UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

GONZALES & GONZALES BONDS & INSURANCE AGENCY, INC., et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,

Defendants.

Case No. 4:20-cv-08897-KAW

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Re: Dkt. No. 59

On May 12, 2022, Plaintiffs filed a motion for summary judgment on the limited issue of whether the Final Rule was lawfully promulgated.

Upon review of the moving papers, the Court finds this matter suitable for resolution without oral argument pursuant to Civil Local Rule 7-1(b), and, for the reasons set forth below, GRANTS Plaintiffs' motion for summary judgment.

I. BACKGROUND

Plaintiffs are companies who post immigration bonds either as federally approved surety companies or on behalf of federally approved surety companies. While removal proceedings are pending, Defendant Department of Homeland Security ("DHS") often takes noncitizens into custody; however, once identified and processed, DHS may release noncitizens conditioned on posting a bond to guarantee that an individual appear upon request at either a DHS office or future hearing. *See* Procedures and Standards for Declining Surety Immigration Bonds and Administrative Appeal Requirement for Breaches, 85 Fed. Reg. 45,968-69 (July 31, 2020) ("the Final Rule"). One way to post bond is by using a "surety bond," which are guaranteed by companies certified to underwrite Federal bonds, who serve as co-obligors. *See id.* at 45,969. As a

result, if the noncitizen fails to appear and DHS determines the bond to be breached, then the surety must pay a fixed sum to DHS as a result of the breach. *Id.*

The Federal Vacancies Reform Act ("FVRA") generally serves as the "exclusive means for temporarily authorizing an acting official" during a vacancy in a Senate-confirmed office, unless, in relevant part, a "statutory provision expressly . . . authorizes" the President, a court, or the head of a Department to designate an acting official or "designate[s] an officer or employee" to serve as the acting official. *See* 5 U.S.C. § 3347(a)(1). The Homeland Security Act ("HSA"), 6 U.S.C. § 113(g), is one such statute. It provides that "[n]otwithstanding" the FVRA, the Under Secretary for Management shall serve as Acting Secretary in the event of vacancies in the offices of the Secretary and Deputy Secretary and that "the Secretary may designate such other officers of the Department in further order of succession to serve as Acting Secretary." *Id.* § 113(g)(1)-(2).

On April 10, 2019, Secretary of Homeland Security Kirstjen Nielsen resigned. On April 9, she purportedly exercised her authority under § 113(g)(2) to issue an order titled "Amending the Order of Succession in the Department of Homeland Security" ("April 2019 Order"). (Decl. of Juliana Blackwell, "Blackwell Decl.," Dkt. No. 61-1 ¶ 2, Ex. 1.) That order placed the Commissioner of U.S. Customs and Border Protection ("CBP") as the third office in the line of succession for the office of the Secretary after the Deputy Secretary and the Under Secretary for Management. *Id*. When Ms. Nielsen resigned, Kevin McAleenan, the Senate-confirmed Commissioner of CBP, was the next most senior officer in that line of succession and assumed the role of Acting Secretary.

On November 8, 2019, Acting Secretary McAleenan exercised his authority under § 113(g)(2) to further amend the same order of succession. (November 2019 Order, Blackwell Decl. ¶ 3, Ex. 2.) When McAleenan resigned on November 13, 2019, Chad Wolf, the Senate-confirmed Under Secretary for Strategy, Policy, and Plans, was next-in-line under the November 2019 Order and assumed the role of Acting Secretary.

On July 31, 2020, Acting Secretary Wolf issued the Final Rule, which requires sureties challenging a bond breach determination to administratively exhaust their claims by appealing to an administrative tribunal, imposes a $675 fee to appeal bond breach determinations, and created

new criteria for DHS to determine whether it will continue to accept immigration bonds from a particular surety. 85 Fed. Reg. 45,968, 45,974. On April 15, 2021, Secretary Alejandro Mayorkas purportedly ratified the Final Rule. *See* Ratification of the Final Rule Regarding Surety Bonds, 86 Fed. Reg. 40,919–20 (July 30, 2021).

