

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEHRING REGIONAL CENTER LLC,
Plaintiff,
v.
CHAD WOLF, et al.,
Defendants.

Case No. 20-cv-09263-JSC

**ORDER GRANTING SUMMARY
JUDGMENT IN PLAINTIFF’S FAVOR
ON CLAIM FOUR**

Behring Regional Center, LLC, a California-based Regional Center that sponsors capital investment projects using funds from foreign investors who are EB-5 Immigrant Investor Program applicants, brings this Administrative Procedures Act (“APA”) action against the Department of Homeland Security.¹ Plaintiff contends that Homeland Security violated the APA when it promulgated a final rule in July 2019 amending its regulations for the EB-5 Program (“the Final Rule”).

At the hearing on Plaintiff’s motion for a preliminary injunction, the parties agreed to convert Plaintiff’s motion to summary judgment on its fourth claim—that the Final Rule was promulgated “in excess of statutory authority” because Former Acting Homeland Security Secretary Kevin McAleenan was not properly serving in his position when he promulgated the Final Rule in July 2019. *See* 5 U.S.C. §§ 706(2)(A), 706(2)(C), 706(2)(D). (Dkt. No. 32.)²

¹ All parties have consented to the jurisdiction of a magistrate judge pursuant to 28 U.S.C. § 636(c). (Dkt. Nos. 8, 16.)

² Record Citations are to material in the Electronic Case File (“ECF”); pinpoint citations are to the ECF-generated page numbers at the top of the document.

1 Following the hearing, the current Secretary of Homeland Security, Alejandro Mayorkas, ratified
2 the Final Rule. (Dkt. No. 34-1.) The government argues that this cures any defect in Mr.
3 McAleenan’s promulgation of the Final Rule. Having considered the parties’ arguments and the
4 relevant legal authority, and having had the benefit of oral argument on May 13, 2021, the Court
5 GRANTS summary judgment in Plaintiff’s favor on its Fourth Claim for Relief. McAleenan was
6 not lawfully serving as Homeland Security Secretary when he promulgated the Final Rule, and
7 therefore, under the Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. § 3345 et seq., the
8 Final Rule is void. Further, neither Secretary Mayorkas’s after-the-fact ratification nor the de-
9 facto officer doctrine save the Rule.

10 BACKGROUND

11 A. The Appointments Clause and Federal Vacancies Reform Act

12 Under the Appointments Clause, the President is granted the power to nominate Officers of
13 the United States, such as Homeland Security Secretary. U.S. Const., Art. II, § 2, cl.2. That
14 power is counterbalanced by “[t]he Senate’s advice and consent power ... a critical structural
15 safeguard of the constitutional scheme.” *N.L.R.B. v. SW Gen., Inc.*, — U.S. —, 137 S.Ct. 929, 935
16 (2017) (“*SW Gen. IP*”) (internal quotations, alterations and citations omitted). However, because
17 the constitutional process of Presidential appointment and Senate confirmation can take time, “the
18 responsibilities of an office requiring Presidential appointment and Senate confirmation—known
19 as a ‘PAS’ office—may go unperformed if a vacancy arises and the President and Senate cannot
20 promptly agree on a replacement.” *SW Gen., II*, 137 S.Ct. at 934. Recognizing this reality,
21 Congress has “authoriz[ed] the President to direct certain officials to temporarily carry out the
22 duties of a vacant PAS office in an acting capacity, without Senate confirmation.” *Id.* The FVRA
23 “is the latest version of that authorization.” *Id.* The FVRA sets forth the exclusive means of
24 temporarily filling vacancies in PAS offices. *See Guedes v. Bureau of Alcohol, Tobacco,*
25 *Firearms & Explosives*, 920 F.3d 1, 12 (D.C. Cir. 2019), *judgment entered*, 762 F. App’x 7 (D.C.
26 Cir. 2019), *and cert. denied*, 140 S. Ct. 789 (2020).

27 Under Section 3345(a) of the FVRA, the general rule is that the first assistant to a vacant
28 office shall become the acting officer, “[b]ut there is an ‘unless’—Congress crafted exceptions to

1 that exclusivity.” *Guedes*, 920 F.3d at 11; 5 U.S.C. § 3347(a)(1)(A)-(B) (“unless – ... a statutory
2 provision expressly – ... authorizes the ... head of an Executive department, to designate an officer
3 or employee to perform the functions and duties of a specified office temporarily in an acting
4 capacity; or ... designates an officer or employee to perform the functions and duties of a specified
5 office temporarily in an acting capacity.”). The Homeland Security Act provides such an
6 exception here; namely, that the Deputy Secretary “shall be the Secretary’s first assistant for
7 purposes of” the FVRA, thereby expressly incorporating the “first assistant” language used in the
8 FVRA. Pub. L. No. 107-296, § 103, 116 Stat. 2135, 2144 (2002) (codified at 6 U.S.C. §
9 113(a)(1)(A)).

