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-846-RJL

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Fed. R. Civ. P. 65(a) and Local Rule 65, Plaintiffs A.B.-B. and her minor child S.B.-B.; M.A.G.M.- and her minor child D.G.M.-G.; L.E.-L. and her minor child I.I.E.-L.; and A.P.S. and her minor children E.L.R.-S., A.A.R.-S., B.J.R.-S., and W.G.L.-S, hereby move for a preliminary injunction to enjoin Defendants Mark Morgan, Acting Commissioner, United States Customs and Border Protection, in his official capacity; Chad Wolf, Putative Acting Secretary, United States, Department of Homeland Security, in his official capacity; Kenneth Cuccinelli, Senior Official Performing the Duties of the Director, United States Citizenship and Immigration Services, in his official capacity; Andrew Davidson, Acting Division Chief of United States Citizenship and Immigration Services Asylum Division, in his official capacity; and William Barr, Attorney General of the United States, in his official capacity; and their agents, and any persons acting in concert with them, from removing each of Plaintiffs from the United States until the Court issues a ruling on the merits of Plaintiffs' Complaint, ECF No. 1. Plaintiffs further request that the Court preliminarily enjoin Defendants and their agents from continuing to implement the January 30, 2020, Memorandum of Agreement ("MOA") (ECF No.

1, Ex. A), including by enjoining Defendants from permitting U.S. Customs and Border Patrol ("CBP") agents to conduct credible fear interviews, pending a ruling on the merits in this case.

As further explained in the accompanying Memorandum, the MOA unlawfully deprives Plaintiffs of a meaningful opportunity to apply for asylum by having CBP officers—not United States Citizenship and Immigration Services asylum officers—conduct credible fear interviews, in violation of the Federal Vacancies Reform Act, the Homeland Security Act of 2002, the Immigration and Nationality Act, the Refugee Act, and the Administrative Procedure Act. A preliminary injunction is warranted to prevent severe and irreparable harm to Plaintiffs and to suspend Defendants' illegal actions until a final decision on the merits. In support of this Motion, Plaintiffs rely on the accompanying Memorandum, declarations, and exhibits and any arguments or authority addressed in oral arguments or reply. A proposed order is attached for the Court's convenience.

Pursuant to Local Rule 7(m), Plaintiffs' counsel conferred with government counsel before the Court on April 2, 2020, wherein a briefing schedule was set for this motion and government counsel indicated its opposition

Dated: April 13, 2020
Falls Church, VA

Respectfully submitted,

/s/. Julie Carpenter

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A.B.-B., *et al.*,

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v.

MARK A. MORGAN, Acting Commissioner, United States Customs and Border Protection, *et al.*,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs challenge Defendants' agreement to substitute law enforcement officers from U.S. Customs and Border Protection (CBP) for trained asylum officers to conduct credible fear asylum interviews. This agreement is procedurally and substantively illegal. Plaintiffs request a preliminary injunction to bar their deportation and to enjoin further credible fear asylum interviews assigned to CBP agents until the Court rules on the merits of Plaintiffs' claims.

It is bedrock constitutional law that high-ranking federal officials are nominated by the President and confirmed by the Senate. The leadership at the Department of Homeland Security (DHS) currently operates in open violation of that fundamental principle and the statutes that enforce it. For example, Mark Morgan, the purported Acting Commissioner of CBP, who committed to the agreement under which CBP agents perform credible fear interviews of asylum seekers, was appointed in violation of those statutes. So too were Ken Cuccinelli, the purported Acting Director of U.S. Citizenship and Immigration Services (USCIS), the other party to that agreement, and purported Acting Secretaries of DHS Kevin McAleenan and Chad Wolf. The use of illegally appointed leadership in lieu of the constitutionally prescribed confirmation process renders the actions at issue here legal nullities.

Defendants' actions are also substantively illegal. CBP agents are law enforcement officers intentionally separated by Congress from the adjudicatory functions of USCIS. The governing statutes and regulations therefore bar the use of those law enforcement agents to conduct credible fear interviews. Even absent that bar, Defendants' practices remain illegal because federal law requires credible fear interviews to be conducted by *trained asylum officers* in a *non-adversarial* manner. The government's own admissions make clear that CBP agents are not trained asylum officers. And CBP agents cannot—and do not—adopt a non-adversarial posture during interviews.

Plaintiffs are likely to succeed on the merits of each of their claims, they will suffer irreparable injury absent an injunction, and the public interest weighs heavily in their favor. A preliminary injunction is thus warranted enjoining Plaintiffs' deportation and preventing the use of CBP agents to conduct further credible fear interviews while this litigation proceeds.

BACKGROUND

Asylum seekers fleeing persecution often arrive at the U.S. border without a visa or other documentation allowing them to enter the country. When they encounter a CBP law enforcement agent, be it at or between official ports of entry, individuals lacking such documentation can be placed in expedited removal. 8 U.S.C. § 1225(b)(1)(A)(i). The expedited removal statute allows CBP to remove individuals immediately unless they "indicate[] either an intention to apply for asylum . . . or a fear of persecution." *Id.* § 1225(b)(1)(A)(ii); *see* 8 C.F.R. § 235.3(b). Individuals who state that they fear returning to their home country are detained by CBP officers, usually for several days, until they can be interviewed by a trained USCIS Asylum Officer. 8 U.S.C. § 1225(b)(1)(B)(i); 8 C.F.R. § 208.30.

