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' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Melissa Crow (D.C. Bar No. 453487)
Leslie K. Dellon (D.C. Bar No. 250316)
AMERICAN IMMIGRATION COUNCIL
1331 G Street NW, Suite 200
Washington, DC 20005
(202) 507-7523
(202) 742-5619 (fax)

Andrew J. Pincus (D.C. Bar No. 370762)
Paul W. Hughes (D.C. Bar No. 997235)
John T. Lewis (D.C. Bar No. 1033826)
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
(202) 263-3300 (fax)

Attorneys for Plaintiffs

Dated: November 13, 2017

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Pages

Cases

Statutes, Rules, and Regulations

Other Authorities

INTRODUCTION

Defendants delayed the Entrepreneur Final Rule just six days before it was set to take effect—yet *six months* after the rule was first promulgated. They did so without offering the public advance notice or an opportunity to comment, instead claiming that the impending effective date of the rule gave them good cause to dispense with notice and comment under the Administrative Procedure Act ("APA"). The Delay Final Rule—the final rule that delayed the Entrepreneur Final Rule—is unlawful and should be vacated.

At the outset, the APA's good cause exception is unavailable when the failure to provide notice and comment stemmed from the agency's own delay. That is the case here. Defendants assert that they delayed the Entrepreneur Final Rule because of Executive Order No. 13,767, promulgated on January 25, 2017. But Defendants apparently did *nothing* for nearly six months, until July 11, 2017, when they issued the Delay Final Rule without first providing notice and comment. Defendants have not given, and cannot give, any explanation for their delay. For this reason, under binding D.C. Circuit precedent, the good cause exception cannot excuse Defendants' failure to provide notice and an opportunity for public comment.

Moreover, Defendants' purported justifications of financial costs and public reliance do not qualify as good cause. The standard is demanding; courts consistently limit good cause to extraordinary circumstances. The D.C. Circuit, for example, found good cause for the FAA to issue new safety regulations without notice and comment in the immediate aftermath of the 9/11 attacks. Neither of Defendants' pedestrian rationales, even if substantiated, qualify as good cause under the APA. And, in any event, Defendants have offered nothing to support them but conclusory assertions and an administrative record bereft of any supporting facts.

The Delay Final Rule is unlawful. The Court should vacate it, the effect of which would be that the effective date of the Entrepreneur Final Rule is restored to July 17, 2017.

STATEMENT OF FACTS

A. 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. *See International Entrepreneur Rule*, 82 Fed. Reg. 5,238, 5,238 (Jan. 17, 2017). 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, and other visa options are frequently unavailable. *Id.* at 5,274-76, 5,283.

The lack of viable paths for foreign entrepreneurs to grow businesses in the United States puts our nation at a serious disadvantage in the global economy. If foreign entrepreneurs cannot build their businesses in the United States, they will do so in foreign lands—and those countries will reap the benefits. *Id.* at 5,274. Indeed, other countries provide immigration status for foreign entrepreneurs precisely to attract the world's leading business innovators. *Id*. at 5,276.

B. The Entrepreneur Final Rule.

To solve this problem, the Obama Administration promulgated the International Entrepreneur Rule ("the Entrepreneur Final 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. The Entrepreneur Final Rule underwent substantial public comment and debate, which ultimately changed its substance. *Id.* at 5,244-73. The Entrepreneur Final Rule allows qualified entrepreneurs to apply for parole—a form of immigration action which would permit them to come to or remain in the United States to grow their businesses. *Id.* at 5,238. Specifically, the Entrepreneur Final Rule required prospective applicants to have founded a business in the United

States within the five years preceding their application (*id.* at 5,239), possess a substantial ownership stake and role in that business (*id.*), and validate that business's growth potential (*id*.).

DHS concluded that the Entrepreneur Final Rule fell well within its parole authority, which has historically been used similarly to "identify classes of individuals to consider for parole so long as each individual decision is made on a case-by-case basis according to the statutory criteria." *Id.* at 5,244. DHS also concluded that the Entrepreneur Final 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.* at 5,238. The Entrepreneur Final Rule would have taken effect on July 17, 2017. *Id.*

C. The Delay Final Rule.

On July 11, 2017, six days before the Entrepreneur Final Rule was to take effect, DHS published a new "final rule," the Delay Final Rule, purporting to "temporarily delay[] the effective date of the International Entrepreneur Final Rule" until March 14, 2018. *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 Entrepreneur Final Rule was the polar opposite of the careful, deliberative process DHS used to formulate the Entrepreneur Final Rule itself. DHS provided no advance notice of the Delay Final Rule, 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.* 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 Entrepreneur Final Rule would require USCIS to expend agency resources and would also waste the resources of those members of the public

who would apply. *Id.* The administrative record upon which DHS purportedly based its decision does not contain any information corroborating these assertions. *See* Dkt. No. 20-1 at 2. Rather, it contains nothing more than the text of the Delay Final Rule and the comments submitted by the public *after* the Delay Final Rule had already been promulgated. *Id.*

