UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FLORIDA EB5 INVESTMENTS, LLC Plaintiff, v. **CHAD WOLF**, et al. Defendants.	Civil Action No. _____

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S APPLICATION FOR TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTION

INTRODUCTION

The EB-5 Immigrant Investor Program ("**EB-5**", the "**Program**", or the "**EB-5 Program**") is an effective and essential program that provides an opportunity for foreign nationals and their families to become permanent United States residents in exchange for investing in American businesses that create jobs for American workers. The Program was originally created in 1990 to encourage job creation and foreign investment. It gained substantial popularity after developers had difficulty obtaining domestic funding in the wake of the 2008 recession. Foreign investment through the EB-5 Program allowed large-scale construction projects to continue despite the recession, which has led to substantial economic development and job growth in the last ten years.

Prior to November 21, 2019, the Program required that an investor make a $1 million investment in a new commercial enterprise in the United States that will create at least ten full-time jobs for United States citizens or legal aliens. However, Congress through the Immigration and Nationality Act ("**INA**") provided a reduced investment threshold of $500,000 for depressed areas of the country in locations called targeted employment areas ("**TEAs**"). These TEAs were either rural areas or those areas experiencing high unemployment. Individual states designated what areas within its borders constituted "high unemployment areas" as qualified TEAs.

On November 21, 2019, the Department of Homeland Security ("**DHS**") issued a final rule amending its regulations for EB-5 to change some of the threshold requirements for participation in the Program (the "**Rule**"). This Rule proposed many changes to the Program, the most salient of which appear to be: (i) significant increases in the requisite investment levels; and (ii) a new TEA designation process that eliminates the input of the individual States in designating such areas in which investments are made.

Plaintiff Florida EB5 Investments, LLC ("**EB5 Investments**") is a regional center designated by DHS to sponsor capital investment projects with investments for applicants to the EB-5 Program. EB5 Investments seeks preliminary relief from the Rule for the following reasons. This Rule will have a devastating, irreparable impact on EB5 Investments. The significant increase in the requisite investment levels has already deterred and will continue to deter foreign investors from using the Program. Moreover, EB5 Investments is likely to succeed on the merits of its claims. First, DHS arbitrarily and capriciously implemented the Rule because it did not give any consideration to the devastating economic impact of the changes and failed to conduct a proper analysis of statistical and economical information it had before it before increasing the minimum investment amounts. Second, DHS has gone beyond the scope of its authority by improperly assuming authority to designate TEAs. Nothing in DHS's enabling statute or other statutory authority permits DHS to make determinations so far outside its expertise. Practically speaking, DHS's role in protecting the nation's security is much different than figuring out where domestic investments can most benefit local communities. Third, the Rule violates the Tenth Amendment of the United States because it usurps the States' ability to designate their own TEAs.

Further, DHS will suffer little to no harm from this Court granting a Temporary Restraining Order ("**TRO**") or preliminary injunction. Finally, the public policy is best served by issuing the TRO and preliminary injunction because the public has an interest in ensuring that the government does not overstep its statutory authority in a manner that will have negative economic impact on businesses and American consumers. Because of the detrimental effects the Rule will have on Plaintiff, EB5 Investments respectfully requests that this Court grant its application for a TRO and Preliminary Injunction.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The EB-5 Visa Program

The EB-5 Program was established as part of the Immigration Act of 1990, and provided an avenue for lawful permanent resident status to those foreign nationals who invest in a new commercial enterprise that would create at least ten full-time jobs for United States citizens or legal aliens. *See* 8 U.S.C. § 1153(b)(5). Prior to November 21, 2019, the minimum investment requirement was $1 million. *Id.* Congress authorized the designation of EB-5 "regional centers" for the promotion of economic growth and authorized DHS to set aside visas authorized under section 203(b)(5) of the INA for individuals who invest in regional centers. *See* 8 U.S.C. 1153 note. DHS regulations define a regional center as an "economic unit, public or private, which is involved with the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment." *See* 8 CFR § 204.6(e). While all EB-5 petitioners go through the same petition process, those petitioners participating in the Regional Center Program may meet statutory job creation requirements based on economic projections of either direct or indirect job creation, rather than only on jobs directly created by the new commercial enterprise. *See* 8 C.F.R. § 204.6(m)(3). In addition, Congress authorized the Secretary of DHS to give priority to EB-5 petitions filed through the Regional Center Program. *See* Section 601(d) of Public Law 102-395, 106 Stat. 1828, as amended by Public Law 112-176, Sec. 1, 126 Stat. 1326 (Sept. 28, 2012).

The Immigration and Nationality Act ("**INA**") provided a reduced investment threshold for economically depressed areas of the country, stating that "in the case of investment made in a targeted employment area, [the Secretary of Homeland Security may] specify an amount of capital required . . . that is less than (but not less than 1/2 of) the [standard investment amount] . .

. .” *See* 8 U.S.C. § 1153(b)(5)(C)(ii). Prior to November 21, 2019, an area could qualify as a “targeted employment area” in one of two ways. The area can either be: 1) a “a rural area,” or 2) “an area which has experienced high unemployment (of at least 150 percent of the national average rate).” *See* 8 U.S.C. § 1153(b)(5)(B)(ii). The INA defines “rural area” to be “any area other than an area within a metropolitan statistical area or within the outer boundary of any city or town having a population of 20,000 or more (based on the most recent decennial census of the United States).” 8 U.S.C. § 1153(b)(5)(B)(iii). The DHS’s predecessor originally set the minimum investment amount for TEAs at $500,000 in 1991, and the threshold remained unchanged until the Rule was implemented. Compl. ¶ 18. The determination as to whether an investor was required to make the reduced investment of $500,000 or the “standard” investment of $1 million was largely contingent [1]upon an individual State’s determination as to what areas within its borders constitute “high unemployment areas.” *See* 56 Fed. Reg. 60897 (1991) at 8 C.F.R. § 204.6(i).

