UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, Plaintiff, v. CHAD F. WOLF, in his official capacity as Acting Secretary of Homeland Security, et al., Defendants.	No. 20 Civ. 1127 (JMF)
R. L'HEUREUX LEWIS-MCCOY, et al., on behalf of themselves and all similarly situated individuals, Plaintiffs, v. CHAD WOLF, in his official capacity as Acting Secretary of Homeland Security, et al., Defendants.	No. 20 Civ. 1142 (JMF)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

The law requires federal agencies to act through careful, considered adherence to Congress's commands and administrative procedure. On February 5, 2020, however, Acting Secretary of Homeland Security Chad Wolf banned all New York residents ("the Ban") from applying to federal Trusted Traveler Programs ("TTPs") without warning—much less with the requisite fidelity to law and process. The Ban disregards standard administrative procedure in order to punish New York for its legislature's enactment of the Green Light Law, which limits federal access to residents' driver data. In doing so, the Ban violates the Administrative Procedure Act ("APA") in several ways.

First, the Ban failed to go through to notice-and-comment rulemaking as required for agency action that terminates individual rights. Second, the Ban betrayed the text and purpose of federal law and the agency's own regulations. Finally, in imposing the Ban, the agency acted contrary to the evidence before it, failed to consider important factors, and offered only a pretextual rationale—rendering the Ban arbitrary and capricious. This Court should therefore deny Defendants' motion for partial summary judgment, grant Plaintiffs' cross-motion for partial summary judgment, and vacate the Ban.

FACTUAL BACKGROUND

The U.S. Department of Homeland Security ("DHS") established Global Entry and other TTPs pursuant to 8 U.S.C. § 1365b in order to "expedite the screening and processing of international travelers, including United States Citizens and residents, who enter and exit the United States." 8 U.S.C. §§ 1365b(k), (k)(3)(A). Congress provided that DHS "shall ensure that the international registered traveler program includes as many participants as practicable by . . . providing applicants with clear and consistent eligibility guidelines," among other requirements. *Id.* § 1365b(k)(3)(E).

Congress further instructed the Secretary of DHS to "initiate a rulemaking to establish the program [and] criteria for participation." *Id.* § 1365b(k)(3)(C). After it launched a pilot program operated by U.S. Customs and Border Protection ("CBP") in 2008, 73 Fed. Reg. 19,861 (Apr. 11, 2008), DHS issued a notice of proposed rulemaking in 2009 to establish the Global Entry Program, 74 Fed. Reg. 59,932 (Nov. 19, 2009), and published a final rule in 2012, which became effective March 7, 2012, 77 Fed. Reg. 5681 (Feb. 6, 2012). Codified at 8 C.F.R. § 235.12, the final rule establishes the process and eligibility requirements for participation in the Global Entry Program. Since then, many New Yorkers have participated in the program and, at the time DHS abruptly banned their participation, accounted for nearly ten percent of Global Entry membership. *See* Administrative Record ("AR"), DHSGLL011, -034 (noting "[m]ore than 814,000 NY residents are CBP TTP members" and "[a]pproximately 9.5 million travelers" are currently enrolled in TTPs).[1]

In June 2019, New York enacted the Driver's License Access and Privacy Act (the "Green Light Law"). DHSGLL006, -067; N.Y. Veh. & Traf. Law § 201(12) (McKinney 2020). That law, which went into effect on December 14, 2019, authorizes New York's Department of Motor Vehicles ("DMV") to issue driver's licenses regardless of citizenship or immigration status, and requires CBP and Immigration and Customs Enforcement ("ICE") to obtain a court order or judicial warrant before accessing DMV records. *Id.*[2]

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[1] All citations to the AR are to the corrected Administrative Record filed on June 29, 2020. *See* 20-CV-1127, ECF No. 75-1; 20-CV-1142, ECF No. 81-1.

[2] The New York State legislature amended the Green Light Law on April 3, 2020, to allow disclosure of DMV records "as necessary for an individual seeking acceptance into a trusted traveler program, or to facilitate vehicle imports and/or exports." *See* Part YYY, New York Senate Bill No. 7508; N.Y. Veh. & Traf. Law § 201(12) (McKinney 2020). Plaintiffs are not relying on Defendants' maintenance of the Ban following enactment of the Green Light Law Amendment as a separate basis for relief on Plaintiffs' APA claims; no party disputes that the

On December 16, 2019, just days after the Green Light Law took effect, Acting ICE Director Matthew Albence sent an e-mail to other DHS component heads, including CBP Acting Commissioner Mark Morgan. DHSGLL065. Before even evaluating if the Green Light Law had any impact on DHS operations, the email asked the component heads to take a "DHS-wide approach to dealing with this," noting that other efforts to halt information-sharing restrictions with DHS had not succeeded. *Id.* In particular, he recommended a punitive response singling out New York: "[W]e need to try to take a consolidated approach to look at *what services we can immediately pull back from NY* as a result" of the Green Light Law. *Id.* (emphasis added). He indicated that the response needed to be "aggressive," as similar legislation "will likely spread to other localities if there is not a strong response from us." *Id.* CBP Acting Commissioner Morgan responded the same day: "Agreed." *Id.*

On December 23, 2019, a week after the Green Light Law took effect and before DHS had heard of or evaluated the operational impact of the law, senior DHS officials—including Acting Commissioner Morgan, Acting ICE Director Matthew Albence, and Acting Deputy Secretary Ken Cuccinelli—met to discuss DHS's "approach" to respond to New York's Green Light Law. DHSGLL067–069. According to a briefing document, the participants of that meeting were aware that "[s]everal states [were] considering similar legislation [to New York's Green Light Law] including California, New Jersey, and Oregon." DHSGLL069. A full week later, Acting Secretary Wolf finally instructed each of DHS's operational component heads—

Ban remains in place and was instituted in response to the Green Light Law as enacted. Because Defendants have stated that they do not oppose exclusion of their extra-record declarations, ECF Nos. 68-1, 68-2, 68-3, if Plaintiffs do not contend that the Green Light Law Amendment affects the APA claims here, *see* ECF No. 72 at 3, the Court should exclude those declarations.

including CBP, ICE, and five other DHS components[3]—to evaluate the impact of the Green Light Law and similar laws in other states on the components' operations. DHSGLL004–005, -026.

CBP responded to DHS's operational assessment request on the same day with a memorandum summarizing its conclusions regarding the law's impact. DHSGLL006–008. The only TTP-related impact that CBP's December 30 memo identifies is on CBP's ability to "[validate] NY driver's licenses presented as part of the interview process for issuance of the TTP cards." DHSGLL006. The memo does not suggest that CBP uses any criminal history information found in the DMV database in its TTP vetting or that the loss of access to such data impairs CBP's TTP operations. Nor does the memo indicate that loss of access to the DMV database has any impact on vetting or verifying applicants who do not present driver's licenses in their interview process.

On January 8, 2020, CBP issued an additional memo outlining implications and recommendations regarding New York's Green Light Law. *See* DHSGLL009–013. In the memo, CBP Acting Commissioner Morgan explains that a third-party system known as the National Law Enforcement Telecommunications System ("NLETS")[4] "enables CBP to validate NY driver's license identity during the interview process for issuance of the TTP cards which serve in lieu of a passport at land borders." DHSGLL010–011.

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[3] The other DHS components whose operational assessments were included in the AR are the Federal Emergency Management Agency, the Transportation Security Administration, United States Citizenship and Immigration Services, the United States Coast Guard, and the United States Secret Service. *See* DHSGLL031.

[4] NLETS is a private, non-profit corporation that maintains a third-party database where numerous types of data are shared between participating state, federal, and international law- and immigration-enforcement agencies. *See* DHSGLL016, -018, -029, -031. Its data includes information from participating states' DMV databases, but "some states do not participate in Nlets." DHSGLL016, -018.

ICE responded to DHS's operational assessment request in a memorandum dated January 14, 2020, identifying a number of purported impacts on ICE's enforcement activities. *See* DHSGLL018–025. ICE's memo identifies no impact on TTPs. *See id.* Other DHS components that responded to DHS's operational assessment request concluded that the Green Light Law would have little if any impact on their operations. *See* DHSGLL014–017, -026–030.