D. Plaintiffs.

Plaintiffs in this case are the National Venture Capital Association ("NVCA"), prospective entrepreneur applicants under the Entrepreneur Final Rule, and companies founded by potential applicants. NVCA is the nation's largest organization of venture capitalists, charged with representing the interests of its members, who frequently invest in businesses founded by foreign entrepreneurs. Dkt. No. 12-3, Declaration of Bobby Franklin ("Franklin Decl.") ¶ 2-3. 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 Entrepreneur Final Rule; 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. Dkt. No. 12-2, Declaration of Atma Krishna ("Atma Decl.") ¶¶ 7-10. Omni and Occasion are two companies founded by foreign entrepreneurs, which have similarly been harmed by their founders' inability to work in the United States. Dkt. No. 12-1, Declaration of Alex Modon ("Modon Decl.") ¶¶ 4-9; Dkt. No. 12-4, Declaration of Aksh Gupta ("Gupta Decl.") ¶¶ 5-8.

LEGAL STANDARD

Normally, a movant is entitled to summary judgment when the pleadings and the record demonstrate that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A genuine issue of material fact exists if the evidence, viewed in a light most favorable to the nonmoving party, could support a reasonable

jury's verdict for the non-moving party." *Friends of Animals v. Jewell*, 82 F. Supp. 3d 265, 270-71 (D.D.C. 2015) (quotation omitted).

However, when a party moves for summary judgment based on the administrative record, "[t]he summary-judgment standard set forth in Federal Rule of Civil Procedure 56(c) … does not apply because of the limited role of a court in reviewing the administrative record." *Winder HMA LLC v. Burwell*, 206 F. Supp. 3d 22, 31 (D.D.C. 2016) (Boasberg, J.). "Instead, in APA cases, the function of the district court is to determine whether or not ... the evidence in the administrative record permitted the agency to make the decision it did." *Resolute Forest Prod., Inc. v. U.S. Dep't of Agric.*, 187 F. Supp. 3d 100, 106 (D.D.C. 2016) (Boasberg, J.) (quotation omitted). "Summary judgment thus serves as the mechanism for deciding, as a matter of law, whether an agency action is supported by the administrative record and is otherwise consistent with the APA standard of review." *Id.*

ARGUMENT

I. Plaintiffs Have Standing To Challenge The Delay Final Rule.

Plaintiffs have shown, based on the undisputed facts contained in their supporting declarations, that they have standing to pursue this case. Specifically, they have suffered a number of cognizable injuries caused by the Delay Final Rule that would be redressed by vacating the Delay Final Rule and allowing the Entrepreneur Final Rule to go into effect.

"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).

The D.C. Circuit has developed specialized standing doctrines applicable where, as here, a plaintiff challenges the denial of a procedural right. That is, a "special standing doctrine" applies when "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).

As to the injury requirement, "[t]o 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 v. F.A.A.*, 485 F.3d 1181, 1185 (D.C. Cir. 2007) (quoting *Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664 (D.C. Cir. 1996) (en banc)). 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'y*, 94 F.3d at 664 (emphasis added).

Likewise, 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). Indeed, the procedural injury is necessarily redressable because an improper "agency action" "can be set aside by this Court." *City of Dania Beach*, 485 F.3d at 1186; *see also Fla. Audubon Soc'y*, 94 F.3d at 668 (noting that procedural injuries are "easily redressable, as a court may order the agency to undertake the procedure"). Thus, as the Supreme Court "noted" in *Lujan*, "in cases in which a party 'has been accorded a procedural right to protect his concrete interests,' the primary focus of the standing inquiry is not the imminence or redressability of the

injury to the plaintiff, but whether a plaintiff who has suffered personal and particularized injury has sued a defendant who has caused that injury." *Fla. Audubon Soc'y*, 94 F.3d at 664; *see also Ctr. for Biological Diversity v. Envtl. Prot. Agency*, 861 F.3d 174, 183 (D.C. Cir. 2017) (same).

For these reasons, the D.C. Circuit has long held that "[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) (emphasis added); *see also Ctr. for Biological Diversity*, 861 F.3d at 184 ("the party seeking to establish standing need not show that but for the alleged procedural deficiency the agency would have reached a different substantive result"). What is necessary is a "causal connection" between the denied procedural right and the underlying substantive injury (*Florida Audubon Soc.*, 94 F.3d at 664)—a link "connecting the omitted procedural step to some substantive government decision that may have been wrongly decided because of the lack of that procedural requirement," and a link in turn "connecting that substantive decision to the plaintiff's particularized injury." *Ctr. for Biological Diversity*, 861 F.3d at 184.

The causal connections between the Final Delay Rule and each of the Plaintiffs' particularized interests are evident: by enacting the Delay Final Rule without providing notice and comment, Defendants wrongfully delayed the effective date of the Entrepreneur Final Rule. And that substantive decision by Defendants has caused a particularized injury to Plaintiffs—who either directly or indirectly intended to benefit from the Entrepreneur Final Rule. 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 sufficient to confer standing.

