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IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; BAY AREA COUNCIL; NATIONAL RETAIL FEDERATION; AMERICAN ASSOCIATION OF INTERNATIONAL HEALTHCARE RECRUITMENT; PRESIDENTS' ALLIANCE ON HIGHER EDUCATION AND IMMIGRATION; CALIFORNIA INSTITUTE OF TECHNOLOGY; CORNELL UNIVERSITY; THE BOARD OF TRUSTEES OF THE LELAND STANFORD JUNIOR UNIVERSITY; UNIVERSITY OF SOUTHERN CALIFORNIA; UNIVERSITY OF ROCHESTER; UNIVERSITY OF UTAH; and ARUP LABORATORIES,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY; UNITED STATES DEPARTMENT OF LABOR; ALEJANDRO MAYORKAS, in his official capacity as Secretary of Homeland Security; and MARTIN J. WALSH, in his official capacity as Secretary of Labor,

Defendants.

Case No. 4:20-cv-7331-JSW

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

Date: September 17, 2021
Time: 9 a.m.
Judge: Hon. Jeffrey S. White
Ctrm.: 5

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INTRODUCTION

We demonstrated in our opening brief that the Lottery Rule, *Modification of Registration Requirement for Petitioners Seeking to File Cap-Subject H-1B Petitions*, 86 Fed. Reg. 1,676 (Jan. 8, 2021), is unlawful three times over: It attempts to rewrite the Immigration and Nationality Act (INA) by replacing the statutory command that H-1B visas be issued "in the order in which petitions are filed for such visas" (8 U.S.C. § 1184(g)(3)), with a salary-based ranking system not even hinted at in the statutory text (*see* Plffs. Mem. 5-10); it was issued under the purported authority of Chad Wolf, who *eight* district courts—including this one—have unanimously concluded never lawfully occupied the office of Acting Secretary of Homeland Security (*see id.* at 10-16); and it arbitrarily disregarded relevant comments and vested reliance interests in violation of the Administrative Procedure Act (APA) (*see id.* at 17-19).

The government's responses falter as to each of these independent bases for setting aside the Lottery Rule. As to the statutory conflict, the government appears to assert that, once it identifies a minor ambiguity in a statute, it has free rein to create *any* substantive legal rule, including one entirely unmoored from the statutory text. But as Justice Scalia once colorfully explained, "[i]t does not matter whether the word 'yellow' is ambiguous when the agency has interpreted it to mean 'purple.'" *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 493 n.1 (2012) (Scalia, J., concurring). Here, because the statute orders that H-1B visas are to be provided based on when they are requested, the agency cannot supplant that first-come, first-served rule with an entirely different, substantive standard for issuing scarce visas. DHS itself recently recognized that the statute as written does not permit this fundamental change to the H-1B program.

With regard to Chad Wolf's widely recognized lack of authority, the government *acknowledges* that it is presenting no new or different arguments than those that have been rejected time and again by courts and executive watchdogs alike. *See* Gov't Mem. 5 & n.4. The government cannot overcome the mountain of contrary authority. And its responses to Plaintiffs' procedural objections fall flat as well. In short, the government cannot resuscitate this fatally flawed and ill-advised rulemaking. The Court should thus set aside the Lottery Rule. And Plaintiffs respectfully request the Court do so promptly, so that stakeholders may plan accordingly.

ARGUMENT

I. THE LOTTERY RULE CONFLICTS WITH THE INA.

As we explained in our opening brief, the Lottery Rule—which provides that DHS will issue scarce H-1B visas based on a ranking of the noncitizen beneficiaries' proposed salaries—is flatly incompatible with the INA's command that noncitizens "shall be issued [H-1B] visas . . . in the order in which petitions are filed for such visas." 8 U.S.C. § 1184(g)(3); *see* Plffs. Mem. 5-10; *see also, e.g.*, *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 609 (2013) ("It is a basic tenet that 'regulations, in order to be valid, must be consistent with the statute under which they are promulgated.") (quoting *United States v. Larionoff*, 431 U.S. 864, 873 (1977)). That is, in the INA, Congress specified a single criterion for selecting among an over-abundance of petitions—the time of filing. The Rule at issue here flatly contradicts that statutory directive.[1]