Following the response of each DHS component to Acting Secretary Wolf's request, on January 27, 2020, DHS Deputy Under Secretary of the Office of Strategy, Policy, and Plans James McCament, sent a further memorandum to Acting Secretary Wolf concerning the impact of state laws restricting DMV data access. DHSGLL031–041. The January 27 memorandum outlines DHS's access to state DMV information and databases and makes clear that many other states—like New York—do not share their respective DMV data.[5] As with CBP's December 30 and January 8 memoranda, the January 27 McCament memorandum identifies only one possible TTP-related impact: the use of New York's DMV data as a means for "identity confirmation" and to establish eligibility for certain TTP cards used at land borders. DHSGLL034. The memorandum, however, goes to great lengths to describe the various impacts these laws will have on ICE's immigration enforcement operations. *See generally* DHSGLL031–041.

On February 4, 2020, following a series of phone calls not memorialized in the AR, for the first time in the entire process and over a month after DHS officials had discussed taking an

[5] Indeed, the AR identifies numerous other states and localities that also restrict ICE access to state databases. DHSGLL072–074. In addition to New York, "Nevada, Hawaii, Oklahoma, Illinois, South Carolina, Connecticut, Vermont, Guam, and the Virgin Islands" do not "shar[e] DMV information with Nlets." DHSGLL018–019. Alaska additionally, like New York, refuses "to provide DMV information without a judicial order or subpoena issued by a judge." *Id.* And numerous other states and localities limit DHS access to their state's DMV data, including Massachusetts, Rhode Island, Connecticut, Vermont, New Hampshire, Maine, Washington, D.C., Washington, California, North Dakota, South Dakota, and Oregon. DHSGLL019, -032.

"aggressive" response to New York's Green Light Law, an e-mail from CBP Trusted Traveler Programs Director Peter Acosta asserted that without access to DMV data through the NLETS database, CBP would not have some information on criminal convictions related to motor vehicles. DHSGLL062. The AR does not analyze this claim or discuss implications for other states that either restrict access to DMV databases or do not provide information to NLETS. DHSGLL018–019, -032, -073–074. Nor does any document in the AR suggest that the purported criminal conviction information is uniquely available through DMV's data.

One day later, on February 5, 2020, DHS Acting Secretary Wolf abruptly announced an immediate ban (the "Ban") on enrollment and re-enrollment by New York residents in CBP's TTPs. *See* DHSGLL001–003. In accordance with ICE Acting Director Albence's December 16 recommendation that DHS take "aggressive" action to pull back services so that other states would not follow New York's lead, this unprecedented announcement barred all New York residents from even applying for enrollment or re-enrollment in the TTPs. Acting Secretary Wolf's letter notifying New York officials of the Ban spent little time addressing any actual impact on Global Entry or the other TTPs, and instead focused on another grievance: that losing access to DMV records purportedly impaired law-enforcement activities by ICE. DHSGLL001–003. What little space the letter did devote to addressing the impact of the Green Light Law on TTPs points to a single rationale, not part of the operational assessment and raised by email just the day before: that the law "prevents DHS from accessing relevant information that only New York DMV maintains, including some aspects of an individual's criminal history." DHSGLL002.

STANDARD OF REVIEW

Summary judgment is proper where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). APA claims

are particularly "amenable to summary disposition" because "'[t]he entire case on review is a question of law.'" *New York v. U.S. Dep't of Health & Human Servs.*, 414 F. Supp. 3d 475, 516 (S.D.N.Y. 2019), *appeal filed*, No. 20-41 (2d Cir. Jan. 3, 2020) (internal quotations marks omitted).

ARGUMENT

I. The Ban is reviewable under the APA.

Agency action is subject to a "strong presumption" of judicial review. *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018). The APA's narrow exception to judicial review for decisions "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), applies only in the "rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (internal quotation marks omitted), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). The Supreme Court recently reaffirmed that this exception to the presumption of reviewability should be applied "quite narrowly." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2568 (2019) (internal quotation marks omitted); *see also Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1905 (2020) (same). Defendants fail to meet the stringent standard for establishing non-reviewability here.

Defendants do not argue that the IRTPA precludes judicial review of Plaintiffs' claims. *See* 5 U.S.C. § 701(a)(1) (exception where "statutes preclude judicial review"). Instead, Defendants contend only that the IRTPA offers no "meaningful standard" to evaluate the validity of the Ban under the narrow exception in § 701(a)(2). *See* Defs.' Mem. at 9–10 (ECF No. 68). But Plaintiffs argue that the IRTPA *does* provide a meaningful standard because Congress directed the Secretary (a) to establish criteria for participation via rulemaking, which he has failed to do with the Ban, and (b) to "ensure" TTPs include "as many participants as practicable"

by making enrollment convenient with "clear and consistent eligibility guidelines," which the Ban flouts. 8 U.S.C. § 1365b(k); *see infra* Part III.A; *see also Wyoming v. United States*, 279 F.3d 1214, 1237 (10th Cir. 2002) (concluding that statutory requirement to develop conservation plan that complies with State policies "to the 'extent' or 'maximum extent practicable[]' undoubtedly places limits on the agency's discretion" and provides "law to apply") (internal citations omitted); *Ashton v. Pierce*, 716 F.2d 56, 63–64 (D.C. Cir. 1983) (concluding that agency regulation was inconsistent with statute's direction to eliminate the hazard of certain lead paint "as far as practicable"); *cf. Chiang v. Kempthorne*, 503 F. Supp. 2d 343, 351–52 (D.D.C. 2007). Plaintiffs also argue that CBP's governing statute requires a finding of illegality before restricting travel or trade—which the Ban forgoes. *See infra* Part III.B.

Defendants do not discuss these statutory provisions, much less deny they provide meaningful standards. *See* Defs.' Mem. at 9–10. Instead, Defendants cite various provisions of their regulations that purport to reserve a significant amount of discretion to the agency. *Id*. at 10. But such regulations cannot overcome statutory commands. *See Westchester v. U.S. Dep't of Hous. & Urban Dev.*, 778 F.3d 412, 422 (2d Cir. 2015) ("The agency's adoption of regulations that might appear to give the agency unfettered discretion does not act to nullify the meaningful standards which exist in the governing statute.").

To the extent Defendants disagree with Plaintiffs' arguments that the IRTPA and CBP's governing statute do not authorize the Ban, that dispute goes to the merits. *See State of New York v. U.S. Immigration & Customs Enf't*, 431 F. Supp. 3d 377, 385 (S.D.N.Y. 2019). On the question of reviewability, these statutes provide meaningful standards. And the Court can, at a minimum, assess Plaintiffs' APA claims "according to the general requirements of reasoned

agency decisionmaking." *Dep't of Commerce*, 139 S. Ct. at 2569.[6] Accordingly, Defendants cannot meet the "heavy burden" of overcoming the "strong presumption favoring judicial review of administrative action" under the APA. *Salazar v. King*, 822 F.3d 61, 75 (2d Cir. 2016).[7]

II. The Ban violates the APA's notice-and-comment requirements.

Defendants' decision to exclude all New Yorkers from TTPs should have followed the APA's notice-and-comment procedures. The APA requires agencies to follow notice-and-comment procedures when issuing "substantive" or "legislative" rules. *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 95–96 (2015); *see also* 5 U.S.C. § 553(b). Legislative rules are agency rules that have the "force and effect of law"—that is, they regulate the rights, obligations, or powers of relevant parties. *Perez*, 575 U.S. at 96.

