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

BEHRING REGIONAL CENTER LLC,

Plaintiff,

v.

ALEJANDRO MAYORKAS,
in his official capacity as Secretary of the Department of Homeland Security,

UR M. JADDOU,
in her official capacity as Director of the United States Citizenship & Immigration Services,

Defendants.

Case No. 3:22-cv-02487-VC

BRIEF OF INVEST IN THE USA AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF

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INTRODUCTION AND INTEREST OF THE *AMICUS CURIAE*

Over the past several decades, Defendant United States Citizenship and Immigration Services ("USCIS") has certified more than 600 EB-5 regional centers. These centers collectively oversee billions of dollars of investments from thousands of investors. Following expiration of the prior statute, Congress enacted the EB-5 Reform and Integrity Act of 2022 ("Integrity Act" or "Act") to achieve—in Congress's express words—"reauthorization" of the Regional Center Program (or "Program"). The Act ensures that foreign investors will continue investing billions of dollars into job-creating projects in the United States, with a statutory emphasis on projects located in high unemployment and rural areas.

But with the click of a mouse, USCIS turned the statute on its head by dismantling the program entirely. USCIS declared, by a web posting, that the hundreds of previously approved regional centers are now all deauthorized. If they wish to continue operating, these centers must invest significant time and money to start the certification process anew. Given enormous processing delays, it will take USCIS many years to recertify all these regional centers, entirely decimating this significant industry in the interim. And by this same web posting, USCIS appears to leave existing EB-5 investors in the surprising position that they are no longer protected by the regulations governing regional centers.

This action is plainly unlawful. Because it contravenes the clear statutory text and defies Congress's intent, it must be set aside. And even if the statute were silent and USCIS had some regulatory flexibility, it erred here by taking this major regulatory action without notice-and-comment rulemaking and by acting in a most arbitrary and capricious manner.

Amicus Invest in the USA ("IIUSA") is the national membership-based 501(c)(6) non-profit trade association for the EB-5 Regional Center Program. IIUSA represents over one hundred regional center members serving forty-seven states and territories. Its mission is to advocate for EB-5 stakeholders, including its regional center members, to foster domestic economic development and job creation. USCIS's action, which categorically deauthorized all existing regional centers, puts the very existence of many of IIUSA's regional center members at risk. *Amicus* therefore has a vital interest on behalf of its members to demonstrate the illegality of USCIS's action.

* * *

1. The Regional Center Program streamlines the statutory requirements for an EB-5 visa by allowing foreign investors to passively invest in job-creating enterprises in the United States. Although initially enacted as a pilot program, the Regional Center Program has become a well-established—indeed the nearly exclusive—means of obtaining an EB-5 visa. In the 1993 Appropriations Act, Congress set aside a small number of visas for a few years exclusively for applicants under the Regional Center Program. Over the years, Congress has reauthorized that set-aside provision dozens of times. Throughout that time, USCIS codified extensive regulations governing the Program and oversaw regional center operations. Today, almost all EB-5 visas go to regional center investors, rendering the initial set-aside pilot-program provision superfluous.

More than 600 regional centers—thriving small and medium-size businesses—have become officially "designated" by USCIS as eligible to receive EB-5 investments and deploy those funds into job-creating projects compliant with the Program's requirements. These regional centers have spent thousands of hours and millions of dollars in seeking and maintaining their designations. In reliance on these designations, thousands of foreign investors have invested billions of dollars into regional center projects in the hopes of obtaining lawful permanent residency in the United States. The regional center designation serves to protect those investors.

2. Following a lapse in the program, Congress enacted the Integrity Act. Recognizing the longstanding predominance of the Regional Center Program in the EB-5 visa category, Congress codified the Program in the Immigration and Nationality Act ("INA") and the United States Code, making visas available through the Regional Center Program through September 2027. The Integrity Act maintained the Regional Center Program materially intact as it had been established by regulation, but it included measures to specifically address the occurrence of fraud and the involvement of "bad actors" in regional center operations. By all accounts—as evidenced throughout the statutory text—Congress intended USCIS and regional centers to promptly get back to work.

