)).

In sum, the most natural reading of Section 3348(a)(2)(A) yields a simple result here: "Congress directed the DHS Secretary to promulgate [immigration and naturalization] rules. Congress did not direct any other officer to perform this duty. Because this duty was one that Congress required only the DHS Secretary to perform, the [Anti-Asylum Rule] was without force or effect." *Gonzales Bonds*, 107 F.4th at 1089 (Christen, J., dissenting) (citation omitted).

2. Structure

Even if Defendants' reading of Section 3348(a)(2)(A) is "plausible when viewed in isolation," it "is untenable in light of [the statute] as a whole." *Dep't of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 343 (1994) (citation omitted). "Over and over," the Supreme Court has "stressed that '[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'"

U.S. Nat. Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 455 (1993) (quoting *United States v. Heirs of Boisdore*, 49 U.S. 113, 122 (1849)). Thus, "[i]nterpretation of a phrase of uncertain reach is not confined to a single sentence when the text of the whole statute gives instruction as to its meaning." *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405, 408 (2017) (quoting *Maracich v. Spears*, 570 U.S. 48, 65 (2013)). Here, multiple aspects of the surrounding text refute Defendants' narrow reading of the phrase "and only that officer."

First, Defendants' position nullifies an adjacent section of the FVRA. *Cf. FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (courts must "fit, if possible, all parts [of the statute] into an harmonious whole" (quotation marks omitted)). Defendants maintain that all delegable functions and duties are exempt from the FVRA's penalties, and they cite DHS's vesting-and-delegation statute to show that the Secretary's rulemaking power is delegable. *See* Opp. 19 ("Congress has specifically authorized the Secretary to 'delegate any of the Secretary's functions to any officer, employee, or organizational unit of the Department.'" (quoting 6 U.S.C. § 112(b)(1))). But the FVRA expressly prohibits the use of such vesting-and-delegation statutes to avoid complying with its rules. Immediately before the penalty provision, it declares that the FVRA's rules may not be circumvented by statutes "providing general authority to the head of an Executive agency . . . to delegate duties statutorily vested in that agency head to . . . officers or employees of such Executive agency." 5 U.S.C. § 3347(b). This is the *only* portion of the FVRA that refers to "delegation," and it makes delegation authority irrelevant.

In other words, "Congress acknowledged general vesting-and-delegation statutes and expressly rejected the practice of relying on them to bypass the FVRA's rules of succession." *Gonzales Bonds*, 107 F.4th at 1091 (Christen, J., dissenting). That choice is unsurprising: "It was the pervasive use of those vesting-and-delegation statutes, along with 'the lack of an

effective enforcement process,' that convinced Congress of the need to enact the FVRA." *L.M.-M.*, 442 F. Supp. 3d at 34 (quoting S. Rep. No. 105-250, *supra*, at 7). Yet if "the mere existence of these vesting-and-delegation statutes" were "sufficient to negate the enforcement mechanisms Congress included in the FVRA," as Defendants claim, then "Congress would have done little 'to restore [the] constitutionally mandated procedures that must be satisfied before acting officials may serve in positions that require Senate confirmation.'" *Id.* (quoting S. Rep. No. 105-250, *supra*, at 8).

Instead, just as before the FVRA's enactment, agencies could cite their vesting-and-delegation statutes to avoid complying with the rules of vacancies legislation. Indeed, agencies would not even need to use these delegation statutes to work around the FVRA. According to Defendants, the mere fact that the agencies *could* delegate authority under these statutes is enough. *See* Opp. 20 ("It does not matter . . . whether there is an actual delegation of authority."). Defendants' reading of Section 3348 therefore critically undermines Section 3347(b).

Second, and relatedly, "the significance of the omission of 'nondelegable' from § 3348(a)(2) is magnified by the FVRA's use of the word 'delegate' in the immediately preceding subsection, § 3347(b), because we must give meaning to the variation in word choice between the two provisions." *Gonzales Bonds*, 107 F.4th at 1091 (Christen, J., dissenting). "Congress's use of 'delegate' in § 3347(b) 'shows that when Congress intended to' refer to delegable duties, 'it knew how to do so.'" *Id.* at 1092 (quoting *Custis v. United States*, 511 U.S. 485, 492 (1994)).

Third, the FVRA declares itself "the exclusive means" for temporarily filling vacant offices, 5 U.S.C. § 3347(a), but Defendants' interpretation would nullify that critical provision

too—and with it the Act's central purpose. *See* S. Rep. No. 105-250, *supra*, at 1 ("The purpose of S. 2176, the Federal Vacancies Reform Act, is to create a clear and exclusive process to govern the performance of duties [during vacancies].").