DHS’s Rulemaking Authority

As a general matter, the “Secretary of Homeland Security [is] charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens.” 8 U.S.C. § 1103(a)(1). The primary mission of the DHS is, in part, to “ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland . . .” *See* 6 U.S.C. § 111(b)(1)(F). Congress has directed the Secretary to “establish such regulations ... and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter.” *Id.* §

[1] Individual applicants were also permitted to submit evidence directly to the United States Citizen & Immigration Services that its investment was in a high unemployment area, though this method was rarely utilized.

1103(a)(3). With regard to the minimum investment requirement, the INA states that the Secretary of Homeland Security, "in consultation with the Secretary of Labor and the Secretary of State, may from time to time prescribe regulations increasing the dollar amount specified . . . ." 8 U.S.C. § 1153(b)(5)(C). Before this Rule, DHS had never acted on such authority, however, and the current standard investment minimum remained at $1 million.

The Rule

On January 13, 2017, DHS acting through the U.S. Citizenship and Immigration Services ("**USCIS**") published a proposed rule about the EB-5 Program and provided opportunity for comment. *See* Notice of Proposed Rulemaking, 82 Fed. Reg. 4738, 4758 (Jan. 13, 2017). On July 24, 2019, USCIS issued the final rule entitled "EB-5 Immigrant Investor Program Modernization", which was published in the Federal Register. 84 Fed. Reg. 35,750 (July 24, 2019). The Rule drastically changes several aspects of the EB-5 Program: First, the Rule increases the minimum investment amount from $1 million to $1.8 million, *see* the Rule at 8 C.F.R. § 204.6(f)(1); Second, the Rule increases the minimum investment amount in a TEA from $500,000 to $900,000, *see* Rule at 8 C.F.R. § 204.6(f)(2); Third, the Rule eliminates state participation in the designation of TEAs and grants DHS the sole authority to designate TEAs, 84 Fed. Reg. at 35752; Rule at 8 C.F.R. § 204.6(i); Finally, the Rule restricts its designation of TEAs in favor of rural areas. Cities and towns with a population of 20,000 or more *within* a metropolitan statistical area ("**MSA**") (as designed by the Office of Management and Budget) can no longer qualify as a TEA, regardless if the city or town qualifies as a "high unemployment" area. *Id*. DHS asserted that its purported statutory authority for enacting these changes stems from the agency's mission statement to provide for "economic security" of the United States. 84 Fed. Reg. 35,750.

The Rule took effect on November 21, 2019.

Plaintiff EB5 Investments

EB5 Investments is an EB-5 regional center, an organization designated by USCIS that sponsors capital investment projects with investments from applicants to the EB-5 Program. Complaint, Ex. 1, Declaration of W. Cummins ("**Cummins Decl.") ¶¶** 3-4. EB5 Investments was created in the wake of the 2008 economic recession to provide a legitimate source of funding for businesses that could not obtain traditional loans. *Id.* ¶ 4. These businesses recognized that foreign investors who met stringent regulatory and security requirements could be a potential source of funding for these projects where American funding sources were simply unavailable. *Id.* EB5 Investments received approval from USCIS as a designated regional center in 2010. *Id.*

Developers of projects or businesses, referred to as "**Affiliates**", seek out EB5 Investments through referrals or through the USCIS listing of approved regional centers. *Id.* ¶ 5. EB5 Investments provides the individual investors with a "designation letter" in support of their petition for residency certifying that their investment will create at least ten new jobs in a new commercial enterprise. *Id.* In exchange for this service, each investor pays EB5 Investments a portion of the administration fee to work with a regional center. *Id.* EB5 Investments also receives an annual fee from its Affiliates for facilitating the process. *Id.* It has grown to have more than 40 Affiliates. *Id.* EB5 Investments' annual profits have ranged from $400,000 per year to $1.1 million. *Id.*

To date, EB5 Investments' Affiliates have had over 600 approved petitions for immigrant investors. *Id.* ¶ 6. Since 2010, it has raised over $300 million in capital from the Program. *Id.* ¶ 7. Nearly all of the projects are in TEAs. *Id.* ¶ 7. Thus, the projects it sponsors create jobs and economic development in historically underserved areas. *Id.* ¶ 6. Its Affiliates have funded a variety of businesses including hotels, resorts, schools for autistic children, assisted living

facilities, affordable housing, apartments, and the soccer stadium that hosts Orlando City Soccer Club. *Id.* In addition, EB5 Investments has seen projects that typically use taxpayer dollars, such as the Orlando soccer stadium, built with private funds, including EB-5 funds instead. Many of the projects it sponsors would simply not be possible without the EB-5 Program, because these projects have difficulty obtaining traditional bank loans. *Id.* ¶ 5.