By contrast, "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" are exempt from the APA's notice-and-comment requirements. 5 U.S.C. § 553(b)(A). "But that convenience comes at a price: Interpretive rules 'do not have the force and effect of law and are not accorded that weight in the adjudicatory process.'" *Perez*, 575 U.S. at 97 (quoting *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99

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[6] Contrary to Defendants' claims, Defs.' Mem. at 10, *Roberts* does not counsel otherwise. *See Roberts v. Napolitano*, 792 F. Supp. 2d 67 (D.D.C. 2011). In *Roberts*, the court considered the reviewability of an individual's specific Global Entry application, noting the discretion delegated to Defendants in "approving applications" by individuals. *Id.* at 73–74. By contrast, Plaintiffs' challenge to the Ban does not require this Court to examine Defendants' exercise of discretion in regard to a particular application or applications, but concerns the promulgation of a categorical policy creating a new, class-wide prohibition on eligibility. *See State of New York*, 431 F. Supp. 3d at 385–86. Indeed, the Ban *eliminates* any agency discretion to adjudicate applications from New York residents by prohibiting New Yorkers from filing applications in the first place.

[7] At the least, Defendants' arguments concerning reviewability do not apply to Plaintiffs' notice-and-comment claims. It is blackletter law that an agency's failure to follow notice-and-comment procedures is always subject to judicial review. *See Lincoln v. Vigil*, 508 U.S. 182 (1993); *see also New York City Employees' Ret. Sys. v. S.E.C.*, 45 F.3d 7, 11 (2d Cir. 1995) (holding that a discretionary action may still be reviewed for adherence to notice-and-comment procedures).

(1995)). Instead, their "critical feature" is that they "advise the public of the agency's construction of the statutes and rules which [the agency] administers." *Id.* (internal quotation marks omitted). Similarly, policy statements only "advise the public prospectively on the manner in which the agency proposes to exercise a discretionary power." *Lincoln,* 508 U.S. at 197 (internal quotation marks omitted).

The Ban is a prototypically legislative rule subject to the APA's notice-and-comment requirements. It imposes a binding prohibition that terminates New Yorkers' rights and eliminates agency discretion. *See* DHSGLL003. And Defendants' belated request to apply the "good cause" exception to notice-and-comment for legislative rules fails both procedurally and substantively. *See* 5 U.S.C. § 553(b)(B). The Court should reject each of Defendants' meritless attempts to skirt the APA's procedural requirements.

A. The Ban is a legislative rule that may only be issued following notice-and-comment rulemaking.

When determining what constitutes a legislative rule, as compared to a statement of policy or an interpretive rule, "[t]he central question is essentially whether an agency is exercising its rule-making power to clarify an existing statute or regulation, or to create new law, rights, or duties in what amounts to a legislative act." *White v. Shalala*, 7 F.3d 296, 303 (2d Cir. 1993). To guide this inquiry, the Second Circuit has recently reiterated that courts should "look to" four factors identified in *Sweet v. Sheahan*, 235 F.3d 80 (2d Cir. 2000). Namely,

> (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, *or* (4) whether the rule effectively amends a prior legislative rule.

Gonnella v. U.S. Sec. & Exch. Comm'n, 954 F.3d 536, 547 (2d Cir. 2020) (emphasis added)

(quoting *Sheahan*, 235 F.3d at 91).[8] "If the answer to any of these questions is affirmative, we have a legislative [rule]." *Sheahan*, 235 F.3d at 91 (quoting *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993)). Here, both the first and fourth factors establish that the Ban is a legislative rule.

The first *Sheahan* factor "is another way of asking whether the disputed rule really adds content to the governing legal norms." *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 96 (D.C. Cir. 1997). Applied here, it is clear that the Ban is squarely the type of agency pronouncement that "adds content" to established norms. Nothing in either the IRTPA or CBP's pre-existing regulations empowers Defendants to prohibit residents of an entire state from even *applying* to TTPs. The Ban is clearly an addition without which "there would not be an adequate legislative basis." *Gonnella*, 954 F.3d at 547 (internal quotation marks omitted).

First, the IRTPA itself does not provide for blanket bans against TTP applicants. To the contrary, the IRTPA directs that the Secretary of Homeland Security "shall ensure" that TTPs "include[] as many participants as practicable by . . . making program enrollment convenient and easily accessible" and "providing applicants with clear and consistent eligibility guidelines." 8 U.S.C. § 1365b(k)(3)(E). And the IRTPA further directs the Secretary to "initiate a rulemaking to establish . . . criteria for participation." *Id.* § 1365b(k)(3)(C). As the Ban is not contemplated by the IRTPA, consistent with the IRTPA's mandates, or even the result of a rulemaking, the IRTPA cannot be said to provide "an adequate legislative basis" for the Ban.

[8] Defendants neither cite *Gonnella* nor make any attempt to discuss the Second Circuit's operative four-factor test for differentiating between legislative rules and interpretative rules or policy statements. *See generally* Defs.' Mem. at 11–15. Instead, Defendants primarily argue that the Ban is not a legislative rule because it merely reflects their determination that New York applicants will no longer be able to demonstrate "low-risk" status as required by the regulations. *Id*. at 11–12. But whether this determination constitutes a legislative rule under *Gonnella* is the critical question before the Court.

Second, CBP's regulations do not predicate eligibility for TTPs on whether an applicant's state grants access to its DMV database. *See generally* 8 C.F.R. § 235.12 (Global Entry regulations). Nor do the regulations contemplate any type of mass action against applicants. Under the regulations, an individual may be deemed ineligible to participate in Global Entry only following a "risk determination . . . based in part upon an applicant's ability" to meet the program's requirements. *Id.* § 235.12(b)(2). And Global Entry applicants are not even required to submit a driver's license to be accepted into the program. *Id.* § 235.12(b)(1). Accordingly, the regulations cannot support a categorical determination regarding millions of individuals.

Instead, the Ban itself is the only basis for denying all New Yorkers the ability to apply for TTPs. "[I]n the absence of the rule there would not be an adequate legislative basis for" the Ban, as neither the IRTPA nor CBP's regulations contemplate the imposition of such a rule. *Gonnella*, 954 F.3d at 547 (internal quotation marks omitted). This fact alone suffices to demonstrate that the Ban is a legislative rule subject to notice-and-comment rulemaking requirements.

Moreover, as the rule "effectively amends a prior legislative rule," the fourth *Sheahan* factor is likewise dispositive. Under the Global Entry regulations, anyone is eligible to apply if she (1) is a citizen, national, or lawful permanent resident of the United States, or is a nonimmigrant alien from a partner country; (2) holds a valid passport, permanent resident card, or other appropriate travel document; (3) has parental or guardian consent, if she is a minor; and (4) does not have any "disqualifying factors." 8 C.F.R. § 235.12(b)(1)(i)–(iii); *see also id.* § 235.12(b)(2)(i)–(vii) (listing seven disqualifying factors, none of which encompass residence in New York or access to DMV data). There is no statutory or regulatory requirement that an applicant's state grant Defendants access to DMV information. And Defendants do not identify

any authority allowing CBP to forgo their obligation to conduct individualized risk assessments prior to making eligibility decisions under *any* circumstances, much less the situation presented here. *See id.* § 235.12(b)(2).

Accordingly, the Ban "effectively amends" the regulations governing eligibility for Global Entry. *Gonnella*, 954 F.3d at 547. As a result of the Ban, New Yorkers who meet all the eligibility requirements in the existing regulations will nevertheless "no longer be eligible" to apply. DHSGLL003. The Ban therefore effects a substantive change and, thus, Defendants were required to follow notice-and-comment procedures.[9] *Guernsey*, 514 U.S. at 100 ("We can agree that APA rulemaking would still be required if [the rule] adopted a new position inconsistent with any of the Secretary's existing regulations.").

