IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VENTURE CAPITAL ASSOCIATION, et al.,

Plaintiffs,

v.

ELAINE DUKE, in her official capacity as Acting Secretary of Homeland Security, et al.,

Defendants.

Civil Action No.: 1:17-cv-01912-JEB

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND SUPPORTING MEMORANDUM OF LAW

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INTRODUCTION

This case concerns the unlawful delay of the International Entrepreneur Rule ("the Rule"), a final rule that permits qualified foreign entrepreneurs to travel to or stay in the United States to grow their businesses. *See* 82 Fed. Reg. 5,238 (Jan. 17, 2017). After extensive comment by the public, the federal government promulgated the final Rule on January 17, 2017, with an effective date of July 17, 2017.

On July 11, 2017, six days before the Rule would have taken effect, Defendants Elaine Duke, the Department of Homeland Security ("DHS"), James McCament, and U.S. Citizenship and Immigration Services ("USCIS") decided to delay the Rule, pushing the Rule's effective date back by eight months, to March 14, 2018. Defendants did not offer the public advance notice or an opportunity to comment, instead claiming that there was "good cause" to dispense with notice and comment under the Administrative Procedure Act ("APA").

Plaintiffs—the nation's largest organization of venture capitalists, affected entrepreneurs, and companies founded by affected entrepreneurs—filed this action to challenge Defendants' unlawful delay. They now seek a preliminary injunction compelling Defendants to implement the Rule pending a final judgment.[1]

Plaintiffs are substantially likely to prevail on the merits. Absent "good cause," the APA requires a period for notice and comment prior to the issuance of a final rule. As the D.C. Circuit recently held, that requirement applies with full force to decisions to delay the effective date of a rule. The standard for "good cause" is demanding; courts consistently limit "good cause" to only the most extraordinary circumstances. Defendants cannot satisfy that standard here: they fail to articulate meaningful reasons for delay; Defendants' *own* conduct is the reason for the failure to

[1] Because no counsel for Defendants have yet entered an appearance, Plaintiffs have not conferred with counsel for Defendants regarding this motion.

provide notice and comment, rendering the "good cause" exception inapplicable; and Defendants' attempted justifications fail on their own weight.

The equities also favor preliminary relief. Plaintiffs are irreparably harmed by the delay of the Rule's implementation. The Rule's suspension hinders the ability of Anand and Atma Krishna to grow their business, LotusPay, in the United States and seek additional U.S.-based investment. It creates material costs for Omni Labs and Occasion, including the expense of maintaining offices outside the United States, because their co-founders must work abroad. And the members of the National Venture Capital Association—thousands of the nation's leading venture capitalists—are harmed because suspension of the Rule makes it more difficult to invest in and assist foreign entrepreneurs in founding and growing new businesses in the United States.

On the other side of the ledger, Defendants cannot meaningfully contend that compelling operation of the Rule will cause any harm. Thus, the Court should issue an injunction compelling Defendants to implement the Rule pending a final judgment.

BACKGROUND

The United States has long benefited from foreign entrepreneurs who come to the United States to found and grow their businesses. These companies provide innovative goods and services both here and abroad, they hire American workers, they contribute to the local, state, and federal tax base, and they grow the American economy as a whole. Compl. ¶¶ 47-55. Yet it is often difficult for foreign entrepreneurs to obtain permission to work in the United States; the United States lacks a dedicated visa category for foreign entrepreneurs (*id.* ¶ 56), and other visa options are frequently unavailable (*id.* ¶ 57).

The lack of viable paths for foreign entrepreneurs to come to the United States legally puts our nation at a serious disadvantage in the global economy. *Id.* ¶ 58. If foreign entrepreneurs cannot come to the United States to run their companies, they will build their businesses in

foreign lands—and those countries will reap the benefits. Indeed, other countries provide immigration status for foreign entrepreneurs in order to attract the world's leading business innovators. *Id*.

To solve this problem, the Obama Administration promulgated the Rule. Compl. ¶ 60. The Rule underwent substantial public comment and debate, which ultimately changed its substance. *Id.* ¶ 62. The Rule allows qualified entrepreneurs to apply for parole, which permits them to come to or remain in the United States to grow their businesses. *Id.* ¶ 60. Specifically, the Rule required prospective applicants to have founded a business in the United States within the five years preceding their application (*id.* ¶ 66), possess a substantial ownership stake and role in that business (*id.* ¶ 67), and validate that business's growth potential (*id*. ¶ 68). One way to demonstrate this potential for growth is evidence of preexisting substantial investment. *Id*. But alternative evidence of this potential is also acceptable. *Id*.

In sum, DHS concluded that the Rule "would increase and enhance entrepreneurship, innovation, and job creation in the United States" by "encourag[ing] foreign entrepreneurs to create and develop start-up entities with high growth potential in the United States." *Id.* ¶ 73; *see* 82 Fed. Reg. at 5,238. The Rule would have taken effect on July 17, 2017. Compl. ¶ 75.

On July 11, 2017, six days before the Rule was to take effect, DHS published a new "final rule" purporting to "temporarily delay[] the effective date of the International Entrepreneur Final Rule" until March 14, 2018. Compl. ¶¶ 78-79; *see International Entrepreneur Rule: Delay of Effective Date*, 82 Fed. Reg. 31,887, 31,887 (July 11, 2017). The process followed by DHS in deciding to delay the effective date of the Rule was the polar opposite of the careful, deliberative process DHS used to formulate the Rule itself. Compl. ¶ 80. DHS provided no advance notice of the delay, nor did it give the public any opportunity to comment on DHS's decision in advance—

instead, it offered the public a chance for "post-promulgation public comments on the decision to delay the IE Final Rule." *Id.*; *see* 82 Fed. Reg. at 31,888. DHS defended its decision to do so by claiming that it had good cause to forgo notice and comment. According to DHS, implementing the Rule would require USCIS to expend agency resources and would also waste the resources of those members of the public who would apply. Compl. ¶¶ 81-83.

Plaintiffs in this case are the National Venture Capital Association, prospective entrepreneur applicants under the Rule, and companies founded by potential applicants. NVCA is the nation's largest organization of venture capitalists (Compl. ¶ 13), charged with representing the interests of its members, who frequently invest in businesses founded by foreign entrepreneurs (*id.* ¶¶ 14-20). Atma and Anand Krishna, the founders of LotusPay (a platform for processing digital payments), are entrepreneurs who would have been eligible to apply for parole under the Rule (*id.* ¶¶ 21-24); their inability to obtain permission to stay in the United States has made it harder for LotusPay to attract additional investment and expand its platform to the United States (*id.* ¶¶ 25-28). Omni and Occasion are two companies founded by foreign entrepreneurs (*id.* ¶¶ 29-31, 34-37), which have similarly been harmed by their founders' inability to work in the United States (*id.* ¶¶ 31-33, 37-39). Each of the Plaintiffs is irreparably harmed by Defendants' decision to delay the effective date of the Rule.