Regional centers provide a valuable service to Affiliates and investors. EB5 Investments gives its Affiliates the opportunity to use economic analyses to satisfy the job creation requirement. *Id.* ¶ 8. As a licensed regional center, EB5 Investments allows its Affiliates to use these economic analyses to credit both direct and *indirect* job creation. *Id.* Without this ability, investors would struggle meeting the job creation requirement – especially in TEAs. *Id.* Regional centers promote increased domestic capital, job creation, improved regional productivity, and increased economic growth. *Id.*

On a macro level, the new Rule will have drastic effects on regional centers like EB5 Investments and the businesses and projects that rely on them. *Id.* ¶ 9. However, on an individual level, EB5 Investments has already seen effects from the Rule in the two years between the Rule's announcement and its effective date. *Id.* Several of its Affiliate's projects are uncertain about the sustainability of the Program after the increased investment requirement takes effect, so they have suspended EB-5 activity on these projects. *Id.* Some additional projects have stopped seeking funds from EB-5 investors and instead, have attempted to look elsewhere. *Id.*

This lack of interest from investors and Affiliates will have severe consequences for EB5 Investments. All of EB5 Investments' business income comes from administration fees from investors and annual fees from its Affiliates. *Id.* ¶ 5. While existing Affiliates who have not

already withdrawn from the Program must continue to pay fees while foreign investors await their visa approvals, EB5 Investments anticipates that EB5 Investments will not see any additional Affiliates join its Regional Center. *Id.* ¶ 10. EB5 Investments estimates that in the first year of its effective date, the Rule will reduce EB5 Investments' annual fee income to as little as $100,000 in administration fees. *Id.* ¶ 11. These numbers will continue to dwindle as fewer to no new projects or investors utilize the Program. *Id.*

EB5 Investments needs reliable access to the Program to continue to thrive and continue to fund projects and create jobs in underserved areas of the United States. The Rule threatens the survival of the EB-5 Program, which in turn, jeopardizes the existence of Plaintiff's business.

LEGAL STANDARD

To obtain a preliminary injunction, Plaintiff must establish that: 1) it is likely to succeed on the merits; 2) it is likely to suffer irreparable harm in the absence of preliminary relief; 3) the balance of equities tips in its favor; and 4) an injunction serves the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The D.C. Circuit has further instructed that "the movant has the burden to show that all four factors . . . weigh in favor of the injunction." *Davis v. Pension Benefit Guar. Corp*., 571 F.3d 1288, 1292 (D.C. Cir. 2009). The central purpose of a preliminary injunction is to maintain the relative positions of the parties pending a final determination on the merits. *See Detroit Int'l Bridge Co. v. Gov't of Can.*, 53 F. Supp. 3d 1, 17 (D.D.C. 2014); *Dist. 50, United Mine Workers v. Int'l Union, United Mine Workers*, 412 F.2d 165, 168 (D.C. Cir. 1969) ("The usual role of a preliminary injunction is to preserve the status quo pending the outcome of litigation."). An injunction is an equitable remedy, so its issuance falls within the sound discretion of the district court. *See Detroit Int'l Bridge Co.*, 53 F. Supp. 3d at 17 (citing *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)).

ARGUMENT

I. EB5 Investments is Likely to Succeed on the Merits of its Claims.

EB5 Investments is likely to succeed on the merits of its claims. First, the Rule is arbitrary and capricious because DHS failed to properly consider data detailing the devastating impact of the Rule change, evidence which it had before it issued the final Rule increasing the minimum investment amounts. Second, DHS failed to properly conduct a Regulatory Flexibility Analysis when implementing the Rule. Third, DHS exceeded its statutory authority in implementing the Rule because DHS does not have the statutory authority to designate TEAs or create a TEA standard that runs afoul of statutory authority. Fourth, DHS violated the Tenth Amendment in revoking the States' ability to designate TEAs.

A. DHS Arbitrarily and Capriciously Implemented the Rule.

DHS arbitrarily and capriciously implemented this Rule because DHS did not consider the economic impact this Rule would have, despite having the information available to it to analyze such effects. Instead, DHS feigned ignorance to avoid grappling with the detrimental effects this Rule will have on the economy.

In determining whether an action was arbitrary and capricious, a reviewing court "must consider whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989) (internal quotation marks and citation omitted). At a minimum, the agency must have considered relevant data and articulated an explanation establishing a "rational connection between the facts found and the choice made." *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 626 (1986) (internal quotation marks and citation omitted); *see also Pub. Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993) ("The requirement that agency action not be arbitrary or capricious includes a requirement that the agency adequately explain its result").

> An agency action usually is arbitrary or capricious if:
>
> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

DHS acknowledged in the Rule's notice of proposed rulemaking ("**NPRM**") that the agency lacked data regarding the potential effects of the proposed changes to the EB-5 Program. In the NPRM, DHS proposed the minimum investment amount for TEAs to be $1.3 million. However, in recommending $1.3 million, DHS acknowledged it did not have data regarding the effects such increase would have:

> In summary, DHS believes that the proposed increase in the minimum investment amount would bring the nominal investment amounts in line with real values and increase the investment amounts in areas where it is needed most. However, DHS recognizes that some of the investment increase benefits could be offset if some investors are deterred from investing at the higher amounts. DHS does not have the data or information necessary to attempt to estimate such mitigating effects. It is reasonable to conclude that the higher investment amounts could deter some investors from EB-5 activity and therefore, negatively impact regional center revenue in some cases, although the magnitudes and net effects of these impacts cannot be estimated. However, it is also possible that the higher investment amounts could attract additional capital overall and stimulate projects to get off the ground that otherwise might not. Due to the complexity of EB-5 financial arrangements and unpredictability of market conditions, DHS cannot forecast with confidence how many projects could be affected by the increased investment amounts through a change in the number of individuals investing through the EB-5 program. However, it is possible that some projects could be forgone and that others would proceed with a higher composition of non-EB-5 capital, with resultant changes in profitability and rates of return to the parties involved. An overall decrease in investments and projects would potentially reduce some job creation and result in other downstream effects.

See Notice of Proposed Rulemaking, 82 Fed. Reg. at 4758 (emphasis added).