For these reasons, Defendants' contention that the Ban is merely a policy statement or an interpretive rule is unavailing. As the Second Circuit has repeatedly explained, "policy statements generally impact agency behavior rather than change the 'existing rights' of others outside the agency." *Gonnella*, 954 F.3d at 546 (quoting *Noel v. Chapman*, 508 F.2d 1023, 1030 (2d Cir. 1975)). Similarly, "[i]nterpretive rules do not have the force and effect of law and are not accorded that weight in the adjudicatory process." *Perez*, 575 U.S. at 97 (internal quotation marks omitted). A sudden blanket ban on all New Yorkers' ability even to *apply* for TTPs cannot be said to leave existing rights undisturbed. By eliminating agency discretion in

[9] That Defendants did not follow the formalistic steps identified in the second and third *Sheahan* factors does not suggest otherwise. Publication in the Code of Federal Regulations and invocation of legislative authority are strong—indeed, virtually indisputable—indicia that a rule is legislative. But the failure to publish or explain the basis of a rule does not prove the inverse. "On the contrary, courts have long looked to the *contents* of the agency's action, not the agency's self-serving *label*, when deciding whether statutory notice-and-comment demands apply." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019) (emphasis in original).

adjudicating applications from New Yorkers, the Ban establishes the type of "binding norm" reserved for legislative rules.[10] 32 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 8154 (2019) (explaining that general policy statements "should not purport to establish a 'binding norm'" and that "the critical factor for determining whether the new policy constitutes an excepted statement is whether it left the agency officials free to exercise discretion in an individual case").[11]

B. Defendants would not be able to meet the "good cause" standard required to forego notice and comment.

Finally, the APA's "good cause" exception is inapplicable here. The "good cause" exception permits an agency to bypass notice-and-comment procedures if it finds them "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). But the APA requires that the agency "incorporates the finding [of good cause] and a brief statement of reasons therefor in the rules issued." *Id*. As Defendants concede that they did not make the requisite finding or incorporate a statement of good cause into the Ban, Defs.' Mem. at 14, they have not met the requirements for bypassing notice-and-comment. And Defendants do not cite a single binding case to support the idea that they may now rely on the "good cause" exception *ex*

[10] In *Noel*, the Second Circuit held that a policy guiding immigration officials' discretion to grant deportation relief was a policy statement, not a legislative rule, because it did not "change[] the existing right of the appellants to have their applications for [deportation relief] authorized in the sole discretion of the district director." 508 F.2d at 1030. Here, by contrast, the Ban has eliminated any discretion to approve New Yorkers for TTPs.

[11] Indeed, even the language Defendants purport the Ban to interpret speaks in terms of an individual "applicant['s]" failing. *See* Defs.' Mem. at 14 (discussing 8 C.F.R. § 235.12(b)(2)(vii) (an applicant may be disqualified if "[t]he applicant cannot satisfy CBP of his or her low-risk status")). A ban against nearly 20 million people cannot be said to interpret that language, and labeling it an interpretation does not change that fact. *See Allina Health Servs*., 139 S. Ct. at 1812.

post facto.[12] Indeed, the Supreme Court recently rejected an agency's "impermissible *post hoc* rationalizations" as "not properly before [the Court]." *Regents*, 140 S. Ct. at 1909; *see also id.* (reasoning that adherence to the APA's procedural rules "serve[] important values of administrative law" and "promote[] 'agency accountability,' by ensuring that parties and the public can respond fully and in a timely manner to an agency's exercise of authority") (citation omitted) (quoting *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 643 (1986)).

Even if such *post hoc* rationalization were permissible, Defendants cannot demonstrate good cause. Defendants argue only that notice-and-comment "would have been impractical." Defs.' Mem. at 14. But claims of impracticality are "generally confined to emergency situations". *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin*., 894 F.3d 95, 114 (2d Cir. 2018) ("*NRDC*"). No such emergency exists here, as the Green Light Law was passed in June 2019 with a December 2019 effective date—giving Defendants six months to undergo notice-and-comment rulemaking. Even if Defendants had not had a half-year's head start, they fail to explain why the Green Light Law creates an "emergency" beyond offering the conclusory assertion that it prevents "comprehensive risk assessments." Defs.' Mem. at 14 (citing the Ban itself and other conclusory assertions in the AR). The Court should not uphold Defendants' procedural and substantive failures to demonstrate "good cause."

III. The Ban is not in accordance with law.

Defendants' decision to bar nearly 20 million New Yorkers—and only New Yorkers—

[12] In the single case that Defendants cite, the court explained that the emergency context of "critical" oil shortages warranted bypassing the procedural requirements of the good cause exception. *Nader v. Sawhill*, 514 F.2d 1064, 1068–69 (Temp. Emer. Ct. App. 1975). The court stressed, however, that it expected decisions in "less calamitous circumstances . . . [to] take the utmost advantage of full and open public comment." *Id.* at 1069. Here, as discussed *infra*, there is no emergency excusing Defendants from meeting their obligations.

from even applying to participate in the TTPs violates the APA. The APA provides that courts shall "hold unlawful and set aside" agency action that is "not in accordance with law." 5 U.S.C. § 706(2)(A); *NRDC*, 894 F.3d at 108 ("It is well settled that an agency may only act within the authority granted to it by statute."). Nor may courts condone agency action that is inconsistent with existing regulations. *See Salazar*, 822 F.3d at 76–77; *Am. Petroleum Inst. v. E.P.A.*, 787 F.2d 965, 975 (5th Cir. 1986) ("It is elementary administrative law that an agency must operate within the confines of its own regulations."); *cf. Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017) ("[A]n agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked and may not alter such a rule without notice and comment." (quotation marks and alterations omitted)). Here, the Ban fails on both counts. It is inconsistent with the IRTPA, CBP's governing statute, and the agency's own regulations.

A. The Ban violates the IRTPA.

The Ban violates both the text and purpose of the IRTPA. As discussed above, the IRTPA mandates that the Secretary establish a registered traveler program that "includes as many participants as practicable." 8 U.S.C. § 1365b(k)(3)(E) ("The Secretary shall ensure that the international registered traveler program includes as many participants as practicable."). For that purpose, the Act requires the Secretary to "ensure" easy and convenient enrollment and propound clear and consistent eligibility guidelines. *Id.* By eliminating even the *possibility* of enrollment for New York's 20 million residents, the Ban violates these requirements.

First, the Ban undermines—rather than ensures—widespread participation. Although Defendants suggest that enrolling *any* New Yorker is not "practicable," Defs.' Mem. at 17, and, therefore, their exclusion is consistent with the enrollment mandate, the law and the facts show otherwise. Neither a driver's license nor access to an applicant's state DMV database is a requirement for participation in TTPs. *See generally* 8 U.S.C. § 1365b(k); 8 C.F.R. § 235.12.

As these elements are not required for a successful application, they cannot be fatal to—much less render impracticable—an application. Additionally, as explained below, millions of New Yorkers who are eligible under CBP's regulations do not have a driver's license or any information in the DMV database—such as minor children. *See infra* Part III.C. Banning *all* applicants because CBP cannot access a database that, at best, contains information relating only to *some* applicants is inconsistent with the IRTPA's requirement that the Secretary enroll "as many participants as practicable." 8 U.S.C. § 1365b(k)(3)(E).

Second, the Ban contravenes the IRTPA's command to provide convenient and accessible enrollment with consistent guidelines. *Id*. For New Yorkers, the Ban makes enrollment (and re-enrollment) not just inconvenient, but impossible. And as discussed in detail *infra*, the Ban subjects New Yorkers to eligibility criteria that are not included in CBP's regulations. In other words, Defendants have not only provided inconsistent eligibility guidelines for New York residents, but also made the eligibility guidelines that apply to New Yorkers inconsistent with those that apply to residents outside the state. The Ban bars New Yorkers on the basis that their DMV data is unavailable to CBP, but leaves the program open to residents of other States for which such data is also unavailable, as well as to U.S. citizens and nationals residing in any country outside the United States without regard to whether such data is available. The decision thus breaches Defendants' statutory obligation.

Defendants contend that the Ban is not contrary to the IRTPA because DHS reasonably balanced the Act's requirement to conduct "security threat assessments" against the mandate to make enrollment as easy and widely available as practicable. Defs.' Mem. at 17. As an initial matter, the AR contains no evidence that the agency engaged in any such balancing or, indeed, recognized its statutory obligation to ensure as many TTP participants as practicable. Nor does

the AR show that the agency considered that the Ban would result in a substantial loss in program participation, or that such loss would put additional strain on CBP screening resources. *See generally* DHSGLL001–003, -006–007, -009–013, -031–041, -063. Defendants' post-hoc assertions cannot establish that such consideration took place. *Cf. Regents*, 140 S. Ct. at 1909; *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2710 (2015) (noting "foundational principle of administrative law that a court may uphold agency action only on the grounds that the agency invoked when it took the action").

