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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

LA CLÍNICA DE LA RAZA, ET AL., Plaintiffs, v. DONALD J. TRUMP, ET AL. Defendants.	Case No. 4:19-cv-04980-PJH **REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR RECONSIDERATION** Courtroom: 3 Judge: Hon. Phyllis J. Hamilton Trial Date: None set Action Filed: August 16, 2019

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I. INTRODUCTION

Defendants concede in one sentence of their "Opposition" brief that the Court should rule for Plaintiffs on the sole ground on which Plaintiffs have moved for reconsideration. *See* Dkt. 184 at 1:4-6 ("Plaintiffs are correct that the President did not designate Mr. McAleenan as Acting Secretary under the Federal Vacancies Reform Act"); *id.* at 2:18-19 (same). On this question, there is no dispute between the parties. That should be the end of this matter. The Court should grant Plaintiffs' Motion for Reconsideration and deny Defendants' Motion to Dismiss with regard to Counts 3, 5, and 8 of the Amended Complaint.

Defendants, however, devote the remainder of their eight-page Opposition to arguing that this Court should reconsider a *different* part of its Order, in which the Court ruled for *Plaintiffs*: namely, the Court's ruling that Acting Secretary McAleenan was not properly appointed under the Homeland Security Act (HSA) and the regulations promulgated thereunder. *See* Dkt. 177 ("Order") at 24-25. Defendants' brief reads like a cross-motion for reconsideration that ignores the substantive and procedural requirements for seeking reconsideration in this District. Defendants did not comply with Local Rule 7-9(a)'s requirement that they receive leave from the Court to request reconsideration of the Court's ruling. Nor have they explained, as required by Rule 7-9(a) and the law of the Ninth Circuit, how any intervening issue of fact or law supports their request for reconsideration of this issue. Indeed, Defendants do not allege any such change in fact or law in their opposition brief. Instead, they merely take a second bite at the apple, rearguing that Mr. McAleenan's assumption of the role of Acting Secretary was proper under the HSA—a contention already rejected by this Court after full briefing. Local Rule 7-9(a) was designed to avoid this precise situation—a party arguing for reconsideration without permission from the Court on an already-rejected ground, without alleging any further factual or legal developments. This Court should not entertain this improper argument.

If the Court does reach the Defendants' argument on the merits, it should reject the argument, just as it did in its prior Order on Defendants' Motion to Dismiss. Defendants' arguments are as incorrect now as they were when the Court rejected them in the prior Order. Indeed, there is even more support for Plaintiffs' position now. Although Defendants fail to

inform the Court of this, another federal district court issued a decision thirteen days before Defendants' Opposition brief was filed (the day after Plaintiffs filed their Motion for Reconsideration) rejecting each of Defendants' arguments. And just two days ago, another Court in this District rejected the precise argument Defendants make in their Opposition, and expressly adopted the reasoning in this Court's August 7, 2020 Order. In short, no reconsideration of this Court's ruling on the HSA issue is warranted. The Court should grant Plaintiffs' Motion for Reconsideration and deny the Motion to Dismiss as to Counts 3, 5, and 8.

Defendants' Opposition is remarkable in several respects. It is remarkable for its lack of candor in failing to inform the Court of what was then the only extant judicial decision addressing its arguments. It is remarkable in its disregard for the Court's rules for seeking reconsideration of a prior ruling. And it is remarkable that Defendants would simply concede in a single sentence that the premise of this Court's prior ruling in their favor was factually untrue, without any explanation for why they allowed that decision to stand without comment to this Court for 48 days. Even as they disavowed in *other* federal courts the basis for their win in this Court, Defendants stood on their victory here until forced to respond to Plaintiffs' Motion for Reconsideration. *Cf. United States v. Young*, 470 U.S. 1, 25 (1985) (Brennan, J., concurring and dissenting) (while "both sides are subject to ethical rules of rhetorical conduct," the Supreme Court has "long emphasized that a representative of the United States Government is held to a *higher* standard of behavior"). Regardless, Defendants' concession that the "the President did not appoint Acting Secretary McAleenan under the FVRA" (Opp. 2) allows the Court to correct a mistake of fact in its prior ruling and deny Defendants' Motion to Dismiss the affected claims.