The Asylum Officer conducts a non-adversarial interview to determine whether the asylum seeker has a credible fear of persecution in her home country. 8 U.S.C. § 1225(b)(1)(B)(ii); 8 C.F.R. § 208.30(d). An asylum seeker can show a credible fear of persecution by demonstrating "a significant possibility . . . that [she] could establish eligibility for asylum" (8 U.S.C. § 1225(b)(1)(B)(v)), which is to say a significant possibility of showing a 10% chance of future persecution. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439–40 (1987). If the Asylum Officer determines that an asylum seeker has not satisfied this low bar, the asylum seeker is subject to immediate removal. 8 U.S.C. § 1225(b)(1)(B)(iii). In contrast, if the Asylum Officer determines

that an asylum seeker has a credible fear of persecution, the individual is placed in removal proceedings in immigration court and may apply for asylum in that forum. *Id.* § 1225(b)(1)(B)(ii).

Plaintiffs are four families held in immigration detention at the South Texas Family Residential Facility in Dilley, Texas. Dkt. 3 ("Compl.") ¶¶ 5, 13–17.[1] Each has fled violence, abuse, or sexual predation. *See generally* Dkt. 8-1 to 8-4 (TRO Exs. B–E, Plaintiffs Declarations). Upon entry to the United States, each family was detained by CBP law enforcement agents, who sought to remove them immediately under expedited removal procedures. *Id.* Each family expressed fear of returning to their home country, and each was referred for a credible fear interview to be conducted by an "asylum officer" under 8 USC § 1225(b)(1)(b)(i). Compl. ¶¶ 5, 13–17. However, instead of being interviewed by an asylum officer, as 8 USC §1225(b)(1)(B)(i) requires, each plaintiff was interviewed again by a law enforcement agent from CBP. *Id.* This is exceedingly unusual. Congress created USCIS and CBP when it dissolved the former Immigration and Naturalization Service (INS) as part of the Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135 (2002) (HSA). For many years before 2002, INS employees who performed credible fear interviews and other adjudications were deliberately walled off from INS employees who engaged in law-enforcement activities. *See* INS, *Aliens and Nationality; Asylum and Withholding of Deportation Procedures*, 55 Fed. Reg. 30,674 (July 27, 1990). And Congress maintained that distinction in the HSA, giving authority over all adjudications to USCIS while giving authority over law enforcement to CBP and the agency that is now Immigration and Customs Enforcement (ICE). *See* HSA, Pub. L. 107-296, Title IV, 116 Stat. at 2177-2212.

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[1] Since the filing of the Motion for a Temporary Restraining Order, Plaintiffs L.E.-L. and I.I.E.-L. have been released from the detention center, apparently due to the fears of coronavirus at the facility and the fact that L.E.-L. has a child who is ill. It is unclear, however, whether her immigration status has changed and whether she is no longer in danger of imminent deportation.

Until 2019, USCIS and CBP respected the distinction that Congress drew. In July 2019, however, purported Acting CBP Commissioner Mark Morgan and purported Acting USCIS Director Ken Cuccinelli entered into a Memorandum of Agreement allowing CBP officers to conduct credible fear interviews. Ex. 1 at 1 [July MOA]. That agreement expired on January 6, 2020. *Id.* at 4–5. But Morgan and then-Deputy USCIS Director Mark Koumans sought to commit their agencies to a new, similar Memorandum of Agreement that took effect on January 30, 2020 ("the MOA"). Compl. ¶ 64; *see also* Dkt. 3-1 (Ex. A, the MOA). Under the MOA, CBP agents are directed to conduct credible fear interviews, prepare reports of material facts, and make credible fear determinations. Dkt. 3-1 at 1.

All of the tasks assigned to CBP agents by the MOA were historically performed by professional, career Asylum Officers within USCIS, and as explained below, the HSA requires those tasks to be performed by USCIS employees. *See* Compl. ¶¶ 47–56. As further explained below, neither Morgan nor Koumans had the authority to commit their respective agencies to the terms of the MOA. *See* Compl. ¶¶ 64–94. And the MOA provides no non-arbitrary explanation for its stark departure from these long-settled legal rules. *See* Compl. ¶¶ 120–25.

These CBP agents who interviewed Plaintiffs had, like all other CBP agents assigned to conduct credible fear interviews, not received training comparable to that received by career USCIS asylum officers. Training for asylum officers consists of a minimum of 9 weeks of formal training, plus 3 to 4 weeks of additional credible fear training for asylum officers in offices with heavy credible fear caseloads and ongoing training throughout their careers.[2] Instead, CBP agents

[2] Ex. 25 at 27, 57 [GAO, *Actions Needed to Strengthen USCIS's Oversight and Data Quality of Credible and Reasonable Fear Screenings* (Feb. 2020), *available at* ttps://www.gao.gov/assets/710/704732.pdf].

received at most 3–5 weeks of training before beginning interviews and are, under the MOA, prohibited from performing credible fear interviews for more than 180 days.

Reflecting that lack of training, the CBP agent interviews were largely conducted as adversarial interrogations rather than non-adversarial interviews as required by law. *E.g.*, Ex. 10 [Herre Decl.] ¶ 5. For example, clients reported CBP agents "interrogat[ed]" them as if they were suspects in a criminal investigation, questioned their children aggressively, acted confrontationally and hostile, or cut them off mid-answer. *See* Exs. 6–9. CBP agents also failed to elicit facts relevant to plaintiffs' claims (*e.g.*, Ex. 6 [A.B.-B. Suppl. Decl.] ¶¶ 7–13, Ex. 7 [A.P.-S. Suppl. Decl.] ¶ 5) and missed or mischaracterized important facts in their summaries and notes (*e.g.*, Ex. 8 [L.E.-L. Suppl. Decl.] ¶¶ 4–9; Ex. 9 [M.A.G.-M. Suppl. Decl.] ¶ 13).