DHS did not remedy its purported lack of data in the two years while the Rule was pending. Instead, in the explanation of the final rule, DHS references and discusses its purported lack of reliable information on the Rule's economic impacts. *See* Rule, at 35,791, Col. 1. Just some of these admissions include:

- DHS made a good faith effort to analyze the impacts of this rule. DHS reviewed numerous studies and requested comment from the public but *received no credible data or information that would provide a more accurate estimate of the impacts*." Rule, at 35,791, Col. 1;
- "*DHS cannot predict with accuracy* changes in demand for the program germane to the major categories of revisions that increase the investment amounts and reform the TEA designation process. *DHS has no way to assess* the potential increase or reduction in investments either in terms of past activity or forecasted activity, and *cannot therefore quantitatively estimate any impacts* concerning job creation, losses or other downstream economic impacts driven by these major provisions." *Id.* at 35,792, Col. 2-3;
- "As discussed further in the FRFA, *DHS cannot estimate the exact impact* to small entities." *Id.* at 35,792, Col. 3;
- *Potential* reduced numbers of EB-5 investors *could* prevent certain projects from moving forward due to lack of requisite capital." *Id.* at 35,793, Col. 3.
- "However, *DHS is unable to estimate* the potential reduction in investments either in terms of past activity or forecasted activity, and *cannot therefore estimate any impacts concerning* job creation, losses or other downstream economic impacts driven by the investment amount increases." *Id.* at 35,797, Col. 1;
- *DHS therefore cannot estimate* how many past investors would have been unable or unwilling to have invested at the new amounts, and hence *cannot make extrapolations to potential future investors and projects* . . . However, the net effect on regional center costs is *not something DHS can forecast with accuracy*." *Id.* at 35,797, Col. 2;
- "There are numerous ancillary services and activities linked to both regional center and direct investments, such as, but not limited to, business consulting and advising, finance, legal services, and immigration services. However, *DHS is not certain* how the rule will affect these services. Similarly, *DHS does not have information* on how the revenues collected from these types of activities contribute to the overall revenue of the regional centers or direct investments." *Id.* at 35,797, Col. 3;
- "DHS recognizes that some of the investment increase benefits could be offset if some investors are deterred from investing at the higher amounts. *DHS does not have the data or information necessary to attempt to estimate* such mitigating effects . . . Due to the complexity of EB–5 financial arrangements and unpredictability of market conditions, *DHS cannot forecast with confidence* how many projects would be affected by the increased investment amounts through a change in the number of individuals investing through the EB–5 program." *Id.* at 35,798, Col. 1;

- "DHS is not able to predict how many investors and projects will be affected, nor can we predict the impact to the capital available for projects." *Id.* at 35,798, Col. 1-2.
- "While DHS has determined, via the preceding analysis, that a significant share of regional centers may be considered small entities, DHS does not have enough data to determine the impact that this rule may have on those entities. Therefore, while many regional centers may be small entities, DHS cannot determine whether this rule will have a substantial impact, positive or negative, on those small entities." *Id.* at 35,806.

Despite its purported lack of data, DHS asserts that the increased investment requirement and new TEA designation process are unlikely to have a substantial adverse effect on investment or affect the economy by $100 million.[2] *Id.* at 35,802. It relies on this bald assertion, ignoring its own admissions to the contrary, to justify the changes to the minimum investment requirement and TEA designation process. DHS's assertion is belied by simple math and logic. The Rule's high-dollar per investment requirement necessarily means that attrition from even relatively few investors will have a substantial effect on the economy.

But one need not rely on simple logic. External studies provided to DHS *confirm* that the Rule's impact on investment and the economy will exceed over $100 million per annum or have a substantial adverse effect. A study prepared by Economic & Policy Resources Inc. (provided to DHS while the Rule was undergoing Office of Management and Budget review) examined the benefits that the pre-Rule EB-5 Program, using lower investment levels, had on the United States economy (the "**EPR Study**").[3] The EPR Study estimated that during FY2014-2015, an unconstrained EB-5 Regional Center Program's economic benefits and job creation contributions to the U.S. economy were nearly $11 billion, which represented 2% of all foreign direct

[2] The significance of the $100 million level affects the designation of the Rule as a "major rule," which requires further procedural hurdles for DHS, such as Congressional approval. By stating that this Rule does not have a substantial effect on the economy, DHS was attempting to avoid additional scrutiny by Congress.

[3] *See* Compl., Ex. 3, Declaration of J. Carr (attaching executive summary of study, *Assessment of the Economic Value and Job Creation Impacts of EB-5 Project Capital Investment Activity Under the EB-5 Regional Center Program*, ECONOMIC & POLICY RESOURCES, INC. (Feb. 28, 2019)).

investment net flows into the U.S. economy for that period. More than 335,000 jobs were created during that same period, accounting for roughly 6% of all jobs gains for that time. The EPR Study also found that the Program resulted in nearly $55 billion, or 3%, added to U.S. economic output and more than $23 billion in labor income.

Other studies by Invest In The USA (the "**IIUSA Study**") and the U.S. Department of Commerce (the "**DOC Study**") support this conclusion as well. The IIUSA Study, provided to DHS, noted that capital investment through the Program contributed over $2.6 billion to the U.S. gross domestic product and created or supported 33,000 American jobs during FY 2010-2011.[4] Compl. ¶ 54. Similarly, many commenters during the notice-and-comment period directed DHS to the DOC Study from January 2017, which concluded that the Program created almost 170,000 American jobs between FY2012 and FY2013. [5] Compl. ¶ 55. The DOC Study further concluded that, for that same period, more than 11,000 immigrant investors provided $5.8 billion in capital, equating to roughly 35% of the total investment ($16.7 billion) for 562 EB-5 related projects active in FY2012.