LEGAL STANDARD

"A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

In this Circuit, it remains an open question whether the "sliding-scale" approach to equitable relief—where "a strong showing on one factor could make up for a weaker showing on

another"—still governs. *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011); *see also Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 239 F. Supp. 3d 77, 83 (D.D.C. 2017) (Boasberg, J.). Plaintiffs respectfully submit that the sliding-scale approach, retained by several circuits, is correct. As the Second Circuit has explained, "[i]f the Supreme Court had meant for *Munaf*, *Winter*, or *Nken* to abrogate the more flexible standard for a preliminary injunction, one would expect some reference to the considerable history of the flexible standards applied in this circuit, seven of our sister circuits, and in the Supreme Court itself." *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35-38 (2d Cir. 2010); *accord, e.g.*, *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1130-35 (9th Cir. 2011); *Hoosier Energy Rural Elec. Coop. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009). Whether or not the "sliding-scale" approach applies, Plaintiffs are entitled to a preliminary injunction. As Plaintiffs will demonstrate, they are likely to prevail on the merits—and all of the other factors support injunctive relief.

ARGUMENT

I. Plaintiffs Have Standing.

Plaintiffs alleged in the Complaint—and now corroborate via supporting declarations—that they have suffered a number of cognizable injuries caused by Defendants' change in the Rule's effective date without providing notice and comment that would be redressed by requiring Defendants to implement the Rule.

"To establish constitutional standing, a petitioner must show an actual or imminent injury in fact, fairly traceable to the challenged agency action, that will likely be redressed by a favorable decision." *New York Reg'l Interconnect, Inc. v. F.E.R.C.*, 634 F.3d 581, 586 (D.C. Cir. 2011) (quotation omitted). "An injury in fact is 'an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.'"

Id. (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). Plaintiffs who sue under the APA must also show that their injuries "fall within the zone of interests protected or regulated by the statutory provision … invoked in the suit." *Bennett v. Spear*, 520 U.S. 154, 162 (1997).

A "special standing doctrine" applies when, as is the case here, "litigants attempt to vindicate their 'procedural rights,' such as their right to have notice of proposed regulatory action and to offer comments on such proposal." *Iyengar v. Barnhart*, 233 F. Supp. 2d 5, 12 (D.D.C. 2002). "To establish injury-in-fact in a 'procedural injury' case, petitioners must show that 'the government act performed without the procedure in question will cause a distinct risk to a particularized interest of the plaintiff.'" *City of Dania Beach, Fla. v. F.A.A.*, 485 F.3d 1181, 1185 (D.C. Cir. 2007) (quoting *Florida Audubon Soc. v. Bentsen*, 94 F.3d 658, 664 (D.C. Cir. 1996)). A plaintiff need show only "a causal connection between the government action that supposedly required the disregarded procedure and some reasonably increased risk of injury to its particularized interest." *Florida Audubon Soc.*, 94 F.3d at 664. Additionally, courts "relax the redressability and imminence requirements for a plaintiff claiming a procedural injury." *WildEarth Guardians v. Jewell*, 738 F.3d 298, 305 (D.C. Cir. 2013). "A plaintiff who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered." *Sugar Cane Growers Co-op. of Florida v. Veneman*, 289 F.3d 89, 94 (D.C. Cir. 2002).

Plaintiffs' standing arguments are straightforward: Defendants failed to provide notice and comment before suspending the Rule, under which Plaintiffs or parties related to them had intended to apply for parole, causing them harm. It makes no difference that Plaintiffs' injuries stem from the loss of the opportunity to apply for parole, a form of discretionary relief. As the D.C. Circuit has explained, "a plaintiff suffers a constitutionally cognizable injury by the loss of

an *opportunity to pursue a benefit* … even though the plaintiff may not be able to show that it was *certain to receive* that benefit had it been accorded the lost opportunity." *CC Distributors, Inc. v. United States*, 883 F.2d 146, 150 (D.C. Cir. 1989); *see also R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 178 (D.D.C. 2015) (Boasberg, J.) (holding that plaintiffs had standing in suit that "seeks to enjoin consideration of a factor that, at the very least, diminishes the likelihood of Plaintiffs' release").[2] Moreover, Atma and Anand Krishna, and Omni and Occasion's founders, would have been exemplary candidates for parole, as Plaintiffs explain below.

While only a single plaintiff must possess standing to allow a case to proceed (*see, e.g.*, *Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 429 (D.C. Cir. 1998)), every Plaintiff in this case has suffered an injury in fact sufficient to confer standing.

First, Atma and Anand Krishna possess standing as foreign entrepreneurs eligible to apply for parole under the Rule. As Judge Mikva explained, a noncitizen's "allegation of concrete, redressable harm to his rights as an alien is sufficient to confer standing." *Hotel & Rest. Employees Union, Local 25 v. Smith*, 846 F.2d 1499, 1502 (D.C. Cir. 1988) (opinion of Mikva, J.); *see, e.g.*, *Texas State AFL-CIO v. Kennedy*, 330 F.2d 217, 219 (D.C. Cir. 1964) ("It is quite true that an alien whose status here is threatened by action of our Government is generally granted standing to sue the responsible officials to vindicate his rights in our courts."); *Maramjaya v. U.S. Citizenship & Immigration Servs.*, 2008 WL 9398947, at *4 (D.D.C. 2008) (concluding that noncitizen had standing to assert claim that "USCIS violated the APA by improperly denying a Form I–140 immigrant petition for alien worker"); *see also Capital Area*

[2] Nor, as this Court has explained, are Plaintiffs' claims barred by 8 U.S.C. § 1226(e), which limits judicial review of parole decisions, because "Plaintiffs do not seek review of DHS's exercise of discretion. Rather, they challenge an overarching agency policy as unlawful under the INA, its implementing regulations, and the Constitution." *R.I.L-R v. Johnson*, 80 F. Supp. 3d at 176.

Immigrants' Rights Coal. v. U.S. Dep't of Justice, 264 F. Supp. 2d 14, 20-22 (D.D.C. 2003) (concluding that association had standing because its members would have standing as "immigrants with pending Board appeals" who "may be adversely affected by the new regulation").