DHS offers essentially one response: *Literal* application of this first-to-file rule, DHS maintains, is impractical if not impossible. *See* Gov't Mem. 12-15. If using mail, USCIS may receive hundreds of thousands of petitions on the same day—and there may be "no legitimate way to determine which petition was 'filed' first." *Id*. at 13 (quotation omitted). And an electronic first-to-file system, the government posits, may have issues of its own. *Id*. at 15. Thus, given the concern of effectively "simultaneous submissions" (*id*. at 12), the government contends that it may design an H-1B selection system that treats some swath of petitions as constructively received at the same time, even if they were not in fact received by the agency at the very same nanosecond.

In large measure, *we agree*. There may well exist statutory ambiguity as to how the agency may effectuate Congress's first-come, first-served directive in a way that accounts for operational realities. That is why Plaintiffs take no issue here with the existing, non-substantive lottery-

[1] The government proposes that the Court need not decide the statutory-authority question if it rules for Plaintiffs on our claim that Chad Wolf lacked authority as Acting Secretary of Homeland Security. *See* Gov't Mem. 12 n.11. While it is true that we offer multiple, independent grounds on which the Court can and should invalidate the Rule, Plaintiffs respectfully submit that it would serve judicial economy to resolve the statutory question. That would conserve judicial resources in the event of any appeal (allowing all issues to be resolved together), and it would provide further guidance in the event that DHS were to consider promulgating a similar rule under the authority of a duly appointed Secretary.

based implementation of Section 1184(g)(3). *Cf.* Gov't Mem. 13-15.[2] A random lottery alleviates the administrative challenges that would result from rote ordering of electronic or postal applications. Yet it retains the essential feature required by the statute: When more H-1B petitions are received than are available (as now always occurs), the substantive factor DHS uses to choose among petitions is the one selected by Congress—the time when the petition is filed. If the H-1B program is oversubscribed at what amounts to the same time (a legal construct presently established by regulation), then random chance—a content-blind factor—makes the final selection.

Indeed, to arrive at this result, DHS has interpreted the meaning of the term "filed" in 8 U.S.C. § 1184(g)(3). As the government's principal authority explains:

> It is not an unreasonable interpretation by USCIS to conclude that when multiple petitions are received simultaneously on the day when the statutory cap is met, all of those petitions are not considered "filed" merely because they were delivered. Thus, USCIS can randomly prioritize those petitions through a computer-generated system and only "file" the petitions that have been selected. The remaining petitions are not "filed," but are instead returned, along with the filing fee. Because the rejected petitions are not filed, they need not be "ordered" under § 1184(g)(3). Thus, the random selection occurs before filing and does not violate the statute.

Walker Macy LLC v. United States Citizenship & Immigr. Servs., 243 F. Supp. 3d 1156, 1175 (D. Or. 2017).[3] Rather than undermining the statute's first-to-file directive, the court held, the random lottery accords with it.

In defending the quite different Lottery Rule here, however, the government appears to deny that the INA requires DHS to create an H-1B program that selects petitions using a single substantive criterion—the time of filing. *See* Gov't Mem. 13. But that is the only way to understand a statute that sets a cap on the number of H-1B visas that may be issued, and then directs

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[2] The statement in our opening brief that the statutory "command leaves no room for agency discretion" (Plffs. Mem. 6) was somewhat imprecise. Our point was that an agency has no discretion as to the substantive criteria that must be used to select among oversubscribed H-1B petitions; DHS must use the first-in-time selection criterion that Congress directed, and not some alternative substantive criteria of the agency's own choosing. We acknowledge that, in operationalizing *how* the first-in-time selection criteria is to work, the agency has some range of discretion.