Plaintiffs' credible fear interviews were each conducted by CBP agents, and each conducted without authority, and in violation of the law and procedural requirements afforded for such interviews. In each case, the CBP agent issued negative fear findings. Compl. ¶¶ 13–17; *see* Exs. 2–5 (Plaintiffs' Negative Fear Determinations). Because of those negative findings, each family of Plaintiffs faces now removal. And, as set forth further below, if removed, each Plaintiff would face a severe risk of irreparable harm in the form of injury, violence, sexual abuse, and/or death. Moreover, others continue to be subjected to unlawful credible fear interviews that may assign them inadequate records or subject them to wrongful removal.

Plaintiffs filed their Complaint in this action challenging the MOA on March 27, 2020. *See* Compl. Plaintiffs then filed a Motion for a Temporary Restraining Order and Related Administrative Stay on April 1, 2020. Dkt. 8. The Court subsequently granted Plaintiffs' Motion for an Administrative Stay and ordered that Plaintiffs submit a motion for a preliminary injunction by April 13, 2020. Dkt. 11. As shown below, Plaintiffs' credible fear hearings were not conducted

in accordance with law, and Plaintiffs bring this motion to respectfully request that their deportation, along with continued implementation of credible fear interviews by CBP agents, be enjoined pending resolution of the merits of this case.

LEGAL STANDARD

"The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (quoting *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)) (internal quotation marks omitted). "A district court facing a request for a preliminary injunction must balance four factors: (i) whether the party seeking the injunction is likely to succeed on the merits of the action, (ii) whether the party is likely to suffer irreparable harm without an injunction, (iii) whether the balance of equities tips in the party's favor, and (iv) whether an injunction would serve the public interest." *Doe v. Mattis*, 928 F.3d 1, 7 (D.C. Cir. 2019) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). The last two factors "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). In conducting an inquiry for a preliminary injunction, "[a] district court must 'balance the strengths of the requesting party's arguments in each of the four required areas.' . . . If the showing in one area is particularly strong, an injunction may issue even if the showings in other areas are rather weak." *Elec. Privacy Info. Ctr. v. Dep't of Justice*, 15 F. Supp. 3d 32, 38 (D.D.C. 2014) (quoting *Chaplaincy*, 454 F.3d at 297) (internal quotation marks omitted).

ARGUMENT

A. Plaintiffs Have a Substantial Likelihood of Success on the Merits

"[A] movant 'need not establish an absolute certainty of success [on the merits]: It will ordinarily be enough that the [movant] has raised serious legal questions going to the merits, so serious, substantial, difficult as to make them a fair ground of litigation and thus for more

deliberative investigation.'" *Akiachak Native Cmty. v. Jewell*, 995 F. Supp. 2d 7, 13 (D.D.C. 2014) (alterations after first in original) (quoting *Population Inst. v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986)). At this stage, Plaintiffs "are not required to prove their case in full," but "only such portions that enable them to obtain the injunctive relief that they seek." *Jacinto-Castanon de Nolasco v. U.S. Immigration & Customs Enf't*, 319 F. Supp. 3d 491, 499 (D.D.C. 2018) (citing *Camenisch*, 451 U.S. at 395). And Plaintiffs need only establish a likelihood of success on the merits on *one* claim. *See D.C. v. U.S. Dep't of Agric.*, No. CV 20-119 (BAH), 2020 WL 1236657, at *13 (D.D.C. Mar. 13, 2020); *Make the Rd. New York v. McAleenan*, 405 F. Supp. 3d 1, 25 (D.D.C. 2019); *FTC v. Mallett*, 818 F. Supp. 2d 142, 148 n.5 (D.D.C. 2011).

Here, Plaintiffs can show a strong likelihood of success on each of their claims.

Claim 1—Violation of Federal Vacancies Reform Act:

As alleged in Plaintiffs' Claim 1, the MOA is void because Mark Morgan, who executed the MOA on behalf of CBP, lacked authority to do so under the FVRA. The FVRA makes clear that Morgan lacked this authority for two independent reasons. First, Morgan did not qualify under the FVRA to serve as Acting Commissioner of CBP (the role he was purporting to operate under when he sought to commit CBP to the terms of the MOA). Second, by the time Morgan purportedly committed CBP to the MOA, the 210-day period in which FVRA allowed any person to serve as acting Commissioner of CBP without Senate confirmation had elapsed. Thus, for either of these two independent reasons, the MOA is "of no force and effect." 5 U.S.C. § 3348(d)(1).

i. ***The requirements of the FVRA.***

When the Constitution was adopted, abuse of the power to appoint was widely seen as "the most insidious and powerful weapon of . . . despotism." *Freytag v. Comm'r*, 501 U.S. 868, 883 (1991) (internal quote omitted). The Founders thus required high-level federal officials to be confirmed by the Senate. *See* U.S. Const. art. II, § 2, cl. 2. "Over the years, Congress has

established a legislative scheme to protect the Senate's constitutional role in the confirmation process." Morton Rosenberg, Cong. Research Serv., *The New Vacancies Act: Congress Acts to Protect the Senate's Confirmation Prerogative*, No. 98 892A, at 5 (1998). The FVRA, is "the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency . . . for which appointment is required to be made by the President, by and with the advice and consent of the Senate." 5 U.S.C. § 3347(a)(1).

Congress enacted the FVRA to prevent the executive branch from circumventing the requirement of Senate consent. *See* S. Rep. 105-250 (1998). To that end, the FVRA limits who may serve as an acting official when an office requiring Senate confirmation becomes vacant. The statute creates the default rule that "the first assistant to the office shall perform the functions and duties of" the vacant office "temporarily in an acting capacity." 5 U.S.C. § 3345(a)(1). The FVRA also permits "the President (and only the President)" to override the default rule and instead appoint as an acting official either (1) another Senate-confirmed official, or (2) an individual who served a sufficient time in the prior year as a senior official within the "Executive agency" that houses the vacant office. *Id.* § 3345(a)(2)-(3).