Both Atma and Anand would have applied and qualified for parole under the Rule. They are the founders of LotusPay, a company owned by an entity founded in the United States in May 2017. Declaration of Atma Krishna ("Atma Decl.") ¶ 2. Atma is the Chief Executive Officer of LotusPay, while Anand is the Head of Marketing, charged with locating potential customers. *Id.* Each owns more than ten percent of the company. *Id.* ¶ 9. LotusPay shows tremendous "potential for rapid growth and job creation" (82 Fed. Reg. at 5,239); LotusPay was one of a select few companies recognized by renowned start-up incubator Y Combinator (Atma Decl. ¶ 3), and has already received $120,000 from qualified U.S. investors (*id.* ¶ 4). Thus, Atma and Anand meet each of the Rule's criteria.

Atma and Anand have both been harmed by Defendants' actions. Most obviously, they have lost the opportunity to apply for parole under the Rule, and they have been unable to obtain any other immigration status that would enable them to grow their business in the United States. *Id.* ¶ 10. Their lack of immigration status creates significant problems for their business: it hinders their ability to launch their platform in the United States, it makes it more difficult to hire U.S.-based employees, and makes it impossible to work in the same location with any employees they might hire in the United States. *Id.* The inability to enter, remain, and work lawfully in the United States for a significant period also makes it difficult to obtain additional investment from U.S.-based investors, who would understandably prefer to invest in companies with founders based in the United States. *Id.* Each of these injuries flows from Defendants' suspension of the

Rule, and would be redressed by a favorable decision on the merits. Moreover, Atma and Anand's injuries fall within the zone of interests of the parole provision of the Immigration and Nationality Act (INA), which allows noncitizens to receive parole where they provide "significant public benefit" to the United States. 8 U.S.C. § 1182(d)(5)(A). Thus, both Atma and Anand have standing.

Second, Omni and Occasion have standing as U.S.-based businesses that have suffered from the absence of their founders. "Economic harm to a business clearly constitutes an injury-in-fact. And the amount is irrelevant. A dollar of economic harm is still an injury-in-fact for standing purposes." *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 5 (D.C. Cir. 2017). Courts have therefore held that businesses can assert standing where they suffer economic injuries from adverse immigration action against their directors, employees, or customers. *See, e.g., V. Real Estate Grp., Inc. v. U.S. Citizenship & Immigration Servs.*, 85 F. Supp. 3d 1200, 1207 (D. Nev. 2015) (agreeing that "by revoking the approval of the Immigrant Investors' I–526 petitions, the USCIS has jeopardized Plaintiffs' economic well-being").

Omni has standing on this basis. Omni was founded in the United States in 2015. Declaration of Alex Modon ("Modon Decl.") ¶ 2. Two of Omni's founders, Nishant Srivastava and Vikram Tiwari, would have qualified for parole under the Rule: both own over ten percent of Omni, and as members of the founding team, play essential engineering and management roles in the company. *Id.* ¶ 4. And Omni's extraordinary growth since January 2017—going from 5 customers to 140 customers, and becoming cash-flow positive (*id.* ¶ 3)—easily serves as "compelling validation of the entity's substantial potential for rapid growth and job creation." 82 Fed. Reg. at 5,239. Omni is also raising substantial amounts of private capital at this very moment. *Id.*

The delay of the Rule has caused Omni a number of ongoing economic injuries. Nishant has recently decided to leave Omni and pursue employment at a company that can assist him in obtaining lawful immigration status, disrupting Omni's operations. *Id.* ¶ 6. While Vikram remains with Omni, his inability to work in the United States also poses a significant hardship. Omni has had to open and maintain a Vancouver office at great expense, and Omni must incur travel expenses for employees to visit Vancouver to work with Vikram in person. *Id.* ¶¶ 4, 7. Vikram's inability to work at Omni's main offices, with other employees, also causes inefficiencies and a loss of the creativity that is generated by in-person collaboration. *Id.* And Vikram's inability to readily meet with U.S.-based investors hinders Omni's ability to acquire U.S. investment, as investors often wish to meet with and interact with the founding team as a precondition to investment. *Id.* ¶ 8.

Omni also faces imminent harm in the future if the Rule continues to be delayed. Now that Nishant has decided to leave, the company is reevaluating its plans regarding where it will maintain offices, which markets it will enter, and other critical strategic questions. *Id.* ¶ 9. Omni urgently needs to determine what immigration options will be possible for Vikram so that it can make plans for the future. *Id.* Each of these injuries falls within the scope of the parole provision—which aims to provide "significant public benefit" to the United States. (8 U.S.C. § 1182(d)(5)(A))—and each would be redressed by requiring Defendants to implement the Rule.

Occasion also has standing as an affected business. Occasion was formally established in the United States in August 2014. Declaration of Aksh Gupta ("Gupta Decl.") ¶ 2. One of Occasion's founders, Pelle ten Cates, would have applied for parole under the Rule. He owns 14-15% of Occasion, and plays critical engineering and management roles as the company's Chief Architect. *Id.* ¶ 6. Occasion has received $1.5 million in funding from qualified U.S. investors

(*id.* ¶ 36)—***far*** more than is required under the Rule (*see* 82 Fed. Reg. at 5,239)—and has grown rapidly, virtually doubling in customers every year (Gupta Decl. ¶ 3). But Pelle's inability to come to the United States has hampered Occasion's growth. He must supervise Occasion's U.S.-based employees from the Netherlands, and Occasion's employees frequently have to travel to the Netherlands to work with him. *Id.* ¶ 7. His absence also chills additional U.S.-based investment. *Id*. ¶ 8. These injuries, too, fall within the scope of the parole provision, and would be redressed if Defendants were required to implement the Rule.

Third, the National Venture Capital Association has associational standing based on the interests of its members. A plaintiff asserting associational standing need only show that "its members would otherwise have standing to sue in their own right, the interests it seeks to protect are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Fund Democracy, LLC v. S.E.C.*, 278 F.3d 21, 25 (D.C. Cir. 2002).

NVCA's members would undoubtedly have standing to sue in their own right. Like Omni and Occasion, NVCA's members have suffered or will suffer economic injury based on Defendants' delay of the Rule. NVCA's members are venture capitalists that invest in nearly every region and sector of the U.S. economy. Declaration of Bobby Franklin ("Franklin Decl.") ¶ 2. They frequently invest in companies founded by foreign entrepreneurs, many of whom may have qualified for parole under the Rule. *Id.* The delay of the Rule therefore jeopardizes existing investments of NVCA's members and chills investments that NVCA's members otherwise would have made in such companies. *Id.* ¶ 9.

Indeed, venture capital is particularly vulnerable to the impact of the Rule, because venture capital investing is considered a "high touch" business involving substantial contact with

company founders. *Id.* Many of NVCA's members are reluctant to invest in businesses when they cannot work directly with the founding team, as such involvement and mentorship is often crucial to the success of an early business. *Id.* The Rule's suspension thus forecloses NVCA from accessing important investment opportunities. *Id.* These injuries, too, fall within the scope of the parole provision, and would be redressed by requiring Defendants to implement the Rule. Thus, NVCA's members would have standing to challenge the Rule.