[3] The government does not—and cannot reasonably—contend that analysis of wage levels under the proposed Lottery Rule occurs "before filing" of the H-1B petitions. *Walker Macy LLC*, 243 F. Supp. at 1175. Thus the essential basis for conclusion that the existing lottery "does not violate the statute" is absent here. *Id*.

that those limited visas "shall be issued . . . in the order in which petitions are filed for such visas." 8 U.S.C. § 1184(g)(3). *Cf., e.g.*, *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1088 (D.C. Cir. 1996) ("[I]f [the statutory text] clearly requires a particular outcome, then the mere fact that it does so implicitly rather than expressly does not mean that it is 'silent' in the *Chevron* sense.").[4] In other words, where one manner of processing applications is mandated, Congress need not explicitly prohibit all other methods, since mandatory language in a statute "creates an obligation impervious to discretion." *Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1320 (2020) (quoting *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016)) (alteration incorporated).

And with the INA properly construed, there is no meaningful defense of the Rule, as it departs fundamentally from the statutory command. Rather than selecting overabundant H-1B petitions based on time as the statute directs, DHS would select petitions based on time *and* wage level.[5] That is incompatible with the INA's directive that that the time of filing is the criterion that "shall" be used for issuing H-1B visas.

What is more, because the Rule would deem all petitions received during the "registration period of at least 14 days" (86 Fed. Reg. at 1676) to be simultaneously filed, the Rule would *replace* time-based selection with wage-based ranking. As DHS plainly acknowledges, it "expect[s]" an excess number of petitions "given the oversubscription of the program for the past ten years." Gov't Mem. 14. In designing the program this way, then, the selection criterion mandated by Congress (time of filing) would be supplanted in whole by a selection criterion of the agency's own invention (wage level). This is not implementation of congressional policy; it is replacement of it. *Cf. Util. Air Reg. Grp. v. EPA*, 573 U.S. 302, 325-326 (2014) ("An agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms.").

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[4] H-1B wage levels are a topic directly addressed by Congress. *See* 8 U.S.C. § 1182(n), (p). Yet, despite reticulated rules regarding wages, Congress chose an entirely different criterion—time-of-filing—to select among an overabundance of petitions.

[5] While the factor at issue today is wage level, under DHS's reasoning the agency could similarly select petitions based on an applicant's country of origin, field of specialty occupation, or any other substantive factor it dreams up.

This policy selected by DHS is, accordingly, outside the boundaries of whatever discretion that is conferred by ambiguities within the statutory text. The governing law is clear and unchallenged by the government: "The presence of some uncertainty does not expand *Chevron* deference to cover virtually *any* interpretation" of a statute, only those that are "within the bounds of [the] uncertainty" left by the text. *Cuomo v. Clearing House Ass'n, LLC*, 557 U.S. 519, 525 (2009) (emphasis added); *see also* Plffs. Mem. 8 & n.3 (collecting additional authorities). That is, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer 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) (emphasis added).

Because the Lottery Rule is incompatible with Congress's command that an overabundance of H-1B petitions are to be prioritized using a first-to-file rule, it is necessarily outside the permissible range of agency discretion. Ultimately, the government has no argument that its arrogation of the power to withhold H-1B visas from all but the highest earners has any basis in the INA's text. *Cf., e.g.*, *Sierra Club v. EPA*, 985 F.3d 1055, 1068 (D.C. Cir. 2021) ("[T]o suggest . . . that *Chevron* step two is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power (*i.e.*, when the statute is not written in 'thou shalt not' terms), is both flatly unfaithful to the principles of administrative law . . . and refuted by precedent.") (quoting *Ry. Lab. Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc)); *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995) ("We refuse, once again, to presume a delegation of power merely because Congress has not expressly withheld such power.").