The FVRA also places limits on how long an acting official may occupy an office. 8 U.S.C. § 3346(a). Specifically, "the person serving as an acting officer as described under section 3345 may serve in the office" for "no longer than 210 days beginning on the date the vacancy occurs." *Id.* § 3346(a)(1). The plain language of § 3346(a)(1) ties this 210-day period to "the vacancy" and thus limits the time that the office can be filled by an acting official. *Id.*; *see also NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 936 (2017) ("the statute permits acting service" only for the 210-day period). The 210-day period can be extended if the President formally nominates someone to the office. 8 U.S.C. § 3346(a)(2).

Congress included "enforcement mechanism[s]" to give teeth to these rules. S. Rep. 105-250, at 17; *see also id.* at 19. To prevent end-runs around the Senate confirmation process, for example, the FVRA provides that, once its 210-day period elapses, an office "shall remain vacant," and only "the head of [the] Executive agency may perform any function or duty of [the] office." *Id.* § 3348(b)(1)–(2). One of the FVRA's other enforcement mechanisms expressly provides that actions taken in violation of its provisions are "without force and effect" and "may not be ratified." *Id*. § 3348(d)(1)–(2).

ii. ***Morgan's designation as Acting Commissioner violated the FVRA.***

Under the FVRA, Mark Morgan was not legally eligible to serve as acting CBP Commissioner. The last Senate-confirmed CBP Commissioner was Kevin McAleenan, who was confirmed in March 2018. On April 10, 2019, McAleenan was purportedly designated as Acting Secretary of DHS.[3] Five days later, McAleenan designated CBP's Chief Operating Officer, John

[3] Ex. 11 [Dep't Homeland Security, *Message from Acting Secretary Kevin K. McAleenan* (Apr. 10, 2019), *available at* https://www.dhs.gov/news/2019/04/10/message-acting-secretary-kevin-k-mcaleenan].

Sanders, as Acting Commissioner.[4] Sanders resigned on July 5, 2019.[5] At that point, Morgan was appointed as Acting Commissioner.[6] But Morgan was not legally eligible for that role.

Morgan was not the "first assistant" (that is, Deputy Commissioner) to the CBP Commissioner when the vacancy arose in April 2019—or at any other point: He did not even hold government office between January 2017 and May 2019, when he was designated as Acting Director of ICE.[7] Morgan remained in that role until early July. He was thus not eligible to become Acting Commissioner under the default rule in § 3345(a)(1).

Nor was Morgan eligible to serve as Acting Commissioner under the alternative mechanisms in § 3345(a)(2) and (3). Morgan was not a Senate-confirmed official in 2019, and he

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4 Ex. 12 [Dep't Homeland Security, *Acting Secretary McAleenan Statement on the Designation of U.S. Customs and Border Protection Chief Operating Officer John Sanders to Serve as Senior Official Performing the Functions and Duties of the Commissioner of CBP* (Apr. 15, 2019), *available at* https://www.dhs.gov/news/2019/04/15/acting-secretary-mcaleenan-statement-designation-cbp-chief-operating-officer-john]; Ex. 13 [Bridget Johnson, *CBP's COO John Sanders Picked to Fill McAleenan's Role as Acting Commissioner*, Homeland Security Today.us (Apr. 15, 2019), *available at* https://www.hstoday.us/federal-pages/dhs/cbp/cbps-coo-john-sanders-picked-to-fill-mcaleenans-role-as-acting-commissioner].

5 *See, e.g.*, Ex. 14 [Priscilla Alvarez & Geneva Sands, *Acting US Customs and Border Protection Commissioner John Sanders to Leave* (June 25, 2019), *available at* https://www.cnn.com/2019/06/25/politics/customs-and-border-protection-john-sanders/index.html].

6 *See, e.g.*, Ex. 15 [Louise Radnofsky, *Mark Morgan Named New Acting Chief of Customs and Border Protection* (June 27, 2019 11:24 AM), *available at* https://www.wsj.com/articles/mark-morgan-named-new-acting-chief-of-customs-and-border-protection-11561649048].

7 *See* Ex. 16 [Gov't Accountability Office, Federal Vacancies Reform Act *available at* https://www.gao.gov/legal/other-legal-work/federal-vacancies-reform-act?vacancyTitle=director&vacancyActing=&vacancyNominee=&agency=Department+of+Homeland+Security&subagency=All&status=all&rpp=10&o=0&searched=1&order_by=date&Submit=Search#search (search for "Director" in DHS)].

was not employed by DHS—much less by CBP—for 90 days in the year before the vacancy arose.[8] The FVRA therefore bars Morgan from serving as Acting Commissioner.

iii. ***When Morgan signed the MOA, the period in which the FVRA allows an Acting CBP Commissioner to serve had lapsed.***

Even if Morgan had been qualified to act as CBP Commissioner under the FVRA, his ability to serve as Acting Commissioner would have expired before he entered into the MOA. Former Commissioner McAleenan "became unable to perform the functions and duties of" the office of CBP Commissioner (5 U.S.C. § 3345(a)) no later than April 15, 2019, when McAleenan appointed Sanders to perform the functions and duties of that office.[9] Under § 3346(a), absent the submission of a nominee for the position of CBP Commissioner to the Senate, an Acting Commissioner could not serve more than 210 days past April 15—that is, past November 11, 2019. And the President did not submit—and still has not submitted—a nominee to the Senate.

Morgan, who replaced Sanders as Acting Commissioner in July 2019, therefore could not legally execute the functions and duties of CBP Commissioner past November 11. Morgan's decision to enter the MOA on January 30, 2020, would accordingly violate the FVRA even if he had been lawfully appointed as Acting Commissioner.