The final two criteria are easily met. The interests NVCA seeks to protect in this lawsuit are clearly germane to its mission: NVCA serves "[a]s the voice of the U.S. venture capital community," and frequently advocates for immigration solutions that would benefit entrepreneurs and investors, including for the Rule itself. *Id.* ¶¶ 3-7. And because this lawsuit challenges Defendants' procedural error, and requests that it be remedied by requiring Defendants to implement the Rule, there is no need for NVCA's members to participate themselves. Thus, NVCA possesses associational standing.

Plaintiffs represent virtually every category of individual and entity affected by the Rule—investors, entrepreneurs, and companies. They surely have standing to pursue this case.

II. Plaintiffs Are Likely To Prevail On The Merits.

Plaintiffs are substantially likely to prevail on their claim that Defendants' decision to delay the Rule without providing notice and comment is unlawful.

Under the APA, an agency must provide "[g]eneral notice of proposed rule making" in the Federal Register, as well as "an opportunity to participate in the rule making through submission of written data, views, or arguments," before promulgating a rule. 5 U.S.C. § 553. "[N]otice-and-comment rule-making is a primary method of assuring that an agency's decisions will be informed and responsive." *State of N.J., Dep't of Envtl. Prot. v. U.S. Envtl. Prot. Agency*, 626 F.2d 1038, 1045 (D.C. Cir. 1980).

These requirements apply with no less force when the agency seeks to delay or repeal a valid final rule. As the D.C. Circuit recently reiterated, "'an agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked' and 'may not alter such a rule without notice and comment.'" *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017) (quoting *Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 234 (D.C. Cir. 1992) (alterations omitted)). An agency has no "inherent authority" to stay a final rule; instead, the agency "must point to something in … the APA that gives it authority" to do so. *Id.*

The APA creates a limited exception to its requirement for notice and comment "where the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). The D.C. Circuit has explained time and again that "the good cause exception is to be 'narrowly construed and only reluctantly countenanced.'" *Mack Trucks, Inc. v. E.P.A.*, 682 F.3d 87, 93 (D.C. Cir. 2012) (quoting *Util. Solid Waste Activities Grp. v. E.P.A.*, 236 F.3d 749, 754 (D.C. Cir. 2001), in turn quoting *Tennessee Gas Pipeline Co. v. F.E.R.C.*, 969 F.2d 1141, 1144 (D.C. Cir. 1992)). It "excuses notice and comment in emergency situations, or where delay could result in serious harm." *Jifry v. F.A.A.*, 370 F.3d 1174, 1179 (D.C. Cir. 2004) (citations omitted). Notice and comment is the ***default***; "the onus is on the [agency] to establish that notice and comment" should not be given. *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 801 n.6 (D.C. Cir. 1983). And the court must "examine closely" the agency's explanation. *Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 580 (D.C. Cir. 1981).

Defendants concluded that providing notice and comment before delaying the effective date of the Rule would be "contrary to the public interest." 82 Fed. Reg. at 31,887-88. But the

public interest prong of the good cause exception is perhaps the most difficult to meet: it "is met only in the ***rare*** circumstance when ordinary procedures—generally presumed to serve the public interest—would in fact harm that interest." *Mack Trucks, Inc.*, 682 F.3d at 95 (emphasis added). An example would be where "announcement of a proposed rule would enable the sort of financial manipulation the rule sought to prevent." *Util. Solid Waste Activities Grp.*, 236 F.3d at 755.

Defendants' excuses are insufficient to outweigh the APA's emphasis on public participation in agency decision-making.[3] ***First***, Defendants' cursory, unsubstantiated assertions fail to comply with the APA's requirement that Defendants "incorporate[] the finding" of good cause with "a brief statement of reasons." 5 U.S.C. § 553(b)(B). ***Second***, Defendants' supposed fear that they will be forced to expend limited agency resources and create reliance interests on the part of the public is a dilemma of their own making—one that cannot be invoked as good cause. And ***third***, each of Defendants' rationalizations fall short on their own terms.[4]

A. Defendants' cursory statement of reasons is insufficient.

As an initial matter, Defendants have failed to meet the APA's procedural requirement that they provide an adequate statement of reasons with their finding of good cause. The requirement "that an agency articulate its basis for dispensing with normal notice and comment, is not a procedural formality but serves the crucial purpose of ensuring that the exceptions do not 'swallow the rule.'" *N. Carolina Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755,

[3] Defendants are limited to the grounds asserted in their finding of good cause; they may not invoke additional reasons, or claim that notice and comment was unnecessary for some other reason. *See, e.g.*, *Mack Trucks, Inc.*, 682 F.3d at 95 ("To the extent this is an argument not preserved by EPA in the IFR, we cannot consider it.").

[4] Defendants' reasons also assume that the Rule will ultimately be rescinded. But that is not a foregone conclusion; Defendants must follow the APA's procedures to repeal the Rule. 5 U.S.C. § 551. Defendants will have to consider the public's views, and any decision by Defendants to repeal the Rule can and will be challenged by affected parties.

766 (4th Cir. 2012) (quoting *Mobil Oil Corp. v. Dep't of Energy*, 610 F.2d 796, 803 (Temp. Emer. Ct. App. 1979)). For example, "[b]ald assertions that the agency does not believe comments would be useful cannot create good cause to forgo notice and comment procedures." *Action on Smoking & Health*, 713 F.2d at 800. The agency must make a "true and supported or supportable finding of necessity or emergency." *United States v. Cotton*, 760 F. Supp. 2d 116, 129 (D.D.C. 2011).

Defendants' statement of reasons—which fills less than a single page of the Federal Register—does not meet that standard. It amounts to a series of conclusory assertions about how implementing the Rule will require the agency to expend resources that "are unlikely to ever be recouped from filing fees under the new program" and will "sow confusion and would likely cause the waste of resources by multiple stakeholders." 82 Fed. Reg. at 31,888. The agency does not even attempt to quantify the amount of unrecouped costs that implementing the Rule will entail, nor the likelihood that members of the public will rely on the Rule to their detriment. Defendants' *ipse dixit* that the public interest will be harmed by providing notice and comment is not nearly enough to show good cause.

B. Defendants' delay precludes their reliance on the "good cause" exception.

Regardless, Defendants' reasons are inadequate because they arise from circumstances that they created themselves. Defendants expressly state that the impetus for delaying the rule was an Executive Order issued on January 25, 2017. *See* 82 Fed. Reg. at 31,887 (citing *Border Security and Immigration Enforcement Improvements*, Exec. Order No. 13,767, 82 Fed. Reg. 8,793 (Jan. 25, 2017)). Instead of providing notice and seeking public comment at that time, Defendants apparently did nothing until July 11, 2017—when they purported to invoke the "good cause" exception as justification for delaying implementation of the July 17 effective date of the Rule *without* notice and comment. Because Defendants easily could have undertaken

notice and comment during that nearly ***six month*** period, Defendants may not rely on "good cause."