Building on their premise that Section 3348 covers only nondelegable duties, Defendants observe that "subdelegation to a subordinate federal officer or agency is presumptively permissible," even without "[e]xpress statutory authority." Opp. 19 (quotation marks omitted). The upshot is that almost no functions or duties of anyone in the executive branch would ever be subject to the FVRA's penalties—unless "there is a statute that precludes delegation of the specific duty." *Id*. at 20. But such statutes are almost nonexistent. *See Arthrex*, 35 F.4th at 1337 ("The government readily admits that only a very small subset of duties are non-delegable." (quotation marks omitted)). As a result, "accepting defendants' interpretation of the statutory language would eviscerate the FVRA's remedial scheme." *Asylumworks*, 590 F. Supp. 3d at 24 (quotation marks omitted).

In practice, therefore, the FVRA would no longer be "the exclusive means" of authorizing a vacant office's functions to be performed, draining § 3347(a) of any force. That concern is more than hypothetical. "At least some agencies have applied [Defendants'] interpretation of the FVRA to continue operating as if the statute had never been enacted." *Gonzales Bonds*, 107 F.4th at 1095 (Christen, J., dissenting); *see Arthrex*, 35 F.4th at 1337 ("the government contends that the FVRA *imposes no constraints whatsoever* on the [Patent and Trademark Office] because all the Director's duties are delegable" (emphasis added)). Courts "cannot interpret federal statutes to negate their own stated purposes," *King v. Burwell*, 576 U.S. 473, 493 (2015) (quotation marks omitted), but Defendants' interpretation would "contravene

Congress's stated purpose in enacting the FVRA," *Asylumworks*, 590 F. Supp. 3d at 24—a purpose inscribed directly into the statutory text, *see* 5 U.S.C. § 3347(a).

Fourth, Defendants' reading would exempt the duties of department heads like the DHS Secretary from the FVRA's penalties, but Section 3348 makes unmistakably clear that such duties are covered. To prevent agency paralysis during vacancies, the FVRA provides that the duties of vacant lower-level offices can still be performed—but only by the head of the department. *See* 5 U.S.C. § 3348(b)(2). This allows essential functions to continue, but ensures accountability by requiring approval from the department's top official. In marked contrast, however, Congress provided no comparable option when there is a vacancy at the head of the department. *See id.* § 3348(b)(1). Instead, the department head's office simply "shall remain vacant." *Id.* And any duties of that office performed during the vacancy are void. *Id.* § 3348(d)(1). Thus, Section 3348 expressly applies to the functions and duties of department secretaries, and when a secretary's office is vacant, it gives the department no recourse besides filling the office through Senate confirmation or with a valid acting officer.

All department secretaries, however, can delegate virtually all of their functions and duties. The DHS Secretary, for example, "may delegate any of the Secretary's functions to any officer, employee, or organizational unit of the Department." 6 U.S.C. § 112(b)(1). And every other department has a similar provision. *See L.M.-M.*, 442 F. Supp. 3d at 31 & n.11 (citing delegation statutes for all fifteen executive departments).

On Defendants' view, the delegable nature of these department secretaries' duties means that those duties are exempt from any penalty when they are performed unlawfully during a vacancy. But that flatly contradicts the plain language of Section 3348(b), which makes clear

that the duties of department secretaries, like those of other officers, are subject to the FVRA's penalties.

As if that were not enough, Section 3348(e) expressly excludes certain named officers from the penalty provision's reach, *see* 5 U.S.C. § 3348(e), but that list does not include the DHS Secretary. "Under defendants' construction of the statute," however, "the DHS Secretary would be functionally added to that list of exempted officials since most, if not all, of his functions and duties are delegable and thus none would be covered." *Asylumworks*, 590 F. Supp. 3d at 24. "Under the government's theory, because all of the Secretary's functions are delegable, none qualify as a duty or function under the FVRA." *Behring*, 544 F. Supp. 3d at 946. Indeed, throughout the voluminous Homeland Security Act, Defendants have found only a single provision that constrains delegation by the Secretary. And because that provision allows the Secretary to delegate to a specific DHS official, *see* 6 U.S.C. § 624(c)(2), even this provision falls outside Defendants' narrow interpretation of the penalty provision.