10 On December 23, 2016, Congress amended the Homeland Security Act in two relevant
11 ways. *See* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, §
12 1903, 130 Stat. 2000, 2672 (2016). First, the amendment established that the Under Secretary for
13 Management would “serve as the Acting Secretary if by reason of absence, disability or vacancy
14 in office, neither the Secretary nor the Deputy Secretary is available to exercise the duties of the
15 Office of Secretary.” 6 U.S.C. § 113(g)(1). Second, the Secretary has the authority,
16 notwithstanding the FVRA, to “designate such other officers of the Department in further order of
17 succession to serve as Acting Secretary.” 6 U.S.C. § 113(g)(2).

18 As relevant here, the last Senate-confirmed Homeland Security Secretary under the Trump
19 administration, Kirstjen Nielsen, resigned on April 10, 2019. Prior to her resignation, Secretary
20 Nielsen purportedly amended the Order of Succession for Homeland Security Secretary to move
21 the Commissioner of Customs and Border Protection from 14th to third in line for succession to
22 assume the position of Acting Secretary after Deputy Secretary and Under Secretary for
23 Management. *See* Department of Homeland Security Delegation No. 00106 (Revision No. 08.5),
24 *DHS Orders of Succession and Delegations of Authorities for Named Positions* § II.B (Apr. 10,
25 2019); (Dkt. No. 21-2). However, Secretary Nielsen’s amendment dealt exclusively with
26 temporary vacancies occurring when the Secretary is “unavailable to act during a disaster or
27 catastrophic emergency,” not following a resignation. *Id.* In particular, Secretary Nielsen
28 amended Delegation No. 00106, Annex A, which identifies those with authority to act in the event

1 of the Secretary’s “unavailab[ility] to act during a disaster or catastrophic emergency”, rather than
2 Executive Order 13753, 81 Fed. Reg. 90667 (Dec. 9, 2016), which sets forth the “orderly
3 succession of officials” following “the Secretary’s death, resignation, or inability to perform.” *See*
4 *La Clinica de la Raza v. Trump*, No. 19-CV-04980-PJH, 2020 WL 6940934, at *13 (N.D. Cal.
5 Nov. 25, 2020) (discussing the orders of succession and delegation in detail).

6 Under Secretary Nielsen’s amendment to the Order of Succession, Kevin McAleenan, who
7 was serving as the Customs and Border Protection Commissioner at the time, purportedly became
8 the Acting Secretary of Homeland Security upon Secretary Nielsen’s resignation because the
9 offices of Deputy Secretary and Under Secretary for Management were both vacant. Six months
10 later, McAleenan resigned, and in November 2019, on his way out of office, he purported to again
11 amend the Order of Succession to move the Under Secretary for Strategy, Policy, and Plans up to
12 fourth in line on the Homeland Security succession list behind the Commissioner of Customs and
13 Border Protection. On November 13, 2019, the Senate confirmed Chad Wolf as the Under
14 Secretary for Strategy, Policy, and Plans, and because all three positions ahead of him in the
15 Homeland Security Order of Succession signed by Mr. Kevin McAleenan were vacate, he became
16 the Acting Secretary of Homeland Security.

17 **B. The EB-5 Program**

18 The EB-5 Immigrant Investor Program was established as part of the Immigration and
19 Nationality Act (“INA”) of 1990. *See* Pub. L. No. 101-649, § 121(a) (Nov. 29, 1990) (codified at
20 8 U.S.C. § 1153(b)(5)). The Program offers foreign nationals the opportunity to obtain a visa
21 when they invest money in American businesses that create at least ten American jobs. *See* 8
22 U.S.C. § 1153(b)(5). The statute specifies that “the amount of capital required” to obtain such a
23 visa is \$1,000,000, but notes that the Secretary of Homeland Security “may from time to time
24 prescribe regulations increasing the dollar amount specified.” *Id.* § 1153(b)(5)(C)(i). If investors
25 make investments in “targeted employment areas,” the threshold amount of capital required is
26 lowered to \$500,000. *Id.* § 1153(b)(5)(C)(ii). A targeted employment area (TEA) subject to the
27 reduced threshold may be either “an area which has experienced high unemployment (of at least
28 150 percent of the national average rate)” or a “rural area,” which is “any area other than an area

1 within a metropolitan statistical area or within the outer boundary of any city or town having a
2 population of 20,000 or more.” *Id.* § 1153(b)(5)(B)(ii)–(iii). The Act allocates 9,940 immigrant
3 visas each fiscal year to foreign nationals participating in the EB-5 program, and at least 3,000 of
4 the visas must be reserved for persons investing in TEAs. *See* 8 U.S.C. §§ 1151(d),
5 1153(b)(5)(B)(i).