On December 14, 2020, Plaintiffs filed the instant lawsuit, asserting that the Final Rule violated the Administrative Procedure Act ("APA") and the Fifth Amendment's equal protection guarantee. Plaintiffs filed an amended complaint on August 3, 2021. (First Am. Compl., "FAC," Dkt. No. 36.) Therein, and as a threshold matter, Plaintiffs allege that the subsequent ratification cannot cure the issuance of a final rule promulgated by an unauthorized official. (FAC ¶¶ 37-38.)

On May 12, 2022, Plaintiffs filed a motion for summary judgment on the limited issue as to whether promulgation of the Final Rule was lawful. (Pls.' Mot., Dkt. No. 59.) On June 13, 2022, Defendants filed an opposition. (Defs.' Opp'n, Dkt. No. 61.) On June 27, 2022, Plaintiffs filed a reply. (Pls.' Reply, Dkt. No. 62.)

II. LEGAL STANDARD

A party may move for summary judgment on a "claim or defense" or "part of... a claim or defense." Fed. R. Civ. P. 56(a). In the context of the APA, the Court does not follow the traditional summary judgment analysis set forth in Federal Rule of Civil Procedure 56. That is because "there are no disputed facts that the district court must resolve." *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985). Instead, the Court "determines whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Id.* The APA permits a court to "hold unlawful and set aside agency action, findings and conclusions found to be - arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

III. DISCUSSION

A. Jurisdictional requirements

As an initial matter, Defendants argue that "Plaintiffs have not satisfied the jurisdictional requirements of standing and ripeness…." (Defs.' Opp'n at 1, 9-13.) The undersigned, however, already found that Plaintiffs have satisfied these jurisdictional requirements, and nothing in

Defendants' opposition changes that analysis, so the Court incorporates its prior ruling and finds that Plaintiffs satisfy these requirements. (*See* Dkt. No. 44 at 4-7.)

B. Whether the Final Rule was lawfully promulgated.

In moving for summary judgment, Plaintiffs argue that the Final Rule was improperly issued because Mr. Wolf was not validly appointed as Acting Secretary and the subsequent ratification by Secretary Mayorkas cannot revive the Final Rule. (Pls.' Mot. at 1.)

On October 19, 2021, the Court, in denying Defendant's motion to dismiss, explained that it was persuaded by *Behring Regional Center LLC v. Wolf*, 544 F. Supp. 3d 937, 948 (N.D. Cal. 2021), which "found that the invalid appointment of Kevin McAleenan invalidated the final rule issued, and that the after-the-fact ratification by Secretary Mayorkas could not cure the defect." (Dkt. No. 44 at 8.) The expanded briefing has not changed the Court's analysis of this matter. Even so, the undersigned will briefly address the Government's arguments, which have been repeatedly rejected by other district courts.

i. Wolf was not validly appointed as Acting Secretary.

Secretary Kirstjen Nielson was the last Senate-confirmed DHS Secretary prior to Mr. Wolf. *Behring*, 2021 WL 2554051, at *2. Prior to her resignation, she amended the Order of Succession for Homeland Security Secretary, but she made a mistake and amended the wrong order of succession. *Id*. In sum, rather than amending the order of succession following the Secretary's death, resignation, or inability to perform, she amended the order concerning who is temporarily in charge when the Secretary is unavailable during a disaster or catastrophic emergency. *Id.; see also La Clinica de la Raza v. Trump*, No. 19-CV-04980-PJH, 2020 WL 6940934, at *13-14 (N.D. Cal. Nov. 25, 2020) (discussing the orders of succession and delegation in detail). To the extent that Defendants contend that Secretary Nielson properly amended the order of succession based on the documents provided, the undersigned disagrees for the reasons set forth in these cases. *See ids.*

Secretary Nielson's failure to properly amend the order of succession, rendered the succession of Mr. McAleenan, and later Mr. Wolf, to Acting Secretary invalid. *Behring*, 2021 WL 2554051, at *7. The undersigned notes that several district courts, including some in this district,