The circumstances that constitute good cause "cannot arise as a result of the agency's own delay." *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 202 F. Supp. 3d 20, 26 (D.D.C. 2016), *aff'd*, 857 F.3d 907 (D.C. Cir. 2017). "Otherwise, an agency unwilling to provide notice or an opportunity to comment could simply wait until the eve of a statutory, judicial, or administrative deadline, then raise up the 'good cause' banner and promulgate rules without following APA procedures." *Council of S. Mountains, Inc.*, 653 F.2d at 581. Courts have therefore frequently rejected assertions of good cause where any harms that might result from notice and comment were due to the agency's procrastination. *See, e.g.*, *Air Transp. Ass'n of Am. v. Dep't of Transp.*, 900 F.2d 369, 379 (D.C. Cir. 1990) ("the FAA is foreclosed from relying on the good cause exception by its own delay in promulgating the Penalty Rules"), *vacated as moot*, 498 U.S. 1077 (1991), *and vacated as moot*, 933 F.2d 1043 (D.C. Cir. 1991); *Nat'l Ass'n of Farmworkers Organizations v. Marshall*, 628 F.2d 604, 622 (D.C. Cir. 1980) (rejecting agency's good cause finding where "the time pressure … was due in large part to the Secretary's own delays"); *World Duty Free Americas, Inc. v. Summers*, 94 F. Supp. 2d 61, 65 (D.D.C. 2000) ("their considerable delay in promulgating the Rules substantially undercuts defendants' present position"); *accord Nat. Res. Def. Council v. Abraham*, 355 F.3d 179, 205-06 (2d Cir. 2004) ("We cannot agree, though, that an emergency of DOE's own making can constitute good cause.").

Indeed, the D.C. Circuit has rejected an agency's finding of good cause where an agency's delay created the very risks the agency sought to avoid. In *Environmental Defense Fund, Inc. v. EPA*, the Environmental Protection Agency defended its decision to suspend certain reporting requirements without providing notice and comment on the grounds that there "was an

alleged pressing need to avoid industry compliance with regulations that were to be eliminated." 716 F.2d 915, 920 (D.C. Cir. 1983). In the EPA's words, it was "essential to take action before the regulated community expended resources." *Id.* (quotation omitted and alterations adopted). The EPA suspended the requirements just one week before the reporting deadline, even though "EPA had expressed its intention to suspend or eliminate the requirement" nearly a year before. *Id.* at 920-21. That, the D.C. Circuit explained, was fatal to the EPA's invocation of good cause: "EPA has failed to demonstrate that outside time pressures forced the agency to dispense with APA notice and comment procedures," since any urgency was the result of the "agency's own delay." *Id.* at 921. "Therefore, it was not at all reasonable for EPA to rely on the good cause exception." *Id.*[5]

That is exactly the case here. Defendants could have provided the public with notice and an opportunity for comment long ago, during the nearly ***six months*** between when the Rule was enacted and when the Defendants decided to delay it. By Defendants' own admission, the executive order that prompted them to reconsider the Rule was issued on January 25, 2017, just ***one week*** after the Rule itself was promulgated. There is simply no reason—in Defendants' statement, or in fact—why Defendants were unable to provide the public with notice and comment before delaying the Rule. Had Defendants done so, any implementation costs or reliance interests could have been avoided. Defendants' delay alone should dispense with their assertion of good cause.

[5] The issue in *Environmental Defense Fund* arose in the context of a fee dispute under the Equal Access to Justice Act, which means the court was required to find not only that the EPA's position was wrong, but that it was not even "substantially justified." *Id.*

C. Defendants' reasons do not constitute good cause.

Even assuming that Defendants' delay is not fatal to their finding of good cause, neither of Defendants' rationales hold up on their own terms.[6]

1. Defendants' purported desire not to expend resources does not constitute good cause.

Defendants assert that any money expended to implement the Rule will be wasted once the Rule is ultimately rescinded. 82 Fed. Reg. at 31,888. As a result, Defendants "would be required to absorb the costs of the IE program within its existing operating budget, possibly impacting efficiency and effectiveness in other programs." *Id.* That is not nearly enough to provide good cause; "[t]he public interest exception to notice and comment requirements contemplates real harm to the public, not mere inconvenience to the agency." *Action on Smoking & Health*, 713 F.2d at 801-02. In every case where a rule calls for an agency to implement a program, delaying the rule will save the agency money and free its resources for other matters. If this argument were sufficient, therefore, agencies would be free to delay the effective date of every rule without notice and comment, greatly expanding this narrow statutory exception.

Regardless, DHS's position makes no sense. DHS cannot seriously contend that it intended to develop a system for adjudicating applications, yet took no steps to do so until the

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[6] Defendants invoked two cases to defend their decision: *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987), and *Mid-Tex Elec. Coop. v. FERC*, 822 F.2d 1123, 1133-34 (D.C. Cir. 1987). *Bowen* is wholly inapposite; it addressed the separate "class of exceptions … for interpretive rules, procedural rules, or general statements of policy," where Congress intended "to preserve agency flexibility in dealing with limited situations where substantive rights are not at stake." 834 F.2d at 1045. It has nothing to say about the good cause exception invoked by Defendants here. While *Mid-Tex Electric Cooperative* held that the agency had shown good cause, it rested that conclusion on a number of factors that are not present here: that the agency had not "engag[ed] in dilatory tactics," that the agency had previously undergone "a lengthy period of public comment" for an earlier version of its rule, and that the rule implicated an interest in "more efficient and rational ***long-range*** capital investment decisions." 822 F.2d at 1133-34. Even still, the court concluded that the petitioners had "raised a substantial and troublesome question." *Id.* at 1132.

final week before the Rule was to take effect. Either DHS ***always*** intended to delay the Rule, and could have easily offered an opportunity for notice and comment to the public, or DHS has ***already*** expended significant resources in developing such a system, and any additional resources DHS would expend are minimal. Indeed, it is clear that DHS had already taken some steps to implement the Rule, given that it published the draft Application for Entrepreneur Parole (I-941) form and its accompanying instructions. *See* Compl. ¶ 71 (citing International Entrepreneur Rule, Fed. Reg. (Aug. 31, 2016), https://goo.gl/1eY35W).