6 In 1992, Congress expanded the EB-5 program by establishing the regional center “pilot
7 program,” which authorized “regional center[s] in the United States ... for the promotion of
8 economic growth, including increased export sales, improved regional productivity, job creation,
9 or increased domestic capital investment.” *See* Departments of State, Justice, and Commerce, the
10 Judiciary and Related Agencies Appropriations Act of 1992, Pub. L. No. 102-395, § 610(a) (Oct.
11 6, 1992) (codified at 8 U.S.C. § 1153). Congress has authorized United States Citizenship and
12 Immigration Services to give priority to EB-5 petitions filed through the Regional Center
13 Program. *See* Pub. L. No. 102-395, § 601(d), *amended by* Pub. L. No. 112-176, § 1 (Sept. 28,
14 2012).

15 **C. The 2019 Final Rule**

16 Until 2017, Homeland Security maintained the standard EB-5 investment threshold at \$1
17 million and the reduced investment threshold at \$500,000, as originally set by the INA in 1990.
18 *See* 8 C.F.R. § 204.6(f) (2018). On July 21, 2019, then-Acting Homeland Security Secretary
19 McAleenan signed a Final Rule, which, among other things, increased the standard investment
20 threshold to \$1.8 million and the reduced investment threshold to \$900,000. EB-5 Immigrant
21 Investor Program Modernization, 84 Fed. Reg. 35,750, 2019 WL 3302698 (July 24, 2019). The
22 United States Citizenship and Immigration Services, through its Acting Director Ken Cuccinelli,
23 issued the Final Rule on July 24, 2019. When the Final Rule went into effect on November 21,
24 2019, Chad Wolf was serving as the Acting Homeland Security Secretary.

25 **D. This Lawsuit**

26 Plaintiff, an EB-5 regional center, filed this APA lawsuit on December 21, 2020.
27 (Complaint, Dkt. No. 1.) It alleges that the Final Rule has had “devastating effects on the Program’s
28 participants and the ability to raise capital for job creating development projects.” (*Id.* at ¶ 58.)

1 Plaintiff brings four claims under the APA: (1) the Final Rule is arbitrary and capricious in
2 violation of 5 U.S.C. § 706(2)(A); (2) the Department of Homeland Security failed to properly
3 perform an economic impact analysis under the Regulatory Flexibility Act in violation of 5 U.S.C.
4 § 601; (3) the Department of Homeland Security exceeded its statutory authority to designate
5 TEAs in violation of 5 U.S.C. § 706(2)(C); and (4) Defendants lacked authority to promulgate the
6 Final Rule in violation of 5 U.S.C. §§ 706(2)(A), (C), 7-7(2)(D).

7 Two days after Plaintiff filed the complaint, it moved for a preliminary injunction. (Dkt.
8 No. 10.) A month later, before briefing on that motion was complete, Defendants moved to
9 transfer the action to the U.S. District Court for the District of Columbia where a similar action is
10 pending, *Florida EB5 Inv., LLC v. Wolf et al.*, Case 1:19-cv-03573-RJL (D.D.C. filed Nov. 26,
11 2019). (Dkt. No. 18.) The Court heard argument regarding both motions on March 25, 2021. The
12 Court subsequently denied Defendants’ motion to transfer, and, after giving the parties notice,
13 converted Plaintiff’s motion for preliminary injunction in part into a motion for summary
14 judgment on Plaintiff’s fourth claim for relief: that Defendants lacked authority to promulgate the
15 Final Rule in violation of 5 U.S.C. §§ 706(2)(A), (C), 7-7(2)(D). (Dkt. No. 32.) On March 31,
16 2021, the recently-Senate confirmed Secretary of Homeland Security Alejandro Mayorkas
17 purported to ratify the Final Rule.³ (Dkt. No. 34.) The parties filed supplemental submissions
18 (Dkt Nos. 35, 37, 38, 39, 43) and the Court heard further argument on May 13, 2021.

19 **DISCUSSION**

20 The issue presented is whether the Final Rule must be set aside as contrary to law because
21 neither Mr. McAleenan, Mr. Wolf, nor Mr. Cuccinelli was lawfully serving in his role at the time
22 the Final Rule issued. In particular, Plaintiff insists that because Secretary Nielsen amended the
23 wrong succession order, her amendment appointing Mr. McAleenan to Acting Secretary did not
24 have the force of law, and Mr. McAleenan’s appointment of Mr. Wolf as his successor likewise
25 lacked the force of law. Similarly, because Congress never authorized the establishment of the
26 newly-created position “Principal Deputy Director of USCIS”, Mr. Cuccinelli’s appointment to
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28 ³ Secretary Mayorkas was confirmed on February 2, 2021.

1 that position was also invalid. For purposes of the current motion for summary judgment, the
2 focus is on Mr. McAleenan’s appointment.

3 Plaintiff’s claim arises under the FVRA and the Homeland Security Act. The FVRA
4 “authorizes the President, a court, or the head of an Executive department, to designate an officer
5 or employee to perform the functions and duties of a specified office temporarily in an acting
6 capacity.” 5 U.S.C. §3347(a)(1)(A). The Homeland Security Act, consistent with the FVRA,
7 states that the “Secretary” may designate an order of succession and does not expressly vest that
8 power in an “Acting Secretary.” Under the FVRA’s vacant-office provision, if a person is not
9 lawfully serving in conformity with the FVRA, “[a]n action taken” by that person “in the
10 performance of any function or duty of [the] vacant office ... shall have no force or effect” and
11 “may not be ratified.” 5 U.S.C. § 3348(d)(1)–(2) (emphasis added); *but cf. id.* § 3348(e)
12 (exempting certain offices not at issue here).