Moreover, Defendants' suggestion that the "security and enrollment objectives" of the IRTPA are at odds is incorrect. The 9/11 Commission recommended the creation of an international trusted traveler program because "[t]he further away from our borders that screening occurs, the more security benefits we gain." Nat'l Comm'n on Terrorist Attacks Upon the U.S., *The 9/11 Commission Report: Final Report of the Nat'l Comm'n on Terrorist Attacks Upon the United States* 389 (2004), http://www.9-11commission.gov/report/911report.pdf. When Congress adopted the Commission's recommendation in the IRTPA as a "high priority," it directed easy and widespread enrollment to *further* security objectives, not in spite of them. 8 U.S.C. § 1365b(k)(1)(A)–(B); *see also id.* (finding that "expediting known travelers . . . can permit inspectors to better focus on identifying terrorists," and that such expediting "should be a high priority"); 77 Fed. Reg. at 5682 (explaining that wide enrollment "allows CBP officers more time and resources to address higher risk security concerns"). Arbitrarily slashing TTP participation by nearly 10 percent does not serve those objectives. *See* DHSGLL034 (noting that there were 814,000 New York enrollees with 64,000 applications pending, out of 9.5 million total enrollees).

Defendants also cite the IRTPA's "security threat assessments" language in 8 U.S.C.

§ 1365b(k)(3)(A) without context. *See* Defs.' Mem. at 17. In fact, Section 1365b(k)(3)(A) directs the Secretary to establish a registered traveler program "that incorporates *available* technologies, such as biometrics and e-passports, and security threat assessments to expedite the screening and processing of international travelers." 8 U.S.C. § 1365b(k)(3)(A) (emphasis added). As evidenced by the direction to use "available" technologies, the Act specifically contemplates that the Secretary will establish a trusted traveler program even if some technologies are not available. Far from authorizing actions like the Ban, Section 1365b(k)(3)(A) affirms that banning New York applicants because New York's DMV database is not available to Defendants violates the statute. *See Friends of Richards-Gebaur Airport v. F.A.A.*, 251 F.3d 1178, 1195 (8th Cir. 2001) ("[A]n agency implementing a statute may not ignore . . . a standard articulated in the statute.").

B. The Ban violates CBP's authorizing statute.

The Ban also violates the U.S. Customs and Border Protection Authorization Act.[13] The CBP Authorization Act assigns a number of mandatory duties to the Commissioner of CBP, including that "[t]he Commissioner shall . . . facilitate and expedite the flow of lawful trade and travel." 6 U.S.C. § 211(c)(3). Because the Ban prohibits *all* New Yorkers from applying for TTPs without making any finding that a particular resident is seeking to engage in "unlawful" trade or travel, the Ban violates the Commissioner's statutory duty.

Defendants argue that they may disregard this duty because the CBP Authorization Act includes other statutory objectives, and an agency may reasonably balance competing priorities.

[13] The U.S. Customs and Border Protection Act is Title VIII of the Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125, §§ 801, 801-819, 130 Stat. 122, 199–222 (2016); which amended in part the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

See Defs.' Mem. at 16 (citing *Fresno Mobile Radio, Inc. v. F.C.C.*, 165 F.3d 965 (D.C. Cir. 1999)). But the Ban does not merely prioritize certain statutory objectives over a competing objective. Rather, the Ban entirely abdicates a mandatory function that Congress directed that the agency "shall" pursue. And *Fresno Mobile Radio* is inapplicable for the separate reason that the court there was considering whether agency action was arbitrary and capricious, not whether it was "not in accordance with law" under 5 U.S.C. § 706(2)(A). *See Gresham v. Azar*, 950 F.3d 93, 103 (D.C. Cir. 2020) (explaining that *Fresno Mobile Radio* held that when "objectives could point to conflicting courses of action, . . . the agency could give precedence to one or several objectives over others without acting in an arbitrary or capricious manner"). The *Fresno Mobile Radio* court therefore had only to consider "the reasonableness of the agency's decision on the basis of the record then before it." 165 F.3d at 971. That is not the standard here.

In assessing whether agency action is contrary to law, a court "is not limited to determining whether an agency's decision was 'reasonable' in light of the law as it existed at the time of its decision; instead, the APA requires a court to determine whether a decision is 'in accordance with law' as it exists at the time of review." *Georgetown Univ. Hosp. v. Bowen*, 698 F. Supp. 290, 297 (D.D.C. 1987), *aff'd*, 862 F.2d 323 (D.C. Cir. 1988). As the Ban is not in accordance with the CBP Authorization Act, it must be set aside.

C. The Ban violates the TTP implementing regulations.

The Ban also runs afoul of CBP's own regulations implementing the TTPs. As an initial matter, the regulations do not predicate eligibility on whether a state has granted CBP access to its DMV database. *See generally* 8 C.F.R. § 235.12. Rather, applicants are eligible to apply for TTPs regardless of what information may or may not be available to CBP in various government databases.

Furthermore, the regulations require an individualized assessment of risk before an

applicant can be disqualified. Specifically, pursuant to Section 235.12(b)(2), CBP is only empowered to disqualify an "*individual*" as ineligible upon a "risk determination" that "the *individual* presents a potential risk for terrorism, criminality (such as smuggling), or is otherwise not a low-risk traveler." 8 C.F.R.§ 235.12(b)(2) (emphasis added).[14] The regulations then lay out possible grounds for disqualification. *Id.* § 235.12(b)(2)(i)–(vii). For each of these grounds, an applicant may only be disqualified if "the applicant" has been found personally to present a risk—as when the applicant lies on an application. *Id.* Nowhere do these regulations contemplate that CBP may discard its processes and criteria for determining an applicant's risk in exchange for a categorical prohibition against an entire population. And courts "insist[] that where the agencies have laid down their own procedures and regulations, those procedures and regulations cannot be ignored by the agencies themselves even where discretionary decisions are involved." *Smith v. Resor*, 406 F.2d 141, 145 (2d Cir. 1969).

Defendants maintain that the Ban merely "appl[ies] its risk determination criteria to a group of similarly situated applicants." Defs.' Mem. at 17. This is no defense. The Ban decidedly *does not* apply CBP's risk determination criteria. No criterion requires access to state DMV databases or, indeed, any databases. Nor does the AR suggest otherwise. *See supra* Parts III.A, C. Moreover, New York's 20 million residents are not all similarly situated. Many have never had a driver's license, some cannot possibly have information in the DMV database, and most who are included in the database—if not all—have information that can be obtained

[14] CBP's regulations governing suspension and revocation of Global Entry participation carry the same limitations. Section 235.12(j) states that a Global Entry "participant may be suspended or removed" upon a determination that "the participant" is disqualified under Section 235.12(b)(2); "the participant" has provided false information; "the participant" has failed to follow the program's terms, conditions, and requirements; or "such action is otherwise necessary." 8 C.F.R. § 235.12(j).

elsewhere. *See infra* Part IV.A. Many New York residents—like judges, federal prosecutors, and DHS employees—have also demonstrated low-risk status following stringent security clearance processes. In other words, for many applicants, access to the DMV database is irrelevant for the assessment of risk. For example, Plaintiff S.T. is a one-year-old minor child. Access to the DMV database has no bearing on whether S.T. can be deemed a low-risk traveler and, as such, S.T. should not be swept into a blanket ban that does not account for her individual situation.