A. The Krishnas have standing.

Atma and Anand Krishna possess standing as foreign entrepreneurs eligible to apply for parole under the Rule. By unlawfully delaying the effective date of the Entrepreneur Final Rule, Defendants deprived the Krishnas of the opportunity to apply for parole.

That lost opportunity is sufficient injury on its own to establish the Krishnas' standing. 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). That is true even where granting the benefit is entirely within the agency's discretion. A plaintiff need only show "more than speculation but less than certainty" that they would have received the benefit, had they been given the opportunity. *Teton Historic Aviation Found. v. U.S. Dep't of Def.*, 785 F.3d 719, 727 (D.C. Cir. 2015). After all, "[t]he standing requirement would be a high wall indeed if a plaintiff could only sue when the defendant was under an inescapable obligation to act as the plaintiff desired." *Id.*[1]

In the context of discretionary immigration relief, this Court has recognized the difference between a ***systemic*** challenge to "an overarching agency policy" and an ***individual*** challenge to "DHS's exercise of discretion." *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 176 (D.D.C. 2015). In the former, plaintiffs "challenge DHS policy as *outside* the bounds of its

[1] Indeed, the D.C. Circuit has repeatedly found standing where the issue at stake is eligibility for a discretionary benefit from a government agency. *See, e.g., Info. Handling Servs., Inc. v. Def. Automated Printing Servs.*, 338 F.3d 1024, 1030 (D.C. Cir. 2003) (loss of an opportunity "to bid on a maintenance contract" confers standing); *Lepelletier v. F.D.I.C.*, 164 F.3d 37, 42 (D.C. Cir. 1999) ("the denial of a business opportunity satisfies the injury requirement"); *W. Virginia Ass'n of Cmty. Health Centers, Inc. v. Heckler*, 734 F.2d 1570, 1574 (D.C. Cir. 1984) (private health centers could sue to challenge denial of funding to state where state nonetheless had "complete discretion to award any additional funding" to the centers).

delegated discretion." *Id.* This Court therefore held that it had jurisdiction over a suit by detained noncitizens alleging that DHS had adopted an "unlawful detention policy aimed at deterring mass migration" (*id.* at 173), even though the Immigration and Nationality Act provides that the "Attorney General's discretionary judgment" concerning individual detention decisions "shall not be subject to review" (*id.* at 176). The Court also held that the plaintiffs had standing because "th[e] suit seeks to enjoin consideration of a factor that, at the very least, diminishes the likelihood of Plaintiffs' release." *Id.* at 178. Similarly, Defendants' unlawful delay of the Rule "diminishes the likelihood" that the Krishnas will receive parole.

More broadly, 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.). Indeed, it is well established that an alien may sue to challenge unlawful action that threatens his or her ability to stay and work in the United States. *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 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. 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, and have shown much "more than speculation" (*Teton Historic Aviation Found.*, 785 F.3d at 727) that they would receive parole if given the opportunity to apply.

Atma and Anand—and their business, LotusPay—have also been harmed by Defendants' actions in other ways. Their inability to work lawfully in the United States hinders their ability to launch their platform in the United States, 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. Atma Decl. ¶ 10. The inability to come to, remain, and work lawfully in the United States 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.* The Delay Final Rule eliminates the Krishna's opportunity to apply for parole, and thereby allows these injuries to continue unabated; by the same token, these injuries would be redressed by restoring the Krishna's opportunity to apply for parole under the Entrepreneur Final Rule. 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, the Krishnas have standing.

B. Omni and Occasion have standing.

Omni and Occasion have standing as U.S.-based businesses that have suffered from their founders' lost opportunity to apply for parole under the Rule. Under the Entrepreneur Final Rule, Omni and Occasion's founders could have applied for parole beginning on July 17, 2017, which would have been a tremendous boon to Omni and Occasion. By enacting the Delay Final Rule, Defendants took that opportunity away, harming Omni and Occasion.

Courts have frequently held that plaintiffs can claim standing when agency action that would remedy their injuries has been unlawfully withheld. Indeed, the APA specifically authorizes lawsuits against agencies that "failed to act" (5 U.S.C. § 702), and permits the court to "compel agency action unlawfully withheld or unreasonably delayed" (*id.* § 706). That was the theory in *Massachusetts v. E.P.A.*, 549 U.S. 497, 516-26 (2007), where plaintiffs asserted that EPA's failure to regulate greenhouse gases perpetuated the injury of global warming. It was no obstacle to standing that the EPA did not itself cause global warming. *Id*. The same theory applies here, as it has for many years.[2]