13 Resolution of Plaintiff’s claim turns on two initial questions: (1) was Mr. McAleenan
14 lawfully serving in conformity with the FVRA, and (2) if not, whether the power to prescribe a
15 regulation that changes the investment amount for the EB-5 Program is an action taken in
16 performance of a function or duty of the vacant office in violation of the FVRA.

17 **A. McAleenan’s Appointment was Invalid**

18 This Court joins the numerous other courts which have held that because Secretary Nielsen
19 amended the wrong Order of Succession when she purported to place the Customs and Border
20 Protection Commissioner—Mr. McAllenan—third in line after the Deputy Secretary of Homeland
21 Security and the Under Secretary of Management for succession to the Acting Secretary of
22 Homeland Security position, Mr. McAllenan’s appointment was invalid. *See, e.g., La Clinica de*
23 *la Raza v. Trump*, No. 19-CV-04980-PJH, 2020 WL 7053313, at *7 (N.D. Cal. Nov. 25, 2020)
24 (“former Secretary Nielsen’s April 9th order did not alter the Department’s order of succession in
25 cases of resignation and that Executive Order 13753 continued to govern the order of succession at
26 the time of Secretary Nielsen’s resignation.”); *Batalla Vidal v. Wolf*, 501 F. Supp. 3d 117, 132
27 (E.D.N.Y. 2020) (“Based on the plain text of the operative order of succession, neither Mr.
28 McAleenan nor, in turn, Mr. Wolf, possessed statutory authority to serve as Acting Secretary.”);

1 *Casa de Maryland, Inc. v. Wolf*, 486 F. Supp. 3d 928, 960 (D. Md. 2020), *appeal dismissed sub*
2 *nom. Casa de Maryland, Inc. v. Mayorkas*, No. 20-2217 (L), 2021 WL 1923045 (4th Cir. Mar. 23,
3 2021) (“McAleenan’s appointment was invalid under the agency’s applicable order of succession,
4 and so he lacked the authority to amend the order of succession to ensure Wolf’s installation as
5 Acting Secretary.”); *Pangea Legal Servs. v. U.S. Dep’t of Homeland Sec.*, No. 20-CV-09253-JD,
6 2021 WL 75756, at *5 (N.D. Cal. Jan. 8, 2021) (“Because the passing of the torch from Nielsen to
7 McAleenan was ineffective, the attempt by McAleenan to pass it in turn to Wolf had no legal
8 effect whatsoever. The entire succession argument under the HSA consequently falls apart.”)

9 The Government Accountability Office (“GAO”) has reached a similar conclusion. GAO,
10 Homeland Security, File B-331650, (Aug. 14, 2020), <https://www.gao.gov/assets/710/708830.pdf>.
11 In its August 2020 decision, the GAO concluded that although “Mr. McAleenan assumed the title
12 of Acting Secretary upon the resignation of Secretary Nielsen, [] the express terms of the existing
13 designation required another official to assume that title. As such, Mr. McAleenan did not have
14 the authority to amend the Secretary’s existing designation.” *Id.* at 10.

15 Accordingly, at the time the Final Rule was approved, Mr. McAleenan was not properly
16 serving as the Acting Secretary of Homeland Security.

17 **B. Promulgating the Rule Violated the FVRA**

18 The Court thus turns to the second question, whether given Mr. McAleenan’s unlawful
19 appointment, promulgating the regulation to change the investment amount was an action taken in
20 performance of a function or duty of the vacant office. The government’s argument here is three-
21 fold. First, that the EB-5 statute does not say that “only” the Secretary can change the investment
22 amount. Second, that unless a duty is explicitly non-delegable, it is delegable in accordance with
23 the “Homeland Security Act [and] the longstanding presumption of delegability.” Third, even if
24 specific non-delegability is not required, the Secretary nonetheless did delegate the authority here.
25 None of these arguments are availing.

26 **1) Section 1153 Falls Under the FVRA**

27 The EB-5 Program was established as part of the Immigration Act of 1990. It is codified
28 at 8 U.S.C. § 1153 which generally governs allocation of immigrant visas. To be considered for

1 permanent residency under the EB-5 Program, a foreign investor must invest at least \$1 million in
2 a new commercial enterprise in the United States that will create at least 10 full-time jobs for
3 United States citizens or legal aliens. *See* 8 U.S.C. § 1153(b)(5). The statute states that with
4 respect to the amount of capital required for an investment in the EB-5 Program: “[t]he Attorney
5 General, in consultation with the Secretary of Labor and the Secretary of State, may from time to
6 time prescribe regulations increasing the dollar amount specified under the previous sentence.” 8
7 U.S.C. § 1153(b)(5)(C)(i). For purposes of summary judgment, Plaintiff does not dispute the
8 government’s position that this authority was transferred from the Attorney General to the
9 Secretary of Homeland Security. (Dkt. No. 43 at 5.)