Defendants' argument that this Court must defer to the agency's interpretation of the regulatory risk-determination criteria, *see* Defs.' Mem. at 17, is meritless. Although an agency may in some instances be entitled to judicial deference when interpreting ambiguous terms in an agency regulation, "the possibility of deference can arise only if a regulation is genuinely ambiguous." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019). Here, CBP's regulations require the agency to make an assessment that "the individual" or "the applicant" presents a potential risk, *see* 8 C.F.R. § 235.12(b)(2)(vii), and there is nothing ambiguous about the words "individual" or "applicant." The Oxford English Dictionary, for example, defines "individual" as "[a] single human being as distinct from a group." *Individual*, *Oxford English Dictionary*, https://en.oxforddictionaries.com/definition/individual (last visited July 10, 2020). The regulatory text thus plainly forecloses the class treatment Defendants would now like to apply. And even if the word "individual" were ambiguous—which it is not—"the agency's reading must still be 'reasonable'" to be owed any deference. *Kisor*, 139 S. Ct. at 2415–16. Interpreting "an individual" or "the applicant" to permit undifferentiated treatment of nearly 20 million New Yorkers is not an interpretation entitled to deference. This Court should vacate the Ban.

IV. The Ban is arbitrary and capricious.

The AR demonstrates that the Ban was "arbitrary [and] capricious" in violation of the

APA. 5 U.S.C. § 706(2)(A). The APA "establishes a scheme of 'reasoned decisionmaking.'" *Allentown Mack Sales & Serv., Inc. v. N.L.R.B.*, 522 U.S. 359, 374 (1998) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983)). It requires an agency to "examine the relevant data and articulate a satisfactory explanation for its action." *State Farm*, 463 U.S. at 43. Though "a court is not to substitute its judgment for that of the agency," *id.*, the APA requires "a thorough, probing, in-depth review" of agency action, *Overton Park*, 401 U.S. at 415.

Here, the AR reveals numerous deficiencies that make the Ban arbitrary and capricious: DHS "offered an explanation for its decision that runs counter to the evidence before the agency"; "failed to articulate a rational connection between the facts found and the choices made"; "entirely failed to consider an important aspect of the problem"; and "relied on factors which Congress has not intended it to consider". *State Farm*, 463 U.S. at 43. The Ban also "rested on a pretextual basis." *Dep't of Commerce*, 139 S. Ct. at 2573. Each of these deficiencies independently compels the conclusion that Defendants' decision to revoke TTP eligibility for millions of New York residents violates the APA.

A. The Ban is contrary to evidence in the AR and lacks a rational connection to that evidence.

Defendants' purported reason for the Ban "runs counter to the evidence before the agency," and fails to reflect "a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43 (internal quotation marks omitted). Defendants offered a single rationale for the Ban: The Green Light Law "prevents DHS from accessing relevant information that only New York DMV maintains, including some aspects of an individual's criminal history." DHSGLL001–002. On that basis, Defendants contended, the Green Light Law "compromises CBP's ability to confirm whether an individual applying for TTP

membership meets program eligibility requirements." *Id.* Yet under the APA, courts will "not defer to [an] agency's conclusory or unsupported suppositions." *McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004); *see also Islander E. Pipeline Co., LLC v. Conn. Dep't of Envtl. Prot.*, 482 F.3d 79, 103 (2d Cir. 2006) (stating that courts may not defer to agency action where the record evidence "directly contradicts the unsupported reasoning of the agency and the agency fails to support its pronouncements with data or evidence"). And the AR reflects just the opposite of DHS's conclusory assertion: that any information contained in the New York DMV database is unnecessary for TTP vetting.

Most notably, the AR is replete with examples of states and localities that restrict or otherwise do not provide DMV data access—all without any indication that CBP's ability to vet TTP applicants is inhibited. Defendants claim that CBP requires access to New York's DMV data, previously available through NLETS, to vet TTP applicants. Defs.' Mem. at 4, 19–20. But Defendants continue to vet TTPs applicants from numerous states and territories that do not share DMV information. According to ICE's operational assessment, "Nevada, Hawaii, Oklahoma, Illinois, South Carolina, Connecticut, Vermont, Guam, and the Virgin Islands" are "[n]ot sharing DMV information with Nlets." DHSGLL018; *see also id.* ("Some states do not participate in Nlets."). USCIS and the U.S. Secret Service similarly reported DMV data restrictions in a host of states and territories. *See* DHSGLL027 (listing nine states); DHSGLL029 (reporting that Illinois, Puerto Rico, and the Virgin Islands do not share driver history, and that several additional states do not share driver's license photos); DHSGLL032 (recognizing that "five other states (Massachusetts, Rhode Island, New Hampshire, Maine, and North Dakota) provide varying degrees of more limited or incomplete access to DMV information to DMV Components"). A spreadsheet sent by ICE Acting Director Albence and

copied to CBP Acting Commissioner Morgan also details that the agency had lacked access to DMV database information from California and Connecticut pre-dating New York's Green Light Law. DHSGLL074. That DHS nowhere indicated that these restrictions would inhibit its ability to vet TTP applicants residing in these other states and localities, nor ultimately banned residents of those states and localities from applying, undermines its contention that the Ban is justified by New York's DMV restrictions. *See Guertin v. United States*, 743 F.3d 382, 388 (2d Cir. 2014) (agency decision arbitrary and capricious both because it was "counter to the relevant evidence presented to the agency," and because it "ignore[d] relevant evidence"); *Brooklyn Heights Ass'n v. Nat'l Park Serv.*, 818 F. Supp. 2d 564, 569 (E.D.N.Y. 2011) (concluding that agency's "revisionist administrative review" was "counter to the evidence before the agency") (internal quotation marks omitted).

Arguing to the contrary, Defendants rely on a statement by CBP Acting Commissioner Morgan that "CBP continues to receive DMV data from other states who have *restricted access to ICE*." DHSGLL009 (emphasis added). But that statement is misleading. It establishes not that CBP has access to DMV data from all states other than New York, but only that CBP has such access for those states that previously provided, but now restrict, DMV data to ICE. Notably, this does not include states that *never* provided DMV data to ICE or participated in NLETS.[15] And the AR makes clear that not all states give DMV data access to ICE or NLETS.

[15] Relying on an extra-record declaration, Defendants also argue "New York was the only state that has terminated CBP's access to driver license and vehicle data via Nlets." Defs.' Mem. at 20 (citing Acosta Decl. ¶ 22). Defendants have now conceded that this declaration should be disregarded, *see supra* at 2–3 n.2, but this argument is misguided in any event: Even if New York is "the only state that has *terminated* CBP's access . . . via Nlets," Defs.' Mem. at 20 (emphasis added), the AR shows there are other states for which CBP lacks—or never had—such access. *See* DHSGLL018 (noting seven states that are "[n]ot sharing DMV information with Nlets").

See, e.g., DHSGLL032 (noting "Other States and Territories Restricting DMV Information Access *to DHS*") (emphasis added). In sum, nothing in the AR supports the notion that CBP has access to DMV data for all other states and localities other than New York, and the AR contains extensive evidence to the contrary. *See New York*, 414 F. Supp. 3d at 554–56 ("Where there is 'no direct evidence' to support an agency's decision, that decision is arbitrary and capricious.") (quoting *State Farm*, 463 U.S. at 52–53).

Furthermore, nothing in the AR establishes that DMV data is available—much less *contemporaneously* available—from countries outside the United States, and Defendants do not argue otherwise. Under Defendants' regulations, eligible applicants for Global Entry include "U.S. citizens, U.S. nationals, and U.S. lawful permanent residents," regardless of the country of their residence, as well as "[c]ertain nonimmigrant aliens from countries that have entered into arrangements with CBP." 8 C.F.R. § 235.12(b)(1); DHSGLL053. Yet DHS did not even undertake to determine whether it has access to DMV data for applicants residing in foreign countries, who remain eligible to apply for TTPs under the Ban.[16] Nor is there any particular evidence that CBP considers such data necessary to vet applicants residing in the United States but not those residing abroad. This significant gap, too, belies Defendants' contention that the lack of DMV data prevents CBP from vetting applicants residing in New York.