[2] *See, e.g.*, *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160-62 (1981) (California had standing to challenge Secretary of the Interior's failure to consider other bidding systems); *People for the Ethical Treatment of Animals v. U.S. Dep't of Agric.*, 797 F.3d 1087, 1094 (D.C. Cir. 2015) (plaintiff had standing where "the USDA's inaction injured its interests"); *Nine Iraqi Allies Under Serious Threat Because of Their Faithful Serv. to the United States v. Kerry*, 168 F. Supp. 3d 268, 282 (D.D.C. 2016) ("Plaintiffs' alleged injury—the lack of final decisions on their [Special Immigrant Visa] applications—is quite clearly caused by Defendants' conduct."); *U.S. Women's Chamber of Commerce v. U.S. Small Bus. Admin.*, 2005 WL 3244182, at *1 (D.D.C. 2005) (organization had standing to challenge failure to establish procedures for identifying women-owned businesses); *Nat'l Coal. for Homeless v. U.S. Veterans' Admin.*, 695 F. Supp. 1226, 1229 (D.D.C. 1988) (rejecting defendants' claim that "plaintiffs' homelessness was not caused by them," and finding that plaintiffs had "demonstrate[d] a causal connection between their inability to find housing and the defendants' failure to implement the McKinney Act").

Omni and Occasion's resulting economic injury is more than sufficient to give them standing. "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. Modon Decl. ¶ 2. Two of Omni's founders, Nishant Srivastava and Vikram Tiwari, would have qualified for parole under the Entrepreneur Final 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.* ¶¶ 4-5. 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 Entrepreneur Final 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 Entrepreneur Final 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 available to 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 could be redressed by requiring Defendants to implement the Entrepreneur Final Rule.

Occasion also has standing as an affected business. Occasion was formally established in the United States in August 2014. Gupta Decl. ¶ 2. One of Occasion's founders, Pelle ten Cates, would have applied for parole under the Entrepreneur Final 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.* ¶ 4)—***far*** more than is required under the Entrepreneur Final 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 could be redressed if Defendants were required to implement the Entrepreneur Final Rule.

C. NVCA has standing.

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 have standing to sue in their own right. NVCA's members are venture capitalists that invest in nearly every region and sector of the U.S. economy. Franklin Decl. ¶ 2. They seek to invest in the very best start-up companies, regardless of whether those companies are founded by U.S. citizens or foreign entrepreneurs. *Id.* But many of NVCA's members will only invest in companies where the founding team is able to live and work *in the United States*. Venture capital investing is a "high touch" business; investors seek substantial contact with company founders. *Id.* ¶ 9. Such involvement and mentorship is often crucial to the success of an early business. *Id.* If foreign entrepreneurs cannot grow their businesses by working *in the United States*, then NVCA members are less likely to invest in these businesses. *Id.*

The suspension of the Entrepreneur Final Rule thus has at least two concrete effects on NVCA's members. ***First***, the unlawful delay of the Entrepreneur Final Rule precludes many of NVCA's members from investing in companies founded by non-U.S. citizens. Because many members require frequent touch-points as a condition of investing, the suspension of the Rule

deprives them from accessing valuable investment opportunities. *Id*. ***Second***, the unlawful delay of the Entrepreneur Final Rule impacts investments that NVCA's members have already made in companies founded by foreign entrepreneurs, causing them economic injury.

Each of these injuries falls within the scope of the parole provision, and would be redressed by requiring Defendants to implement the Rule. Thus, NVCA's members have standing to challenge the Delay Final 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 Entrepreneur Final Rule itself. *Id.* ¶¶ 3-7. And because this lawsuit challenges Defendants' procedural error, and requests that it be remedied by vacating the Delay Final 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 unlawful delay of the Entrepreneur Final Rule—investors, entrepreneurs, and companies. They surely have standing to pursue this case.

II. The Delay Final Rule Is Unlawful.

The Delay Final Rule is unlawful because Defendants failed to provide the notice and comment procedures required by the APA—and they lacked anything that remotely resembles the sort of "good cause" necessary to dispense with notice and comment. Under the APA, a reviewing court must set aside an agency's action if it was undertaken "without observance of procedure required by law." 5 U.S.C. § 706(2)(D). Specifically, 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." *N.J. Dep't of Envtl. Prot. v. EPA*, 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)).

The standard for good cause is demanding. Good cause is limited to "*emergency* situations," such as "where delay would imminently threaten life or physical property." *Sorenson Commc'ns Inc. v. F.C.C.*, 755 F.3d 702, 706 (D.C. Cir. 2014) (citations omitted). That is, good cause "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); *see also*

Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec., 202 F. Supp. 3d 20, 26 (D.D.C. 2016) ("Notice and comment can only be avoided in truly exceptional emergency situations, which notably, cannot arise as a result of the agency's own delay."), *aff'd*, 857 F.3d 907 (D.C. Cir. 2017). Against this standard, courts have found "good cause" in highly limited circumstances, such as where the FAA needed to counteract "the threat of further terrorist acts involving aircraft in the aftermath of September 11, 2001." *Jifry*, 370 F.3d at 1179.