Moreover, Defendants' cost projections—such as they are—are untenable, especially when compared to DHS's original projections. In the final Rule, DHS estimated that 2,940 entrepreneurs and 3,234 spouses and children would apply for parole, and that 2,940 spouses of entrepreneurs would also apply for work authorization. 82 Fed. Reg. at 5,273-74. Entrepreneurs would each pay $1,285 in processing fees, dependents would pay $660, and spouses applying for work authorization would pay an additional $410. *Id.* By simple math, DHS could expect to receive in the vicinity of $7 million in filing fees in any given year.[7] That is surely more than enough to pay for the costs of establishing a system and processing applications.

Indeed, DHS itself estimated that filing fees would easily cover any costs of implementing the Rule. DHS stated that it did not anticipate "that the rule will generate additional processing costs to the government to process applications." *Id.* at 5,274. That is because "[t]he INA provides for the collection of fees at a level that will ensure recovery of the full costs of providing services, including administrative costs and services provided without charge to certain applicants and petitioners." *Id.* at 5,283. In fact, DHS continues to recognize

[7] The final Rule estimated that costs to private parties each year would total $8,465,080, but that figure includes time and opportunity costs as well as filing fees. *Id.* at 5,274. It is likely that Plaintiffs' projection is slightly—though not significantly—higher than the actual fees, given that only dependents age 14 and over will need to pay $85 for biometric processing. *Id.*

that "USCIS derives approximately 96 percent of its operating budget from fees." 82 Fed. Reg. at 31,888. That is compelling evidence that DHS knows just how much to charge to recoup its operating expenses. Defendants offer no basis to reject DHS's original, carefully reasoned estimates that the filing fees were calibrated with program costs—estimates which accord with DHS's claimed expertise in ensuring that filing fees across USCIS's portfolio account for its operating budget.

Ultimately, Defendants' argument amounts to nothing more than an assertion that creating a system for processing applications will involve upfront costs significantly greater than that to be recouped by filing fees. But Defendants provided ***nothing*** to support that view when they delayed the Rule—neither an assessment of the resources necessary to begin implementing the rule, nor a new estimate of the actual filing fees that would be recouped. That is reason enough to reject Defendants' explanation. *See, e.g.*, *Sorenson Commc'ns Inc. v. F.C.C.*, 755 F.3d 702, 705-07 (D.C. Cir. 2014) (rejecting claims of financial necessity where the agency did not offer "factual findings supporting the reality of the threat"); *Tennessee Gas Pipeline Co.*, 969 F.2d at 1145-46 (rejecting assertion of good cause where "FERC has claimed good cause without offering any evidence, beyond its asserted expertise," and offered "little factual basis" for its views).

2. Defendants' purported fear of creating reliance interests does not constitute good cause.

Defendants also claim that the public will rely on the Rule to their detriment in the absence of an immediate delay. 82 Fed. Reg. at 31,888. But that much could be said in any case: "any regulation has the effect of resolving uncertainty" by clarifying the rights and obligations of private parties. *Cotton*, 760 F. Supp. 2d at 128. However, "an agency's desire to provide immediate guidance does not, by itself, constitute 'good cause' to avoid notice and comment

procedures." *Coal. for Parity, Inc. v. Sebelius*, 709 F. Supp. 2d 10, 20-21 (D.D.C. 2010). Courts have therefore rejected assertions of good cause where the agency claims that private parties would alter their conduct if a rule is delayed. *See, e.g., Thrift Depositors of Am., Inc. v. Office of Thrift Supervision*, 862 F. Supp. 586, 592 (D.D.C. 1994) (no good cause where "many savings associations would have quickly submitted conversion applications before the new rule went into effect").

Defendants assert that failing to delay implementation of the Rule could "lead the public to continue to rely on the rule" and thereby "expend[] significant effort and resources in order to establish eligibility under the criteria promulgated by the IE Final Rule." 82 Fed. Reg. at 31,888. But that concern could readily be solved by doing just what the APA requires: providing notice and opportunity for public comment as to DHS's intent to delay and rescind the program in the future. Issuing that notice would have provided the public the precise information they needed in order to make a reasoned decision as to whether or not to expend effort and resources to apply for parole. Faced with the risk that the Rule could end in eight months, there are many reasons why entrepreneurs would nonetheless apply for parole under the Rule.

First, many start-ups grow rapidly. The opportunity to work lawfully in the United States for even a few months might allow an entrepreneur to connect with an investor who makes a game-changing investment in the company. Or an entrepreneur might associate with a partner that provides critical assistance and ideas for growing the company. For start-up founders, even a few months of being able to work in the United States can hold significant value. *See* Franklin Decl. ¶ 10.

Second, entrepreneurs may decide that applying for and receiving parole—and then using their lawful presence and employment authorization in the United States to grow their

businesses—would be the best way to encourage Defendants not to rescind the Rule. Entrepreneurs could rationally decide that demonstrated successes under the Rule would encourage Defendants not to rescind it—a fair assumption, if Defendants in fact plan to make a reasoned decision about whether to retain the Rule.

Third, entrepreneurs could also apply for parole under the Rule and request to be grandfathered in, even if the Rule is ultimately rescinded. Indeed, it is not uncommon when, after certain programs are discontinued, existing participants retain their benefits for the originally-stated term. Entrepreneurs may thus decide to apply for parole now in the hopes of obtaining thirty months of lawful presence and work authorization in the United States. Because the benefit of this opportunity can be so significant for start-up founders, they may choose to expend their resources to obtain it, notwithstanding a stated risk that it could later be retracted.

Had Defendants done what the APA required—provided notice and comment as to their proposal to delay, and ultimately revoke, parole at sometime in the future—members of the public would have made reasoned decisions as to how to expend their resources. Indeed, Defendants' invocation of foreign entrepreneurs' own personal interests is rather perverse: Defendants have suspended a program that would have provided foreign entrepreneurs something that they desperately need—the ability to grow their businesses in the United States. Instead, Defendants' actions significantly harm the interests of these individuals, their businesses, and their investors. Defendants nonetheless attempt to invoke these same entities' own personal interests as ***justification*** for the delay. That reasoning lacks all merit.

Beyond the likelihood that many entrepreneurs would have chosen—rationally—to apply for parole despite its uncertain future, it is likely that potential entrepreneurs, the companies they are associated with, and others had ***already*** taken steps to qualify for parole under the Rule

before the Rule was delayed. For example, qualifying entrepreneurs and their companies may have already retained counsel to assist in applying for parole; begun preparing the paperwork and the required evidentiary support; and adjusted ownership stakes. Similarly, companies may have already taken action based on the possibility of parole, including soliciting additional investment, hiring additional employees, or expanding their operations. Any harm to the regulated public has already occurred as a result of DHS's last-minute decision to delay the Rule.

