UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

A.B.-B., *et al.*, *Plaintiffs*, v. MARK A. MORGAN, Acting Commissioner, United States Customs and Border Protection, *et al.*, *Defendants*.	Case No. 20-cv-0846 (RJL)

PLAINTIFFS' RESPONSE TO DEFENDANTS' NOTICE OF PURPORTED RATIFICATION

Defendants' last-minute effort to save their policy of using CBP agents to conduct credible fear interviews is futile. Plaintiffs have challenged that policy because, among other legal defects, the officials responsible for the policy held their positions unlawfully. Defendants now submit a purported "ratification" of that policy by one of the very officials whose legitimacy Plaintiffs have challenged. Defendant Wolf cannot "ratify" anything as Acting Secretary of DHS, because he holds that position in violation of the FVRA and DHS's organic statute—and, in any event, an action that is unlawful under the FVRA cannot be ratified. Moreover, Defendants' invocation of *M.M.V. v. Barr*, 2020 WL 1984309 (D.D.C. Apr. 27, 2020), does nothing to change the jurisdictional analysis in this case because the issue in *M.M.-V.*—whether there was a "written" policy or procedures upon which jurisdiction under 8 U.S.C. § 1252(e)(3) could be premised—is not presented here. Plaintiffs believe full briefing on the newly raised FVRA issues would be appropriate, but in the meantime, Plaintiffs offer three points in response to Defendants' eleventh-hour filing.

1. Chad Wolf is not lawfully serving as Acting Secretary of DHS and therefore cannot ratify policies adopted by CBP and USCIS. The office of DHS Secretary became vacant on April 10, 2019, *see* PI Reply 7–9, and the President has not nominated a new Secretary. The 210-day period during which an acting official could fill the office of Secretary has long since expired. *See* 5 U.S.C. § 3346(a)(1). Wolf's "ratification" is thus itself void under the FVRA and the Administrative Procedure Act. *See* 5 U.S.C. §§ 706 & 3348(d)(1); PI Mem. 12–14.

Even apart from the FVRA's time limits, Wolf did not validly become Acting Secretary. As Plaintiffs have explained (PI Mem. 20), Wolf was elevated to the position of Acting Secretary via a DHS succession order issued by former Acting Secretary Kevin McAleenan. That order was void under the FVRA because McAleenan himself was unlawfully serving as Acting Secretary. *Id.* at 18–19.

Defendants again attempt to defend the validity of McAleenan's service. Defs.' Notice at 5 n.2. They repeat their assertion that, in April 2019, former Secretary Kirstjen Nielsen changed the order of succession for the Secretary, placing McAleenan's position of CPB Commissioner third in line. *Id.*; PI Opp. at 36. Specifically, Defendants argue that "the order of succession change that was signed and approved by Secretary Nielsen * * * is generally applicable regardless of the reason for the vacancy." Defs.' Notice at 5 n.2 (citing Dk. 17-1, at ECF p.89–90).

As Plaintiffs showed in their Reply, however, the documents furnished by Defendants do not say what Defendants claim. The order signed by Secretary Nielsen that Defendants now cite did only one thing: it replaced "Annex A of DHS Orders of Succession and Delegations of Authorities for Named Positions." Dk. 17-1, at ECF p.90. And Annex A is *not* a succession order specifying who becomes Acting Secretary upon the Secretary's resignation. Rather, it is—

as Plaintiffs previously pointed out (PI Reply at 15)—a delegation of authority for situations in which the Secretary is temporarily unavailable due to disasters or emergencies. Dkt. 17-1, at ECF p.12, ¶ II.B ("*delegat[ing]* to the officials occupying the identified positions in the order listed (Annex A), my authority to exercise the powers and perform the functions and duties of my office, to the extent not otherwise prohibited by law, *in the event I am unavailable to act during a disaster or catastrophic emergency*" (emphasis added)). By contrast, the very same order provided that, "[i]n case of the Secretary's death, *resignation*, or inability to perform the functions of the Office, the orderly *succession of officials* is governed by Executive Order 13753." *Id*. ¶ II.A (emphasis added).

Defendants have apparently confused what Secretary Nielsen did in April 2019 with what Acting Secretary McAleenan later did in November. On November 8, McAleenan signed an "Amendment to the *Order of Succession* for the Secretary of Homeland Security." Dkt. 17-1, ECF p.92 (emphasis added). That amendment provides that the April order approved by Nielsen "is amended hereby to state as follows: 'In case of the Secretary's death, resignation, or inability to perform the functions of the Office, the order of succession of officials is governed by Annex A.'" *Id.* Illustrating the change that was made in November (not in April), Nielsen's April order had stated:

> In case of the Secretary's death, resignation, or inability to perform the functions of the Office, the orderly succession of officials *is governed by Executive Order 13753, amended on December 9, 2016*.

Dkt. 17-1, ECF p.12 (emphasis added). But the November update to that order, issued after the amendment made by McAleenan, stated instead:

> In case of the Secretary's death, resignation, or inability to perform the functions of the Office, the order of succession of officials *is governed by Annex A*.

Id., ECF p.46 (emphasis added).

Because Defendants have offered no legal basis for Kevin McAleenan's acting service, and because it was only McAleenan's November succession order that made Chad Wolf the Acting Secretary, Wolf's purported "ratification" of the policies challenged here is no more valid than the policies themselves.