10 In promulgating the Final Rule, the government cited as legal authority, among other
11 things, the statute that created the EB-5 Program. *See* 84 Fed. Reg. 35,750 (July 24, 2019) (citing
12 8 U.S.C. § 1153). Further, the Final Rule reiterates the statute’s language regarding who is
13 authorized to alter the investment amount:

14 In 1990, Congress set the minimum investment amount for the
15 program at \$1 million and ***authorized the Attorney General (now the***
Secretary of Homeland Security) to increase the minimum
16 ***investment amount***, in consultation with the Secretaries of State and
Labor. INA section 203(b)(5)(C)(i), 8 U.S.C. 1153(b)(5)(C)(i).

17 84 FR 35,750, at 35762 (emphasis added). Given that it was not a lawful Acting Secretary who
18 specified the amount of capital required under the Final Rule (McAleenan), the question is
19 whether the Final Rule is valid. For this, the Court turns to the FVRA.

20 As noted *supra*, under the FVRA’s vacant-office provision, if a person is not lawfully
21 serving in conformity with the FVRA, “[a]n action taken” by that person “in the performance of
22 any function or duty of [the] vacant office ... shall have no force or effect” and “may not be
23 ratified.” 5 U.S.C. § 3348(d)(1)–(2) (emphasis added); *but cf. id.* § 3348(e) (exempting certain
24 offices not at issue here). The phrase “function or duty,” in turn, is defined as follows:

25 (2) the term “function or duty” means any function or duty of the applicable office that—

- 26 (A) (i) is established by statute; and
27 (ii) is required by statute to be performed by the applicable officer (and only
that officer).

28 5 U.S.C. § 3348(a)(2)(A).

1 As a threshold matter, there can be no dispute that prescribing a regulation to increase the
 2 investment amount in accordance with Section 1153(b)(5)(C)(i) constitutes a “function or duty” of
 3 the Secretary of Homeland Security. The government instead insists that the statutory power to
 4 prescribe a regulation that increases the investment amount for the EB-5 Program is not a
 5 “function or duty” within the meaning of the FVRA because it is not a function or duty *exclusively*
 6 assigned to the Secretary of Homeland Security. That is, because Section 1153 does not say “the
 7 Attorney General and *only* the Attorney General may prescribe regulations” increasing the EB-5
 8 investment amount, it is not a duty or function within the meaning of the FVRA. *See* 5 U.S.C. §
 9 3348(a)(2)(A) (defining a “duty or function” as being “required by statute to be performed by the
 10 applicable officer (and only that officer)”).

11 The Court is unpersuaded. The EB-5 program statute—Section 1153(b)(5)(C)(i)—states
 12 that “[*t*]he **Attorney General**, in consultation with the Secretary of Labor and the Secretary of
 13 State, may from time to time prescribe regulations increasing the dollar amount specified under
 14 the previous sentence.” *Id.* (emphasis added). That the statute does not use the word “only” is
 15 immaterial—it provides that the Attorney General can specify the amount and does not identify
 16 any other official who can do so; in other words, it identifies the Attorney General and only the
 17 Attorney General. “If the language [of the statute] has a plain meaning or is unambiguous, the
 18 statutory interpretation inquiry ends there.” *See CVS Health Corp. v. Vividus, LLC*, 878 F.3d 703,
 19 706 (9th Cir. 2017) (internal citation omitted). The language of Section 1153 is clear and
 20 unambiguous and falls squarely within the definition of “function or duty” under the FVRA. 5
 21 U.S.C. § 3348(a)(2)(A)(ii) (“any function or duty of the applicable office that... is required by
 22 statute to be performed by the applicable officer”).

23 The government’s insistence that the Secretary of Homeland Security’s ability to delegate
 24 functions, including the function of increasing the required EB-5 program investment amount,
 25 means that increasing the investment amount is not a “function or duty” within the meaning of the
 26 FVRA is no more availing. The government observes that the Homeland Security Act allows the
 27 Secretary of Homeland Security to delegate “any” function. *See* 6 U.S.C. § 112(b)(1) (specifying
 28 that the Secretary of Homeland Security “may delegate any of the Secretary’s functions to any

1 officer, employee, or organizational unit of the Department.”). Under the government’s theory,
2 because all of the Secretary’s functions are delegable, none qualify as a duty or function under the
3 FVRA because the ability to be delegated means that each is not required by statute to be
4 performed *only* by that officer.