II. ARGUMENT

A. Plaintiffs' Motion Should Be Granted in Light of Defendants' Concession

As the Court explained in its August 7, 2020 Order, while the FVRA generally constitutes the exclusive means to temporarily authorize an acting official to perform the duties of an executive office that requires Senate confirmation, there is an exception when another statute designates an acting official or authorizes the President or head of an executive department to designate an acting official. 5 U.S.C. § 3347; Order at 23. The organic statute for the Department

of Homeland Security ("DHS") contains such an exception. It specifies that the Deputy Secretary is the Secretary's first assistant for purposes of the FVRA; that notwithstanding the FVRA, the Under Secretary for Management shall serve as Acting Secretary if neither the Secretary nor Deputy Secretary is available; and that, notwithstanding the FVRA, "the Secretary may designate such other officers of the Department in further order of succession to serve as Acting Secretary." 6 U.S.C. § 113(a)(1)(A), (g)(1), (g)(2); Order at 23.

In its August 7, 2020 Order, the Court concluded that "at the time of [Secretary] Nielsen's resignation, Executive Order 13753 governed the order of succession," because that was the order that Secretary Nielsen had designated pursuant to the DHS organic statute. Order at 25-26. The Court further observed that Plaintiffs properly alleged that Mr. McAleenan was not next-in-line at the time under the order of succession set out in subsection (a) of Executive Order 13753. *Id.* at 26. The Court ruled, however, that the President may also appoint an Acting Secretary pursuant to the FVRA, and that subsection (b) of Executive Order 13753 expressly reserves the President's right to depart from the order of succession in subsection (a) to the extent permitted by the FVRA. *Id.* Thus, the Court held, "as long as McAleenan's appointment was permitted by the FVRA, the President had the discretion to appoint him as Acting Secretary"—regardless of the order of succession adopted by Secretary Nielsen. *Id.* And because "Plaintiffs do not allege that McAleenan failed to meet one of the three options provided by the FVRA for the temporary appointment of officers," the Court granted Defendants' motion to dismiss Counts 3, 5, and 8 of Plaintiffs' Complaint. *Id.*

The factual premise of the Court's ruling was that the President had appointed Mr. McAleenan to the position of Acting Secretary pursuant to the FVRA. Defendants did not argue that the President had done so in its Motion to Dismiss, and Plaintiffs obtained leave to seek reconsideration of that ruling based, *inter alia*, on subsequent admissions by Defendants that Mr. McAleenan was *not* appointed by the President pursuant to the FVRA.

Defendants now squarely concede that the premise of the Court's ruling dismissing Counts 3, 5, and 8 was mistaken: "Plaintiffs are correct that the President did not appoint Acting Secretary McAleenan under the FVRA." Dkt. 184 at 2. There is thus no dispute regarding the narrow

ground on which Plaintiffs seek reconsideration. Plaintiffs and Defendants agree that this Court's decision was premised on a mistake of fact. Plaintiffs' Motion for Reconsideration should therefore be granted.

Once the issue of appointment by the President under the FVRA is taken off the table, it is clear that Defendants' Motion to Dismiss Counts 3, 5, and 8 must be denied. The only other way for Mr. McAleenan to have been appointed Acting Secretary was pursuant to the order of succession designated by Secretary Nielsen. And the Court already ruled that Mr. McAleenan was not next-in-line under that order of succession. Order at 25-26. Accordingly, Mr. McAleenan never validly assumed the duties of Acting Secretary of DHS. And the public charge rule promulgated by him is invalid and has no force or effect. *See* 5 U.S.C. § 3348(d)(1) (an action taken by any person who is not acting under the FVRA's appointment provisions or another statute's appointment provisions in the performance of any function or duty of a vacant office "shall have no force or effect"); 5 U.S.C. § 706(2) (court shall hold unlawful and set aside agency actions found to be "not in accordance with law" or "in excess of statutory . . . authority"); *see also SW Gen., Inc. v. NLRB*, 796 F.3d 67, 80 (D.C. Cir. 2015) (action taken by improperly appointed officer is invalid under the APA, and is not harmless error where Court "cannot be confident that the [Rule] would have issued under an Acting [officer] other than [the challenged officer]"), *aff'd*, 137 S. Ct. 929 (2017).