2. Even if Defendants had identified a lawfully serving DHS official with the authority to perform the duties of the Secretary, that official could not have ratified the policies challenged here. The FVRA expressly states that, when an illegally serving acting official performs a "function or duty" assigned by statute exclusively to the vacant office, that person's action "may not be ratified." 5 U.S.C. § 3348(d)(2); *see* PI Mem. 9.

As Plaintiffs have explained, committing CBP and its resources and personnel to an agreement like the MOA is a function or duty assigned by statute exclusively to the Commissioner of CBP. PI Mem. 12–13. Likewise, establishing USCIS's policies for performing credible-fear adjudications is a function or duty assigned by statute exclusively to the Director of USCIS. *L.M.-M. v. Cuccinelli*, __ F. Supp. 3d __, 2020 WL 985376, at *19-23 (D.D.C. Mar. 1, 2020). And as Plaintiffs have explained (PI Mem. 12–13), that is no less true simply because the DHS Secretary, like the head of every federal department, is vested with the functions of the entire Department. 6 U.S.C. § 113(a)(3). Were it otherwise, the penalties Congress imposed in § 3348(d) would never apply—an untenable interpretation of the statute. *See* PI Mem. 13. Thus, if the actions described above are performed by an unlawfully serving Commissioner or Director in violation of the FVRA, they cannot be ratified. *See L.M.-M.*, 2020 WL 985376, at *20 (explaining that whether an action is void and whether it may be ratified are questions governed by the "same definition" in § 3348(d)).

That ends the matter. If, however, the Court has questions about this issue, Plaintiffs respectfully request the opportunity to file a supplemental brief. After all, although Plaintiffs briefed the meaning of "function or duty" in their opening memorandum (PI Mem. 9, 12–13), Defendants chose to devote only a cursory, two-sentence footnote to that issue in their opposition. *See* PI Opp. at 34 n.8. Now, however, less than 48 hours before this Court's scheduled preliminary injunction hearing, Defendants have attempted to shoehorn briefing of this complex issue into a few paragraphs of a supplemental filing. To the extent the Court intends to rule on this basis, it merits substantial briefing, not the fly-by-night approach represented by Defendants' filing.

3. As to *M.M.V.*, Defendants emphasize that the court held the 60-day filing limitation in 8 U.S.C. § 1252(e)(3) to be jurisdictional. Notice 1–2. But Defendants never explain how that analysis is relevant here—and it is not. As Plaintiffs previously noted, this Court need not address whether the 60-day deadline in § 1252(e)(3)(B) is jurisdictional unless the Court determines that the MOA is not a written procedure implementing a policy—a position that is not credible. *See* PI Reply at 2–4.[1]

Indeed, *M.M.V.* confirms that the MOA is a written procedure implementing a policy and for that reason is subject to challenge by Plaintiffs here. The plaintiffs in *M.M.V.* similarly sought to challenge the use of CBP agents to conduct credible fear interviews under an earlier, July 2019 MOA between CBP and USCIS. Accepting Defendants' position that the July MOA constituted the implementation of that policy (*see* PI Reply 2–3), the court in *M.M.V.* identified

[1] Even if Defendants were correct on this point, Plaintiffs would be entitled to challenge the 2019 delegation. *M.M.V.*'s holding that the statute of limitations in § 1252(e)(3)(B) is jurisdictional—and the language in *Am. Immigration Lawyers Ass'n v. Reno ("AILA")*, 199 F.3d 1352 (D.C. Cir. 2000), on which *M.M.V.* relies—is irreconcilable with controlling Supreme Court precedent. PI Mem. at 43–45; PI Reply 4–6.

the July MOA as Defendants' "written decision to assign CBP agents to perform" credible fear interviews. 2020 WL 1984309 at *18. The court then dismissed those claims because they were not brought within 60 days of the July MOA's approval. *Id*. The *M.M.V.* court thus recognized the centrality of the MOA in authorizing and enabling CBP's participation in credible fear determinations.

The plain text of the MOA and the 2019 delegation compel the same conclusion here. PI Reply 2. But even if they did not, Defendants' extensive and exclusive reliance on the MOA in *M.M.V.* (PI Reply 2–3) prevents them from taking a contrary position in the wake of *M.M.V.* Courts "invoke judicial estoppel where a party assumes a certain position in a legal proceeding, succeeds in maintaining that position, and then, simply because his interests have changed, assumes a contrary position." *Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 798 (D.C. Cir. 2010) (internal quotations and alterations omitted); *see also, e.g.*, *New Hampshire v. Maine*, 532 U.S. 742 (2001). Courts deciding whether to estop a party from asserting an inconsistent position also routinely consider whether the party "derive[s] an unfair advantage or impose[s] an unfair detriment on the opposing party if not estopped." *Moses*, 606 F.3d at 798. All of those factors are present here: Defendants prevailed in *M.M.V.* on the basis of their now-disavowed position that the policy at issue depends on an MOA between CBP and USCIS, they have changed that position solely based on "the exigencies of the moment" (*Maine*, 532 U.S. at 750), and it would be manifestly unfair to prevent Plaintiffs from bringing their challenges in this Court—or any other court—as a result of Defendants' results-driven reversal.[2]

[2] Moreover, application of judicial estoppel against the government is appropriate here, because "this is not a case where estoppel would compromise a governmental interest in enforcing the law" or where the government's inconsistent position flows from changed facts or alterations to public policy. *Maine*, 532 U.S. at 755. Rather, it is a case in which the

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Respectfully submitted,

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government has, in rapid succession, made two inconsistent arguments in an attempt to evade review of the very same public policy.