III. The Unlawful Delay Of The Rule Irreparably Harms Plaintiffs.

Plaintiffs have also shown irreparable harm. To merit a preliminary injunction, a plaintiff must show injury that is "both certain and great, actual and not theoretical, beyond remediation, and of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Mexichem Specialty Resins, Inc. v. E.P.A.*, 787 F.3d 544, 555 (D.C. Cir. 2015) (quotation omitted). "Financial injury is only irreparable where no 'adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation.'" *Id.*

All of the Plaintiffs are currently suffering severe economic losses that cannot be recouped after a final judgment in their favor, given Defendants' sovereign immunity. While economic loss generally does not constitute irreparable harm, "[w]here a plaintiff cannot recover damages from an agency because the agency has sovereign immunity, 'any loss of income suffered by the plaintiff is irreparable *per se*.'" *Smoking Everywhere, Inc. v. U.S. Food & Drug Admin.*, 680 F. Supp. 2d 62, 77 n.19 (D.D.C. 2010) (quoting *Feinerman v. Bernardi*, 558 F. Supp. 2d 36, 51 (D.D.C. 2008)) (alteration adopted); *see, e.g.*, *R.J. Reynolds Tobacco Co. v. U.S. Food & Drug Admin.*, 823 F. Supp. 2d 36, 50 (D.D.C. 2011) (same). Moreover, Plaintiffs do not even "seek monetary compensation for their injuries," and instead "seek injunctive and declaratory relief invalidating and setting aside" Defendants' unlawful delay. *R.I.L-R*, 80 F.

Supp. 3d at 191. Because any losses caused by Defendants' conduct are irretrievable, Plaintiffs have shown irreparable harm.

If they must, however, Plaintiffs have also made "a strong showing that the economic loss would significantly damage [their] business above and beyond a simple diminution in profits." *Air Transp. Ass'n of Am., Inc. v. Exp.-Imp. Bank of the U.S.*, 840 F. Supp. 2d 327, 336 (D.D.C. 2012) (Boasberg, J.) (quotation omitted). Specifically, Plaintiffs have shown ***three*** forms of significant, irreparable economic harm that the delay of the Rule inflicts upon LotusPay, Omni, Occasion, and the companies in which NVCA's members have invested—indeed, that the delay of the Rule inflicts on ***every*** company with founders that would have applied for parole under the Rule.

First, the inability of the companies' founders to come to or stay in the United States to work poses an immense practical hardship to each company. Now that the Y Combinator program has ended, Atma Krishna has already left the United States, and Anand Krishna will soon be forced to leave as well. Atma Decl. ¶ 6. Because they cannot stay and grow their business in the United States, they cannot maintain the connections they fostered in the program, nor can they easily hire any U.S.-based employees, with whom they would have to work remotely. *Id.* ¶ 10. Similarly, because Omni's founder, Vikram, cannot obtain employment authorization in the United States, Omni has been forced to establish a Vancouver office at great expense. Modon Decl. ¶¶ 4, 7. Even still, Omni's employees must either work with Vikram remotely, or travel to Vancouver, which they do every two months. *Id.* ¶ 7. Likewise, Occasion's U.S.-based employees must either travel to the Netherlands to work with its Chief Architect, or work remotely across the physical distance and time zones. Gupta Decl. ¶ 7.

These difficulties would challenge any company, but are particularly severe for companies in the position of LotusPay, Omni, and Occasion. As nascent, growing start-ups that are continuing to develop their products and brands, they are at a critical stage of their development. The absence of their founders is a significant hardship at this stage. Omni and Occasion cannot afford to spend substantial sums flying their employees abroad every month, nor can they spare the time and energy. Moreover, studies have shown that creativity and productivity suffer when team members do not work in the same location. *See, e.g.*, R. Keith Sawyer, *Telecommuting Kills Creativity: What the Research Says About Yahoo's New Work Policy*, HuffPost (May 7, 2013), https://goo.gl/Li8MTQ. It is impossible to quantify—let alone recompense—the severe downstream impacts that keeping these companies' founders out of the United States will have on the companies themselves.

Omni is in a particularly difficult spot, given that it must now decide how to reshape its operations in light of Nishant's impending departure. Modon Decl. ¶ 9. Whether or not Vikram can obtain permission to come to and work in the United States is a critical factor in Omni's decisions regarding where it will maintain offices, which markets it will enter, and other critical strategic questions. *Id.* That uncertainty and inability to plan for the future is a significant hardship for Omni, and cannot possibly be repaired by a favorable final judgment

Second, the absence of the companies' founders makes it far harder for the companies to expand their operations to the United States or expand their existing U.S.-based operations. Courts have frequently concluded that foreclosing a plaintiff from a particular market constitutes irreparable injury. *See, e.g.*, *Armour & Co. v. Freeman*, 304 F.2d 404, 406 (D.C. Cir. 1962) (forcing "[w]ithdrawal from the interstate market" constitutes irreparable injury); *Patriot, Inc. v.*

U.S. Dep't of Hous. & Urban Dev., 963 F. Supp. 1, 5 (D.D.C. 1997) ("Unless an injunction is granted, plaintiffs will be barred from the reverse mortgage market.").

The same is true where government action inhibits a plaintiff from competing for market share within a given market. *See, e.g.*, *Feinerman*, 558 F. Supp. 2d at 5051 (finding irreparable injury where it would be "difficult for [plaintiff] to attract new customers"); *Bracco Diagnostics, Inc. v. Shalala*, 963 F. Supp. 20, 29 (D.D.C. 1997) (explaining that loss of market share causes harm "that can never be fully recouped through money damages or by 'playing catch-up'"); *Serono Labs., Inc. v. Shalala*, 974 F. Supp. 29, 35 (D.D.C. 1997) ("those who lose market share are irreparably harmed"), *vacated on other grounds*, 158 F.3d 1313 (D.C. Cir. 1998).

Both are the case here. Atma and Anand seek to bring LotusPay to the United States (Atma Decl. ¶ 8), but they cannot begin to consider taking such a step when they cannot work in the United States themselves (*id.* ¶ 10). The delay of the Rule effectively forecloses them from expanding their operations to the United States. Similarly, Omni and Occasion cannot grow nearly as quickly in the United States when critical personnel are absent. Modon Decl. ¶ 7; Gupta Decl. ¶ 7.

Every day that LotusPay, Omni, and Occasion cannot compete as effectively in the U.S. market is another day that they lose market share to other companies operating in the United States, putting them at a significant disadvantage moving forward. Plaintiffs' loss of market share, coupled with the fact that any resulting monetary losses will be irretrievable, brings this case well within those where courts have granted preliminary relief. *See, e.g.*, *Holiday CVS, L.L.C. v. Holder*, 2012 WL 10973832, at *2 (D.D.C. 2012) (explaining that loss of sales and market share could not be recompensed given sovereign immunity); *Nalco Co. v. U.S. E.P.A.*,

786 F. Supp. 2d 177, 188 (D.D.C. 2011) ("EPA's actions threaten a loss of sales and goodwill for which Nalco will have no right of recourse against the federal government.").