B. The Court Should Not Consider the Arguments Presented in Defendants' Opposition, Which Is a *De Facto* Motion for Reconsideration

Rather than dispute the grounds on which Plaintiffs sought reconsideration, Defendants' Opposition seeks *de facto* reconsideration of the portion of the Court's ruling regarding the applicable order of succession, which went *against* Defendants. Without expressly acknowledging what they are doing, Defendants urge the Court to reconsider its holding that Mr. McAleenan was not properly appointed under the order of succession adopted by the Secretary pursuant to the HSA. In so doing, Defendants fail to comply with the requisite procedural and substantive requirements for motions to reconsider. Defendants' attempt to reargue an issue they already briefed and lost should be rejected on that basis.

Under this Court's Local Civil Rules, a party may seek reconsideration of an interlocutory order only with leave of court and only upon a proper showing. N.D. Cal. L. Civ. R. 7-9. The Court will grant leave only based upon newly available facts or law or when a court "manifest[ly] fail[ed]" to consider arguments previously presented. *Id.*; *cf. Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (under FRCP 59(e), "a motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law"). Defendants' *de facto* request for reconsideration—which rehashes the same arguments using the same facts and law—does not satisfy those requirements.

Disagreement with the Court's ruling alone is not a basis for reconsideration. *See Swoopes v. Doctors Med. Ctr.*, No. C 07-0101 PJH, 2007 WL 1518074, at *1 (N.D. Cal. May 21, 2007) ("A motion for reconsideration is not a vehicle permitting the unsuccessful party to reiterate arguments."). In fact, this Court's rules expressly bar counsel who seek reconsideration from "repeat[ing] any oral or written argument made by the applying party in support of . . . the interlocutory order which the party now seeks to have reconsidered." L. Civ. R. 7-9(c). Nor is it appropriate to present new variations on an argument that could have been raised earlier. *See* L. Civ. R. 7-9(b)(1) ("The party also must show that in the exercise of reasonable diligence the party applying for reconsideration did not know such fact or law at the time of the interlocutory order"); *cf. Kona Enters., Inc*, 229 F.3d at 890 ("A Rule 59(e) motion may *not* be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation.") The opportunity to file an opposing brief should likewise not be treated as an opportunity to relitigate prior issues. *See Ortiz v. Valdes*, 714 F. Supp. 2d 230, 233 (D.P.R. 2010) (expressing disinclination to consider arguments in opposition that "attempt[ed] to relitigate" a dispute from the motion-at-issue).

Defendants' Opposition is a *de facto* motion for reconsideration because it focuses exclusively on an issue on which the Court ruled for Plaintiffs after full briefing by the parties, and with which Defendants disagree. Defendants describe their arguments as "respectfully submit[ting an] additional explanation" and contend that the Court erred in finding that Mr. McAleenan was

not next in the order of succession. Dkt. 184 at 1. Defendants acknowledge that their arguments are points that "Defendants presented previously, which are further expanded" therein. *Id.* at 2. Each of Defendants' "additional explanation[s]" relies upon factual or legal arguments that Defendants could have offered during briefing on the Motion to Dismiss.[1] *Id.* at 1.

Defendants argue that Plaintiffs' Motion should be denied because the Court erred in its prior decision regarding the order of succession. If an opposition to a motion for reconsideration can prevail only by reconsidering a separate holding unchallenged by the motion, that argument is not a proper opposition. It is instead its own motion for reconsideration. Defendants have not followed, and would not meet, Local Rule 7-9's requirements to seek or obtain reconsideration only where *new* law or facts are available, or where the Court has failed to consider prior arguments. There is no new information that supports Defendants' request for reconsideration, which they concede to be based on arguments this Court already considered and rejected. The Court therefore should decline to consider Defendants' improper request to reconsider its ruling on the order of succession.

C. Even If This Court Considers Defendants' Previously Rejected Theory, the Contentions Are Meritless

This Court already has considered and rejected Defendants' contention that Mr. McAleenan was properly appointed under the HSA. Because, however, Defendants' Opposition impermissibly expands on its prior briefing, Plaintiffs will (once again) address Defendants' meritless arguments.