Simply put, as Defendants concede, no function or duty of the Homeland Security Secretary is eligible for the FVRA's penalties. And the same goes for other department secretaries. That reading is incompatible with the FVRA's express exemption of certain officials—but not department secretaries—from its enforcement mechanism. *See SW Gen.*, 580 U.S. at 302 (citing the *expressio unius* canon, *i.e.*, the principle that "expressing one item of [an] associated group or series excludes another left unmentioned," which applies whenever "circumstances support[] a sensible inference that the term left out must have been meant to be excluded" (quotation marks omitted)).

Fifth, the government's reading also makes the exemptions in Section 3348(e) superfluous. None of the specific officers listed in that provision—inspectors general, chief

financial officers, and the general counsels of two agencies—are prohibited by statute from delegating any of their functions or duties. *See* Stephen Migala, *The Vacancies Act and Its Anti-Ratification Provision* 19-20 (Nov. 11, 2019), https://ssrn.com/abstract=3486687 (citing statutes). According to Defendants, this alone means that none of their functions or duties are covered by the penalty provision. But if that were true, there would be no need for Section 3348(e). Defendants' reading therefore turns it into surplusage. "It is, however, a cardinal principle of statutory construction that [courts] must 'give effect, if possible, to every clause and word of a statute.'" *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)); *see SW Gen.*, 580 U.S. at 304 (applying this principle to the FVRA).

In contrast, Plaintiffs' interpretation "gives effect to every clause and word of [the] statute." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 385 (2013). As explained above, the qualifier "and only that officer," 5 U.S.C. § 3348(a)(2)(A)(ii), is needed to clarify that Section 3348 does not apply if a function or duty "is required by statute to be performed by the applicable officer," *id.*, but is also required to be performed by other officers.

Sixth, and finally, Section 3348 plainly indicates that it encompasses delegable functions and duties. In addition to covering duties that are established by statute, the penalty provision also covers duties that are "established by regulation." 5 U.S.C. § 3348(a)(2)(B). But duties established by regulation typically are delegations—a higher official granting a lower official some portion of the higher official's powers. *E.g.*, Greer Decl., Ex. A, Ex. 1, ¶ 1 (delegating certain powers of the DHS Secretary to the Deputy Secretary). And critically, the FVRA treats these duties just as stringently as it treats duties established by statute. It even prevents agencies from circumventing the FVRA's limits by manipulating their regulations in anticipation of an

impending vacancy. *See* 5 U.S.C. § 3348(a)(2)(B)(ii). Given this treatment of duties established by regulation—which are usually if not always delegable—it makes no sense to exempt statutorily established duties from the penalty simply because they too can be delegated.

Instead, properly interpreted, both provisions work together to ensure that where a specific duty has been assigned to a specific office by statute or regulation, that duty can only be performed during a vacancy by a valid acting officer. That, of course, is the whole point of the FVRA and its "exclusive" procedures. *Id.* § 3347(a).

In sum, when the FVRA is viewed as a whole, and not with a myopic focus on four words of a single provision, its meaning is clear. Between Plaintiffs' and Defendants' reading of the parenthetical in Section 3348(a)(2)(A)(ii), "only one of [those] meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988).

3. Purpose and History

If there were any lingering doubt, consideration of the FVRA's purpose and history removes it. Defendants' position not only deprives the statute of nearly all effect, but it does so by permitting the precise abuse that Congress sought to eliminate.

As explained above, Defendants' interpretation virtually writes the FVRA's unique penalties out of existence. Under their delegation-based gloss, almost no violations of the FVRA are ever void or ineligible for ratification. Notably, because department secretaries can typically delegate all of their statutory powers, the most important functions that Congress assigned to the highest-level executive officers would never be subject to the FVRA's enforcement mechanism.

It defies belief that this is how the FVRA is supposed to operate. As described earlier, "[t]he statute was framed as a reclamation of the Congress's Appointments Clause power," *SW*

Gen., 796 F.3d at 70, and it "ensures compliance by providing that, in general, 'any function or duty of a vacant office' performed by a person not properly serving under the statute 'shall have no force or effect,'" *SW Gen.*, 580 U.S. at 296 (quoting 5 U.S.C. § 3348(d)). Defendants' reading "turns what the Supreme Court has described as the Act's 'general rule' into an exception," *Gonzales Bonds*, 107 F.4th at 1089 (Christen, J., dissenting), and a "vanishingly small" exception at that, *Kajmowicz*, 42 F.4th at 151 (quotation marks omitted). It cannot be that Congress sought "to limit the power of the President to name acting officials," S. Rep. No. 105-250, *supra*, at 8, through an enforcement mechanism that virtually never applies.