By ignoring these studies showing the success of the Program on an unconstrained market, DHS failed to examine the relevant data and articulate a satisfactory explanation for increasing the minimum investment requirement and changing the TEA designation standards. *State Farm*, 463 U.S.at 43. The Rule's reasoning failed to include a rational connection between data showing substantial adverse effects on the economy (or even DHS's admitted lack of reliable data regarding such effects) on one hand, and the choice to enact an increased minimum investment threshold and restrictive TEA designation, on the other hand. *See* 8 U.S.C. §

[4] See *EB-5 Economic Impact*, INVEST IN THE USA, http://iiusa.org/eb5-economicimpactmap/.
[5] *Estimating the Investment and Job Creation Impact of the EB-5 Program*, U.S. DEPT. OF. COMM., https://www.commerce.gov/sites/default/files/migrated/reports/estimating-the-investment-and-job-creation-impact-of-the-eb-5-program_0.pdf.

1153(b)(5)(A). DHS's failure to make such a connection means the agency "entirely failed to consider an important aspect of the problem" and made a "decision that runs counter to the evidence before the agency." *State Farm*, 463 U.S.at 43. Thus, the Rule must be vacated.

B. DHS Failed to Properly Perform an RFA Analysis

DHS also failed to properly conduct a Regulatory Flexibility Act ("**RFA**") Analysis. The RFA, 5 U.S.C. §§ 601-612 requires Federal agencies to consider the potential impact of regulations on small entities during the development of their rules. The term "small entities" comprises small businesses, not-for-profit organizations that are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. 5 U.S.C. § 601. An agency's compliance with the RFA is subject to judicial review by an "adversely affected or aggrieved" small entity, including 5 U.S.C. § 604. *See* 5 U.S.C. 611; *see also AFL-CIO and Chamber of Commerce of the United States v. Chertoff*, 552 F.Supp.2d 999 (N.D. Cal. 2007) (entry of preliminary injunction enjoining implementation of rule due to a violation of the Regulatory Flexibility Act); *Nat'l Ass'n of Psychiatric Health Sys. v. Shalala*, 120 F.Supp.3d. 33 (D.D.C. 2000) (concluding that the Secretary failed to conduct an RFA analysis as required).

In part, 5 U.S.C. § 604(a) requires that an agency's final RFA contain:

> ". . . (4) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available; (5) a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; (6) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected; and (7) 1 for a covered agency, as defined in section 609(d)(2), a description of the steps the agency has taken to minimize any additional cost of credit for small entities."

DHS states in the Rule that it was not able to make an assessment of small businesses impacted. Specifically, it stated:

> DHS is not sure how many, if any, investors will be deterred from the EB-5 program due to the increased investment amounts and the new TEA requirements.
> …
> While DHS has determined, via the preceding analysis, that a significant share of regional centers may be considered small entities, DHS does not have enough data to determine the impact that this rule may have on those entities. Therefore, while many regional centers may be small entities, DHS cannot determine whether this rule will have a substantial impact, positive or negative, on those small entities."

Id. at 35,806. DHS did not use diligence in performing this RFA. As stated above, DHS had a plethora of information before it, yet states here that it is unsure what effects this Rule will have. *Nat'l Ass'n of Psychiatric Health Sys.*, 120 F. Supp. 3d at 43 (finding violation of RFA when DHS did not make a good faith effort to "obtain data or analyze available data on the impact of the final rule on small entities"). Thus, DHS has not properly conducted an RFA consistent with 5 U.S.C. § 604.

C. DHS Exceeded its Statutory Authority in Designating TEAs.

DHS has exceeded its statutory authority in exclusively authorizing itself as the body which will designate TEAs, thereby divesting states of the ability to designate TEAs. In addition, by eliminating qualification for cities in metropolitan areas as TEAs, DHS contradicts the statutory definition of TEA, acting in excess of the authority granted by Congress.

Under the Administrative Procedure Act ("**APA**"), the Court must set aside agency action that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). When a plaintiff challenges an agency's authority to act, a court analyzes the agency's interpretation of the authorizing statute using the **two-step** procedure set forth in *Chevron, U.S.A., Inc. v. Natural Resource Defense Council, Inc*., 467 U.S. 837 (1984). Such

deference may apply when an agency interprets jurisdictional statutes regarding their own scope of authority. *See City of Arlington, Tex. V. F.C.C.*, 569 U.S. 290 (2013). The *Chevron* doctrine first determines "whether Congress has directly spoken to the ... issue." *Chevron*, 467 U.S. at 842. If the statute "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*. at 842-43. If Congress was silent or has not squarely addressed the issue, *Chevron* then requires a determination as to whether the agency's interpretation of its authority "is based on a permissible construction of the statute." *Id*. at 843.

"It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp*., 488 U.S. 204, 208 (1988). *See Gonzales v. Oregon*, 546 U.S. 243, 258-59 (2006). "Rulemaking authority is legislative power" which can only be delegated to an agency by Congress. *Whitman v. American Trucking Ass'n, Inc*., 531 U.S. 457, 488 (2001) (Stevens, Souter, JJ, concurring) (internal quotations omitted). If Congress explicitly leaves a gap in a statute for an agency to fill, "there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Chevron*, 467 U.S. at 843-44. An administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress. And "'in [its] anxiety to effectuate the congressional purpose of protecting the public, [courts] must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop." *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 161 (2000).

In the Rule, DHS cites various statutes as the source of its legal authority allowing them to replace the TEA designation process. DHS cites Section 103(a) of the INA, which states that

the Secretary of Homeland Security "shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens . . . ." DHS also cites Section 101(b)(1)(F) of the Homeland Security Act ("**HSA**"), which states that one of the primary missions of the DHS is to "ensure that overall *economic security* of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland." (emphasis added).