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[8] *See, e.g.*, Ex. 17 [Ron Nixon, Border Patrol Chief, *An Agency Outsider, Stepping Down*, N.Y. Times (Jan. 26, 2017), *available at* https://www.nytimes.com/2017/01/26/us/politics/border-patrol-mark-morgan.html].

[9] There can be no question that Sanders was, in fact, Acting Commissioner of CBP. CBP itself repeatedly referred to Sanders using that title. *See, e.g.*, Ex. 44 [CBP Public Affairs, User Fee Advisory Members Named (June 21, 2019), *available at* https://www.cbp.gov/newsroom/national-media-release/user-fee-advisory-committee-members-named-0]; Ex. 19 [CBP Public Affairs, U.S. Customs and Border Protection Announces May 2019 Migration Statistics (June 5, 2019), *available at* https://www.cbp.gov/newsroom/national-media-release/us-customs-and-border-protection-announces-may-2019-migration-0].

iv. ***Based on the above, the MOA and all CBP actions under it are void.***

Because Morgan could not serve as Acting Commissioner on January 30, 2020, the MOA and any actions taken under it are void. Under the FVRA, an action "shall have no force and effect" if it is taken by an improperly-appointed official "in the performance of any function or duty of a vacant office" to which the statute applies. 5 U.S.C. § 3348(d)(1). For purposes of this enforcement provision, the statute defines "function or duty" to mean, in relevant part, any function or duty that "is required by statute to be performed by the applicable officer (and only that officer)." *Id*. § 3348(a)(2)(A).

Under that definition, Morgan was performing a function or duty of the vacant office of CBP Commissioner when he entered into the MOA. The Homeland Security Act of 2002, which created CBP, gives the CBP Commissioner, *and no one else*, the duty to "enforce and administer" immigration laws in coordination with USCIS and ICE. 6 U.S.C. § 211(c)(8). Thus, if the HSA authorizes anyone to commit CBP and its personnel to an MOA of this type, it grants that authority to the CBP Commissioner and the CBP Commissioner alone.[10]

Nor may Defendants argue that Morgan was not performing a duty solely assigned to the CBP Commissioner, and thus that his action is not void under § 3348(d)(1), because the HSA vests DHS functions in the Secretary and gives the Secretary the power to redelegate those functions. *See* 6 U.S.C. § 112(a)(3) & (b)(1). That argument cannot be squared with the text of the FVRA. As Judge Moss explained in *L.M.-M. v. Cuccinelli*, ___ F. Supp. 3d ___, 2020 WL 985376, at *19 (D.D.C. Mar. 1, 2020), a function is "required by statute to be performed by the applicable officer (and only that officer)" for purposes of the FVRA if it is expressly assigned to only one official even if the duty is covered by a vesting-and-delegation provision like 6 U.S.C. § 112. If that were

[10] If the HSA does *not* authorize anyone to commit CBP and its personnel to an MOA of this type, then the MOA is also invalid as contrary to the HSA. *See infra* Claim 2.

not the case, the FVRA would be effectively nugatory, because a similar vesting-and-delegation provision applies to every head of a cabinet-level agency. *Id.* at *23; *see also* S. Rep. No. 105-250, at 3 (making clear that Congress enacted the FVRA in part to overrule agencies who believed their vesting-and-delegation statutes exempted them from prior vacancies laws). And the untenable nature of the contrary position is highlighted where, as here, the Secretary holding vesting-and-delegation authority was also appointed in violation of the FVRA. *See infra* pp. 16–19.[11]

That ends the matter. As the D.C. Circuit has explained, § 3348(d) "renders any action taken in violation of the statute void ab initio." *SW Gen. Inc. v. NLRB*, 796 F.3d 67, 71 (D.C. Cir. 2015), *aff'd*, 137 S. Ct. 929 (2017). Because Morgan's tenure as Acting Commissioner violated the FVRA, and because committing CBP to the terms of the MOA was (if authorized at all) a "function or duty" of the Commissioner's office, 5 U.S.C. § 3348(a)(2), the MOA is void. *Id.* § 3348(d)(1). "The FVRA exempts [certain offices] from the general rule that actions taken in violation of the FVRA are void ab initio," *SW Gen.*, 137 S. Ct. at 938 n.2, but the CBP Commissioner's office is not one of them. *See* 5 U.S.C. § 3348(e). And without a proper authorization by someone legally empowered to make decisions for CBP, the MOA has never taken effect, either under the FVRA or under its own terms. Compl., Ex. A at 4.

Moreover, under the APA, because Morgan "was exercising the authority of" CBP Commissioner "in violation of the FVRA," the MOA was "not issued 'in accordance with law.'" *L.M.-M.*, 2020 WL 985376, at *23 (quoting 5 U.S.C. § 706(2)(A)). The MOA is thus invalid under

[11] As Judge Moss correctly noted, two other specific provisions of the FVRA also presuppose that § 3348(d) *does* apply to functions and duties subject to general vesting-and-delegation provisions. *See L.M.-M. v. Cuccinelli*, 2020 WL 985376, at *21–23.

the APA as well.[12] Thus, Plaintiffs are likely to succeed on Claim 1 in establishing that the MOA and CBP action taken under it are void as violating both the FVRA and APA.

Claim 2—Violation of the Homeland Security Act of 2002:

The Homeland Security Act of 2002—DHS's organic statute—provides independent grounds for setting aside the MOA. The HSA makes credible fear determinations the exclusive realm of USCIS. Thus, the MOA is invalid irrespective of whether the particular individuals who signed it on behalf of CBP and USCIS had the authority to commit their agencies to its terms. But the HSA also makes clear that Mark Koumans, who signed the MOA on behalf of USCIS, lacked the authority to do so.

i. ***The MOA exceeds the authority of USCIS and CBP in the HSA.***

***First*, under the HSA, only USCIS may conduct credible fear interviews**—Even if Morgan had the authority to sign the MOA on behalf of CBP, that document would still be invalid. Federal agencies are "creature[s] of statute" that have "no constitutional or common law existence or authority, but only those authorities conferred upon [them] by Congress." *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001). And actions in excess of an agency's statutory authority are expressly unlawful under the APA. 5 U.S.C. § 706(2)(A) & (C).