To the contrary, the AR contains evidence that DHS does not in fact consider DMV data

[16] Defendants also cite to various provisions of the TTP Handbook which purportedly show that CBP considers DMV data necessary for TTP vetting. *See* Defs.' Mem. at 4, 19. But those provisions do no such thing. The AR shows that CBP continues to accept applications from residents of jurisdictions other than New York that restrict CBP's access to DMV data, as well as from residents of *every* foreign jurisdiction, for which the agency undertook no study as to whether it had access to such data. In light of that evidence, those provisions indicate at most that DMV data could be relevant for vetting TTP applicants, and may be used by CBP where it is available. The AR does not show, however, that CBP ever has depended on access to DMV data to determine an applicant's low-risk status.

necessary to vetting TTP applicants. Nowhere in DHS's operational assessment did agency officials indicate that any criminal history data contained in New York's DMV databases was used—much less necessary for—vetting TTP applicants, or that New York's Green Light Law would otherwise prevent CBP from vetting TTP applicants. *See generally* DHSGLL006–007 (CBP Operational Assessment), -009–013 (Morgan Memo), -031–041 (Policy Memo). While that assessment purported to "reveal[] specific operational concerns created by the Green Light Law," *see* Defs.' Mem. at 2, the only such concern with regard to TTPs identified by CBP in its assessment was that the component would no longer be able to "validat[e] NY driver's licenses presented a part of the interview process for issuance of the TTP cards." DHSGLL006; *see also* DHSGLL010–011 ("NLETS enables CBP to validate NY driver's license identity during the interview process. . . .").

Similarly, the February 4 email by CBP Trusted Traveler Programs Director Pete Acosta—prepared after DHS's operational assessment, a day before Acting Secretary Wolf announced the Ban—shows only that the Green Light Law prevents CBP accessing data which *could* be relevant to TTP vetting, not that the agency actually considers or has considered such information *necessary* for vetting. *See* DHSGLL062–063; *see also* Defs.' Mem. at 6, 19 (relying on the Acosta email to suggest DMV data is necessary for TTP vetting). And nothing exists in the AR to suggest that CBP ever used such data to verify applicants' low-risk status. *See* DHSGLL010–011 (noting that access to NLETS is relevant to TTP applications for the purpose of "validat[ing] NY driver's license identity during the interview process," but not mentioning verification of low-risk status). The notion that CBP has depended on DMV data to verify low-risk status is belied both by the agency's repeated, consistent pronouncements in its operational assessment, which disclosed no such need, and its treatment of applicants residing in

jurisdictions in which such data is or may be unavailable.

The Ban is illogical in other ways, too. The Ban is irrationally over-inclusive in at least two respects: First, it applies to millions of New York residents for whom DMV has no records. Defendants assert that "application of the TTP Decision to individuals without New York licenses was reasonable" because CBP is unable to verify low-risk status without querying New York DMV to verify such records do not exist. Defs.' Mem. at 22–23. But the Ban applies to millions of young New Yorkers—such as named plaintiff S.T., an infant child—about whom relevant DMV records could not plausibly exist. Second, the categorical determination that DHS cannot verify low-risk status as to any New York resident is also irrationally over-inclusive, as it would apply to individuals with top-secret security clearances and others about whom DHS has access to significant information.

Defendants also claim DHS needs contemporaneous access to DMV data to verify low-risk status. Defs.' Mem. at 19. But that claim is belied by the fact that the Ban allows the 814,000 New York residents currently enrolled in TTPs to keep their membership until its next expiration, which may be in as many as five years, notwithstanding that CBP will not have access to New York DMV data during that time. *See* DHSGLL034, -050. Furthermore, CBP announced the Ban nearly two months after the Green Light Law took effect, and there is no indication in the AR that during this period CBP agents had difficulty verifying low-risk status as to any New York applicants or current enrollees. *Cf.* DHSGLL005 (instructing DHS components that the operational assessment "should in no way impede or delay any action to implement appropriate mitigation measures to ensure the safety and security of the American people"). These logical flaws further demonstrate that Defendants' decision lacks "a rational connection between the facts found and the choice made," and is therefore arbitrary and

capricious. *State Farm*, 463 U.S. at 43 (internal quotation marks omitted).

B. The agency failed to consider important factors and relied on impermissible factors.

The Ban is also arbitrary and capricious because it "entirely failed to consider . . . important aspect[s] of the problem," *id.*, namely, the decrease in eligible TTP applicants, lack of consistent eligibility criteria, and consequent threat to public safety that would result from banning millions of New York residents. *See supra* Part III.A.; *see also, e.g.*, *Humane Soc'y of U.S. v. Zinke*, 865 F.3d 585, 606 (D.C. Cir. 2017) (agency decision arbitrary and capricious because it failed to consider the impact of the loss of gray wolves' historical habitat on the survival of the gray wolves as a whole); *Prometheus Radio Project v. F.C.C.*, 373 F.3d 372, 420–21 (3d Cir. 2004) (vacating an agency's repeal of a rule where the agency failed to consider or even acknowledge the effect of its decision on minority television station ownership); *New York*, 414 F. Supp. 3d at 554–56 (rule arbitrary and capricious where agency failed to consider its impact on healthcare delivery in emergency situations, and "assumed away the problem with conclusory statements").

The agency also failed to consider obvious alternative solutions that would not entail the same detrimental impacts on program participation and consistency of eligibility criteria. DHS's operational assessment of the Green Light Law revealed a single concern related to TTPs: "validating NY driver's licenses presented a part of the interview process for issuance of the TTP cards." DHSGLL006; *accord* DHSGLL010–011. That concern suggests an obvious solution: require New Yorkers to present other identification at TTP interviews such as the valid passport that already is required for such applications. Instead, however, Defendants categorically revoked TTP eligibility from millions of New York residents, drastically reducing the number of eligible program applicants and resulting in inconsistent eligibility criteria. *See supra* Part III.A.

By choosing a response that was "plainly inferior" in terms of the metrics of the IRTPA without an adequate explanation for doing so, Defendants' actions were arbitrary and capricious. *See Pub. Citizen, Inc. v. Mineta*, 340 F.3d 39, 56 (2d Cir. 2003); *see also Delaware Dep't of Nat. Res. & Envtl. Control v. E.P.A.*, 785 F.3d 1, 11 (D.C. Cir. 2015), *as amended* (July 21, 2015) (reversing where agency did not fully consider alternatives); *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 825–26 (D.C. Cir. 1983) (rescission of ban was arbitrary where the agency failed to consider alternatives to complete elimination of the ban); *Action on Smoking & Health v. Civil Aeronautics Bd.*, 699 F.2d 1209, 1216, 1218 (D.C. Cir. 1983) (agency's decision failed to give sufficient consideration to narrower alternatives).

Furthermore, the AR plainly shows that the agency "relied on factors which Congress has not intended it to consider" in setting TTP eligibility criteria. *State Farm*, 463 U.S. at 43. While the AR does not support that DHS actually, as a matter of policy or practice, require criminal history data from DMV systems for TTP vetting, *see supra* at Part IV.A., the AR is nonetheless replete with predictions of how the Green Light Law will affect *other*, unrelated agency operations, chief among them ICE enforcement activities, *see* DHSGLL001–002, -032–033. Indeed, from the outset, agency leadership sought to "take a DHS-wide approach to deal with [the] issue," unrelated to specific concerns about TTP vetting. DHSGLL065. As discussed *infra*, this approach indicates the Ban was driven by concerns other than TTP vetting, in a concerted attempt by DHS to punish New York for its policy decisions and coerce the state to change its policy.

But under the IRTPA and its implementing regulations, the effect of a State's policy on ICE's enforcement activities is not a basis for *CBP*, a separate DHS component, to change how it goes about carrying out its duties in administering the TTP program. *See* 8 U.S.C. § 1365b(i)(3)

(instructing DHS to "provide clear and consistent eligibility guidelines for applicants in low-risk traveler programs"); *id.* §§ 1365b(k)(1)(A)–(B) (explaining that "expediting previously screened and known travelers . . . can permit inspectors to better focus on identifying terrorists"); 8 C.F.R. § 235.12(a) (explaining that the purpose of Global Entry is to "expedite[] the movement of *low-risk air travelers* into the United States") (emphasis added); *id.* § 235.12(b)(1)–(2) (listing eligibility criteria and disqualifying factors for individual applicants and not mentioning immigration enforcement). Nor is coercing states into changing (or not changing) certain state laws a permissible basis for reasoned agency decisionmaking. The agency's decision was therefore arbitrary and capricious. *See League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 10–12 (D.C. Cir. 2016) (disregard for statutory criterion renders agency decision arbitrary under the APA); *J.E.C.M. v. Lloyd*, 352 F. Supp. 3d 559, 583 (E.D. Va. 2018) (plaintiffs stated claim that agency action was "motivated by 'factors which Congress has not intended it to consider,'" and hence arbitrary and capricious, where agency was focused on immigration enforcement unrelated to the purpose of the program being administered).