Both sources of purported statutory authority fail step one of *Chevron*; neither statute directly addresses how a TEA should be designated nor how the TEA process should operate.[6] Therefore, *Chevron* step two requires that this Court determine whether DHS's interpretations were reasonable. Both DHS's interpretation of its inherent authority and its interpretation of a TEA go beyond the scope of its delegation from Congress.

1. *DHS's Does Not Have Authority to Create Standards for TEAs*

DHS relies on its mission to preserve "economic security" in order to grant itself authority to designate TEAs pursuant to a new, national standard. 84 Fed. Reg. at 35751. However, economic security does not mean economic development in underserved areas, which is the purpose of TEAS. Rather, "economic security" is tied to protecting the homeland, as confirmed by a review of DHS's other statutorily prescribed missions. These other mission objectives include:

[6] Prior to the Rule, DHS recognized that it did not have the requisite expertise to classify TEAs in metropolitan areas. *Employment-Based Immigrants*, 56 Fed. Reg. 60897 (November 29, 1991). ("With respect to geographic and political subdivisions of this size, however, the Service believes that the enterprise of assembling and evaluating the data necessary to select targeted areas, and particularly the enterprise of defining the boundaries of such areas, should not be conducted exclusively at the Federal level without providing some opportunity for participation from state or local government.").

> "(A) prevent terrorist attacks within the United States; (B) reduce the vulnerability of the United States to terrorism; (C) minimize the damage, and assist in the recovery, from terrorist attacks that do occur within the United States; (D) carry out all functions of entities transferred to the Department, including by acting as a focal point regarding natural and manmade crises and emergency planning; (E) ensure that the functions of the agencies and subdivisions within the Department that are not related directly to securing the homeland are not diminished or neglected except by a specific explicit Act of Congress . . . (G) ensure that the civil rights and civil liberties of persons are not diminished by efforts, activities, and programs aimed at securing the homeland; and (H) monitor connections between illegal drug trafficking and terrorism, coordinate efforts to sever such connections, and otherwise contribute to efforts to interdict illegal drug trafficking."

6 U.S.C. § 111(b)(1). Moreover, the only function of DHS as it pertains to "economic security" is to ensure that it "is not diminished by efforts, activities, and programs aimed at securing the homeland." The foregoing powers and descriptions all share the common thread of protection.

This district court has limited DHS's "economic security" mission statement as authority to protect American workers from an influx of visa holders overflowing the labor market. In *Washington Alliance of Tech. Workers v. U.S. Dep't of Homeland Security*, the district court of D.C. interpreted economic security to be inherent in DHS's "authority to "regulate the terms and conditions of a nonimmigrant's stay, include its duration." 156 F.Supp. 3d 123 (D.D.C. 2015), *judgment vacated, appeal dismissed sub nom. Washington All. of Tech. Workers v. United States Dep't of Homeland Sec.*, 650 F. App'x 13 (D.C. Cir. 2016) (vacated as moot). In support of DHS's authority, the *Washington Alliance* Court held that "a significant purpose of immigration policy is to balance the productivity gains that aliens provide to our nation against the potential threat to the domestic labor market" and it seeks to "safeguard[] American workers." *Id*. Therefore, the definition of "economic security" did not extend to directing investments to create economic development, as TEAs do.

Using the entire mission statement of DHS in context and interpretive case law, DHS's interpretation of "economic security" to apply to TEA designations is unreasonable. Determining which geographic areas in the United States are high-unemployment or deserving of economic development is distinct from regulating an EB-5 investors length of stay or seeking to implement measures to protect American workers. Rather, DHS is unilaterally directing foreign investments to areas it deems worthier of investment, all without input from the states themselves.

In addition, the evaluation and consideration factors underlying the parameters for a TEA – specifically, consideration of where persons reside versus where their jobs are located, as well as commuter patterns for such areas, are well outside the scope of DHS knowledge. Instead, the expertise and powers needed to make such determinations have already been bestowed by Congress upon other governmental agencies, including, not surprisingly, the Department of Labor and the Department of Commerce. *See* 29 U.S.C. § 551 ("The purpose of the Department of Labor shall be to foster, promote, and develop the welfare of the wage earners of the United States, to improve their working conditions, and to advance their opportunities for profitable employment."); 29 U.S.C. § 2 (mandating the Bureau of Labor Statistics "collect, collate, and report at least once each year . . . full and complete statistics of the conditions of labor and the products and distribution of the products of the same"); 15 U.S.C. § 1512 (noting the Department of Commerce mission to "foster, promote, and develop the foreign and domestic commerce, the mining, manufacturing, and fishery industries of the United States . . . ."). While the power to determine which state areas are in need of economic development resides with the individual states, *see infra* Section I(D), it certainly does not rest with the DHS and, at best, would instead be within the realm of the Labor Department or

Commerce Department. 29 U.S.C. § 551; 15 U.S.C. § 1512. Thus, DHS's action to unilaterally designate TEAs was not based on a reasonable construction of the statute.

2. *The TEA Standard Runs Afoul of the Plain Language of the Statute*

DHS also exceeded its authority by defining TEAs in a way that contradicts the plain meaning of the INA.