In all, the government attempts to bootstrap perceived statutory silence on a relatively minor point (simultaneously received petitions) into a license to disregard the text of the INA—which, again, mandates that visas be issued "in the order in which petitions are filed" (8 U.S.C. § 1184(g)(3))—in processing *all* petitions in years when the visa quota is oversubscribed. The Court should reject such a brazen attempt to rewrite a duly enacted statute. *See, e.g. Sierra Club v. EPA*, 762 F.3d 971, 981 (9th Cir. 2014) ("[An] agency's 'authority and responsibility to resolve some questions left open by Congress that arise during the law's administration' does not extend

to 'include a power to revise clear statutory terms that turn out not to work in practice.'") (quoting *Util. Air Reg. Grp.*, 573 U.S. at 327); *Decker*, 568 U.S. at 609.[6]

II. THE LOTTERY RULE IS VOID BECAUSE CHAD WOLF WAS NEVER ACTING SECRETARY OF HOMELAND SECURITY.

Our motion further demonstrated that, as "a growing chorus of authority" has concluded, "[Chad] Wolf was unlawfully serving as acting secretary of DHS," rendering void all actions taken under his purported authority, including the Lottery Rule. *E. Bay Sanctuary Covenant v. Barr*, __ F. Supp. 3d. ___, 2021 WL 607869, at *4 (N.D. Cal. Feb. 16, 2021); *see* Plff. Mem. 10 (collecting cases from seven unanimous district courts.).[7] Indeed, this Court itself previously joined the choir, concluding (for purposes of a preliminary injunction) that plaintiffs were "likely to succeed on their claim that Mr. McAleenan and Mr. Wolf were not lawfully serving under the HSA." *See Immigrant Legal Res. Ctr. v. Wolf*, 491 F. Supp. 3d 520, 533-537 (N.D. Cal. 2020) (White, J.) (capitalization altered).

In response, the government is commendably candid. It "acknowledge[s] that this Court . . . has already reached the preliminary conclusion . . . that Mr. McAleenan's service as Acting Secretary of Homeland Security and Mr. Wolf's subsequent service in the same position were invalid"; it recognizes that "[e]very other district court to have addressed this issue has likewise re-

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[6] Amicus U.S. Tech Workers takes a different tack. It argues that "USCIS is *not* faced with ambiguity," but rather that the statute unambiguously "directs that which cannot be done." Dkt. 146-1, at 5. It therefore urges that "the task of [the] agency" is to "implement[] to the fullest extent possible the directives" of the statute "while remaining within the bounds of [the] agency's statutory authority." *Id.* at 4 (quoting *Citizens to Save Spencer Cty. v. EPA*, 600 F.2d 844, 871 (D.C. Cir. 1979)).

First of all, courts generally do not entertain legal arguments advanced by amici but not by the supported party. *See, e.g.*, *United States v. Wahchumwah*, 710 F.3d 862, 868 n.2 (9th Cir. 2013) ("[T]he court will not consider arguments raised only in amicus briefs."). And in any event, this argument only highlights the core problem with the Lottery Rule: It makes *no attempt* to "implement[] to the fullest extent possible the [statutory] directive" that visas be issued in a first-come first-served manner (*Citizens to Save Spencer Cty.*, 600 F.2d at 871), as might be accomplished by selecting a different content-blind selection mechanism (like a random lottery). Rather, it disregards that directive entirely in favor of a salary-based ranking system with no grounding in the statutory text. Even under *amicus*'s preferred framing, the Lottery Rule is unlawful.

[7] In fact, yet another court—one in this District—recently adopted the same reasoning, bringing the current tally to eight. *See Behring Reg'l Ctr. LLC v. Wolf*, 2021 WL 2554051, at *4-5 (N.D. Cal. June 22, 2021) ("This Court joins the numerous other courts which have held that because Secretary Nielsen amended the wrong Order of Succession . . . Mr. McAleenan was not properly serving as the Acting Secretary of Homeland Security.") (Corley, M.J.).

jected the Government's position"; and it concedes that "the substance of Defendants' arguments here remain the same as those asserted in the prior case." Gov't Mem. 5 & n.4. In all, the government straightforwardly asks the Court to disagree with its earlier, preliminary conclusion—and with seven other district courts and the Government Accountability Office, all of whom have reached the same result. The Court should decline that invitation, because its earlier decision is correct.[8]

a. The government's core argument—that Secretary Nielsen did in fact revise the order of succession—has properly been rejected by every court to consider it. The government contends that Secretary Nielsen's April 2019 Order both "revis[ed] the list of officials in Annex A, which previously had applied only to delegations of authority under § 112(b)(1), *and* [] us[ed] the revised list as the new order of succession." Gov't Mem. 7 (emphasis added); *see also id.* at 9 ("Secretary Nielsen's order put the list of officials in Annex A to an additional use under a different statutory authority," by "expressly ma[king] the revised Annex A the order of *succession* under § 113(g)(1).").