5 The government’s “approach would require us to ignore the provision’s plain language—a
6 cardinal sin of statutory interpretation.” *United States v. Pocklington*, 792 F.3d 1036, 1041 (9th
7 Cir. 2015). Section 1153 falls squarely within the plain language of the FVRA’s definition of
8 function or duty—a statute that designates one officer and only that officer to perform the duty or
9 function. The FVRA does not define function or duty as required by “a statute that designates one
10 officer to perform a *non-delegable* duty or function.” 5 U.S.C. § 3348(a)(2)(A). It also refers to a
11 “statute” in the singular which means we look only at Section 1153. *Id.* The government, in
12 contrast, urges the Court to look at a second, additional statute—the statute providing that the
13 Secretary’s functions are delegable. The FVRA’s unambiguous language does not support that
14 interpretative exercise.

15 Further, as one district court has noted regarding this precise issue, “Defendants’
16 construction of the vacant-office provision is at odds with the statutory purpose of the FVRA.”
17 *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 34 (D.D.C. 2020), judgment entered, No. CV 19-2676
18 (RDM), 2020 WL 1905063 (D.D.C. Apr. 16, 2020), *appeal dismissed*, No. 20-5141, 2020 WL
19 5358686 (D.C. Cir. Aug. 25, 2020). Nearly every cabinet-level department has a version of a
20 vesting statute like Section 112(b)(1). *Id.*

21 It was the pervasive use of those vesting-and-delegation statutes,
22 along with ‘the lack of an effective enforcement process,’ that
23 convinced Congress of the need to enact the FVRA. Senate Report at
24 7. Yet, if Defendants were correct that the mere existence of these
25 vesting-and-delegation statutes (and the absence of an express
26 statutory bar on vesting and delegating a specific function or duty)
27 were sufficient to negate the enforcement mechanisms Congress
28 included in the FVRA, 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.” Senate Report at 8; *see also U.S. Telecom Ass’n v.*
FCC, 359 F.3d 554, 565 (D.C. Cir. 2004) (“When a statute delegates
authority to a federal officer or agency, subdelegation to a subordinate
federal officer or agency is presumptively permissible absent
affirmative evidence of a contrary congressional intent.”).

1 *Id.* Congress enacted the FVRA to “recla[im its] Appointments Clause power” *SW Gen., Inc. v.*
2 *N.L.R.B.*, 796 F.3d 67, 70 (D.C. Cir. 2015), “in the face of the long-standing Department of Justice
3 ‘position that, in many instances, the head of an executive agency had independent authority apart
4 from the Vacancies Act to temporarily fill vacant offices,’” *L.M.-M.*, 442 F. Supp. 3d at 29
5 (quoting *N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 935 (2017)). “Congress was concerned, most
6 notably, that the Attorney General and other department heads had made frequent use of organic
7 vesting and delegation statutes to assign the duties of PAS offices to officers and employees, with
8 little or no check from Congress.” *L.M.-M.*, 442 F. Supp. 3d at 29. Under the government’s
9 interpretative theory, the FVRA did not address these concerns. The Court is not persuaded that
10 the FVRA is so weak.

11 The government’s lament at oral argument that Congress also recognized that the
12 government cannot come to a halt when there is not a Senate confirmed officer to perform a
13 function or duty and thus has allowed the Secretary of Homeland Security (and other cabinet-level
14 secretaries) to delegate functions is not well-taken. If Secretary Nielsen had amended the proper
15 order of succession there would be no issue here; the problem arises because she did not do so and
16 as a result, Mr. McAleenan was not lawfully serving as the Acting Secretary of Homeland
17 Security. If the individual who was actually next in line on the Order of Succession had signed the
18 Final Rule, Plaintiff would not have a claim. But that is not what happened.

19 **2) The 2003 Delegation Does Not Apply**

20 Next, the government argues that the Secretary in fact delegated the authority to prescribe
21 the Final Rule at issue here. In particular, the government relies on a 2003 Delegation to Deputy
22 Secretary by then Homeland Security Secretary Tom Ridge (“the 2003 Delegation”). (Dkt. No.
23 39-1.) In the 2003 Delegation, Secretary Ridge delegated certain delineated responsibilities
24 including “Acting for the Secretary to sign, approve, or disapprove any proposed or final rule,
25 regulation or related document” to the Deputy Secretary of Homeland Security. (*Id.* at Sec. II.G.)
26 This delegation, however, does not apply as there was no Deputy Secretary of Homeland Security
27 for which the authority to sign the Final Rule could be delegated. Indeed, the vacancy in the
28 Deputy Secretary position is what led to the purported appointment of Mr. McAllenan’s—the

1 Customs and Border Protection Commissioner—as *Secretary* of Homeland Security.

2 For this reason, among others, *Nw. Immigrant Rts. Project v. U.S. Citizenship & Immigr.*
 3 *Servs.* (“*NWIRP*”), 496 F. Supp. 3d 31 (D.D.C. 2020), *appeal dismissed*, No. 20-5369, 2021 WL
 4 161666 (D.C. Cir. Jan. 12, 2021), is not persuasive. The *NWIRP* court never grappled with the
 5 fact that the 2003 delegation (assuming it was still in effect in 2019) delegated certain authority to
 6 the Deputy Secretary. Further, the *NWIRP* court relied on an interpretation of 5 U.S.C.
 7 3348(a)(2)(B), applying to functions or duties created by *regulation*. Here, in contrast, Section
 8 3348(a)(2)(A)—applying to functions and duties created by *statute*—applies. And, in any event,
 9 the *NWIRP* court never reconciled its apparent interpretation of the FVRA as not applying to
 10 delegable functions with the FVRA’s plain language.