An agency may not redelegate its authority to unauthorized actors. To be sure, the D.C. Circuit has said that, "[w]hen a statute delegates authority to a federal officer or agency,

[12] The D.C. Circuit has held that an action taken in violation of the FVRA generally cannot be seen as harmless, because "a different" official "may have imposed different requirements and procedures during his tenure." *SW Gen Inc.*, 769 F.3d at 80; *accord L.M.-M.*, 2020 WL 985376 at *24. That rule applies here. There is no basis for the speculation that a different CBP Commissioner would have entered into the MOA. To the contrary, given that CBP was announced to be "experiencing a system-wide emergency that is severely impacting [its] workforce, facilities and resources" in 2019, there is every reason to think that a different Commissioner would not have entered into the MOA. *See* Ex. 19 [CBP Public Affairs, *U.S. Customs and Border Protection Announces May 2019 Migration Statistics*].

subdelegation to a subordinate federal official is presumptively permissible absent affirmative evidence of a contrary legislative intent." *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004). But "[a] general delegation of decision-making authority to a federal administrative agency does not, in the ordinary course of things, include the power to subdelegate that authority beyond federal subordinates." *Id.* at 566.

The Homeland Security Act of 2002 dissolved the former INS and split its functions among USCIS, CBP, and ICE. *See* Pub. L. 107-296, 116 Stat. 2135, Title IV (Nov. 25, 2002). And the HSA leaves no doubt that USCIS is the agency with the authority to conduct credible fear interviews and make credible fear determinations.

In particular, the HSA gives the USCIS Director authority over all adjudications previously performed by the INS, including "[a]djudications of asylum and refugee applications." 6 U.S.C. § 271(b)(3) & (5). It also gives the Director of USCIS the authority to establish associated policies and to administer those policies. *Id.* § 271(b)(3)(A)–(B). Those duties and functions entail authority over credible fear interviews and determinations, which are threshold adjudications in the asylum process. *See* 8 U.S.C. § 1225(b). The HSA does not, however, give the Director the authority to transfer credible fear determinations—or any kind of adjudication—to anyone outside USCIS. Thus, under *U.S. Telecom Association*, the Director could transfer that function solely to his own subordinates in USCIS. 359 F.3d at 565.

The HSA also does not give CBP any role in credible fear determinations. As noted above, the closest provision in CBP's enabling statute, 6 U.S.C. § 211(c)(8), simply gives the CBP Commissioner the authority to "enforce and administer the immigration laws" in "coordination with" USCIS and ICE. 6 U.S.C. § 211(c)(8). Nothing about that coordination provision gives

CBP substantive authority it would not otherwise have, much less the authority to trespass on USCIS's statutory realm of authority.[13]

Another provision of the HSA confirms that Congress's choice not to allow CBP to participate in credible fear determinations (or any other adjudication) was a deliberate one. The HSA includes a provision giving the President authority to engage in the "consolidation, reorganization, or streamlining of agencies" within DHS as part of a reorganization plan promulgated shortly after the statute's enactment. 6 U.S.C. § 254(a)(2). Congress placed only one limitation on that authority: It specified that, although the President could "reorganize functions or organizational units within" CBP or USCIS, he could not "recombine the two bureaus into a single agency or otherwise . . . combine, join, or consolidate functions or organizational units of the two bureaus to each other." *Id.* § 291(b). Congress thus expressly prevented the President from breaching the historic firewall between the subcomponents of the INS that conducted adjudications and the subcomponents of the INS that engaged in law enforcement. It would not, at the same time it did so, give a lower-ranking executive official the implied authority to breach the same firewall. Section 211(c)(8) therefore cannot be read as authorizing the MOA. The result is that the MOA is contrary to law and must be set aside under the APA.

***Second*, the DHS Secretary could not legally redelegate USCIS's authority**—For two independent reasons, the government may not escape the consequences of its violation of the HSA by arguing that the DHS Secretary authorized the violation by promulgating a redelegation of

[13] The subsections within § 211(c)(8) confirm as much. Those sections specify that the CBP Commissioner is to coordinate administration and enforcement of "(A) the inspection, processing, and admission of persons who seek to enter or depart from the United States; and (B) the detection, interdiction, removal, departure from the United States, short-term detention, and transfer of persons unlawfully entering, or who have recently unlawfully entered, the United States." 6 U.S.C. § 211(c)(8). These are actions that CBP has authority to undertake independent of its coordination role under § 211(c)(8). *E.g.*, *id.* § 211.

USCIS's authority. To start, USCIS's authority to conduct credible-fear interviews is not delegable. But regardless, even if that authority could be redelegated, the redelegation here would almost certainly have been performed by a purported Acting Secretary whose actions are also without force and effect under the FVRA.

As to the first point, the HSA vests "[a]ll functions of all officers, employees, and organizational units of the Department" in the Secretary. 6 U.S.C. § 112(a)(1). The statute also authorizes the Secretary to redelegate those functions across DHS. *Id.* § 112(b)(1). But the HSA makes clear that this authority extends "except as otherwise provided by" the HSA itself. *Id.* And as shown above, Congress not only delegated authority over credible fear interviews to USCIS but also expressly prohibited the reassignment of USCIS functions to CBP.