"[R]eview of the agency's legal conclusion of good cause is *de novo*." *Sorenson Commc'ns Inc.*, 755 F.3d at 706. As the D.C. Circuit has explained, "[t]o accord deference would be to run afoul of congressional intent." *Id*. To the contrary, "the good-cause inquiry is 'meticulous and demanding.'" *Id.* (quoting *N.J. Dep't of Envtl. Prot.*, 626 F.2d at 1045). Thus, "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)).

Finally, the agency is limited to the rationale it gave when deciding to forgo notice and comment and to the factual findings contained in the administrative record. Under the *Chenery* doctrine, a court "may not affirm an agency action on grounds other than those adopted by the agency in the administrative proceedings." *See National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 683-84 (2007) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)). Courts have therefore frequently rejected alternative grounds for upholding the agency's decision not to provide notice and comment where those grounds were not previously stated by the agency. *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."); *Mid Continent Nail Corp. v. United*

States, 846 F.3d 1364, 1380 (Fed. Cir. 2017) ("[W]e are limited to examining the reasons Commerce cited in *Withdrawal Notice* to justify its invocation of good cause."); *N. Carolina Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 767 (4th Cir. 2012) ("Post-hoc explanations that an agency did not have to comply with regular notice and comment procedures are viewed with skepticism.").

Here, Defendants expressly relied on the good cause exception, and specifically 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.

The Delay Final Rule is unlawful under the APA for three independently sufficient reasons. ***First***, Defendants' own delay in promulgating the Delay Final Rule—procrastinating for ***six months*** after President Trump issued the Executive Order that supposedly prompted them to reconsider the Entrepreneur Final Rule—precludes them from relying on the good cause exception. ***Second***, 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). And ***third***, Defendants cannot identify a reason for failing to provide notice and comment that meets the demanding standard for good cause.

A. Defendants' own delay precludes reliance on the "good cause" exception.

Defendants' delay in enacting the Delay Final Rule bars them from relying on the good cause exception. Defendants expressly state that the impetus for the Delay Final Rule was the

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 Entrepreneur Final 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*, 202 F. Supp. 3d at 26. "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 the agency's delay created the very risks the agency sought to avoid. The present situation is indistinguishable from *Environmental Defense Fund, Inc. v. EPA*, 716 F.2d 915 (D.C. Cir. 1983)—and that decision thus dictates the result here.

There, following a change in administrations, the Environmental Protection Agency sought 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." *Id*. at 920. 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.*[3]

The same is true here. Defendants could have provided the public with notice and an opportunity for comment long ago. By Defendants' own admission, the Executive Order that

[3] 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 found not only that the EPA's position was wrong, but that it was not even "substantially justified." *Id.*

prompted them to delay the Entrepreneur Final Rule was issued on January 25, 2017, just ***one week*** after the Entrepreneur Final Rule itself was promulgated on January 17, 2017. Yet Defendants did nothing for nearly six months, until July 11, 2017. There is simply no reason—in Defendants' statement in the Federal Register, the administrative record, or in fact—why Defendants were unable to provide the public with notice and comment before enacting the Delay Final Rule.

If an agency could delay rulemaking until the very last minute—and then claim that urgency constitutes good cause—the APA's notice and comment requirement would be rendered a dead letter. That is why courts repeatedly reject reliance of good cause in these circumstances. Defendants' delay therefore alone forecloses their reliance on the APA's good cause exception to notice and comment.

B. Defendants' cursory statement of reasons is insufficient.

Even if Defendants could invoke the good cause exception, they have failed to meet the APA's 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*, 702 F.3d at 766 (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 Entrepreneur Final 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. But the agency apparently relied on ***nothing*** to reach these conclusions: the administrative record does not reflect one iota of data or consideration about these issues. 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 Entrepreneur Final Rule to their detriment. Defendants' *ipse dixit* that the public interest will be harmed by providing notice and comment is just the kind of "bald assertion," made without any supporting evidence, that cannot constitute good cause.

C. Defendants' reasons do not constitute good cause.

Even assuming that Defendants' delay is not fatal to their finding of good cause, none of Defendants' rationales hold up on their own terms.[4] Indeed, there is nothing in the administrative record that at all supports Defendants' invocation of good cause—leaving them with only the conclusory, implausible assertions in the Delay Final Rule.

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

Defendants principally assert that any money expended to implement the Entrepreneur Final Rule will be wasted once the Entrepreneur Final 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.*

[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 reach a decision that is neither arbitrary nor capricious in light of all facts and evidence.

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.

And, as a factual matter, Defendants' 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 final week before the Rule was to take effect. Either DHS ***always*** intended to delay the Entrepreneur Final 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 Entrepreneur Final Rule, given that it published the draft Application for Entrepreneur Parole (I-941) form and its accompanying instructions. *See 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 Entrepreneur 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.* The Entrepreneur Final Rule estimated that costs to private parties each year would total $8,465,080. *Id.* at 5,274.