3. In view of the Integrity Act's plain text and manifest purpose, USCIS took a most extraordinary action. The agency announced by means of an "alert" on its website—not so different in form or complexity than a character-limited tweet—that all preexisting regional centers (over

600 of them) were categorically decertified. As USCIS would have it, rather than the Integrity Act serving as a "reauthorization" and strengthening of the preexisting Regional Center Program—the Act instead *canceled* all existing regional centers, forcing the industry to start over from nothing.

The statutory text does not tolerate such a construction. To the contrary, the text compels the conclusion that preexisting regional center designations continue to hold force. The Act is structured such that the new anti-fraud measures sit on top of the preexisting regulatory structure. USCIS's contrary decision—that all existing regional centers have been decertified overnight—renders statutory provisions in the Act unintelligible. And USCIS's conclusion does not square with the import of the statutory text: Congress enacted the Integrity Act expressly to *shore up* the Regional Center Program, not to destroy it and remove any regulation of the billions already invested.

Even if there were a statutory gap for USCIS to fill here, its action was unlawful. USCIS's action flouts the essential requirement of notice-and-comment rulemaking in defying its own regulations. More, in effectively eviscerating the Program, USCIS failed to consider important aspects of the problem, the costs of its rule, and serious reliance interests. USCIS's action must be set aside.

ARGUMENT

I. THE INTEGRITY ACT'S PLAIN TEXT FORECLOSES USCIS'S ACTION

Courts "shall" "set aside" agency action that is "not in accordance with law" or "in excess of statutory … authority." 5 U.S.C. § 706(2). "[I]t is axiomatic that administrative agencies may act only pursuant to authority delegated to them by Congress." *Air All. Houston v. EPA*, 906 F.3d 1049, 1060 (D.C. Cir. 2018) (cleaned up). "If Congress has spoken directly to the precise question at issue and the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* (cleaned up).

The statutory text is plain: When Congress explicitly *reauthorized* the Regional Center Program via the Integrity Act, Congress did not simultaneously *deauthorize* the more than 600 approved regional centers. Given the manifest intent of the statute to promptly return the Program to operation, that would be a bizarre congressional choice. In all, the Act reflects an unambiguous intent that approved regional centers sustain their operations and retain their designation so that USCIS can smoothly implement the Integrity Act and reinvigorate the Program. USCIS's action,

however, defies the statutory text and "is incompatible with both the mechanics and purpose of the entire statute." *Columbia Riverkeeper v. Wheeler*, 944 F.3d 1204, 1210 (9th Cir. 2019). Because USCIS acted contrary to the statute's text and purpose, its action was "in excess of statutory authority and must be set aside." *Friends of Animals v. Haaland*, 997 F.3d 1010, 1017 (9th Cir. 2021).

A. The statutory text affirmatively ensures preexisting regional centers retain their designations and continue operating without interruption

"In construing a statute, we begin, as always, with the language of the statute." *California v. Trump*, 963 F.3d 926, 944 (9th Cir. 2020). The text compels the conclusion that, per clear congressional direction, preexisting approved regional centers need not begin their certification processes anew. Rather than strip regional centers of their designation, as USCIS suggests, the Integrity Act confirms that preexisting regional centers may continue their operations uninterrupted.

1. The Integrity Act defines a "regional center" under the reenacted Program in terms that encompass preexisting regional centers. Specifically, the Act makes visas available to "qualified immigrants participating in a program implementing this paragraph that involves a regional center in the United States, which has been designated by the Secretary of Homeland Security on the basis of a proposal for the promotion of economic growth, including prospective job creation and increased domestic capital investment." Integrity Act § 103(b)(1) (8 U.S.C. § 1153(b)(5)(E)(i)). Preexisting approved regional centers already conform to those requirements.

As a threshold matter, preexisting regional centers are participating "in a program implementing this *paragraph*." Integrity Act § 103(b)(1) (8 U.S.C. § 1153(b)(5)(E)(i)) (emphasis added). The "paragraph" at issue is 8 U.S.C. 1153(b)(5), the general EB-5 category—*not* the *sub*paragraphs added by the Integrity Act that codify the Regional Center Program. Under the Act, then, the pilot program under which existing regional centers were designated was "a program implementing this *paragraph*." *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, Pub. L. No. 102-395, § 610(a) (Oct. 6, 1992) ("1993 Appropriations Act") ("Of the visas otherwise available under section 203(b)(5) of the Immigration and Nationality Act (8 U.S.C. 1153(b)(5)), the Secretary of State, together with the Attorney General, shall set aside visas for a pilot program to *implement the provisions* of such section.") (emphasis added).