But even if the Secretary *did* have the power to redelegate credible fear functions to CBP, which the Secretary does not, the redelegation here would remain unlawful. A redelegation under § 112(b)(2) must be promulgated by a properly appointed Secretary, or it would be void under the FVRA and the APA. The redelegation here—Department of Homeland Security Delegation 2019-001, a purported "Delegation to the Commissioner of U.S. Customs and Border Protection Regarding Credible Fear Determinations"—has never been made public,[14] but it was almost certainly promulgated by an *improperly* appointed Secretary.

The first public mention of the redelegation is in a July 2019 MOA that precedes the MOA at issue here. *See* Ex. 1 at 1. And by the time that MOA took effect, Kevin McAleenan had served

[14] The government's failure to disclose the redelegation is itself unlawful. Two organizations—including the Tahirih Justice Center, counsel for Plaintiffs in this matter—filed Freedom of Information Act ("FOIA") requests covering that document and then, in the absence of a response from DHS, CBP, or USCIS, filed suit on October 2, 2019. *See Am. Immigration Council v. U.S. Customs & Border Protection*, No. 1:19-cv-2965, Dkt. 1 (Oct. 2, 2019). More than six months later, the government has still not produced the redelegation in response to the FOIA requests.

for roughly three months as purported Acting Secretary of DHS.[15] It is therefore likely that McAleenan issued the redelegation. McAleenan, however, was appointed in violation of the HSA.

The HSA specifies that the Deputy Secretary is "first assistant" to the Secretary for FVRA purposes. 6 U.S.C. § 113(a)(1)(A). And other provisions of the HSA expressly supersede the alternative mechanisms in FVRA for replacing acting officials. Under the HSA, "the Under Secretary for Management shall serve as the 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," and this rule holds "[n]otwithstanding" the FVRA. *Id.* § 113(g)(1). The HSA further provides, again "[n]otwithstanding" the FVRA, that "the Secretary may designate such other officers of the Department in further order of succession to serve as Acting Secretary." *Id.* § 113(g)(2).[16]

Executive Order 13753 governs that further order of succession to the office of DHS Secretary. *See* Ex. 21 [Executive Order 13753, 81 Fed. Reg. 90,667 (Dec. 14, 2016)]. As it must, that Executive Order tracks the HSA. It places the Deputy Secretary first in the line of succession to the office of Secretary and makes the Under Secretary of Management second. It also adds sixteen further officials to the line of succession. And when DHS Secretary Nielsen resigned in

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[15] *See* Ex. 20 [Ltr. from H.R. Comm. on Homeland Security and Comm. on Oversight and Reform to U.S. Comptroller General (Nov. 15, 2019) ("Oversight Letter"), *available at* https://oversight.house.gov/sites/democrats.oversight.house.gov/files/191115%20T%20Dodaro%20re%20Letter%20to%20GAO%20on%20Wolf-Cuccinelli%20Appointment.pdf].

[16] The HSA is thus unlike the statutes at issue in *Guedes v. BATFE*, 356 F. Supp. 3d 109 (D.D.C. 2017), *aff'd*, 920 F.3d 1 (D.C. Cir. 2019), *English v. Trump*, 279 F. Supp. 3d 307 (D.D.C. 2018), and other cases, because its plain text explicitly states that it must be read as superseding—and not operating in conjunction with—the alternate appointment mechanisms in the FVRA.

April 2019, the Executive Order governed succession to the office of Secretary when that office was vacant because of a resignation. *See* Ex. 20 [Oversight Letter] at 2 & Encl. B.

Thus, when Nielsen resigned, the governing statutes, the governing executive order, and the governing departmental policy all required that the Deputy Secretary become Acting Secretary. And if the Deputy Secretary was unavailable, all three of those authorities required the Under Secretary for Management to become Acting Secretary.

That is not what happened. Instead, McAleenan—who, as CBP Commissioner, was *seventh* in line to the position of Secretary (*see* 81 Fed. Reg. at 90,667)—purported to take over. The illegality of his appointment therefore is not subject to reasonable dispute. And because the HSA gives the Secretary, and only the Secretary, the ability to redelegate functions across DHS agencies (6 U.S.C. § 112(b)(1)), a redelegation by McAleenan would lack force and effect under 5 U.S.C. § 3348(d)(1). It would also be void under the APA. 5 U.S.C. § 706(2). As a result, the original delegations in the HSA are controlling and have not been changed—and under those delegations, the use of CBP officers to conduct credible fear interviews and make credible fear determinations is straightforwardly illegal.

ii. ***Mark Koumans lacked authority to commit USCIS to the MOA.***

The MOA also violates the HSA for a second reason. Mark Koumans, who was then Deputy Director of USCIS, signed the MOA on behalf of that agency. Compl. Ex. A, at 5. The statute, however, gives the Director of USCIS—and only the Director of USCIS—authority over policies related to asylum adjudications. 6 U.S.C. § 271(a)(3)(A)-(B) & (b)(3). The Director is accordingly the only person authorized by statute to commit USCIS to an MOA concerning credible-fear determinations.

Any subdelegation to Koumans undertaken by the DHS Secretary would itself be illegal. Any such subdelegation almost certainly post-dates the prior July 2019 MOA. Ex. 1. Any

subdelegation would thus have been signed by either McAleenan, who purported to serve as Acting Secretary in July 2019, or the current purported Acting Secretary, Chad Wolf. Yet, as detailed above, McAleenan's actions are without force and effect as he was not lawfully appointed as Acting Secretary. And because McAleenan purported to appoint Wolf as Acting Secretary while McAleenen was himself not lawfully appointed, Wolf's appointment is infirm for the same reason. Thus, all of Wolf's actions are also without force and effect. *See, e.g.*, Ex. 20 [Oversight Letter].