DHS itself estimated that filing fees would easily cover any costs of implementing the Entrepreneur Final 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 that "USCIS derives approximately 96 percent of its operating budget from fees." 82 Fed. Reg. at 31,888. Thus, it is DHS's ***own*** position that it 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. Nor are there any factual findings in the administrative record that corroborate Defendants' new cost projections.

Defendants' argument cannot, in any event, satisfy the demanding standard of good cause. In *Sorenson Communications*, the D.C. Circuit held open "the possibility that a fiscal calamity could conceivably justify bypassing the notice-and-comment requirement." 755 F.3d at 707. But *Sorenson Communications*, which ***rejected*** the agency's claim of good cause, confirms that an agency's fear of resource expenditure cannot qualify as a viable excuse.

Sorenson Communications addressed the FCC's Telecommunications Relay Services ("TRS") Fund—a pool of money (created from fees assessed to various telecommunication companies) that compensated providers of specialty telephone services for individuals with

hearing impairments. *Id*. at 704. After Sorenson Communications introduced a new product, the FCC feared that mass adoption would "result[] in a strain on the TRS fund, with actual disbursements to providers far exceeding projected amounts." *Id*. at 705. On this basis, the FCC issued new regulations, without notice and comment, citing the good cause exception. *Id*.

The D.C. Circuit vacated the order because "there was no good cause for bypassing notice and comment." 755 F.3d at 710. Although the FCC cited "the threat of impending fiscal peril as cause for waiving notice and comment," "there were no factual findings supporting the reality of that threat." *Id*. at 706. Even though one Commissioner had demonstrated that the "unsustainable payout rate" would leave the Fund with tens of millions of dollars of unfunded obligations, the Court found no good cause: "Cause for concern? Perhaps. But hardly a crisis." *Id*. at 707; *see also 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).

So too here. Given that there is ***nothing*** about cost projections in the administrative record, Defendants offer nothing beyond an "unsupported assertion" as to economic hardship. *Sorenson Communications*, 755 F.3d at 707. And they do not so much as attempt to demonstrate that implementation of the Entrepreneur Final Rule would cause the sort of "fiscal calamity" that could potentially constitute good cause. *Id*.

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 the D.C. Circuit rejected that exact argument in *Environmental Defense Fund*. There, the government also contended that the underlying regulations "were to be eliminated" and thus it was "essential to take action before the regulated community expended resources." *Env't Defense Fund*, 716 F.2d at 920 (alterations omitted). This did not constitute good cause to bypass notice and comment—especially where the agency itself caused the delay. *Id.* at 921. Not only was there no good cause, the D.C. Circuit held, but the agency's arguments were "not at all reasonable," justifying an award of attorney's fees under the Equal Access to Justice Act. *Id.*

Additionally, Defendants' argument fails because their stated 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 members of the regulated 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, after certain programs are discontinued, for existing participants to 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 some time 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. Defendants' actions significantly harm the interests of these individuals, their businesses, and their investors. Defendants nonetheless attempt to invoke these same individuals' and entities' own 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 with which they are associated, 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. Thus, Defendants acted far too late to stave off harm to the regulated public.

Finally, Defendants invoked two cases in justifying the Delay Final Rule: *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 1044-45. It has nothing to say about the good cause exception invoked by Defendants here.

Nor did *Mid-Tex Electric Cooperative* hold that an agency has good cause to dispense with notice and comment whenever it wishes to "mov[e] expeditiously to eliminate uncertainty or confusion." 82 Fed. Reg. at 31,888. Notably, *Mid-Tex* held that, to invoke the good cause exception, "the agency must convince" the Court "that it is not engaging in dilatory tactics." 822 F.2d 1123, 1132 (D.C. Cir. 1987). Here, however, it is plain that Defendants have engaged in "dilatory tactics" by delaying for ***six months*** before promulgating the Delay Final Rule.

In any event, *Mid-Tex* does not equate mere "regulatory confusion" with "good cause." In *Mid-Tex*, FERC made several arguments—including that the absence of *any* rule, resulting from a court order outside of FERC's control, made it far harder for the regulated industry to engage in "more efficient and rational *long-range* capital investment decisions." *Id.* at 1133. Moreover, FERC's rule "had been approved 'in substantial measure'" by an earlier panel decision, and the agency had previously undergone "a lengthy period of public comment" for an earlier version of its rule. 822 F.3d at 1131, 1133. As the court explained, none of these reasons "would constitute 'good cause' standing alone." *Id*. at 1132-33. Even still, the court concluded that the petitioners had "raised a substantial and troublesome question." *Id.* at 1132. If the question was close in *Mid-Tex*, then Defendants' reasons are surely inadequate here.

3. Defendants cannot defend the Delay Final Rule by offering a new rationale that the Entrepreneur Parole Rule departs from the historic usage of parole.