Preexisting regional centers also have already been "designated by the Secretary of Homeland Security on the basis of a proposal for the promotion of economic growth, including prospective job creation and increased domestic capital investment." Integrity Act § 103(b)(1) (8 U.S.C. § 1153(b)(5)(E)(i)). That definitional language tracks the statutory language in the pilot program. *Compare id.*, *with* 1993 Appropriations Act § 610(a) ("for the promotion of economic growth, including increased export sales, improved regional productivity, job creation, or increased domestic capital investment"). For all practical purposes, existing regional centers were thus designated using the same criteria set forth in the Integrity Act.[1]

Nowhere in the text of the statute did Congress expressly state that existing regional centers, which satisfy those definitional requirements, were deauthorized or defunct, or that they had to start the regulatory process anew. "Where Congress has explicitly provided a definition for a term, and that definition is clear, an agency must follow it." *Safer Chemicals, Healthy Families v. EPA*, 943 F.3d 397, 425 (9th Cir. 2019). Congress's definition of regional center in the Integrity Act "clearly includes" legacy regional centers, making USCIS's "exclusion of legacy [regional centers] from the definition of ["regional center"] … unlawful." *Id.* The text establishes that Congress defined "regional center" with purposeful breadth to encapsulate preexisting regional centers already approved by USCIS in its now-codified Regional Center Program. Congress thus plainly intended for those existing regional centers to resume their operations without interruption by USCIS.

2. Moreover, the Integrity Act explicitly recognizes, and treats as "binding," approved Forms I-924 (regional center applications) under the preexisting Program.

The Act provides that approved regional center business plans continue to be binding as to future adjudications. Specifically, the Act states: "The approval of an application under this subparagraph, including an approval before the date of the enactment of this subparagraph, shall be binding …." *Id.* § 103(b)(1) (8 U.S.C. § 1153(b)(5)(F)(ii)). Prior to the Integrity Act, a business plan "application" was an amendment to Form I-924, the application for a regional center. To

[1] Indeed, the I-924 approval notices of preexisting regional centers largely tracked this same language, confirming they were approved to "promote economic growth." And as recently as last year, regional centers had to submit an I-924A annual certification to demonstrate to USCIS that they were still satisfying those same requirements. *See* 8 C.F.R. § 204.6(m)(6)(i)(B).

receive designation from USCIS, a regional center had to submit a proposal that clearly described how it would promote economic growth and job creation in a particular region, describing in detail the amount and source of capital and forecasting the job-creation impacts of its projects. *See* 8 C.F.R. § 204.6(m)(3). The initial application for designation was a Form I-924, and any subsequent business plan was an amendment to the regional center's Form I-924.[2]

The Integrity Act declares that "an approval before the date of the enactment of this subparagraph"—the subparagraph being "(F) Business Plans for Regional Center Investments"—is nonetheless "approval of an application under this subparagraph." Integrity Act § 103(b)(1) (8 U.S.C. § 1153(b)(5)(F)(ii)). But the subparagraph did not exist before the Integrity Act was enacted. The only way this text makes sense is if the Integrity Act recognized that previously approved designations were in fact "approval[s] of an application under [the Integrity Act]," and thus would continue to bind. *Id.* That is, the Act keys into and supplements the existing regulatory structure of the Regional Center Program. *See* 8 C.F.R. § 204.6(m).

This text is incomprehensible if, as USCIS apparently contends, the Integrity Act eliminated all approved regional centers, forcing them to start over. If that were the case, then the phrase "approval of an application under this subparagraph, including an approval before the date of the enactment of this subparagraph," would not make any sense. *Id.* A business plan "application under this subparagraph" can only be approved "before" the subparagraph is enacted if the existing Regional Center Program is understood to survive the enactment of the text in question.

B. Congress designed the Integrity Act to immediately "reauthorize" the Regional Center Program—not to decimate the industry and leave investors without protections.