The specific circumstances that prompted the FVRA's passage are undisputed. "During the 1970s and 1980s, interbranch conflict arose over the Vacancies Act. The Department of Justice took the position that, in many instances, the head of an executive agency had independent authority apart from the Vacancies Act to temporarily fill vacant offices." *SW Gen.*, 580 U.S. at 294. One common tactic was that an officer would purport to delegate all of his or her powers to another official just before resigning. *See* S. Rep. No. 105-250, *supra*, at 5-6, 12. Another was that, after a vacancy arose, the head of the department would purport to delegate all the powers of that vacant office to someone else. *Id.* at 3-5.

"These acting officers filled high-level positions, sometimes in obvious contravention of the Senate's wishes." *SW Gen.*, 580 U.S. at 295. The problem was compounded by the D.C. Circuit's decision in *Doolin Security Savings Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203 (D.C. Cir. 1998), which avoided ruling on the legality of a dubious acting appointment because a valid official later ratified the earlier actions. *See* S. Rep. No. 105-250, *supra*, at 8 ("this portion of the court's position demands legislative response"). "Perceiving a threat to the

Senate's advice and consent power," Congress "replaced the Vacancies Act with the FVRA." *SW Gen.*, 580 U.S. at 295.

As Defendants see it, however, Congress scarcely did anything. In their view, an agency's vesting-and-delegation statute continues to provide an escape hatch that excuses it from obeying the FVRA's requirements, despite 5 U.S.C. § 3347(b). Vacancies legislation is still not the "exclusive means" for carrying out the functions of vacant offices, despite 5 U.S.C. § 3347(a). And judicially imposed penalties can still be averted by ratification, just as in *Doolin*, despite 5 U.S.C. § 3347(d). Congress's attempt to reclaim its Appointments Clause power was merely sound and fury, signifying nothing.

The text and structure of the FVRA do not demand that interpretation—indeed, they rebut it. This Court should not immunize the fruits of Chad Wolf's unlawful appointment from the unique remedies that Congress established for agency actions that transgress the vacancies laws.

III. Plaintiffs Are Entitled to Vacatur and Declaratory Relief.

A. The Rule Must Be Vacated in Its Entirety.

1. The APA states that a "reviewing court shall . . . hold unlawful and set aside agency action" that is "in excess of statutory jurisdiction, authority, or limitations" or "contrary to constitutional . . . power." 5 U.S.C. § 706(2). Accordingly, as Defendants acknowledge, D.C. Circuit precedent identifies vacatur as the typical remedy "for a successful APA challenge to a regulation." Opp. 25; *see Long Island Power Auth. v. FERC*, 27 F.4th 705, 717 (D.C. Cir. 2022) (characterizing vacatur as "the normal remedy under the APA" for "unlawful agency action"); *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019) ("The ordinary practice is to vacate unlawful agency action."); *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 985 F.3d 1032, 1052 (D.C. Cir. 2021) ("[V]acatur is the default response.");

Council of Parent Att'ys & Advocs., Inc. v. Devos, 365 F. Supp. 3d 28, 55 (D.D.C. 2019) (Chutkan, J.) ("The D.C. Circuit has stated that 'vacatur is the normal remedy' for an APA violation." (quoting *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014))).

Courts across the country have repeatedly taken that "normal course," *United Steel*, 925 F.3d at 1287, when illegally appointed acting officials have purported to authorize agency actions. *E.g.*, *Asylumworks v. Mayorkas*, 590 F. Supp. 3d 11, 26 (D.D.C. 2022); *L.M.-M.*, 442 F. Supp. 3d at 37; *Behring*, 544 F. Supp. 3d at 950; *Batalla Vidal v. Wolf*, No. 16-4756, 2020 WL 7121849, at *1 (E.D.N.Y. Dec. 4, 2020); *Bullock v. U.S. Bureau of Land Mgmt.*, No. 20-62, 2020 WL 6204334, at *2 (D. Mont. Oct. 16, 2020). Wolf's unlawful approval of the Anti-Asylum Rule demands the same remedy. Neither Defendants' assertions that this Court should enter a "strictly limited" remedy as a matter of discretion, nor their citations to non-binding opinions questioning the wisdom of "universal vacatur," Opp. 26-27, supply any reason to treat this case differently.