In opposing Plaintiffs' motion for a preliminary injunction, Defendants invoked a new rationale for failing to provide notice and comment: that the Entrepreneur Final Rule is a "tectonic shift in the way the discretionary mechanism of parole has been administered in the United States for over a century." Dkt. No. 15 at 25. That rationale is found nowhere in the Delay Final Rule, meaning that Defendants may not rely upon it under the *Chenery* doctrine. *See supra* at 17-18.

Regardless, Defendants are simply wrong that the Entrepreneur Final Rule alters the historical usage of parole. As DHS explained when promulgating the Rule, "[a]cross Administrations, … it has been accepted that the Secretary can identify classes of individuals to consider for parole so long as each individual decision is made on a case-by-case basis according to the statutory criteria." 82 Fed. Reg. at 5,244 (citing 8 C.F.R. § 212.5(b) (providing multiple categories for parole)). Indeed, as Defendants seemed to acknowledge in their opposition brief, DHS has long exercised "parole authority … through regulations that identify classes of individuals to be considered for parole on individualized case-by-case bases." *See* Dkt. No. 15 at 3. Those categories include "individuals with serious medical conditions," "individuals subject to prosecution," "individuals cooperating with law enforcement," "volunteers offering assistance," and "foreign officials." *Id.* And DHS has even extended parole to categories of individuals for economic reasons, like "domestic labor needs." Kate M. Manuel & Michael John Garcia, Cong. Research Serv., R43782, *Executive Discretion as to Immigration: Legal Overview* 12-13 (2014).

That is what the Entrepreneur Final Rule does. It "identif[ies] [a] class[] of individuals to be considered for parole" (Opp. 3): foreign entrepreneurs. 82 Fed. Reg. at 5,239. Once an entrepreneur establishes eligibility, however, an adjudicator must still conclude that "(1) The applicant's parole would provide a significant public benefit, and (2) the applicant merits a grant of parole as a matter of discretion." *Id.* The Entrepreneur Final Rule therefore functions like past regulations: it identifies a category of eligible applicants, but reserves individual decisions to the agency's discretion. Far from displacing the agency's discretionary authority, it expressly preserves it.

Even if the Rule represented a so-called "tectonic shift" (Dkt. No. 15 at 25) in how parole has been used, that would not amount to good cause for enacting the Delay Final Rule without

notice and comment. There is no reason why any temporary changes to the parole system could not be reversed in the event the Entrepreneur Final Rule is ultimately rescinded, which is not even a foregone conclusion. Moreover, Defendants' argument would imply that an agency has good cause to forgo notice and comment whenever it seeks to delay a final rule that would significantly change existing policy. But "the good cause exception is to be narrowly construed and only reluctantly countenanced" (*Mack Trucks, Inc.*, 682 F.3d at 93 (quotation omitted)), not, as Defendants wish, invoked whenever an agency wants to delay a rule.

III. The Court Should Vacate The Delay Final Rule.

The proper remedy for Defendants' unlawful decision to enact the Delay Final Rule without providing notice and comment is to vacate it. Remanding the Delay Final Rule to the agency without vacating it would serve no purpose and would only compound the injuries that Plaintiffs have suffered.

When the court concludes that agency action is unlawful, "the practice of the court is ordinarily to vacate the rule." *Illinois Pub. Telecomms. Ass'n v. F.C.C.*, 123 F.3d 693, 693 (D.C. Cir. 1997); *see also Allina Health Servs. v. Sebelius,* 746 F.3d 1102, 1110 (D.C. Cir. 2014) ("vacatur is the normal remedy"); *Reed v. Salazar*, 744 F. Supp. 2d 98, 119 (D.D.C. 2010) ("the default remedy is to set aside Defendants' action"); *Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 77, 78 (D.D.C. 2010) ("both the Supreme Court and the D.C. Circuit Court have held that remand, along with vacatur, is the presumptively appropriate remedy for a violation of the APA"). Ultimately, "[t]he decision whether to vacate depends on the seriousness of the order's deficiencies … and the disruptive consequences of an interim change that may itself be changed." *Susquehanna Int'l Grp., LLP v. Sec. & Exch. Comm'n,* 866 F.3d 442, 451 (D.C. Cir. 2017) (quotation omitted).

There can be no doubt that the Delay Final Rule is seriously deficient. In general, "[f]ailure to provide the required notice and to invite public comment … is a fundamental flaw that 'normally' requires vacatur of the rule." *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 199 (D.C. Cir. 2009). In *CropLife America v. Environmental Protection Agency*, 329 F.3d 876, 879 (D.C. Cir. 2003), the D.C. Circuit explained that when an agency issues a regulation "without notice and the opportunity for comment," the proper remedy is to "vacate the new rule." The consequence is that "the agency's previous practice … is reinstated and remains in effect unless and until it is replaced by a lawfully promulgated regulation." *Id*. Here, that means that the Entrepreneur Final Rule would remain in effect.