In addition to those two provisions, the Integrity Act makes clear throughout that Congress did not intend to start the Program from scratch. Rather, the only way the Integrity Act makes any sense is if it is understood to simply add new anti-fraud measures to preexisting regional centers—not to eliminate them all, making every longstanding regional center begin again. Congress intended to breathe new life into the Program and have them "immediately get back to work" in

[2] *See* USCIS, *I-924, Application For Regional Center Designation Under the Immigrant Investor Program*, https://perma.cc/AJ2X-H9WF (explaining that an "amendment" is appropriate to "[a]dd a new commercial enterprise associated with the regional center" or "[n]otify USCIS of changes").

creating jobs and providing a pathway for immigration. 168 Cong. Rec. S1220 (daily ed. Mar. 16, 2022) (statement of Sen. Cornyn). USCIS's action, however, makes that impossible. The agency's action is "incompatible with both the mechanics and purpose of the entire statute. Congress enacted the [Integrity Act] to restore [the EB-5 program]" immediately, not destroy it by requiring duplication of government and regional center resources. *Columbia Riverkeeper*, 944 F.3d at 1210.

1. As an initial matter, Congress itself described the enactment as a "*Reauthorization and Reform* of the Regional Center Program." Integrity Act § 103 (emphasis added). Congress's choice of the term "reauthorization" demonstrates it did not intend to create an all-new program, divorced from the preexisting one, but instead to restart the program. *See* Antonin Scalia & Bryan A. Garner, *Reading Law* 221 (2012) ("The title and headings are permissible indicators of meaning.").

2. The text demonstrates, moreover, that in adopting the Integrity Act, Congress intended to fully revive the Regional Center Program with immediate effect. The Act's additional or modified requirements for investors' visa petitions went into effect on the date of Act's enactment: March 15, 2022. *See* Integrity Act §§ 102(e), 103(c)(2), 104(b)(1), 105(b). But the portions of the Act that impose additional anti-fraud and compliance requirements on regional centers state that those additional requirements "shall take effect on the date that is 60 days after the date of the enactment of this Act." Integrity Act § 103(b)(2). The import of this lag in effective date is to give both existing regional centers and USCIS a reasonable period of time to implement the additional requirements, which would then become enforceable at the end of that transition period. Or as one Senator put it, the "60-day implementation period … allow[s] USCIS to begin processing EB-5 petitions and applications that have been on hold since the lapse" and "[f]ollowing that initial period, *existing regional centers* will be able to *immediately get back to work* driving investment into the U.S. and facilitating the creation of jobs across the country." 168 Cong. Rec. S1220 (daily ed. Mar. 16, 2022) (emphasis added) (statement of Sen. Cornyn).

Had Congress intended to start all over from scratch, there would have been no need to specify an alternative effective date for the heightened anti-fraud measures imposed on regional centers. None would be approved at all until USCIS implemented the new measures in a new application process. Again, the text makes sense only if existing regional centers continue to exist.

Moreover, the Act provides a mechanism for regional centers to bring their operations and reporting into compliance with the new requirements without losing their designation. Regional centers may amend their proposals, without interruption to their operations (Integrity Act § 103(b)(1) (8 U.S.C. § 1153(b)(5)(E)(vi)), to report "changes to [their] organizational structure, ownership, or administration," to report new "individuals not previously subject to the requirements under [the Integrity Act]," and to change "any information, documents, or other aspects of the investment offering described in [a business plan]" (*id.* § 103(b)(1) (8 U.S.C. § 1153(b)(5)(F)(iii))). By all accounts, any additional certification information regional centers must submit under the Integrity Act falls within those categories. *Id.* (8 U.S.C. § 1153(b)(5)(E)(iii), (F)(i)); *compare* Dkt. 41 (Defs. Supp. Br.), Ex. 2 (Form I-956), *with* USCIS, *Form I-924, Application for Regional Center Designation*, https://perma.cc/5PUB-SYXQ.

The government's understanding of the statute, by contrast, "undermine[s] the clear expediency that Congress mandated throughout the [Integrity Act] and [is] difficult to reconcile with the purpose of the statute." *Columbia Riverkeeper*, 944 F.3d at 1210.