DHS's new national standard articulated in the Rule prevents the designation of TEAs in high unemployment areas contained within a metropolitan statistical area, or MSA. 4 Fed. Reg. at 35752. However, the INA defines a TEA as either a rural area *or* an area experiencing high unemployment. 8 U.S.C. § 1153(b)(5)(B)(ii). The statute does not limit qualification for a high-unemployment TEA by population size or whether the city is included within a metropolitan area, nor does the statute give preference to rural areas. The Rule changes the criteria to make it impossible to designate a TEA in an MSA, and gives preference to rural areas, against the express intent of Congress. DHS's interpretation exceeds its statutory authority by limiting the Program in a way Congress did not intend. Therefore, DHS's interpretation fails the second *Chevron* requirement; DHS's interpretation is not only unreasonable, it expressly contradicts and limits the plain meaning of the statute. *See, e.g.*, *Arent v. Shalala*, 70 F.3d 610, 615 (1995) ("The question for the reviewing court is whether the agency's construction of the statute *is faithful to its plain meaning*, or, if the statute has no plain meaning, whether the agency's interpretation "is based on a permissible construction of the statute.") (emphasis added). Thus, DHS's new TEA designation process exceeds its statutory authority and is otherwise not in accordance with law.

D. The Rule Violates the Tenth Amendment

The Rule violates the Tenth Amendment because it usurps the states' ability to designate TEAs.The concept of federalism is one that is rooted in our nation's history. *Federalist Paper* No. 45 explains the concept:

> The powers delegated by the proposed Constitution to the Federal Government are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace negotiation, and foreign commerce....The powers reserved to the several states will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people, and the internal order, improvement, and prosperity of the state.

The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961). The Tenth Amendment essentially codifies this federalism principle, stating "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. Amend. X. Courts interpreting the Tenth Amendment note it "confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power." *New York v. United States*, 505 U.S. 144, 157 (1992). "The constitutionally mandated balance of power between the States and the Federal Government was adopted by the Framers to ensure the protection of our fundamental liberties." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (internal quotations omitted). "The question is not what power the Federal Government ought to have but what powers in fact have been given by the people." *United States v. Butler*, 297 U.S. 1, 63 (1936). The Supreme Court recognizes that a decentralized government is advantageous because sovereign states "will be more sensitive to the diverse needs of a heterogeneous society." *Gregory*, 501 U.S. at 458.

The Supreme Court has specifically "acknowledged the unique nature of state decisions that 'go to the heart of representative government.'" *Id.* at 461; *see Sugarman v. Dougall*, 413 U.S. 634, 647 (1973). "[F]ederal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power." *Nixon v. Missouri Mun. League*, 541 U.S. 125, 140 (2004) (holding that states have the ability to restrict their own telecommunications services on preemption grounds). When Congress seeks to displace state authority, "a clear and manifest statement from Congress is ordinarily required." *Rapanos v United States*, 547 U.S. 715, 738 (2006).

States' abilities to promote economic development within their borders is a "traditional and long-accepted function of government." *Kelo v. City of New London, Conn*., 545 U.S. 469, 484 (2005). By removing states from considerations of whether to designate certain localities as TEAs, DHS has, in essence, directed foreign investment to state cities and towns of its choosing. This constitutes an unconstitutional usurpation of the states' power to conduct their own government and foster economic development within their respective borders. States and localities have significant information about their own employment needs and are best equipped to make the fact-specific and specialized determinations of where to direct and encourage investment. DHS's predecessor recognized and endorsed this role for the states when it originally promulgated the current TEA designation process:

> [w]ith respect to geographic and political subdivisions of this size . . . the Service believes that the enterprise of assembling and evaluating the data necessary to select targeted areas, and particularly the enterprise of defining the boundaries of such areas, should not be conducted exclusively at the Federal level without providing some opportunity for participation from state or local government.

56 Fed. Reg. 60,897-01. Similarly, the USCIS Policy Manual notes that though the agency has the ability to review states' determinations for compliance with the regulations, the agency

"deferred to state determinations of the appropriate boundaries of a geographic or political subdivision that constitutes the targeted employment area." USCIS Policy Manual, *Volume 6 – Immigrants, Part G – Investors: Chapter 2 – Eligibility Requirements*, at A(5), https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartG-Chapter2.html. Changing this longstanding DHS policy usurps the ability and expertise of the states to determine which areas within its own borders need further economic development.

II. EB5 Investments Will Suffer Irreparable Harm Unless the Court Grants the Requested Temporary Restraining Order.

If the Rule remains in effect, investors and Affiliates will be deterred from using the Program because of the increases in minimum investment amounts and the DHS designation of TEAs. If there are no investor and Affiliates, or even a diminished amount, EB5 Investments will lose its business.

"The basis for injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Sampson v. Murray*, 415 U.S. 61, 88 (1974). Although the concept of irreparable harm does not readily lend itself to definition, the courts have developed several well-known and indisputable principles to guide them in the determination of whether this requirement has been met. *Wisconsin Gas Co. v. Fed. Energy Regulatory Com.*, 758 F.2d 669, 674 (D.C. Cir. 1985). First, the injury must be both certain and great; it must be actual and not theoretical. *Id*. Injunctive relief "will not be granted against something merely feared as liable to occur at some indefinite time," *Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931); the party seeking injunctive relief must show that "the injury complained of [is] of such imminence that there is a 'clear and present' need for equitable relief to prevent irreparable harm." *Ashland Oil, Inc. v. FTC*, 409 F. Supp. 297, 307 (D.D.C.), *aff'd*, 179 U.S. App. D.C. 22, 548 F.2d 977 (D.C. Cir. 1976) (citations and internal quotations omitted).