As this Court ruled, when Mr. McAleenan purported to assume the Acting Secretary's office, he was not next in line under the relevant succession order. Order at 25-26. Specifically,

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[1] To the extent that Defendants seek to relitigate the issues based upon their disagreement with the Government Accountability Office (GAO), they should not be permitted to do so for two reasons. First, implicit in the concept of reconsideration is that the subsequent legal or factual developments be contrary to the Court's prior holding. The GAO's interpretation of Delegation No. 00106 is entirely consistent with this Court's interpretation. Second, while Plaintiffs' Motion for Reconsideration noted the persuasiveness of the GAO's legal conclusion, Plaintiffs relied upon the report primarily because it undermined the *factual* predicate of the Court's order. *See* Dkt. 183 at 9 ("Beyond the legal persuasiveness, the decision's factual revelations—that Defendants deny that the FVRA was the basis of succession—independently justify reconsideration . . . .")

in DHS Delegation No. 00106, Secretary Jeh Johnson designated two distinct succession orders: one in case of the Secretary's death, resignation, or inability to perform the office; and another in the event the Secretary is "unavailable to act during a disaster or catastrophic emergency." Order at 23. The order of succession in case of death, resignation, or incapacity was to be governed by Executive Order 13753. *Id.* The order of succession in case of unavailability due to disaster or emergency was set forth in an "Annex A." *Id.* at 24. Here is the relevant portion of Delegation No. 00106:

> **II. Succession Order/Delegation**
>
> A. 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.
>
> B. I hereby delegate 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.

Order at 24.

On April 9, 2019, Secretary Kirstjen Nielsen signed an order that approved an amendment to Delegation No. 00106. *Id.* Specifically, her amendment stated: "I hereby designate the order of succession for the Secretary of Homeland Security as follows: Annex A of DHS Orders of Succession and Delegations of Authorities for Named Positions, Delegation No. 00106, is hereby amended by striking the text of such Annex in its entirety and inserting the following in lieu thereof," followed by an order of succession listing CBP Commissioner (Mr. McAleenan's then-position) third. *Id.* As the plain text of Secretary Nielsen's amendment states, only Annex A—which provides the order of succession in case of disaster or emergency—was changed. The portion of Delegation No. 00106 providing for succession according to Executive Order 13753 in case of death, resignation, or incapacity remained unaltered. *Id.* at 25-26.[2]

[2] As the Court explained: "In other words, the April 9th order only replaced Annex A and made no other changes to Delegation No. 00106. Thus, when Secretary Nielsen resigned 'the orderly succession of officials [was] governed by Executive Order 13753, amended on December 9, 2016,' but not the amended Annex A, which only applied when the Secretary was unavailable due

The next day, April 10, 2019, DHS issued a new revision of Delegation No. 00106 in response to Secretary Nielsen's amendment order. Consistent with the plain text of Secretary Nielsen's amendment, the new revision of Delegation No. 00106 left unchanged sections II.A and II.B of Delegation No. 00106 and their provision for distinct orders of succession for death or resignation (governed by Executive Order 13753) and for disaster or emergency (governed by Annex A); the new revision of Delegation No. 00106 merely replaced the text of Annex A, consistent with Secretary Nielsen's amendment order. *See* Dkt. 167-1.

When Secretary Nielsen resigned, McAleenan's office of CBP Commissioner was *seventh* in line under the order of succession for resignation in Executive Order 13753. 81 Fed. Reg. 90,667. At least two other offices higher in the line were then filled by Senate-confirmed appointees. FAC ¶¶ 152-153. Accordingly, Mr. McAleenan did not lawfully assume the office of Acting Secretary. In purporting to assume the office, Mr. McAleenan skipped ahead of the two Senate-confirmed officials who preceded him under the unambiguous text of Delegation No. 00106 and Executive Order 13753.