C. The agency's rationale was pretextual.

Finally, the Ban is arbitrary and capricious because its purported rationale—that the Green Light Law prevents CBP from accessing DMV data, without which the agency cannot verify the low-risk status of TTP applicants—was pretextual. *See Dep't of Commerce*, 139 S. Ct. at 2573.[17]

[17] The AR is sufficient for the Court to conclude that DHS's reason for the Ban was a pretext. *See New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 661 (S.D.N.Y. 2019), *aff'd in part, rev'd in part on other grounds sub nom. Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019) (finding that the AR alone supported a prima facie showing of pretext). In the alternative, however, the AR at least contains a "strong showing" of "bad faith or improper behavior" warranting extra-record discovery and precluding summary judgment in Defendants' favor. *See*

Two days after the Green Light Law took effect, ICE Acting Director Albence emailed CBP Acting Commissioner Morgan and others urging that "we need to be aggressive, as this will likely spread to other localities if there is not a strong response from us." DHSGLL065. Albence proposed a "consolidated approach to what services we can immediately pull back from NY as a result of this." DHSGLL065. He also noted that "Ken"—presumably Ken Cuccinelli, then-Acting Deputy Secretary of DHS—had "in other contexts . . . mentioned things like no longer adjudicating applications." *Id.* Morgan replied, "Agreed." *Id.*

Subsequently, DHS undertook an assessment of the effects of New York's Green Light Law on its operations. That assessment revealed a number of potential impacts, but nowhere did it indicate that the law would prevent CBP from adequately verifying a TTP applicant's low-risk status. *See generally* DHSGLL006–007, -009–013, -031–041; *see supra* Part IV.A.

Only after the agency's internal assessment, in an email prepared the day of the President's State of the Union and one day before the announcement of the Ban, did an agency official suggest that the law would inhibit the vetting of TTP applicants. DHSGLL062–063. That email followed a series of phone calls not memorialized in the AR, beginning with the DHS Deputy General Counsel's request for a phone call "to discuss the impact of the New York DMV law on the Global Entry process from the operational perspective." DHSGLL063. This email exchange also refers to other emails not included in the record. DHSGLL062.

These "conspicuous procedural irregularities" support a finding of pretext. *New York*, 351 F. Supp. 3d at 661; *see also Dep't of Commerce*, 139 S. Ct. at 2574 (affirming the finding of pretext where the agency "adopted the Voting Rights Act rationale late in the process," among

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Nat'l Audubon Soc'y v. Hoffman, 132 F.3d 7, 14 (2d Cir. 1997) (citing *Overton Park*, 401 U.S. at 420).

other indicia that "the sole stated reason . . . seems to have been contrived"). They plainly reveal that the Ban had nothing to do with TTP vetting, but instead was part of a pre-ordained "aggressive" response by DHS, driven by unrelated operational concerns. DHSGLL065. As Albence proposed in his December 16 email, that response would "immediately pull back [services] from N[ew] Y[ork]" in order to coerce the State to change its policy, and to prevent the policy's "likely spread to other localities." *Id.* In addition, the timing and substance of the hurried series of phone calls and emails immediately preceding the Ban, raising for the first time the problem of vetting TTP applicants, at minimum suggest a search for explanations to justify a decision that had already been made. *Tummino v. Von Eschenbach*, 427 F. Supp. 2d 212, 233 (E.D.N.Y. 2006) ("[A] plausible interpretation . . . is that senior management . . . had long since decided" how to proceed, "but needed to find acceptable rationales for the decision").

The AR also "reveal[s] a significant mismatch between the decision . . . made and the rationale he provided." *See Dep't of Commerce*, 139 S. Ct. at 2575. By the agency's own findings, the Ban bars New Yorkers on the basis that New York DMV data is unavailable to CBP, but leaves the program open to residents of other States and localities for which such data is also unavailable, as well as to U.S. citizens and nationals residing in any country outside the United States without regard to whether such data is available. *See supra* Part III.A. The Ban is riddled with other logical flaws, the result of which is that it bars New York residents for whom the New York DMV has no records, while leaving the program open to non-New York residents for whom it may or does have records. Quite simply, the agency's decision "cannot be adequately explained in terms of [its purported rationale]." *See Dep't of Commerce*, 139 S. Ct. at 2575.

The above evidence together makes clear that a need for DMV data to vet TTP applicants

was not the real reason for the Ban. Instead, the agency sought to make an example of New York for reasons wholly unrelated to TTP vetting, in order to coerce the State into changing its policy and to discourage other State and local jurisdictions from adopting similar policies. The APA requires agencies to "offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public." *Id.* at 2575–76. Because Defendants failed to do so, their action was arbitrary and capricious and must be set aside.

V. Vacatur is the appropriate remedy for the Ban.

Contrary to Defendants' claim, vacatur is the appropriate remedy if this Court concludes the Ban violates the APA. It is well settled that vacatur is the ordinary result where, as here, an agency's action is unlawful.[18] *See Camp v. Pitts*, 411 U.S. 138, 143 (1973) (vacating agency action and remanding for further proceedings); *Guertin v. United States*, 743 F.3d 382, 388 (2d Cir. 2014) (same). This Court recognized as much quite recently. *See New York*, 351 F. Supp. 3d at 673–75 ("[V]acatur and remand is the 'usual' remedy for violations of the APA.") (quoting *Guertin*, 743 F.3d at 388).

Those rare instances in which courts have remanded without vacatur to remedy APA violations exist only "where the agency shows 'at least a serious possibility that [it] will be able to substantiate its decision on remand' and that 'the consequences of vacating may be quite disruptive.'" *U.S. Dep't of Commerce*, 351 F. Supp. 3d at 673–74 (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 151 (D.C. Cir. 1993)) (alternation in original); *see also Nat. Res. Def. Council v. E.P.A.* 808 F.3d 556, 584 (2d Cir. 2015) (reaffirming vacatur as the ordinary remedy for APA violations while recognizing courts' discretion to remand

[18] The vacatur remedy is supported by the text of the statute, which provides that the reviewing court "shall . . . hold unlawful and *set aside* agency action . . . found to be" in violation of the APA. 5 U.S.C. § 706(a)(2) (emphasis added).

without vacatur where equity so demands).

Defendants can make no such showing in this case. Here, the Ban violates the APA in a number of ways, any one of which independently suffices to justify vacatur of the Ban by this Court. *See supra* Parts II–IV. Were this case remanded, it is highly unlikely that Defendants could substantiate their decision categorically to revoke TTP eligibility for millions of New York residents. Nor can Defendants establish that vacatur of the Ban would cause any disruption that might otherwise justify remand without vacatur as an equitable remedy. To the contrary, there is no showing that CBP does not continue seamlessly to vet TTP applicants from a host of other states and localities that, like New York, restrict or otherwise do not offer DHS access to DMV data. DHSGLL032, -075. CBP has not banned any other state residents from TTPs notwithstanding not having access to those states' DMV data. There is simply no reason CBP cannot resume vetting New York applicants in the same manner it vets applicants from these other jurisdictions.

CONCLUSION

The Ban unmistakably violates the APA. For all the foregoing reasons, the Court should grant Plaintiffs' joint cross-motion for partial summary judgment, deny Defendants' motion for partial summary judgment, and enter judgment in favor of Plaintiffs on their APA claims.

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Respectfully submitted,

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