As an initial matter, whether "Congress intended" to authorize vacatur under the APA is not up for debate. Opp. 26. This Court may not reevaluate a statute's meaning as a matter of first principles when that meaning is firmly settled in the D.C. Circuit—as it is here. *See, e.g.*, *Long Island Power Auth.*, 27 F.4th at 717.[1]

[1] Justice Gorsuch's suggestion in his non-binding concurrence in *United States v. Texas*, 599 U.S. 670 (2023), that the *Supreme Court* address whether the APA authorizes vacatur, *see id.* at 702 (Gorsuch, J., concurring in the judgment), provides no basis for a district court to disregard binding precedent. Moreover, other Justices apparently do not share Justice Gorsuch's view. *See, e.g.*, *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2461 (2024) (Kavanaugh, J., concurring) (defending the "long-settled" understanding that the "APA authorizes vacatur of agency rules," and calling the government's "newly minted position" "both novel and wrong"); Transcript of Oral Argument at 35-36, *United States v. Texas*, 599 U.S. 670 (2023) (No. 22-58) (Chief Justice Roberts describing the government's argument about vacatur as "radical" and at odds with "what the D.C. Circuit and other courts of appeals have been doing all the time as a staple of their decision output").

Moreover, equitable factors weigh strongly in favor of vacatur in this case. This Court has already rejected Defendants' argument that Plaintiffs are unharmed by the Rule because of the Northern District of California's preliminary injunction. *See* Mem. Op. & Order at 8-9 (Mar. 4, 2024) (ECF No. 54). And as described above, *see supra* Part I.A, Plaintiffs have put forth undisputed evidence that if the Rule goes into effect, it will further undermine their missions, Huang Decl. ¶¶ 14, 17, 22; Bangudi Decl. ¶¶ 33, 43, reduce the number of asylum clients they can represent, Huang Decl. ¶ 22, Bangudi Decl. ¶¶ 34, 40, divert resources from their other priorities, Huang Decl. ¶¶ 19-20, 22; Bangudi Decl. ¶¶ 34, 36-38, and jeopardize their funding, Huang Decl. ¶ 18; Bangudi Decl. ¶¶ 40-43.

In the meantime, despite the *Pangea* preliminary injunction, *see Pangea Legal Servs. v. DHS*, 512 F. Supp. 3d 966 (N.D. Cal. 2021), prolonged uncertainty about whether and when the Rule, or portions of it, will go into effect is costing Plaintiffs time and resources. For example, when assessing their existing and potential clients' asylum claims in light of the Rule, Plaintiffs cannot readily determine whether those claims are viable now, in the near future, or the far future—and therefore cannot accurately assess how much work should be expected for each case. *See* Huang Decl. in Support of Stay ¶ 4 (July 14, 2023) (ECF No. 47-1); Turngren Decl. in Support of Stay ¶ 10 (July 14, 2023) (ECF No. 47-2). Therefore, perpetuating the status quo "would harm their missions and threaten their continued funding and functioning," as this Court has already recognized. Mem. Op. & Order at 9.

In short, nothing justifies deviating from "the default response" of vacatur, *Standing Rock Sioux Tribe*, 985 F.3d at 1052, to remedy the illegality of the Anti-Asylum Rule.

2. Defendants, for their part, make a brief pitch for "remand without vacatur," Opp. 31, but offer no plausible basis for that request. The only reason this case is being litigated now is

the government's failure to produce the new rules it has long promised will rescind or modify the Anti-Asylum Rule. By prolonging the status quo to await new regulatory action by Defendants, a remand without vacatur would be functionally equivalent to denying Plaintiffs' motion to lift the stay—a course this Court rightly rejected.

Furthermore, Defendants do not point to *any* evidence of "the disruptive consequences" they say would result from vacatur, a prerequisite for requesting remand without vacatur in this Circuit. *United Steel*, 925 F.3d at 1287 (quoting *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 197 (D.C. Cir. 2009)); *see also Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) ("The decision whether to vacate depends on the seriousness of the order's deficiencies . . . and the disruptive consequences of an interim change." (quotation marks omitted)). Because the Rule has never been implemented, "[t]his is not a case in which the egg has been scrambled and there is no apparent way to restore the status quo ante.'" *Council of Parent Att'ys & Advocs.*, 365 F. Supp. 3d at 56 (quotation marks omitted).

3. Defendants also assert that "Plaintiffs do not challenge the DOJ provisions of the Rule, nor could they." Opp. 27. Both parts of this sentence are wrong. While Plaintiffs' motion for partial summary judgment addresses only the illegality of Wolf's approval of the Rule on behalf of DHS, Plaintiffs are entitled to vacatur of the entire Rule as a remedy for that illegality.[2]

Under both the APA and the FVRA, the Rule must be vacated in its entirety rather than piecemeal as a result of Wolf's unlawful approval. The text of the Rule itself makes clear that "the DHS and DOJ regulations are inextricably intertwined," 85 Fed. Reg. 80,274, 80,286 (Dec.