As this Court already has ruled, the language of Delegation No. 00106 and Secretary Nielsen's April 9, 2019 order amending Delegation No. 00106 is not subject to meaningful dispute. Order at 25. As a result, Defendants' rehashed and expanded arguments operate from the premise that the Court should disregard the plain text and instead infer from surrounding circumstances or out-of-context prefatory language that Secretary Nielsen must have *intended* to do something different. They argue that Secretary Nielsen's amendment—which on its face purported to amend *only Annex A* of Delegation No. 00106—actually intended to override the *entirety* of Section II.A. and Section II.B. of Delegation No. 00106 and dissolve the distinction between succession in the case of death or resignation and succession due to disaster or emergency, despite the amendment never mentioning any of this.

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to disaster or catastrophic emergency. … [A subsequent further amendment] reinforces the conclusion that at the time of Nielsen's resignation, Executive Order 13753 governed the order of succession." Order at 25-26.

Defendants' conjecture as to Secretary Nielsen's purported intent cannot override the express text of what she actually ordered.

1. Two District Courts Have Now Interpreted the Amendment and Order of Succession Exactly in Line with This Court's Opinion

As Plaintiffs' Motion explains, this Court's reading of Delegation No. 00106 and the Nielsen Amendment was subsequently confirmed by the GAO. Dkt. 183 at 6-7. Subsequent to Plaintiffs filing their motion for reconsideration, two district courts have adopted this Court's reasoning that Mr. McAleenan's appointment violated the HSA. First—and unacknowledged by Defendants' opposition even though it was issued 13 days before they filed—the District of Maryland granted a preliminary injunction blocking several actions taken by Mr. McAleenan's successor Chad Wolf, based on its conclusion that Mr. McAleenan unlawfully assumed the Acting Secretary position. *See Casa de Maryland v. Wolf*, _ F. Supp. 3d _, 2020 WL 5500165 (D. Md. Sept. 11, 2020). Next, on September 29, a Court in this District granted a preliminary injunction on the grounds that Mr. McAleenan was serving improperly. *See Immigrant Legal Res. Ctr. v. Wolf*, _ F. Supp. 3d _, 2020 WL 5798269, at *7-8 (N.D. Cal. Sept. 29, 2020) ("*ILRC*").

In *Casa v. Maryland*, the plaintiffs challenged various restrictions that the current purported Acting Secretary Chad Wolf sought to place on asylum applicants' ability to obtain work authorization. Analyzing the text and history of the succession orders, the court could not "help but conclude that McAleenan assumed the role of Acting Secretary without lawful authority." 2020 WL 5798269 at *21. And because "McAleenan had not lawfully assumed the office of 'Acting Secretary,' and because only the Secretary may designate such 'further order of succession,'" Mr. McAleenan's further changes to the succession order making Wolf next in line after Mr. McAleenan resigned "were likewise without authority." *Id.* The rules promulgated by Mr. Wolf therefore were "likely to be invalidated under the APA." *Id.*[3] The court considered and

[3] While the District of Maryland correctly reached the same interpretation of the order of succession and Nielsen Amendment as this Court and the GAO, its opinion contains an apparent error that was immaterial to the outcome. The court incorrectly suggested that the remedial section of the FVRA, 5 U.S.C. § 3348(d), did not apply to Wolf's actions because he was

rejected the very same kinds of arguments that Defendants now make to this Court. *See id.* at *20-23. It reached the same conclusion as this Court: Mr. McAleenan was not properly next in line under Delegation No. 00106 or the Amendment.[4]

In *ILRC*, the plaintiffs challenged a Rule implementing changes to USCIS fees and schedules, promulgated by Mr. Wolf. Noting that "Defendants[']arguments have been considered and rejected by two district courts and by the [GAO]," the Court considered the very arguments defendants now make regarding Acting Secretary Nielsen's purported intent and the alleged distinction between delegation and succession, and found them meritless. *Id.* at 7-9. It explained, after discussing this Court's decision in depth, that it "finds the reasoning set forth in *La Clinica de la Raza* and *Casa de Maryland* on the succession issue highly persuasive." *Id.* at 8.

These recent decisions confirm that this Court held correctly that Mr. McAleenan did not validly assume the office of Acting Secretary under the order of succession. The only two courts to consider the issue, as well as the GAO, have all reached the same conclusion. There is no reason for the Court to reverse itself.

