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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEHRING REGIONAL CENTER LLC,

Plaintiff,

v.

ALEJANDRO MAYORKAS,
Secretary of Homeland Security, *et al.*,

Defendants.

Case No. 3:20-cv-09263-JSC

DEFENDANTS' SUPPLEMENTAL BRIEF

Given the ratification of the rule at issue here by Secretary Mayorkas, it is no longer necessary for this Court to address the propriety of the appointment of Mr. McAleenan or the *de facto* officer doctrine. *See* Defs.' Notice of Ratification, ECF No. 34. But we are submitting this brief nonetheless in light of the Court's briefing order and to supplement our argument for purposes of the Court's consideration of partial summary judgment. As we explained in our opposition to the motion for a preliminary injunction, if the Court were to reach these issues, this Court should consider the *de facto* officer doctrine before concluding that the rule at issue here is likely invalid based on perceived flaws in the designation of Mr. McAleenan as Acting Secretary in April 2019.

It is well established that a court may instead treat the "acts of an officer de facto" as "valid and binding," even if he was not "an officer de jure." *Phillips v. Payne*, 92 U.S. 130, 132 (1876). Under the *de facto* officer doctrine, however, a court should not redress an unlawful appointment through backward-looking relief that sets aside the appointee's past acts. A court may instead treat the "acts of an officer *de facto*" as "valid and binding," even if he was not "an officer *de jure*." *Id.*

As the Supreme Court has explained, the *de facto* officer doctrine "confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient." *Nguyen v. United States*, 539 U.S. 69, 77 (2003) (quoting *Ryder v. United States*, 515 U.S. 177, 180 (1995)). The *de facto* officer doctrine has a long legal pedigree. The earliest English case to discuss the rule dates to 1431 and explains that "if a man be made abbot or parson erroneously" by one who "had no right" to make the appointment, the wrongful appointee may be "ousted by legal process," but "a deed made by him" in the meantime need not be set aside. *State v. Carroll*, 38 Conn. 449, 458 (1871) (translating *The Abbé de Fontaine*, 1431 Y.B. 9 Hen. 6, fol. 32, pl. 3 (Eng.)). Early American state courts considered the doctrine "too well settled to be discussed." *People ex rel.* Bush *v. Collins*, 7 Johns. 549, 552 (N.Y. Sup. Ct. 1811) (Kent, C.J.).

The Supreme Court recognized the doctrine as early as 1842, and it has applied the doctrine to uphold challenged actions in over a dozen cases since then.[1]

The *de facto* officer doctrine rests on "considerations of policy and necessity." *Norton v. Shelby Cty.*, 118 U.S. 425, 441 (1886). First, the doctrine safeguards "the foundations of law and order and the stability of government" by preventing the chaos that could result if a defect in an officer's appointment required the mass invalidation of the officer's past acts. *Briggs v. Voss*, 85 P. 571, 572 (Kan. 1906). Second, the doctrine ensures that members of the public who transact business with an officer need not "investigate his title, but may safely act upon the assumption that he is a rightful officer." *Waite v. City of Santa Cruz*, 184 U.S. 302, 323 (1902). Third, the doctrine protects "innocent men, who have dealt with officers upon the faith of a public appointment," from "difficulty and losses." *State of Ohio ex rel. Newman v. Jacobs*, 17 Ohio 143, 152 (1848) (in bank). The Ninth Circuit has recognized that the "de facto officer doctrine might potentially be raised to overcome the consequences of particular FVRA violations." *Hooks v. Kitsap Tenant Support Services, Inc.*, 816 F.3d 550, 564 (9th Cir. 2016); *see also S.W. General, Inc. v. N.L.R.B.*, 796 F.3d 67, 82 (D.C. Cir. 2015) (applying doctrine in FVRA challenge), *aff'd*, 137 S. Ct. 929 (2017).