[2] Defendants also seem to forget that Counts 4 through 7 of Plaintiffs' Complaint, which currently remain stayed, do not relate to Chad Wolf's unlawful tenure at DHS, but rather raise a host of substantive and procedural challenges to the Rule—including its DOJ provisions—under the APA and the Equal Protection Clause. Plaintiffs have not abandoned those claims. Rather, the Court ordered that the stay be partially lifted with respect to Counts 1 through 3 only.

11, 2020), such that vacatur of the DHS provisions but not the DOJ provisions would cause disruption to our "uniform" system of immigration law, *Arizona v. United States*, 567 U.S. 387, 394 (2012) (quoting U.S. Const. art. I, § 8, cl. 4); *see also* 85 Fed. Reg. at 80,286 ("Because officials in both DHS and DOJ make determinations involving the same provisions of the INA, including those related to asylum, it is appropriate for the Departments to coordinate on regulations like the proposed rule that affect both agencies' equities in order to ensure consistent application of the immigration laws."). For this reason, the district court in *Pangea* enjoined enforcement of the entire Rule, despite analyzing only the DHS-related appointments claim in that case. *See* 512 F. Supp. 3d at 975 (reasoning that "the DHS and DOJ regulations are substantively identical in key respects," and the DOJ regulations likely would 'not have been passed but for' the inclusion of the DHS regulations" (quoting *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294 (1988))).

Even Defendants seem to agree that partial vacatur would make little sense here. They argue that partial vacatur would "result[] in a situation where DHS may not be authorized to use the same definitions and analyses as DOJ when adjudicating asylum and protection claims," resulting in significant confusion. Opp. 27. The solution is not for this Court to throw up its hands and allow an unlawful rule to remain on the books; it is to vacate the rule in its entirety.

4. If there were any question that the Rule should be vacated under the APA—and there isn't—Plaintiffs' FVRA claims supply a separate and independent ground for vacatur. *See supra* Part II. When someone performs "any function or duty" of a vacant office without complying with the FVRA's rules, that action "shall have no force or effect." 5 U.S.C. § 3348(d)(1). In other words, the action is "void ab initio" and the presiding court "*must* vacate" it. *SW Gen.*, 796 F.3d at 78 (emphasis in original). Put simply, remand without vacatur is not an option under the

FVRA. *See Asylumworks*, 590 F. Supp. 3d at 26 ("no remedy other than vacatur is appropriate should plaintiffs prevail on their FVRA claim").

B. Wolf's Approval of the Rule Was Not Harmless.

Even if the FVRA's penalty provision did not apply here, and the doctrine of harmless error were therefore available as a defense against APA vacatur, Wolf's approval of the Anti-Asylum Rule was not harmless.

Defendants claim that "any error or impropriety in [Wolf's] designation did not prejudice Plaintiffs and was therefore harmless." Opp. 21. But "a petitioner need not demonstrate prejudice . . . if the alleged error is 'structural' in nature." *SW Gen.*, 796 F.3d at 79 (quoting *Landry v. FDIC*, 204 F.3d 1125, 1131 (D.C. Cir. 2000)). "In the agency context," the D.C. Circuit has held that "[i]ssues of separation of powers are structural errors that do not require a showing of prejudice." *Id.* (quotation marks omitted). Thus, where a decision-making official served in violation of the Appointments Clause, subsequent *de novo* review by another authority could not "cleanse the violation of its harmful impact." *Landry*, 204 F.3d at 1132.

Likewise, where a decision-making official served in violation of the FVRA, "a different [official] may have imposed different requirements and procedures during his tenure." *SW Gen.*, 796 F.3d at 80. Such "uncertainty is sufficient to conclude that [a Plaintiff] has carried its burden of demonstrating that the FVRA violation is non-harmless under the Administrative Procedure Act." *Id.* After all, the very reason that President Trump professed to prefer acting appointments—and to be in "no hurry" to submit Senate nominations—was because he perceived a difference in how acting officials responded to his wishes: "I like acting. It gives me more flexibility." Amanda Becker, *Trump Says Acting Cabinet Members Give Him 'More Flexibility,'* Reuters, Jan. 6, 2019, https://www.reuters.com/article/world/trump-says-acting-

cabinet-members-give-him-more-flexibility-idUSKCN1P00KW/. To put it mildly, this Court "cannot be confident that the [Anti-Asylum Rule] would have issued under an Acting [Secretary] other than [Wolf]." *SW Gen.*, 796 F.3d at 80. And that is enough to satisfy the "not . . . particularly onerous requirement" of demonstrating harm. *Id.* at 81 (quoting *Jicarilla Apache Nation v. U.S. Dep't of Interior*, 613 F.3d 1112, 1121 n. 5 (D.C. Cir. 2010)).