3. The grandfathering provisions in the Integrity Act also confirm that regional center designations must survive the Act's passage. The Integrity Act requires USCIS to continue adjudicating pending petitions filed by investors who have put their capital at risk in existing projects sponsored by preexisting regional centers. *See* Integrity Act § 105(c). That only makes sense if Congress believed that those existing regional centers would continue to exist—otherwise those investors would not just lose any accountability for their investment but also be ineligible for a visa, or permanent residency, altogether. "We avoid absurd results when interpreting statutes." *East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 669 (9th Cir. 2021). Yet absurd results are exactly what the government's construction of the statute produces.

An investor's capital must be at risk and tied to an approved regional center for his visa to be approved, and for the conditional status of his permanent residency to ultimately be removed. 8 C.F.R. § 204.6(m)(9); *see also* Integrity Act § 103(b)(1) (8 U.S.C. § 1153(b)(5)(M)(ii)) (when a regional center is terminated for non-compliance, providing good-faith investors 180 days to reassociate their investment with a different approved regional center); USCIS, *Form I-526 Immigrant*

Petition by Alien Entrepreneur, at 6, https://perma.cc/XMN7-SPTZ (requiring evidence of an "investment associated with an approved Regional Center"); USCIS, *Form I-829 Petition by Investor to Remove Conditions on Permanent Resident Status*, at 4, https://perma.cc/9K98-LK83 (same).

Congress knew this (indeed it reiterated the requirement in the Integrity Act) and specifically provided that previously approved business plans, including those approved "before the date of the enactment of this subparagraph, shall be binding for purposes of the adjudication" of those investors' visa petitions. *Id.* § 103(b)(1) (8 U.S.C. § 1153(b)(5)(F)(ii)). Congress indisputably intended to facilitate the resolution of the pending petitions of existing investors. *See* Integrity Act § 105(c). But that is only possible if existing approved regional centers maintained their authorization upon enactment of the Integrity Act. It would be "absurd" for Congress to expedite those pending adjudications while simultaneously making it impossible for those petitions to be approved. *East Bay Sanctuary Covenant*, 993 F.3d at 669. And it would be equally absurd for Congress to categorically deauthorize the regional centers responsible for those petitioners' investments, whose participation is necessary for the petitioners to meet the statutory requirements for a visa. The whole point of the Act is to increase regional center "integrity." It would be entirely contrary to that purpose for Congress to remove all USCIS oversight of the hundreds of regional centers sponsoring the billions of dollars of EB-5 investment.

4. The Integrity Act's enforcement mechanisms also make clear that the statute's anti-fraud provisions are designed to operate against existing, approved regional centers prospectively. They are not designed, as USCIS would have it, to require cancellation of all existing regional centers.

The Integrity Act requires the Secretary to "terminate the designation of a regional center" that fails to comply with any of the new anti-fraud and compliance measures instituted by the Act. *See, e.g.*, Integrity Act § 103(b)(1) (8 U.S.C. § 1153(b)(5)(E)(vii), (F)(v)). The Act therefore establishes a process by which USCIS may *individually* deauthorize existing regional centers for failure to conform with the Act's new requirements moving forward. Nowhere does Congress mention categorically stripping hundreds of regional centers of their designation. To reach that conclusion, the government must "read into the text" a much broader stroke than the "deliberate" choice Congress made. *California v. Trump*, 963 F.3d 926, 946 (9th Cir. 2020).

C. The repeal provision did not deauthorize preexisting regional centers

It is of no consequence that Section 103(a) repealed the pilot program enacted in the 1993 Appropriations Act. *See* Integrity Act § 103(a). The government places extraordinary weight on this one sentence—it is the only justification for USCIS's action—but this language cannot have the far-reaching consequences the government suggests. *See* Dkt. 26 (Defs. Opp. Br.), at 14-17.

The government appears to misunderstand the crux of the issue on this point. It spends many words proclaiming that Section 103(a) was a repeal and not an amendment. *See* Defs. Supp. Br. 1-9. Of course it is a repeal. There is no question that Section 103(a) is an express repeal of the text establishing the pilot program in the 1993 Appropriations Act. *See* Integrity Act § 103(a) ("Section 610 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993 (8 U.S.C. 1153 note) is repealed."). But that has no substantive bearing on whether Congress categorically erased USCIS's prior regulatory actions certifying hundreds of regional centers, in the context where Congress enacted a materially identical program in the very same statute. The government offers no logical connection between Section 103(a) and the categorical deauthorization of every preexisting regional center, because there is none.