The obvious problem with this position is that the April 2019 Order does not accomplish this end. The Order *does not* "expressly ma[ke] the revised Annex A the order of succession" in the event of resignation; by its plain text, the *only* thing the order accomplishes is the amendment of Annex A. *See* Dkt. 144-2, at 2 ("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."). While the order's prefatory text states that "I hereby designate the order of succession for the Secretary of Homeland Security as follows" (*id.*), the only operative language that "followed" was the amendment to Appendix A, *not* any change to the situations in which Appendix A would apply—just as this and many other courts have already held. *See Batalla Vidal v. Wolf*, 501 F. Supp. 3d 117, 132 (E.D.N.Y. 2020) ("The government's reading of the documents is tortured. On the plain text, Secretary Nielsen amended the order of officials in Annex A but did nothing to change when

[8] To be clear, we do not contend not that the government is collaterally estopped from arguing otherwise. *Cf.* Gov't Mem. 5-6. Rather, our point is that the result previously reached by this Court—and by all the others—is correct.

Annex A applied."); *La Clinica de la Raza v. Trump*, __ F. Supp. 3d ___, 2020 WL 6940934, at *13 (notwithstanding this prefatory language, "the April 9th order only replaced Annex A and made no other changes to Delegation No. 00106," meaning that "the amended Annex A . . . only applied when the Secretary was unavailable due to disaster or catastrophic emergency."); *Casa de Md., Inc. v. Wolf*, 486 F. Supp. 3d 928, 959-960 (rejecting this argument because "the plain language of the Order controls and speaks for itself") (alterations incorporated); *Immigrant Legal Res. Ctr.*, 491 F. Supp. 3d at 534-535 (White, J.) ("The Court finds the reasoning set forth in *La Clinica de la Raza* and *Casa de Maryland* on the succession issue highly persuasive.").

The government also contends that "[t]he *intent* of Secretary Nielsen's order" may be divined from "actions surrounding its execution," including the fact that Secretary Nielsen swore in Mr. McAleenan as Acting Secretary, as well as the text of the associated transmittal memorandum. Gov't Mem. 8, 9-10. But numerous courts have rejected this argument as well. *See Batalla Vidal*, 501 F. Supp. 3d at 132 ("[T]he Government urges the court to ignore official agency policy documents and invalidate the plain text of the April Delegation because it does not comport with [Secretary Nielsen's] supposed intent . . . . The court credits the text of the law over *ex post* explanations that the text means something other than what it says."); *Casa de Md.*, 486 F. Supp. 3d at 959 (rejecting this argument, and explaining that "prefatory clauses or preambles cannot change the plain meaning of the operative clause," and "agency action 'must be viewed critically to ensure that [it] is not upheld on the basis of impermissible *post hoc* rationalization.") (first quoting *Kingdomware Tech., Inc. v. United States*, 136 S. Ct. 1969, 1978 (2016), then quoting *DHS v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1908 (2020)); *accord* Dkt. 140-3 (GAO Report), at 8-9 (rejecting the government's reliance on the cover memorandum because "the plain language of the delegation controls, and speaks for itself," and explaining that "it would be inappropriate, in light of the clear express directive of the April Delegation, to interpret the order of succession based on [Secretary Nielsen's] post-hoc actions.").