The doctrine applies to *constitutional* claims regarding the appointment, so it also would apply to the claim like the one here – where Acting Secretary McAleenan believed he was properly serving as Acting Secretary but Plaintiffs are likely to establish that there was a defect in the designation order. The Supreme Court has cited ""[n]umerous cases" that apply the doctrine "to the invalidity, irregularity, or unconstitutionality of the mode by which the party was

[1] *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 142 (1976) (members of administrative agency); *United States v. Royer*, 268 U.S. 394, 396-98 (1925) (army major); *Tulare Irrigation Dist. v. Shepard*, 185 U.S. 1, 13-14 (1902) (irrigation district); *Waite v. City of Santa Cruz*, 184 U.S. 302, 322-24 (1902) (mayor); *Nofire v. United States*, 164 U.S. 657, 661 (1897) (clerk); *Starr v. United States*, 164 U.S. 627, 631 (1897) (circuit-court commissioners); *Wright v. United States*, 158 U.S. 232, 238 (1895) (deputy marshal); *Lyons v. Woods*, 153 U.S. 649, 669 (1894) (territorial legislators); *In re Delgado*, 140 U.S. 586, 590 (1891) (county commissioners); *Gonzales v. Ross*, 120 U.S. 605, 619 (1887) (land commissioner); *Hussey v. Smith*, 99 U.S. 20, 24 (1879) (marshal); *United States v. Insurance Cos.*, 89 U.S. (22 Wall.) 99, 101-03 (1875) (state legislators); *Cocke ex rel. Commercial Bank of Columbus v. Halsey*, 41 U.S. (16 Pet.) 71, 87 (1842) (clerk of court).

appointed or elected." *Norton*, 118 U.S. at 444 (emphasis added); *id*. at 446 (applies despite "the unconstitutionality of the act by which the officer is appointed to an office").

To be sure, the doctrine has not been applied in cased involving the adjudicative functions of judges when challenged on direct appeal. *See Ryder*, 515 U.S. at 180; *Nguyen*, 539 U.S. at 77. In *Ryder*, the Court explained that a challenge could be "brought to the appointment of an officer who adjudicates his case" when the case is on "direct review," and that "[a]ny other rule would create a disincentive to raise Appointments Clause challenges with respect to questionable *judicial* appointments." 515 U.S. at 179, 182-183 (emphases added). But these concerns do not apply to a rulemaking under the Administrative Procedure Act.

The application of the doctrine by the Supreme Court in *Buckley v. Valeo* is instructive (and presented a far more challenging application of this doctrine than a challenge to a rule under the Administrative Procedure Act). In *Buckley*, the Supreme Court held that the composition of the Federal Election Commission violated the Appointments Clause of the Constitution. But it applied the *de facto* officer doctrine to preserve the Commission's actions despite their appointments being unconstitutional. *See* 424 U.S. at 124-43. As the Supreme Court explained, the illegality of the appointments "should not affect the validity of the Commission's administrative actions and determinations to this date, including its administration of those provisions." *Id*. at 142; *see id*. at 124-37. The Court instead accorded "*de facto* validity" to those "past acts." *Id*. at 142. Indeed, the Court stayed its judgment for 30 days to allow the Commission to continue to "exercise the duties and powers granted it" and in the meantime afford an opportunity to fix the appointment problem. The same should be done here – Mr. McAleenan's past act of approving this rule should be accorded "de facto validity." *Id*.

To the extent the Court looks at the various factors cited in decisions applying this doctrine through history, they militate in favor of applying the *de facto* officer doctrine to the EB-5 rule. First, the rule was signed by Mr. McAleenan three months into his tenure on July 24, 2019, at a time when there was no reason to doubt his authority as the designated Acting Secretary; and it was not until over a year later that the GAO issued its report and questioned his designation. *See*

GAO Report (Aug. 14, 2020), available at https://www.gao.gov/assets/b-331650.pdf.[2] Thus, this is a circumstance where it is appropriate to "confer[] validity upon acts performed by a person acting under the color of official title even though *it is later discovered* that the legality of that person's appointment or election to office is deficient." *Nguyen*, 539 U.S. at 77; *see Ryder*, 515 U.S. at 180 (asking whether "it is later discovered" that there is a flaw in the appointment). As the D.C. Circuit has explained, to challenge a policy based on the authority of the officer, the plaintiff "must bring his action at or around the time of the challenged government action" and the "plaintiff 'must show that the agency or department involved has had reasonable notice under all the circumstances of the claimed defect in the official's title to office." *S.W. General*, 796 F.3d at 82. Neither test is met here – the plaintiff did not challenge this rule until 399 days after its promulgation, and Mr. McAleenan had no reasonable notice of the alleged flaw in his designation. Importantly, the Supreme Court in *Buckley* allowed all prior actions of the Commission – which was constituted in a manner that violated the Constitution and during a period during which that violation was under active challenge in the courts – to be treated as valid under the *de facto* officer doctrine. The same result is appropriate here where it would be over a year before *any* case challenged the designation of Mr. McAleenan. *See A.B. –B v. Morgan*, Civil Case No. 20-cv-0846 (RJL), 2020 WL 5107548 (D.D.C. Aug. 31, 2020) (complaint filed March 27, 2020). Critically, this case is different from all the others challenging Mr. Wolf's authority to take action; those actions were taken around the same time as or after the designation problems were identified by the GAO. The government has therefore never advocated for the *de facto* officer doctrine until this case.