Put simply, it is irrelevant whether Congress "amended" the pilot program or "repealed" it. *Contra* Defs. Supp. Br. 5. What matters is whether, in adopting the Integrity Act, Congress captured existing regional centers in the text defining the reauthorized program. It did so.

As a legal matter, the pilot program provision repealed by Section 103(a) only required USCIS to "set aside [EB-5] visas" for investors qualifying through investment in a regional center, rather than those qualifying through a direct entrepreneurial venture. *See* 1993 Appropriations Act § 610. The statute itself, therefore, did not certify regional centers as a legal matter—USCIS did pursuant to its regulations. *Id.*; *see* 8 C.F.R. § 204.6(m). Thus, its subsequent repeal has no bearing on the designation of regional centers already approved by USCIS, nor does it change the fact that existing regional centers "ha[ve] been designated by the Secretary … on the basis of a proposal for the promotion of economic growth." Integrity Act § 103(b)(1) (8 U.S.C. § 1153(b)(5)(E)(i)). The Integrity Act should be understood to operate with the regulatory backdrop presently in force.

Moreover, as a factual matter, the most recent reauthorization of that particular statutory

provision (the pilot program) had already expired prior to Congress's enactment of the Integrity Act (and thus the repeal). *See* Div. O, Title I, Sec. 104 of the Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 (2020) (reauthorizing the pilot program until July 1, 2021). Notwithstanding that expiration (and consistent with the law described in the preceding paragraph), regional centers continued to operate and maintain their designation from USCIS—indeed, the agency required them to submit their annual I-924A certification and fees.[3]

Given this backdrop, Section 103(a) can only be understood to serve an organizational purpose. It could not serve a practical purpose because the pilot program had already sunset and was no longer in effect. Rather, the express repeal sets the stage for Congress's codification of the Regional Center Program. The subsequent paragraph, Section 103(b), states that the reformed Regional Center Program will now be memorialized in the Immigration and Nationality Act, and thus the United States Code. *See id.* § 103(b). The expired statutory provision repealed by Section 103(a), by contrast, had never been codified. The repeal simply demonstrates that Congress no longer viewed the decades-old and well-established Regional Center Program as a "pilot" program.

Finally, the government's latest suggestion—that the Integrity Act functions in the alternative to impliedly repeal the preexisting Regional Center Program and thus categorically strip hundreds of them from their designation—fares no better. Defs. Supp. Br. 7-9. The statutory text explicitly and comprehensively treats preexisting regional centers as if they are a part of the reinvigorated Regional Center Program and promptly able to resume their work. The Integrity Act only makes sense if preexisting center designations survived the Act's enactment. That is a world away from a "clear and manifest" intent to strip over 600 regional centers of their designation only for them to start the process anew. *Rodriguez v. United States*, 480 U.S. 522, 524 (1987).

II. IF THE STATUTORY TEXT IS SILENT AS TO THE STATUS OF REGIONAL CENTERS, USCIS'S ACTION WAS GROSSLY UNLAWFUL.

As we explained, the statutory text flatly *precludes* USCIS from taking the action it did here. But even if that were wrong, and there were some statutory gap for USCIS to fill, the agency's

[3] The agency's post-hoc maneuver to refund filing fees for Forms I-924A does not change that "the agency continued to accept and collect fees for [Forms] I-924A … as it had during the prior sunset" of the pilot program. Dkt. 41-5, Defs. Supp. Br. Decl. ¶ 10. USCIS treated regional centers as designated under the regulatory framework presently in force.

flawed and unreasoned website posting is both procedurally and substantively unlawful.

A. The agency failed to comply with notice-and-comment rulemaking

"An agency can issue a legislative rule only by using the notice and comment procedure described in the APA." *Hemp Industries Ass'n v. DEA*, 333 F.3d 1082, 1087 (9th Cir. 2003); *see* 5 U.S.C. § 553(b)-(d). A rule is legislative, and thus subject to the APA's procedural strictures, if it "create[s] rights, impose[s] obligations, or effect[s] a change in existing law." *Id.* at 1087.