C. 8 U.S.C. § 1252(f)(1) Does Not Bar Vacatur.

Defendants spill much ink discussing 8 U.S.C. § 1252(f) ("Limit on injunctive relief"), which bars lower courts from enjoining certain provisions of the INA. They go to great lengths attempting to illustrate which aspects of the Rule are subject to Section 1252(f)(1), distinguishing between the Statutes at Large and the U.S. Code in a head-spinning analysis. But this is all a distraction. Section 1252(f)(1) is irrelevant here, for the simple reason that Plaintiffs do not ask this Court to enjoin anything. Plaintiffs seek only vacatur of the Rule and a declaration that it was issued unlawfully. *See* MSJ 3, 44.

Section 1252(f)(1) has no plausible effect on vacatur. "By its plain terms, and even by its title, that provision is nothing more or less than a limit on *injunctive* relief." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481 (1999) (emphasis added). It "prohibits lower courts from entering injunctions that *order federal officials to take or to refrain from taking actions*." *Biden v. Texas*, 597 U.S. 785, 797 (2022) (emphasis added) (quoting *Garland v. Aleman Gonzalez*, 596 U.S. 543, 550 (2022)); *see id.* at 798 (explaining that Section 1252(f)'s title, "Limit on injunctive relief," "makes clear the narrowness of its scope"). In light of the Supreme Court's clarity on this point, it is no surprise that Defendants fail to cite a single case holding that 8 U.S.C. § 1252(f)(1) applies to vacatur. In contrast, every court to consider the issue has held otherwise. *See, e.g.*, *Texas v. United States*, 50 F.4th 498, 528 (5th Cir. 2022)

("§ 1252(f)(1) does *not* apply to vacatur" (emphasis added)); *Florida v. United States*, 660 F. Supp. 3d 1239, 1284-85 (N.D. Fla. 2023) (same); *E. Bay Sanctuary Covenant v. Biden*, 683 F. Supp. 3d 1025, 1039-40 (N.D. Cal. 2023) (same); *Al Otro Lado, Inc. v. Mayorkas*, 619 F. Supp. 3d 1029, 1045 (S.D. Cal. 2022) (same).

Defendants also make the extraordinary claim that vacating a rule is functionally no different from enjoining officials from enforcing it because both remedies "involve coercion." Opp. 25. That is simply wrong. Vacatur is not an *in personam* remedy—it operates against a rule or regulation, not a party. Obviously, a rule or regulation cannot be "coerced." Put another way, vacating a rule does not "order federal officials" to do anything—it does not "tell[] someone what to do or not to do." *Aleman Gonzalez*, 596 U.S. at 549 (citation omitted). Vacatur is a self-executing remedy that essentially wipes a rule off the books, resetting the legal landscape to what it was before the rule was enacted. *See Env't Def. v. Leavitt*, 329 F. Supp. 2d 55, 64 (D.D.C. 2004) ("When a court vacates an agency's rules, the vacatur restores the status quo before the invalid rule took effect . . . .").

Defendants' own authorities help illustrate this point. In *Aberdeen & Rockfish Railroad Co. v. Students Challenging Regulatory Agency Procedures (S.C.R.A.P.)*, 422 U.S. 289 (1975), the Supreme Court held that a court order that "directed the ICC to perform certain acts" was effectively an "injunction," even though it was not labelled as such. *Id.* at 308 & n.11. The order in question "direct[ed] the ICC to reopen" an administrative proceeding, "ordered the ICC to prepare a new [environmental] impact statement," and "ordered the ICC to hold hearings after circulating the new impact statement and to fully consider anew [certain issues] in light of the new statement and the hearing." *Id.* at 306-07. And if the ICC were to "refuse to do so," the order would be enforceable via contempt proceedings. *Id.* at 308 n.11.