11 ***

12 Accordingly, because Section 1153(b)(5)(C)(i) provides that “[t]he Attorney General, in
 13 consultation with the Secretary of Labor and the Secretary of State, may from time to time
 14 prescribe regulations increasing the dollar amount specified under the previous sentence,” *see* 8
 15 U.S.C.A. § 1153(b)(5)(C)(i), and when McAleenan promulgated the Final Rule in July 2019, he
 16 was not in fact the Secretary of Homeland Security, his actions have no “force or effect.” *See* 5
 17 U.S.C. § 3348(d)(1) (“[a]n action taken” by that person “in the performance of any function or
 18 duty of [the] vacant office ... shall have no force or effect”).

19 **C. Ratification**

20 The government next argues that even if McAleenan’s approval of the Final Rule has no
 21 force or effect, current (and lawfully Senate confirmed) Secretary of Homeland Security
 22 Mayorkas’ ratification of the Final Rule in March of this year cures any defect arising from Mr.
 23 McAleenan’s improper appointment. The government’s argument is foreclosed by the FVRA’s
 24 plain and unambiguous language: “An action that has no force or effect under paragraph (1) may
 25 not be ratified.” 5 U.S.C. § 3348(d)(2); *see also* 5 U.S.C. § 551(5) (“actions” include “rule
 26 making”). The government’s heavy reliance on *Consumer Fin. Prot. Bureau v. Gordon*, 819 F.3d
 27 1179, 1190-92 (9th Cir. 2016), is misplaced as it was not a FVRA case and thus did not address
 28 the unequivocal language prohibiting ratification. The government’s reliance on *Guedes v. Bureau*

1 *of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 12 (D.C. Cir. 2019), *judgment entered*,
 2 762 F. App’x 7 (D.C. Cir. 2019), *and cert. denied*, 140 S. Ct. 789 (2020), is similarly misplaced as
 3 there the plaintiff did not contest the validity of Attorney General Barr’s ratification. *Id.* at 12
 4 (“We need not wade into that thicket...Codrea accepts the validity of Attorney General Barr’s
 5 ratification as to both his statutory and his Appointments Clause claims (citing 5 U.S.C. §
 6 3348(d)(1)–(2) (only prohibiting the ratification of nondelegable duties); 28 U.S.C. § 510
 7 (authorizing delegation of “any function of the Attorney General”)).

8 “[W]hen the statute’s language is plain, the sole function of the courts—at least where the
 9 disposition required by the text is not absurd—is to enforce it according to its terms.” *Hartford*
 10 *Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (internal citation
 11 omitted). The FVRA plainly states that actions taken without authority cannot be ratified.

12 **C. De Facto Officer Doctrine**

13 At the March 25, 2021 hearing, the government requested the opportunity to submit
 14 additional briefing regarding whether the common law de facto officer doctrine applies to salvage
 15 the Final Rule. “The oft-forgotten doctrine has ‘feudal origins,’ dating back to the 15th century.”
 16 *SW Gen., Inc. v. N.L.R.B.*, 796 F.3d 67, 81 (D.C. Cir. 2015), *aff’d*, 137 S. Ct. 929 (2017) (internal
 17 citation omitted). “The de facto officer doctrine ‘confers validity upon acts performed by a person
 18 acting under the color of official title even though it is later discovered that the legality of that
 19 person’s appointment or election to office is deficient.’” *Hooks v. Kitsap Tenant Support Servs.,*
 20 *Inc.*, 816 F.3d 550, 564 n.13 (9th Cir. 2016) (quoting *Nguyen v. United States*, 539 U.S. 69, 77
 21 (2003)).

22 The Ninth Circuit has noted that “[t]he continued vitality of the de facto officer doctrine is in
 23 serious doubt.” *Silver v. U.S. Postal Serv.*, 951 F.2d 1033, 1036, n. 2 (9th Cir. 1991).

24 The Court has reviewed and considered the parties’ additional briefing regarding the de
 25 facto officer doctrine and concludes that the government’s argument is unavailing. (Dkt. Nos. 21,
 26 35, 38.) The government’s reliance on *Hooks* and *SW Gen., Inc.*, is misplaced as both involved
 27 vacancies in the positions of General Counsel to the National Labor Relations Board which is
 28 explicitly exempted from FVRA Section 3348(d)(1). No such exemption exists for the Secretary

1 of Homeland Security. The FVRA renders actions taken by persons serving in violation of the Act
2 void *ab initio*. *SW Gen., Inc.*, 796 F.3d at 70-71 (citing 5 U.S.C. § 3348 (d)(1)-(2) (“An action
3 taken by any person who is not acting [in compliance with the FVRA] shall have no force or
4 effect” and “may not be ratified.”)). Under these circumstances, the de facto officer doctrine
5 cannot save the day.