USCIS's action is a "legislative rule" because it has the "force and effect of law." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979). The agency's website announcement categorically stripped the approval of all existing regional centers. This decision plainly "affect[ed] individual rights and obligations" (*id.* (quoting *Morton v. Ruiz*, 415 U.S. 199, 232 (1974))), as regional centers cannot recruit new investors or invest in new projects if they are not certified by USCIS. The agency's action thus halted, indefinitely and without any warning, their ability legally to function.

Furthermore, USCIS has taken the position that, as a result of this action, the hundreds of existing regional centers must initiate *new* legal proceedings—they must apply again for regional center designation. *See* Defs.' Supp. Br. Ex. 2. Because the USCIS determination obligates regional centers to file new applications, it is necessarily a legislative rule because it has prospective legal force. Indeed, it declares that the results of prior legal proceedings—that is, previously approved regional center designations—are now void. If a regional center wishes to be treated as a regional center, it must file a new application with the agency. "The sole effect of [USCIS]'s decision was to deprive a broad category of [all existing regional centers] the right" to operate their businesses and obtain new investors, "and this effect had legal consequences … only prospectively." *Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 449 (9th Cir. 1994).

The government is wrong to contend that USCIS's action was an "'interpretive rule' and not a legislative (or 'substantive') rule requiring notice and comment." Defs. Opp. Br. 16. "Interpretive rules 'simply clarify or explain existing law or regulations'" (*Yesler*, 37 F.3d at 449) in order to "provide[] *guidance* to agency officials in exercising their discretionary power while preserving their flexibility and their opportunity to make individualized determinations" (*Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1124 (9th Cir. 2009) (cleaned up)). Interpretive

rules "do not conclusively affect the rights of private parties." *Yesler*, 37 F.3d at 449. But USCIS's rule indisputably does not leave any individualized or discretionary decision for USCIS officials to make—the rule *per se* deemed null and void the approval of all preexisting regional centers. And that rule plainly "affect[s] the rights" of those regional centers. *Id.* It is therefore a legislative rule subject to the APA's procedural requirements.[4]

USCIS issued this rule without publishing a notice of proposed rulemaking in the Federal Register or allowing the public an opportunity to comment, as required by the APA. 5 U.S.C. § 553(b); *East Bay Sanctuary Covenant*, 993 F.3d at 675. USCIS's action is thus unlawful.

B. USCIS's action is substantively arbitrary and capricious

The APA obligates courts to set aside agency action that is arbitrary and capricious. 5 U.S.C. § 706(2). USCIS's action—taken overnight via a website posting—so qualifies many times over.

1. To start with, USCIS's action implements a statute designed to restore the Regional Center Program in a way that threatens to destroy it—and, in so doing, it failed to account for the devastating practical consequences of its action, or to consider less burdensome alternatives. That is the hallmark of an arbitrary agency action. *See Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 232 (2009) (Breyer, J., concurring) ("[E]very real choice requires a decisionmaker to weigh advantages against disadvantages."); *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 732 (D.C. Cir. 2016) (Kavanaugh, J., dissenting) ("[R]easoned decisionmaking requires assessing whether a proposed action would do more good than harm.").

USCIS has a long history of prolonged adjudications in the EB-5 program. Prior to its announcement, USCIS typically took at least two years, and sometimes up to nine years, to certify the designation application of a *single* regional center. For instance, in FY2021, the median processing time for an I-924 regional center application was 22.1 months, and in that same year, only *fourteen* new applications were submitted. *See* Exs. A, B. Those prolonged processing times will necessarily increase exponentially if USCIS is flooded with over *six hundred* applications at once.

[4] If the government's characterization of the rule as "interpretive" were correct, then to the extent there is any statutory gap for the agency to fill (there is not), the agency's "interpretation" would not be entitled to *Chevron* deference. "Chevron deference applies only to agency decisions rendered through formal procedures." *Turtle Island Restoration Network v. Dep't of Commerce*, 878 F.3d 725, 733 (9th Cir. 2017). A website post does not constitute any procedure at all.