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appointed under the HSA and not the FVRA. *See Casa de Maryland*, 2020 WL 5500165, at *17 ("[N]owhere does this enforcement provision [§ 3348(d)] specify that it applies to those acting officials who serve pursuant to an *exception* to the FVRA—one of the agency-specific succession statutes"). The court apparently reached this conclusion based on a mistaken belief that section 3348 is "cabined to those acting officers serving under section 3345." *Id.* at 19. In fact, section 3348(d) expressly applies to "[a]n action taken by any person who is not acting under 5 U.S.C. §§ 3345, 3346, *or 3347*." 5 U.S.C. § 3348(d)(1) (emphasis added). Section 3347 is the provision of the FVRA that allows for acting officials to be appointed pursuant to agency-specific statutes. *See* 5 U.S.C. § 3347(a)(1). Thus, section 3348(d)(1) expressly applies when an action is taken by a person who is not serving *either* under the FVRA's appointment provisions (section 3345) *or* under an agency-specific statute that creates an exception to the FVRA (section 3347). The District of Maryland's decision failed to account for section 3348's express reference to section 3347 as well as section 3345. This error appears to have been immaterial to the outcome in the District of Maryland's decision, because the court reached the conclusion that actions taken by the unlawfully-serving McAleenan and Wolf were likely void for other reasons, without needing to invoke section 3348(d). *See Casa de Maryland*, 2020 WL 5500165, at *20, *21, *23.

[4] The District of Maryland's decision does not discuss the possibility that Mr. McAleenan was appointed by the President under the FVRA, because the government conceded that he had not been so appointed. *Cf. Casa de Maryland*, 2020 WL 5500165, at *18 (noting that Wolf was not "tapped by the President" under the FVRA's appointment provisions and that "[t]he parties do not dispute that Wolf was selected pursuant to the HSA's specific succession provision applicable to the office of the Secretary").

2. Defendants Ignore the Text of Nielsen's Order and Mr. McAleenan's Subsequent Amendment of Delegation No. 00106

Defendants attempt to persuade this Court to disagree with its own prior decision, the GAO, and the *Casa* and *ILRC* decisions; to ignore the express and unambiguous language of Secretary Nielsen's amendment; and to find that Secretary Nielsen had an unexpressed intent to establish a single order of succession applicable both to death, resignations, and incapacity, on the one hand, and disasters or catastrophic emergencies on the other. Defendants' arguments are not supported by law or logic.

Defendants offer no explanation why, if Nielsen intended for a single order of succession to apply where two separate orders once did, she nonetheless left unaltered the text of Sections II.A and II.B of Delegation No. 00106—which expressly provide for two different orders of succession in the two different circumstances. *See* Order at 14. Relatedly, Defendants do not explain why, if the Nielsen Amendment did what Defendants claim, Mr. McAleenan felt the need to issue a subsequent amendment to Delegation No. 00106 that *expressly* amended Section II.A, governing succession in case of death or resignation, so that it also referred to Annex A rather than Executive Order 13753. *Id.* at 14. Such a move would make no sense if, as Defendants contend, Secretary Nielsen's amendment entirely displaced Delegation No. 00106 or caused Section II.A to be no longer operative. Mr. McAleenan's amendment of Section II.A of Delegation No. 00106 only makes sense under Plaintiffs' interpretation of Nielsen's amendment: Section II.A remained operative after Secretary Nielsen's amendment and continued to govern succession in case of death or resignation. *See ILRC*, 2020 WL 5798269, at *8.

3. Defendants' Reliance on a Distinction Between "Succession" and "Delegation" Is Unfounded

Defendants argue that Secretary Nielsen's amendment cannot mean what it says because it used the phrase "order of succession." Opp. 3. Defendants argue that "order of succession" is a term of art that must refer to the officers designated to serve in case of vacancy, while the different word "delegation" is used when the Secretary gives powers to other officials while continuing to occupy her office. *Id.* According to the Defendants, if Secretary Nielson had intended her

amendment to do what it says—altering only the Annex A governing who can exercise the Secretary's powers during a disaster or emergency—then Secretary Nielson should have used the word "delegation," not "order of succession." This argument fails for several reasons.