Vacatur operates differently. When a court vacates a rule, it cannot then hold an official in contempt for taking an action previously authorized by the vacated rule. *See Armstrong v. Exec. Off. of the President*, 1 F.3d 1274, 1289 (D.C. Cir. 1993) (judgment declaring agency action unlawful is not enforceable by contempt). Instead, that official simply can no longer point to the vacated rule as a source of authority for the legality of his action. This is why an injunction is an "additional," "drastic[,] and extraordinary remedy," available only "[i]f a less drastic remedy . . . such as partial or complete vacatur" is insufficient. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165-66 (2010).

Defendants' other case, *Direct Marketing Association v. Brohl*, 575 U.S. 1 (2015), says nothing about vacatur—the words "vacate" or "vacatur" do not even appear in the opinion. The passage quoted by Defendants does not, as they suggest, say that *vacatur* "restrict[s] or stop[s] official action." *Id.* at 13. Indeed, if *Brohl* is relevant at all, it only undercuts Defendants' effort to read "restrain" so broadly as to encompass the non-coercive remedy of vacatur—for *Brohl* rejected just that sort of argument under another statute. The Court explained that "'[r]estrain,' standing alone, can have several meanings," including a broader meaning capturing "orders that merely *inhibit* acts" and a narrower meaning capturing "only those orders that stop (or perhaps compel) acts," *i.e.*, "[t]o prohibit from action; to put compulsion upon . . . to enjoin." *Id.* at 12-13 (quotation marks omitted). Because the statute in question—much like § 1252(f)(1)—paired the word "restrain" with "enjoin" and "suspend," the Court interpreted "restrain" as similarly referring only to "equitable remedies that restrict or stop official action." *Id.* at 13; *see id.* at 14 ("a suit cannot be understood to 'restrain' the assessment, levy or collection of a state tax if it merely inhibits those activities").

At bottom, Defendants' arguments about 8 U.S.C. § 1252(f)(1) require a rewriting of that statute. Section 1252(f)(1) bars only efforts to "enjoin or restrain" the operation of certain INA provisions. Because Plaintiffs do not seek an order enjoining or restraining anyone from doing anything—they seek merely the "less drastic remedy" of vacatur, *Monsanto*, 561 U.S. at 165—Section 1252(f)(1) presents no obstacle.

D. Declaratory Relief Is Appropriate and Warranted.

Tellingly, Defendants do not even argue that Section 1252(f) precludes *declaratory* relief—and for good reason. "Section 1252(f) prohibits only injunctions . . . . It does not proscribe issuance of a declaratory judgment." *Make the Rd. N.Y.*, 962 F.3d at 635 (citing *Nielsen v. Preap*, 586 U.S. 392, 403 (2019)). Instead, Defendants throw out a flyby assertion that "Plaintiffs failed to plead a claim under the Declaratory Judgment Act." Opp. 27.

This statement reflects a misunderstanding of the Declaratory Judgment Act. By its plain terms, the Act does not require plaintiffs to plead a cause of action under it. Rather, it authorizes courts to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). For this reason, the Supreme Court has made clear that "Congress enlarged [through the Declaratory Judgment Act] the range of remedies available in the federal courts but did not extend their jurisdiction." *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950).

Plaintiffs indisputably preserved their right to a declaratory judgment as a *remedy*. Their Prayer for Relief asked this Court to "[d]eclare the Rule unlawful," Compl. at 126 ¶ A, and it made this request separately from Plaintiffs' request for vacatur, *id.* ¶ B. Plaintiffs also requested "any such other or further relief as this Court deems just and equitable." *Id.* ¶ E; *see Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15 (1971) ("breadth and flexibility are inherent in

equitable remedies"). These requests are more than sufficient to entitle Plaintiffs to a declaration that the Rule was issued unlawfully.

CONCLUSION

When Chad Wolf approved the Anti-Asylum Rule in December 2020, multiple courts had already held his ascension to the leadership of DHS unlawful. Undeterred, Wolf continued wielding the Secretary's powers and tried to revamp the nation's asylum system by methodically stripping away protections for the most vulnerable among us. In short, the "critical structural safeguard" of the Appointments Clause, *SW Gen.*, 580 U.S. at 293 (quotation marks omitted), designed "to preserve democratic accountability," *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, 590 U.S. 448, 457 (2020), had gone off the rails. But federal law provides that such illegality has consequences. Plaintiffs respectfully request that this Court declare the Rule unlawful and vacate it under both the APA and the FVRA, ensuring that neither this administration nor the next one can benefit from the Rule's illegal issuance by retaining or reviving its radical innovations.

Respectfully submitted,

Dated: September 10, 2024

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