6 **D. Remedy**

7 As a remedy for the FVRA violation, Plaintiff seeks (1) a declaratory judgment that the
8 Final Rule is without force and effect, and (2) an injunction barring Secretary Mayorkas from
9 reinstating the rule absent compliance with the APA’s rule-making process. The government
10 counters that the proper remedy is at most to set aside the part of the rule that is procedurally
11 defective and remand it to agency for consideration. The government also suggests that the Court
12 could remand without vacatur and that it should do so because (1) vacating the rule would be
13 extremely disruptive, and (2) Secretary Mayorkas has ratified the rule which signals that any
14 defects “are at best technical deficiencies.” (Dkt. No. 39 at 15.) However, if the Court enters any
15 kind of vacatur order, the government requests a stay to allow the agency time to address the issue.

16 Because the Final Rule “ha[s] no force or effect,” 5 U.S.C. § 3348(d)(1), it must be “set
17 aside” as action taken “in excess of statutory ... authority,” 5 U.S.C. § 706. “Ordinarily when a
18 regulation is not promulgated in compliance with the APA, the regulation is invalid.” *Idaho Farm*
19 *Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995); *see also Sierra Club v. Van*
20 *Antwerp*, 719 F. Supp. 2d 77, 78 (D. D.C. 2010) (reiterating “remand, along with vacatur, is the
21 presumptively appropriate remedy for a violation of the APA.”). In the Ninth Circuit, remand
22 without vacatur is the exception rather than the rule. *See California Cmty. Against Toxics v. U.S.*
23 *EPA*, 688 F.3d 989, 994 (9th Cir. 2012) (“we have only ordered remand without vacatur in
24 limited circumstances.”); *Humane Soc’y v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010) (“In
25 rare circumstances, when we deem it advisable that the agency action remain in force until the
26 action can be reconsidered or replaced, we will remand without vacating the agency’s action.”).

27 Here, while there would certainly be some disruption if the Rule is vacated given the
28 length of time the Rule has been in effect, the government has made no specific showing of harm

1 beyond asserting that it would be “extraordinarily disruptive.” (Dkt. No. 39 at 14.) *See Ctr. for*
2 *Food Safety v. Vilsack*, 734 F.Supp.2d 948, 951 (N.D. Cal. 2010) (“[T]he Ninth Circuit has only
3 found remand without vacatur warranted by equity concerns in limited circumstances, namely
4 serious irreparable environmental injury.”). Remand with vacatur—the default remedy for a rule
5 that lacks the force of law—is thus appropriate here.

6 With respect to Plaintiff’s request for an injunction, as the court in *L.L.-M.* noted when
7 considering the proper remedy there for the FVRA violation, “the Supreme Court has cautioned
8 that a district court vacating an agency action under the APA should not issue an injunction unless
9 doing so would ‘have [a] meaningful practical effect independent of [the policy’s] vacatur.’”
10 *L.M.-M.*, 442 F. Supp. 3d at 36 (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165
11 (2010)) (alterations in original). This caution is warranted because “[a]n injunction is a drastic and
12 extraordinary remedy, which should not be granted as a matter of course” or where “a less drastic
13 remedy ... [is] sufficient to redress” the plaintiffs’ injury. *Monsanto Co.*, 561 U.S. at 165. Plaintiff
14 contends the “BRC may continue to find investors are hesitant to participate in the EB-5 Program
15 even though the new Rule has been set aside and the old rule is still in effect” such that it “will not
16 obtain the full range of investors.” (Dkt. No. 38 at 20.) This unadorned argument insufficient to
17 justify the extraordinary remedy of an injunction and fails to demonstrate that remand and vacatur
18 is an insufficient remedy here.

19 Accordingly, the Court sets aside the Final Rule and remands the matter to the Agency.⁴
20 The Court declines to address the government’s one-sentence request for a stay which was only
21 raised in a footnote in its brief. (Dkt. No. 39 at 15 n.9.)

22 CONCLUSION

23 For the reasons stated above, Plaintiff’s cross-motion for summary judgment on its fourth
24 claim is GRANTED. The Final Rule is VACATED and the matter is REMANDED to the Agency
25 for further action.

26 As vacating the Rule moots Plaintiff’s remaining causes of action, they are dismissed
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28 ⁴ Having concluded that Plaintiff is entitled to remand on this claim, it is unnecessary to consider Plaintiff’s other claims for relief and Plaintiff’s motion for a preliminary injunction is moot.

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without prejudice. Separate judgment will be entered in Plaintiff's favor.

IT IS SO ORDERED.

Dated: June 22, 2021



JACQUELINE SCOTT CORLEY
United States Magistrate Judge