Nor do legal timelines speed the agency along. Although USCIS is required by regulation to adjudicate a Form I-829 Petition by Investor to Remove Conditions on Permanent Resident Status within 90 days (8 C.F.R. § 216.6(c)), this fiscal year, the median time it has taken USCIS is *41.5 months*—which the agency "admit[s]" is far "too long" but justifies because "delays just happen." Dkt. 39, 25:13-17; *see* Ex. A. The instantaneous backlog USCIS has created for itself is untenable.

The agency did not consider the administrative burden it invented for itself, nor the practical consequences for regional centers and their investors. By taking this action, USCIS indefinitely stalled the Regional Center Program, halting billions of dollars in job-creating economic development. The agency therefore "entirely failed to consider an important aspect of the problem." *E.g.*, *Turtle Island Restoration Network v. Dep't of Commerce*, 878 F.3d 725, 732 (9th Cir. 2017).

USCIS had numerous more efficient alternatives available to implement the Integrity Act without categorically decertifying every existing regional center. Approved regional centers have already invested millions to secure designation from USCIS, and in fact, each year they have been required to submit Forms I-924A with updated information to maintain continued designation. Regional centers may continue to operate while USCIS processes their Forms I-924A. USCIS could quite simply have required existing regional centers to supplement their disclosures with the new information required under the Integrity Act, or to submit amendments to their existing Forms I-924. Instead, the agency arbitrarily chose to invalidate all existing designations.

By taking a wasteful approach without considering the consequences of its action on the Regional Center Program—and the resulting economic costs—the agency acted arbitrarily and capriciously. *See Michigan v. EPA*, 576 U.S. 743, 753 (2015). Because USCIS "failed to acknowledge" the "social costs" of its rule that result from the indefinite delay and likely destruction of the Regional Center Program, and further because it failed to take "into account this cost," its action is unlawful. *Nat'l Family Farm Coalition v. EPA*, 960 F.3d 1120, 1142-43 (9th Cir. 2020).

2. Related, USCIS's action is "substantively invalid because it conflicts with the plain congressional intent instilled in [the Integrity Act]." *East Bay Sanctuary Covenant*, 993 F.3d at 671. The Integrity Act made visas available through only September 30, 2027. *See* Integrity Act § 103(b)(1) (8 U.S.C. § 1153(b)(5)(E)(i)). Given the historical pace of USCIS's approval of

regional center applications, the enormous backlog created by its announcement, and the administrative logistics of designing a new process entirely (all problems of USCIS's own making), it is likely that USCIS's "new" Regional Center Program will barely begin operation by the time it expires. At that point, it will be too late for investors to obtain the immigration benefits at the heart of this program, harming economic growth and job creation. That was not Congress's intent.

Moreover, the agency's action has the effect of undermining one of the central features of the Integrity Act: to strengthen reporting, oversight, and the ability to individually sanction regional centers for failure to comply with the Act's enhanced anti-fraud measures. Congress could not have possibly intended to take all existing controls off billions of dollars of existing Regional Center Program investments by terminating the designation (and thus the reporting obligations) of the only entities responsible for oversight of those investments. Yet USCIS—through a website posting—has now gutted these controls, "conflict[ing] with the plain congressional intent." *East Bay Sanctuary Covenant*, 993 F.3d at 671. For this reason, too, USCIS's action must fall.

3. Finally, USCIS erred by failing to consider the regional centers' "serious reliance interests" on its "longstanding policies." *DHS v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) (quotation marks omitted). It was "arbitrary and capricious to ignore such matters." *Id.*

USCIS categorically decertified approved regional centers without providing any analysis or account of the serious reliance interests by both regional centers and EB-5 investors under the government's three-decade-old Regional Center Program. Preexisting regional centers have collectively invested millions of dollars in obtaining designation from USCIS. They have employed thousands of workers to manage their businesses. They oversee the aggregation and deployment of billions of dollars of investors' capital. And investors made those substantial investments under the reliance that USCIS would provide regulatory oversight of the regional centers. The agency simply cast aside these "serious reliance interests"—interests held by regional centers and individual EB-5 investors alike—without any justification, and thus acted arbitrarily and capriciously. *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 224 (2016).

CONCLUSION

The Court should grant injunctive relief.

Respectfully submitted,

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