Third, for the inability of the companies' founders to work in the United States deters additional U.S.-based investment. Disruption of potential investment and funding—which is often difficult to quantify—is a quintessential irreparable injury. *See, e.g.*, *FutureGen Co. v. Carter*, 2012 WL 12874177, at *2 (D.D.C. 2012) (finding irreparable injury where company would lose its largest investor and other investors would likely quit working with it); *Planned Parenthood of Metro. Washington, D.C., Inc. v. Horner*, 691 F. Supp. 449, 457 (D.D.C. 1988) ("exclusion from the Campaign will deprive PPMW and other affiliates from receiving a substantial amount of money in federal contributions").

That is exactly what will happen if Defendants are permitted to continue delaying the Rule unlawfully. Atma and Anand ***had*** to found in the United States to even be considered for the Y Combinator program, from which they received most of their funding, and have since attracted even more interest from U.S.-based investors. Atma Decl. ¶ 5. Their absence from the United States makes it more difficult to reach out to, meet with, and ultimately obtain commitments from U.S.-based investors. *Id.* ¶ 10. Similarly, it is harder for Omni and Occasion to obtain additional U.S.-based investors because those investors are understandably wary of investing in companies with critical personnel who cannot work in the United States. Modon Decl. ¶ 8; Gupta Decl. ¶ 8. NVCA's members see this dynamic from the other side. In addition to preventing the companies in which NVCA's members have invested from obtaining additional investment, which is often necessary, the delay of the Rule chills NVCA's members from making ***new*** investments in companies with founders who might have benefited from the Rule. Franklin Decl. ¶¶ 9-10. Those lost opportunities are equally irreparable.

Aside from these economic injuries, Plaintiffs have also suffered irreparable ***procedural*** injury. Every day that Defendants are allowed to delay the Rule is another day that Plaintiffs have been denied their procedural right to comment on Defendants' actions. While procedural injury "is insufficient, *standing alone*, to constitute irreparable harm justifying issuance of a preliminary injunction, … such procedural harm does bolster plaintiffs' case for a preliminary injunction," when combined with other harms. *Fund For Animals v. Norton*, 281 F. Supp. 2d 209, 222 (D.D.C. 2003); *see also Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 24-25 (D.D.C. 2009) ("When a procedural violation of [the National Environmental Policy Act] is combined with a showing of environmental or aesthetic injury, courts have not hesitated to find a likelihood of irreparable injury."). That is the case here, where Plaintiffs have also suffered substantial economic injuries from Defendants' conduct, as explained above.

Finally, Plaintiffs' harms are all the more irreparable because this case will likely be over by the time Plaintiffs could receive a final judgment on the merits and a permanent injunction. Any final judgment is at least months away, given the potential need for discovery, motions practice, pre-trial proceedings, and trial—not to mention any appeal by either side. But if Defendants formally rescind the Rule on March 14, 2018, then there will be nothing left to enjoin. Denying Plaintiffs "a preliminary injunction at this time will effectively grant the Government a default success on the merits." *Legatus v. Sebelius*, 988 F. Supp. 2d 794, 814 (E.D. Mich. 2013). Because Plaintiffs cannot recapture the loss of their right to apply for parole, "if resolution of this case is postponed, and the plaintiffs ultimately prevail in their position, they will have won a Pyrrhic victory." *Ayuda, Inc. v. Meese*, 687 F. Supp. 650, 666 (D.D.C. 1988), *order vacated on other grounds sub nom. Ayuda, Inc. v. Thornburgh*, 880 F.2d 1325 (D.C. Cir. 1989), *judgment vacated*, 498 U.S. 1117 (1991). In contrast, Defendants will have suffered no

consequences for their unlawful decision to delay the Rule without providing notice and comment. That further counsels in favor of finding that Plaintiffs' harms are literally irreparable.

In sum, Plaintiffs have shown sufficient irreparable injury to merit a preliminary injunction.

IV. The Balance Of Equities Favors A Preliminary Injunction.

Given that Plaintiffs are likely to prevail on the merits, Defendants cannot say that enjoining them to implement the Rule would cause the government any significant harm. As the Court has recognized, "[t]he Government 'cannot suffer harm from an injunction that merely ends an unlawful practice.'" *R.I.L-R*, 80 F. Supp. 3d at 191 (quoting *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013)). To the extent Defendants claim that a preliminary injunction would require them to expend costs implementing the Rule, or would create reliance interests on the part of the public, those arguments do not withstand scrutiny. *See supra* Part II.

V. The Public Interest Favors An Injunction.

For the reasons Plaintiffs have already explained, a preliminary injunction would be in the public interest. Requiring Defendants to implement the Rule will not force Defendants to waste the public's money, nor will it create significant reliance interests on the part of the public. *See supra* Part II. Moreover, by promulgating the final Rule in the first place, the relevant agencies—including Defendants DHS and USCIS—conclusively determined that implementation of the Rule would serve the public interest by "encourag[ing] foreign entrepreneurs to create and develop start-up entities with high growth potential in the United States." 82 Fed. Reg. at 5,238. That is compelling evidence that issuance of the requested injunction is in the public interest.

Beyond that, requiring Defendants to implement the Rule requires them to do nothing more than comply with the law—and complying with the law is itself in furtherance of the public

interest. That is, "[t]he public interest is served when administrative agencies comply with their obligations under the APA." *N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 21 (D.D.C. 2009); *see also Texas Children's Hosp. v. Burwell*, 76 F. Supp. 3d 224, 246 (D.D.C. 2014) ("the Secretary's compliance with applicable law constitutes a separate, compelling public interest") (quotation omitted); *Michigan Citizens for an Indep. Press v. Thornburgh*, 1988 WL 90388, at *7 (D.D.C. 1988) ("The general public has an interest in seeing that laws are administered reasonably, in accordance with law and not arbitrarily."). Where agencies have failed to comply with notice-and-comment requirements, "enforcing the APA strictly does serve the public interest." *Texas Food Indus. Ass'n v. U.S. Dep't of Agric.*, 842 F. Supp. 254, 261 (W.D. Tex. 1993).

For all of these reasons, issuance of the requested preliminary injunction is in the public interest.

CONCLUSION

Plaintiffs' motion for a preliminary injunction should be granted.

Respectfully submitted,

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Dated: September 29, 2017

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has caused a true and correct copy of the foregoing to be provided to a process server for service upon the following by hand delivery on September 29, 2017:

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