Second, the rule was finalized nearly two years ago, and has been operative for nearly 18 months, including under the auspices of the current properly appointed and confirmed Secretary.

[2] Even if we look at the first time the appointment issue was publicly flagged – in a congressional letter asking GAO to investigate– that letter was sent in November 2019, months after the final rule was promulgated. *See* https://oversight.house.gov/sites/democrats.oversight.house.gov/files/191115%20T%20Dodaro%20re%20Letter%20to%20GAO%20on%20Wolf-Cuccinelli%20Appointment.pdf.

The public has therefore been relying on the new updated standards for a lengthy period. To be sure, as this Court noted, investor applications under the new rule dropped sharply after the change, and have only begun to recover. But the COVID pandemic intervened, and has had a very significant impact on all visa approvals and the ability to travel by individuals seeking visas abroad. *See* ECF No. 33, Transcript of Mar. 25, 2021 Hearing ("Tr."), at 15, lines 2-4; *see also Tate v. Pompeo*, --- F. Supp. 3d ---, 2021 WL 148394, at *1 (D.D.C. Jan 16, 2021) (explaining that "The COVID-19 pandemic has disrupted the visa application and interview process, creating challenges both for foreign nationals wishing to travel to the United States and for the diplomatic posts responsible for processing visa applications."). One data point that does show reliance on the new rules and relates to the plaintiff here is the number of regional center designations: there were 16 applications in the quarter of the rule change in late 2019, and 18 applications in the three FY 2020 quarters thereafter, even in the midst of the pandemic.

Moreover, the ultimate purpose of the program is to benefit economic development in the United States, with a focus on underserved communities through the targeted employment area provisions. Those communities are relying on the judgment of the agency that updated investment thresholds will increase community investments. *See Employment-Based Immigrants, Final Rule*, 56 Fed. Reg. 30708-09 (Jul. 5, 1991) (explaining that the lower amount thresholds are designed to encourage investments in areas that would benefit most from employment creation); *EB–5 Immigrant Investor Program Modernization*, 84 Fed. Reg. 35,750-751 (Jul. 24, 2019) (same). [3]

[3] This Court expressed concern that new requirements would limit the ability of cities like Oakland to qualify. That is not correct. The new rule maintains two types of high unemployment area TEAs as the old rule did: 1) certain geographic and political subdivisions that independently qualify based on having a sufficiently high unemployment rate, *see* 8 C.F.R. 204.6(j)(6)(ii)(A); and 2) specially designated high unemployment TEAs, *see* 8 C.F.R. 204.6(j)(6)(ii)(B) and 8 C.F.R. 204.6(i). With respect to the first category, the new rule *added* another independent subdivision that could independently qualify, namely, city or town with a population of 20,000 or more outside of a metropolitan statistical area. With respect to the second category, which used to be designated by states by whatever metric they chose, DHS created clear parameters based on census tracts in order to prevent gerrymandering and focus investment on those census tracts within cities that are suffering high unemployment. *See* 8 C.F.R. § 204.6(i); 84 Fed. Reg. 35,754-755 (Jul. 24, 2019) (explaining changes in method of designation of a TEA). Thus, the parts of Oakland that suffer