First, the statutory source for the purported distinction between an "order of succession" and a "delegation" contradicts Defendants' argument. Defendants cite 6 U.S.C. § 113(g)(2) as "empower[ing] the Secretary to designate an 'order of succession' for officers to serve as Acting Secretary *in the event of a vacancy*." Opp. 3 (emphasis added). But the emphasized language, "in the event of a vacancy," does not appear in section 113(g). Rather, section 113(g) specifies who shall serve as Acting Secretary if "by reason of *absence, disability, or vacancy* in office, neither the Secretary nor Deputy Secretary is *available to exercise the duties* of the Office of the Secretary," 6 U.S.C. § 113(g)(1) (emphasis added), and goes on to say that the Secretary may designate additional officers "in further order of succession to serve as Acting Secretary." *Id.* § 113(g)(2). Thus, the idea of an "order of succession" pursuant to section 113(g) of the HSA is not limited to "vacancies," but also encompasses circumstances where the Secretary is not "available to exercise the duties" of the office due to "absence" or "disability." *Cf. English v. Trump*, 279 F. Supp. 3d 307, 322 (D.D.C. 2018) ("Defendants argue, with some force, that [unavailability to act is] commonly understood to reflect a temporary condition, such as not being reachable due to illness or travel," rather than a permanent condition such as a vacancy.) That is precisely what Section II.B of Delegation No. 00106 does: It specifies an order of succession among officials—by listing them on Annex A—who may "exercise the powers and perform the functions and duties" of the Secretary's office in the event the Secretary is "unavailable to act during a disaster or catastrophic emergency." Dkt. 167-1, at 2. There is nothing surprising about Secretary Nielsen's use of the phrase "order of succession" to refer to the order of succession set out in Annex A in case of her unavailability due to emergency. *See Casa de Maryland*, 2020 WL 5500165, at *22 ("the changes that Nielsen *did* make to Annex A" were made "pursuant to her authority under section 113(g)"); *ILRC*, 2020 WL 5798269, at *8.

Second, the suggestion that Secretary Nielsen adhered to some strictly-defined distinction between an "order of succession" in case of vacancy and a "delegation" in case she remained in

office is belied by the text of her amendment. As Defendants point out, the amendment describes itself as changing the "order of succession." But the document that the amendment purported to change is entitled "*Delegation* No. 00106." And in addition to changing the list of officials in Annex A, it directed that the new list bear the title "Annex A. Order for *Delegation* of Authority by the Secretary of the Department of Homeland Security." Dkt. 166-3 at 3 (emphasis added); *see also ILRC*, 2020 WL 5798269, at *8 (Noting that "[t]he replacement text continues to state 'Annex A. Order for Delegation of Authority'"). This demonstrates that Secretary Nielsen did not recognize any strict distinction between an "order of succession" and a "delegation," and proves that she could not have expected her amendment to Annex A to effect a change involving only the former and not the latter. This, too, is unsurprising. The HSA contemplates an "order of succession" for situations where the Secretary remains in office but is not available to act due to absence or disability. 6 U.S.C. § 113(g). In such cases, the acting official may also be thought of as exercising the Secretary's "delegate[d]" powers, *see* 6 U.S.C. § 112(b)(1) (authorizing the Secretary generally to delegate her functions to other officers), and to have assumed those delegated powers pursuant to an order of succession. The order authorizing that official to act can be viewed as both a delegation and an order of succession. There is no contradiction.

Third, even if there were some tension between the prefatory language in Secretary Nielson's amendment and its operative language—and there is not—"prefatory clauses or preambles cannot change the scope of the operative clause." *Kingdomware Techs., Inc v. United States*, 136 S. Ct. 1969, 1978 (2016); *see also Casa de Maryland*, 2020 WL 5500165, at *22. The action directed by Nielsen's Amendment, not the preceding statements, controls.