In short, the government offers no argument in support of Wolf's purported service as Acting Secretary that has not already been rejected by court after court. Instead, the government "has recycled exactly the same legal and factual claims made in the prior cases, as if they had not

been soundly rejected in well-reasoned opinions by several courts." *Pangea Legal Servs. v. DHS*, __ F. Supp. 3d. ___, 2021 WL 75756, at *4 (N.D. Cal. Jan. 8, 2021) (similarly rejecting the government's arguments about "Wolf's authority *vel non*"). This Court should—again—reject those arguments here.

b. Even if all of the above were incorrect, the action at issue here is *still* unlawful for an additional, independent reason. As we explained, and as at least one district court has held, acting secretaries may not lawfully modify a succession order; only a *Senate-confirmed* Secretary of Homeland Security has that authority. *See* Plffs. Mem. 15-16 (discussing *Nw. Immigrant Rights Project v. USCIS*, 496 F. Supp. 3d 31 (D.D.C. 2020)). And because Wolf's acting tenure is contingent on a modification to the succession order by Acting Secretary McAleenan, Wolf lacked authority on this separate ground. *Id*. "The Government's position is that this argument is not correct" (Gov't Mem. 10), but it offers neither any basis on which to distinguish *Northwestern Immigrant Rights Project*, nor any legal argument not already considered and rejected by that court in its exceedingly thorough analysis. *See Nw. Immigrant Rights Project*, 496 F. Supp. 3d at 64.

The government does not directly respond to the textual analysis contained in *Northwestern Immigrant Rights Project*, in which the court explained in painstaking detail that 6 U.S.C. § 113(g)(2) specifically empowers only the "Secretary" to determine succession order, while elsewhere referring to the "Acting Secretary" as well. 496 F. Supp. 3d at 62. Given this distinction, the court continued, the HSA cannot be said to "expressly" authorize the *Acting* Secretary to create an order of succession, as required to create an exception to the Federal Vacancies Reform Act's (FVRA) default rules. *Id.* at 63-64.[9] What is more, the government's position—that an inferior officer at DHS can in effect *select* another inferior officer to serve as the Head of the Department—is at odds with the essential purpose and text of the Constitution's Appointments

[9] The government notes that Section 113(g)(2) "operates 'notwithstanding' the FVRA," claiming that the FVRA therefore "does not limit the authority conferred by § 113(g)(2)." Gov't Mem. 11. But as the *Northwestern Immigrant Rights Project* court explained, that argument is question-begging. All agree "that the HSA establishes an exception to the FVRA framework"; the question is "*how big* an exception to the FVRA Congress created." 496 F. Supp. 3d at 62.

Clause. *Id*. at 64-65. Interpreting the statute to empower only a Senate-confirmed Secretary to revise the succession order thus "avoid[s] any constitutional concerns." *Id*. at 69.

Moreover, the government's reliance (Mem. 10-11) on *In re Grand Jury Investigation*, 916 F.3d 1047, 1055 (D.C. Cir. 2019) was considered and rejected by *Northwestern Immigrant Rights Project*, 496 F. Supp. 3d at 64 ("To be sure, acting officials are typically 'vested with the same authority that could be exercised by the officer for whom he acts,' but an acting official must take on that authority either by implication or by virtue of statutory language that expressly vests the acting official with that authority[.] Only the latter is sufficient to create an exception to the FVRA, and no such express statutory language is present here.") (citation omitted) (quoting *In re Grand Jury Investigation*, 916 F.3d 1047, 1055 (D.C. Cir. 2019)); *see generally id.* at 61-70 (extensive analysis of this issue). That analysis is correct, and the Court should adopt it as an independent reason why Wolf was not a lawful Acting Secretary.

c. Finally, the government does not defend the alternative theory offered by the Lottery Rule for Wolf's purported service as Acting Secretary, under which another official, Peter Gaynor, was himself recognized as Acting Secretary "only for the sham purpose of abdicating his authority to DHS's preferred choice," Wolf. *Batalla Vidal*, 501 F. Supp. 3d at 133; *compare* Plffs. Mem. 13-16 (rebutting this theory), *with* Gov't Mem. (not defending it). Any reliance on this theory is therefore forfeited—and rightly so. *See, e.g.*, *In re Polycom, Inc.*, 78 F. Supp. 3d 1006, 1014 n.6 (N.D. Cal. 2015) ("[I]n most circumstances, failure to respond in an opposition brief to an argument put forward in an opening brief constitutes waiver or abandonment in regard to the uncontested issue.") (quoting *Stichting Pensioenfonds ABP v. Countrywide Fin. Corp.*, 802 F. Supp. 2d 1125, 1132, (C.D. Cal. 2011)).