Courts have therefore repeatedly vacated rules where the agency failed to engage in prior notice and comment. *See, e.g., Allina Health Servs.*, 746 F.3d at 1110 ("deficient notice is a 'fundamental flaw' that almost always requires vacatur"); *Mendoza v. Perez*, 72 F. Supp. 3d 168, 175 (D.D.C. 2014) ("the failure of the Federal Defendants to engage in notice and comment is a fundamental procedural flaw that frequently requires vacatur of the invalid agency action"); *In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.*, 853 F. Supp. 2d 138, 144 (D.D.C. 2012) ("When notice-and-comment is absent, the Circuit has regularly opted for vacatur."); *AFL-CIO v. Chao*, 496 F. Supp. 2d 76, 91 (D.D.C. 2007) ("[T]he absence of notice and comment … constitutes a procedural error of sufficient gravity for the court of appeals to have opted for vacatur recently and with some regularity.").

Indeed, if Plaintiffs are correct that Defendants' failure to provide advance notice and comment before delaying the Rule violated the APA, there is nothing the agency can do to cure that defect. At best, the agency could promise to consider the post hoc comments that were submitted after the Delay Final Rule was promulgated. But the APA demands more: the "notice-

and-comment requirement permits interested parties to criticize projected agency action ***before*** that action is embedded in a final rule and allows the agency to benefit from the parties' suggestions." *Council of S. Mountains, Inc.*, 653 F.2d at 580 (emphasis added); *see also N. Arapahoe Tribe v. Hodel*, 808 F.2d 741, 751 (10th Cir. 1987) ("Section 553 is designed to give affected parties an opportunity to participate in agency decisionmaking early in the process, when the agency is more likely to consider alternative ideas."). Indeed, allowing Defendants to maintain the Delay Final Rule even though it was promulgated without advance notice and comment would be to permit precisely the unlawful conduct the APA forbids.

Nor can Defendants show that vacatur would yield any disruptive consequences. To the extent that Defendants would assert the same inadequate reasons they invoked for good cause—that vacating the Delay Final Rule would entail financial costs and would create reliance interests on the part of the public—those arguments have been adequately addressed above. *See supra* at 15-31. A mechanism already exists to reverse any changes to the parole system caused by vacating the Delay Final Rule and implementing the Entrepreneur Final Rule—notice and comment rulemaking in accordance with law.

Finally, "when considering the real-world impact of vacatur, the Court should not turn a blind eye to the danger of leaving the current rule in place." *Conservation Law Found. v. Pritzker*, 37 F. Supp. 3d 254, 271 (D.D.C. 2014) (Boasberg, J.) (ordering vacatur). Here, remand without vacatur would only compound the many injuries that Plaintiffs have suffered. *See supra* at 5-15. Thus, the Court should vacate the Delay Final Rule.[5]

[5] If the Court agrees with Plaintiffs and vacates the Delay Final Rule, Plaintiffs respectfully request that the Court decline to issue a stay pending appeal. The relevant factors are (1) the likelihood that the party seeking a stay would prevail on appeal, (2) the likelihood that the appealing party would suffer irreparable harm absent a stay, (3) the prospect that others will be

CONCLUSION

The Court should vacate the Delay Final Rule, the effect of which would be that the effective date of the Entrepreneur Final Rule is restored to the original date of July 17, 2017.

---

harmed, and (4) the public interest. *Shays v. Fed. Election Comm'n*, 340 F. Supp. 2d 39, 44 (D.D.C. 2004). All factors here counsel against a stay.

Defendants are unlikely to prevail on any appeal of a vacatur order. Defendants' position on the merits is exceptionally weak: the D.C. Circuit in *Environmental Defense Fund* found that the government's nearly identical arguments were so substantially unjustified that EAJA fees were appropriate. 716 F.2d at 920. And Defendants cannot show any irreparable injury caused by implementing the Entrepreneur Final Rule—a valid regulation with an effective date of July 17.

A stay would, however, harm Plaintiffs—causing the very irreparable injuries that Plaintiffs identified in their motion for a preliminary injunction. Moreover, if the government does propose to rescind the Entrepreneur Final Rule—a step that Defendants have announced they will take, but still have not done—any further delay would only restrict the ability of Plaintiffs and others like them to apply for parole. Finally, it is in the public interest for the government to immediately comply with the law.

Respectfully submitted,

/s/Paul W. Hughes
Andrew J. Pincus (D.C. Bar No. 370762)
Paul W. Hughes (D.C. Bar No. 997235)
John T. Lewis (D.C. Bar No. 1033826)
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
(202) 263-3300 (fax)

Melissa Crow (D.C. Bar No. 453487)
Leslie K. Dellon (D.C. Bar No. 250316)
AMERICAN IMMIGRATION COUNCIL
1331 G Street NW, Suite 200
Washington, DC 20005
(202) 507-7523
(202) 742-5619 (fax)

Attorneys for Plaintiffs

Dated: November 13, 2017

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused a true and correct copy of the foregoing to be filed via the Court's CM/ECF system on November 13, 2017, which will send notice of filing to all counsel of record registered with the system.

/s/ Paul W. Hughes
Paul W. Hughes