4. Defendants' Contention that Delegation No. 00106 Is an "Internal Administrative Document" Is Unfounded

Defendants attempt, again without citing any authority, to recast Delegation No. 00106 as a mere "internal administrative document" without binding force. Dkt. 184 at 7. Defendants' own actions undermine that claim. As the *Casa* court recognized, it is undisputed that "Delegation Order 00106 is the only written repository that memorializes Secretary's changes to the succession orders." *Casa de Maryland*, 2020 WL 5500165, at *22. Thus, when Secretary Nielsen sought to

alter the designated order of succession, she did so by *amending* part of Delegation No. 00106. If that document were simply an internal administrative document of no force, Secretary Nielsen would have had no reason to make her change by amendment and would instead have issued a stand-alone directive. *See also ILRC*, 2020 WL 5798269, at *8 n.10 (rejecting argument that Delegation No. 00106 is an internal administrative document).

Defendants further contend that Delegation No. 00106 (as amended) could not have been an order establishing succession under section 113(g)(2) of the HSA because the original version of Delegation No. 00106 was signed before HSA section 113(g)(2) became law.[5] Defendants assert that Secretary Nielsen's amendment constitutes the first exercise of the Secretary's authority under Section 113(g)(2) and thus, despite amending only the Annex to Delegation No. 00106 governing the order of succession for unavailability for disaster or emergency, the amendment must be viewed as designating an order of succession for all circumstances permitted by Section 113(g). Not only is this argument unsupported by the text of the amendment, it is again belied by DHS's own practice.

DHS has amended Delegation No. 00106 at least six times since section 113(g)(2) was added to the HSA and before Secretary Nielsen's amendment. *See* Dkt. 167-1 at 5 (noting revisions to Annexes G, R, U, X, Y, and Z postdating § 113(g)(2)'s December 23, 2016 enactment and preceding April 10, 2019 amendments of Annexes A and B). Defendants identify no stand-alone value for the annexes and none appears on their face. Rather, each annex has meaning only by reference to Delegation No. 00106's instructions, including Section II.A. and II.B. Likewise, DHS issued a revised version of Delegation No. 00106 the day after Secretary Nielsen's amendment that left Section II.A in place and unchanged; the revised document continued to reference Executive Order 13753 in case of death or resignation, and only the text of Annex A was

[5] Defendants incorrectly state that Secretary Johnson signed Delegation No. 00106 before "Congress gave the Secretary" the authority in section 113(g)(2) to designate an order of succession. (Dkt. 184 at 4 n.2). Though the Court need not wade into this issue, the timeline is more nuanced than Defendants present. Both Executive Order 13753 and Secretary Johnson's signature on Delegation No. 00106 occurred *after* both houses of Congress had approved section 113(g), but before President Obama signed it into law.

altered. That is consistent with the text of Secretary Nielsen's amendment, which does not purport to create a new directive but rather to amend the preexisting Delegation No. 00106.

By changing only Annex A, Secretary Nielson adopted Delegation No. 00106 as an order of succession under Section 113(g)(2), and altered the order of succession only for cases in which she was unavailable due to disaster or emergency.

Defendants' position runs counter to every authority to consider this issue, and even to their own prior interpretation. DHS plainly understood Secretary Nielsen's order to have left Delegation No. 00106 in place and to have modified only the text of its Annex A, as it issued a revised version of Delegation No. 00106 in response that restated the entire document with only Annex A altered. Mr. McAleenan later confirmed that view when he purported to further amend Delegation No. 00106 to revise section II.A so that the order of succession in case of death, resignation, or incapacity would also be governed by Annex A, rather than by Executive Order 13753. That action makes sense only if Delegation No. 00106, including section II.A, remained in effect and governed the order of succession.

This Court likewise concluded in its prior Order that Secretary Nielsen left Delegation No. 00106 in place and amended only the Annex A governing succession for unavailability due to disaster or emergency. The GAO reached the same conclusion in its August 14, 2020 opinion, as did the District of Maryland in the *Casa* decision and another Court in this District just days ago. It is only Defendants, having realized that they failed to follow their own documents, that now strain to find some way to give Secretary Nielsen's order a reading it cannot bear. Defendants offer this Court no reason to reconsider its prior, well-reasoned, and correct ruling on this issue.

III. CONCLUSION

Plaintiffs respectfully request that the Court grant their Motion for Reconsideration and deny Defendants' motion to dismiss on Counts 3, 5, and 8.

Respectfully submitted,

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