Finally, to the extent the drop in applications is due to the increase in the required investment threshold, this obviously has nothing to do with the propriety of the appointment and as this Court observed, *failing* to update that threshold to reflect inflation would be arbitrary and capricious given that they had not been updated since 1992. Tr. at 8, lines 2-4 (the Court acknowledging "that actually it might be arbitrary and capricious not to adjust" the minimum capital investment amounts for inflation.). The public likewise relied upon the Administrative Procedure Act process that led to the promulgation of the rule after notice and an extensive period of public comment. But these specifics should be beside the point in applying the de facto officer doctrine: the point is that the rule had been governing public planning and preparation for well over a year when this case was filed. The public should not be required to investigate Mr. McAleenan's authority before beginning to gather investors; before advertising based on the new investment amount; before saving or diverting resources towards U.S. projects to meet the new investment thresholds; before developing a project in one of the more focused census defined TEAs established by DHS as set out by the rule; before planning for a TEA minimum investment differential that was more favorable to investors than in the proposed rule; before relying on the assurance that investment adjustments required by securities laws are not disqualifying; or before relying on the priority date clarifications of the new rule. *See* 84 Fed. Reg. at 35,751 (summarizing primary changes to the rule). In other words, the public should be able to "otherwise safely act upon the assumption that he is a rightful officer." *Waite*, 184 U.S. at 323. It is no answer to say that any investor who qualified under the prior investment minimum would qualify now – the new rule makes numerous changes and improvements to the EB-5 regime that help the program serve its statutory goals and this won't always be the case. And the work investors have taken in preparing or planning to satisfy the new standards should not be penalized or undermined now. The rule has now been administered across two Presidential administrations (and was proposed by a third in early 2017). The public should be entitled to rely on the certainty provided by the *de facto* officer doctrine.

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from sufficiently high unemployment can continue to qualify as a targeted employment area regardless of population level.

It is also relevant that this is a challenge filed under the Administrative Procedure Act. The APA focuses on review of "agency action," not the action of any particular agent or office-holder. *See* 5 U.S.C. §§ 702, 704, 706. An agency is defined as "each authority of the Government of the United States. 5 U.S.C. § 701. And the "United States may be named as a defendant in any such action." *Id*. § 702. So may the "agency by its official title, or the appropriate officer." *Id*. § 703. Thus, the officer is not an essential defendant. It is the "final agency action" that is challenged, not the actions of a particular office holder. *Id*. § 704. And the Court's role is to "hold unlawful and set aside *agency* action." *Id*. § 705 (emphasis added). Given this congressional focus on agency action, and the need for stability in agency conduct pursuant to formally promulgated rules that are evaluated by the public under statutory procedures, the *de facto* officer doctrine is especially appropriate here where Congress has focused review on the actions of the agency, not the officer. It is also relevant that this rule has been treated as the operative agency rule by the government for nearly two years, including by the current Senate-confirmed Secretary, who of course has now ratified the rule. This is also not a circumstance where there can be said to have been any prejudice resulting from the erroneous designation of Mr. McAleenan. *See Hooks*, 816 F.3d at 564 (observing that "defenses based on harmless error or the de facto officer doctrine" might be raised in FRVA appointment challenge); *PDK Labs., Inc. v. U.S. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) ("If the agency's mistake did not affect the outcome, if it did not prejudice the petitioner, it would be senseless to vacate and remand for reconsideration."); *Nw. Immigrant Rights Project v. United States Citizenship & Immigration Servs.,* No. CV 19-3283 (RDM), 2020 WL 5995206, at *17 (D.D.C. Oct. 8, 2020) (finding Plaintiffs unlikely to succeed on the challenge to McAleenan's appointment, stating "there is no reason to doubt that the Rule would have come out the same way if he had been serving properly" and "[n]or is there any indication in the record that either the Proposed Rule or the Final Rule would have come out any differently had they been approved [by someone other than McAleenan] instead."). Finally, unlike a judicial act taken by a person who is not a judge, this "agency action" is an "action [that] . . . could have been taken" by the agency "if properly pursued" and is not "one which could never have been taken at all."

Nguyen, 539 U.S. at 79; *see also United States v. Gantt*, 179 F.3d 782, 787 (9th Cir. 1999) (declining to apply doctrine where statute specified certification by specific named officer, the United States Attorney).

CONCLUSION

For these reasons, and the reasons provided in our opposition to the motion for a preliminary injunction, the Court should decline to grant summary judgment on the appointment claim to Behring RC.

Dated: April 1, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on April 1, 2021, I electronically filed the foregoing document with the Clerk of the Court by using the CM/ECF system, which will provide electronic notice and an electronic link to this document to all attorneys of record.

Executed on April 1, 2021, at San Diego, CA.

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