While the general rule is that economic loss, in itself, is not sufficient for irreparable harm, "where "monetary loss . . . threatens the very existence of the movant's business," it may qualify as irreparable injury." *Cardinal Health, Inc. v. Holder*, 846 F. Supp. 2d 203, 211(D.D.C. 2012) (quoting *Wisconsin Gas*, 758 F.2d at 674). Price erosion and diminished market share can also constitute irreparable harm. *Bayer HealthCare, LLC v. United States FDA*, 942 F. Supp. 2d 17, 26 (D.D.C. 2013) (citing *Purdue Pharma L.P. v. Boehringer Ingelheim GmbH*, 237 F.3d 1359, 1368 (Fed. Cir. 2001) (likelihood of price erosion and loss of market position are evidence of irreparable harm); *Polymer Tech., Inc. v. Bridwell*, 103 F.3d 970, 975-76 (Fed. Cir. 1996) (explaining how loss of market opportunities constitutes evidence of irreparable harm); *Bio-Tech. Gen. Corp. v. Genentech, Inc.*, 80 F.3d 1553, 1566 (Fed. Cir. 1996) (loss of revenue, goodwill, and research and development constitute irreparable harm)).

This Court supported an analogous finding of irreparable harm in *Art-Metal USA, Inc. v. Solomon*. 473 F. Supp. 1, 3-4 (D.D.C. 1978). In *Art-Metal*, the General Services Administration (GSA) *de facto* debarred the plaintiff from entering into contracts with GSA when plaintiff received the vast majority of its business from the GSA. *Id.* The Court held plaintiff demonstrated that absent an injunction, it would have been put out of business. *Id.* As such, the plaintiff's alleged harm was irreparable.

As in *Art-Metal*, this Rule threatens the existence of EB5 Investments' business. EB5 Investments is a regional center under the EB-5 Program. Accordingly, EB5 Investments' entire business existence is contingent upon the popularity of the EB-5 Program. All of EB5 Investments' business income comes from administration fees from investors and annual fees from its Affiliates. If EB5 Investments were not able to rely on investors and its Affiliates using the Program, its regional center would lack the funds to operate. EB5 Investments has already

witnessed a reduction of interest from potential immigrant investors and Affiliates in the EB-5 Program *while the Rule was merely pending*. Cummins Decl. ¶ 9. EB5 Investments will undoubtedly experience even further losses now that the Rule is in effect. *Id.* ¶ 10. This attrition of immigrant investors necessarily means that EB5 Investments' business will continue to lose Affiliates as investors use the Program less as time goes on. *Id.* ¶¶ 10-11. While it is plausible that EB5 Investments could potentially change its business model to charge higher fees or bill its Affiliates differently, "the Court would have to be blind to the realities to conclude that [Plaintiff] would be able to shift its long-established commercial patterns to [other investors] on essentially a 'moment's notice.'" *Id*. Every day that the Rule remains in effect erodes investment opportunities and adversely affects EB5 Investments. Therefore, EB5 Investments has made the requisite showing of irreparable harm.

III. The Balance of Harms Weighs Decidedly in Favor of Granting EB5 Investments' Motion.

While Plaintiffs will suffer immediate and irreversible harm, DHS will not. DHS has no immediate need to implement this Rule change; it waited over two years from the NPRM to the implementation of the Rule. While it is understandable that it has an interest in the resolution of this matter and swift implementation of rules, its interest simply does not outweigh the harm that will befall EB5 Investments, especially where the agency exceeded its statutory powers. The seriousness of the defects in this instance are such that the only adequate remedy in this case will be *vacatur*, and that any alternative remedy would have immense and irreversible consequences on the aggrieved parties. *See Allied-Signal Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (noting that when determining whether to vacate regulations that violate the APA, a court considers "the seriousness of the [rule's] deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an

interim change that may itself be changed."). The injunction would only compel DHS to follow the status quo and not overstep its bounds.

An injunction is necessary immediately. This Rule took effect on November 21, 2019. If allowed to take effect while this matter is pending, even if struck down later, it will be too late. EB5 Investments will be out of business. Preserving the status quo, that is keeping the TEA designations and investment minimums as is less disruptive under the circumstances.

IV. The Requested Preliminary Relief Serves the Public Interest.

The issuance of equitable relief in the instant case is clearly in the public interest. EB-5 regional centers will suffer under the current Rule through reduced interest from investors and developers who do not think the Program is worth the risk. It is in the public interest to promote rather than cripple legitimate businesses and to have an independent arbiter determine whether this action is lawful before its implementation.

In addition, the public has an interest in federal agency compliance with the INA and the Tenth Amendment. *Bayer HealthCare, LLC*, 942 F. Supp. 2d at 27l; *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013); ("[E]nforcement of an unconstitutional law is always contrary to the public interest."). DHS has overstepped its bounds under the governing statutes in attempting to exercise its authority to increase the minimum investment levels and designate TEAs. On the other hand, there would be no burden to DHS to delay implementation of the Rule.

CONCLUSION

For the foregoing reasons, EB5 Investments requests that this Court grant its Temporary Restraining Order and Preliminary Injunction.

Dated: November 26, 2019

Respectfully submitted,

/s/ Michael R. Sklaire

MICHAEL R. SKLAIRE
sklairem@gtlaw.com
THOMAS J. MCKEE, JR.
mckeet@gtlaw.com
BRETT A. CASTELLAT (*pro hac vice* to be filed)
castellatb@gtlaw.com
GREENBERG TRAURIG, LLP
1750 Tysons Boulevard, Suite 1000
McLean, Virginia 22102
Telephone: 703.749.1300
Facsimile: 703.749.1301

SARAH M. MATHEWS (*pro hac vice* to be filed)
mathewss@gtlaw.com
GREENBERG TRAURIG, LLP
1144 15th Street, Suite 3300
Denver, Colorado 80202
Telephone: 303. 572.6500
Facsimile: 303.572.6540

Attorneys for Plaintiff