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January 26, 2021

Hon. George B. Daniels
United States District Court
Southern District of New York
500 Pearl Street, Room 1310
New York, NY 10007

Re: *Make the Road New York, et al. v. Kenneth Cuccinelli, et al.*, No. 19-cv-7993 (GBD) (“MRNY”); *State of New York, et al. v. U.S. Dep’t of Homeland Security, et al.*, 19-cv-7777 (GBD) (“*State of New York*”)

Dear Judge Daniels:

On January 19, 2021, Defendants filed a Notice of Agency Action (the “Notice”) stating that former Acting Secretary of Homeland Security Chad Wolf and Peter T. Gaynor had again taken actions purporting to ratify DHS’s public-charge rule. *See State of New York*, Dkt. 268; *MRNY*, Dkt. 289. Specifically, after briefing on Plaintiffs’ pending motion for partial summary judgment had already been completed, Wolf purported to designate Gaynor as Acting Secretary of Homeland Security. Gaynor then purported to delegate certain of his authorities as Acting Secretary back to Wolf, and Wolf purported to issue an order “‘affirm[ing] and ratify[ing]’ the Rule at issue in this case.” *State of New York*, Dkt. 268; *MRNY*, Dkt. 289.

These last minute actions, taken days before the new presidential administration took office, do not remedy the fatal defects in the appointment of Kevin McAleenan as former Acting Secretary of Homeland Security or his ultra vires issuance of the public-charge rule in violation of the Federal Vacancies Reform Act (“FVRA”) and the Administrative Procedure Act (“APA”). For example, as explained in Plaintiffs’ summary-judgment briefs, McAleenan’s invalid issuance of the public-charge rule cannot be ratified. *See Mem. of Law in Supp. of Pls.’ Mot. for Partial Summary Judgment 25-26; Pls.’ Reply Mem. of Law 9-14.* Moreover, neither Wolf nor Gaynor was validly exercising authority as Acting Secretary when they attempted this latest eleventh-hour ratification. At bottom, Defendants’ perfunctory actions are plainly an improper attempt to circumvent the statutory limits of the FVRA, the Homeland Security Act, and the APA.

In any event, Defendants have not to date set forth any position about the relevance of their purported ratification to the pending motions, and their January 25 letter did not address the issue. To the extent that Defendants intend to rely on their new actions or make arguments about

them in support of Defendants' opposition to Plaintiffs' motion for partial summary judgement and Defendants' motion to dismiss (*see State of New York*, Dkt. 249, Dkt. 259; *MRNY* Dkt. 276, Dkt. 286), or to the extent that the Court would find it useful, Plaintiffs respectfully request an opportunity to confer with Defendants regarding a schedule to file further submissions addressing Defendants' new actions.

Respectfully submitted,

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cc: All Counsel of record via ECF