In sum, the government offers no compelling reason for this Court to depart from its earlier holding—in accord with the unanimous decisions of *seven* other courts in this district and across the country—that Chad Wolf never became Acting Secretary of Homeland Security, and acts taken in his name are therefore void.

III. THE LOTTERY RULE IS PROCEDURALLY ARBITRARY AND CAPRICIOUS.

Finally, we explained that the Lottery Rule is also arbitrary and capricious because the agency both failed to respond adequately to comments regarding the effect of the rule on recent graduates and early-career professionals, and did not take reliance interests into account in reversing its long-held position on the practical availability of visas at different wage levels. Plffs. Mem. 17-19; *see, e.g.*, *Centro Legal de la Raza v. Exec. Office for Immigration Review*, __ F. Supp. 3d ___, 2021 WL 916804, at *25 (N.D. Cal. Mar. 10, 2021) (agency "cannot simply 'nod to concerns raised by commenters only to dismiss them in a conclusory manner.'") (quoting *Gresham v. Azar*, 950 F.3d 93, 103 (D.C. Cir. 2020)) (alterations incorporated); *DHS v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) ("When an agency changes course, as DHS did here, it must 'be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.' 'It would be arbitrary and capricious to ignore such matters.'") (first quoting *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016), then quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)) (citation omitted).

The government attempts to rescue DHS's response to commenters' concern that the wage-based prioritization will lock out recent graduates and early-career professionals (Gov't Br. 18)—but we already explained why DHS's response is a non-sequitur: "The commenters' point . . . was that, *in fact*, entry-level professionals tend to make lower salaries than their more experienced counterparts, even though they may be just as important to firms and the economy (if not more so) than those later-stage employees, and that the Lottery Rule is likely to exclude many of the bright, ambitious, early-career professionals who often drive innovation." Plffs. Mem. 18. Neither the Lottery Rule itself nor the government's brief responds to this concern. And while the government points to the Rule's observation that, "with the current random selection process, even the most talented foreign student may have less than a 50 percent chance of selection," (Gov't Mem. 18 (quoting Lottery Rule, 86 Fed. Reg. at 1,684)), it does not attempt to square this observation with DHS's own estimate that *zero percent* of applications for jobs at wage level I—the level associated with "entry level" jobs available to recent graduates and early-career professionals—would be selected under the Lottery Rule. *See* Lottery Rule, 86 Fed. Reg. at 1,723-1,724

& tbl. 12; *Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States*, 86 Fed. Reg. 3,608, 3,611 (Jan. 14, 2021) (DOL Rule) ("Level I" defined as "entry level"). Prior to the Rule, then, an appreciable number of entry-level workers—tens of thousands per year, by the government's count (Lottery Rule, 86 Fed. Reg. at 1,722 tbl. 11)—would receive an H-1B visa. After the Rule, that number would plummet to zero—yet DHS never even addresses the baleful effects this would have on the stakeholders who use the H-1B program.

As to the reliance interests, the government asserts that DHS considered and rejected them in the Notice of Proposed Rulemaking. Gov't Mem. 20. But it does not explain how the government could have made a reasoned decision that reliance interests were outweighed by other concerns *before* receiving the comments that illuminate what those reliance interests are. (For its own part, the Lottery Rule does not even mention reliance interests). Nor does providing a delay in implementation adequately address reliance on the scale of "entire staffing, recruitment, and training models" and "business unit long-term . . . planning that rel[ies] on access to early-career professionals," as the comments revealed had accrued. Compete America Comment 4; *cf.* Gov't Mem. 20.

The Court should set aside the Lottery Rule for these reasons, as well—quite apart from the fact that it was issued by a purported official who has been unanimously held to be powerless, and that the rule is manifestly contrary to the INA.

CONCLUSION

The Court should enter summary judgment for Plaintiffs and set aside the Lottery Rule.

Respectfully submitted,

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DATED: August 6, 2021

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