have concluded that Mr. Wolf's unlawful ascension to Acting Secretary rendered the promulgation of DHS rules void. *See, e.g., Behring*, 2021 WL 2554051, at *8; *Chamber of Com. of United State v. United States Dep't of Homeland Sec.*, No. 20-CV-07331-JSW, 2021 WL 4198518, at *5 (N.D. Cal. Sept. 15, 2021), appeal dismissed sub nom. *Chamber of Com. of United States v. U.S. Dep't of Homeland Sec.*, No. 21-16912, 2021 WL 8444310 (9th Cir. Dec. 2, 2021). Notably, in *Pangea Legal Services*, the district court characterized the Government's strategy of repeatedly relitigating this issue as "troubling," and noted that, after having its arguments rejected in five different cases, "[a] good argument might be made that, at this point in time, the government's arguments lack a good-faith basis in law or fact." *Pangea Legal Servs. v. U.S. Dep't of Homeland Sec.*, 512 F. Supp. 3d 966, 973 (N.D. Cal. 2021).

In opposition, Defendants argue that no appellate court has yet addressed the issue of whether Mr. Wolf was validly serving as Acting Secretary. (Defs.' Opp'n at 21.) This argument is disingenuous, because, as Plaintiffs argue, while the Government is not required to pursue appeal, it has affirmatively chosen not to appeal these adverse rulings, or has abandoned its appeals, and instead continues to litigate the same issue before different district courts hoping for a different result. (Pls.' Reply at 10-11.) Regardless of the reasoning behind it, this litigation strategy has resulted in a tremendous waste of the judiciary's limited resources.

The undersigned joins the other district courts in finding that Mr. Wolf was not validly appointed Acting Secretary and that the promulgation of the Final Rule was invalid.

ii. Ratification Cannot Revive the Final Rule.

Here, Defendants again argue that Secretary Mayorkas's ratification of the Final Rule cures any alleged defects in the rule arising from Chad Wolf's service as Acting Secretary. (Def.'s Opp'n at 13.) Specifically, Defendants argue that the Secretary delegated the authority to prescribe the Final Rule at issue here. *Id.* at 14-15. In so arguing, the Government relies on a 2003 Delegation to Deputy Secretary by then Homeland Security Secretary Tom Ridge. (2003 Delegation, Decl. of Juliana Blackwell ISO Mot. to Dismiss, Dkt. No. 39-2 ¶ 2, Ex. 1.) In the 2003 Delegation, Secretary Ridge delegated certain delineated responsibilities including "[a]cting for the Secretary to sign, approve, or disapprove any proposed or final rule, regulation or related

document" to the Deputy Secretary of Homeland Security. (2003 Delegation at § II.G.) This delegation, however, is inapplicable, because, by virtue of a vacancy, there was no Deputy Secretary of Homeland Security for which the authority to sign the Final Rule could be delegated. Indeed, it was this vacancy that led to Mr. McAllenan, as Senate-confirmed CBP Commissioner, to be named Acting Secretary. *See Behring*, 544 F. Supp. 3d at 947. Thus, the Government's arguments that there was delegation to the Deputy Secretary, of which there was not one, are unavailing. (*See* Defs.' Opp'n at 14-17.)

Since there was no delegation, the Court finds that the FVRA precludes ratification for the same reasons set forth in the October 19, 2021 order denying the motion to dismiss. In sum, the FVRA explicitly provides that "[a]n action that has no force or effect under paragraph (1) may not be ratified.'" *Behring*, 2021 WL 2554051, at *8 (quoting 5 U.S.C. § 3348(d)(2); also citing 5 U.S.C. § 551(5) ("actions" include "rule making")). Thus, as is the case here, Mr. Wolf was not lawfully serving as Acting Secretary at the time the Final Order was issued, and the later ratification by Secretary Mayorkas does not cure the defect in promulgation.

IV. CONCLUSION

For the reasons set forth above, the Court GRANTS Plaintiffs' motion for summary judgment and orders that, pursuant to 5 U.S.C. § 706, the Final Rule promulgated on July 31, 2020, and entitled "Procedures and Standards for Declining Surety Immigration Bonds and Administrative Appeal Requirement for Breaches", 85 Fed. Reg. 45,968 (July 31, 2020), be VACATED, and the matter is REMANDED to the Agency for further action.

As vacating the Final Rule moots Plaintiffs' remaining causes of action, they are dismissed without prejudice. A separate judgment will be entered in Plaintiffs' favor.

IT IS SO ORDERED.

Dated: August 10, 2022

Kandis Westmore

KANDIS A. WESTMORE
United States Magistrate Judge