Nor could Ken Cuccinelli, the purported Acting Director of USCIS, subdelegate authority to Koumans to enter the MOA. Cuccinelli's actions are also without force and effect under the FVRA as he, too, was not lawfully or constitutionally seated in his post.[17]

The Director of USCIS is a federal position subject to Senate confirmation and, thus, to the FVRA. 6 U.S.C. § 113(a)(1)(E). That position became vacant with the resignation of Director L. Francis Cissna in June 2019. At that point, Cuccinelli was not the "first assistant" to Cissna. Cuccinelli was also not serving in any other Senate-confirmed position, and had never worked at USCIS.[18] He was therefore ineligible to become Acting Director of USCIS. 5 U.S.C. § 3345.

Nevertheless, nine days after Cissna resigned, McAleenan invented the position of "Principal Deputy Director" of USCIS, named that position "first assistant" to the Director, and

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[17] A obvious pattern emerges here of multiple purported federal Officers serving without Senate confirmation and in violation of FVRA. While the number of such individuals may seem incredible, it is a byproduct of the Administration's decision to pursue "acting" appointments in lieu of formal appointments submitted to the Senate as the Constitution contemplates. While any administration may choose to so proceed, the actions of its officials can only be valid if those officials take their roles in conformance with the FVRA.

[18] Furthermore, only the President can appoint individuals other than the first assistant as acting officials, and the President did not appoint Cuccinelli; McAleenan did. *See L.M.-M.*, 2020 WL 985376, at *16.

appointed Cuccinelli to the position.[19] Cuccinelli's appointment as Acting Director thus violated the FVRA in three ways:

First, Cuccinelli was appointed by McAleenan to a position created by McAleenan, and McAleenan's actions are without force and effect for the reasons discussed above.

Second, as Judge Moss held in *L.M.-M.*, "Cuccinelli does not qualify as a 'first assistant.'" 2020 WL 985376, at *16. "An 'assistant' is," by definition, "'one who acts as a subordinate to another or as an official in a subordinate capacity.'" *Id.* (quoting Webster's Third New Int'l Dictionary 132 (1993)). Cuccinelli, however, was elevated to "the role of principal" from the outset and, "by design, he never has served and never will serve 'in a subordinate capacity' to any other official at USCIS." *Id.* In fact, a declaration submitted by the government in *L.M.-M.* conceded that the office of Principal Deputy Director will cease to exist as soon as a new Director is confirmed—and thus that the office Cuccinelli purportedly holds will never be subordinate to any other office. *Id.* at *17.

Third, the plain text of FVRA makes clear that the first assistant *at the time of the resignation* becomes the acting official. The statute, after all, says in the present tense that the first assistant takes over "[i]f an officer of an Executive agency . . . resigns." 5 U.S.C. § 3345(a)(1). That language precludes a later-appointed official from taking over. The Dictionary Act confirms as much by making clear that "resigns" does not refer to *past* resignations. 1 U.S.C. § 1. So too do the alternate appointment mechanisms in the FVRA (*see* 5 U.S.C. § 3345(a)(2)–(3)), which would each be rendered meaningless if the President or others could create new "first assistant"

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[19] *See, e.g.*, Ex. 40 at 1 [Jerrold Nadler, Elijah Cummings & Bennie G. Thompson, Letter to Kevin K. McAleenan, Committee on the Judiciary (Jun. 18, 2019), *available at* https://judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/06-18-2019%20letter%20to%20acting%20secretary%20mcaleenan.pdf].

positions after the fact and assign whoever they liked to those positions. And as shown above, when Cissna resigned, Cuccinelli was not the first assistant. To the contrary, his position did not even exist.

Ironically, the first assistant at that time was Koumans. So, had the government complied with the FVRA and made Koumans Acting Director, he would have had authority to sign the MOA. But instead the government violated the FVRA and elevated Cuccinelli. Koumans then lost that authority. And Cuccinelli could not subdelegate that authority to Koumans, because authority over credible-fear policies is a function and duty exclusively assigned to the USCIS Director. *See* 6 U.S.C. § 271(a)(3)(A)-(B) & (D), (b)(3) & (5).

In sum, the HSA makes clear both that CBP may not perform credible fear interviews and that Koumas did not have the authority to commit USCIS to the MOA. Plaintiffs are thus likely to succeed on the merits of their second claim.

Claim 3—Violation of Immigration and Nationality Act (INA):

The MOA would be invalid even if it were consistent with the HSA and signed by individuals with proper authority, because allowing CBP agents to conduct credible fear interviews violates the Immigration and Nationality Act ("INA") and its implementing regulations.

As an initial matter, Department of Homeland Security regulations implementing the INA's credible fear provisions make clear that USCIS—not CBP—has jurisdiction over credible fear determinations. *See* 8 C.F.R. § 208.2(a) (giving jurisdiction to the Refugee, Asylum, and International Operations Directorate of USCIS). Moreover, the regulation does so in mandatory language, stating that USCIS "shall . . . have initial jurisdiction over credible fear determinations." The MOA's inconsistency with governing regulations, standing alone, shows that the MOA is unlawful. *See, e.g.*, *Damus v. Nielsen*, 313 F. Supp. 3d 317 (D.D.C. 2018) ("It has long been settled that a federal agency must adhere firmly to self-adopted rules by which the interests of

others are to be regulated[.]" (citing *Mass. Fair Share v. Law Enf't Assistance Admin.*, 758 F.2d 708 (D.C. Cir. 1985))).

i. ***CBP agents lack the training required by law to conduct credible fear interviews as Asylum Officers.***

Even if federal law did allow CBP agents to conduct credible fear interviews as asylum officers—which it does not—CBP agents have not undergone the training required of asylum officers by Congress as a prerequisite to conducting credible fear interviews. Under the INA, an asylum officer who can conduct credible fear interviews must:

> (i) [have] professional training in country conditions, asylum law, and interview techniques *comparable to that provided to full-time adjudicators of applications under section 1158 of this title*, and
>
> (ii) [be] supervised by an officer who meets the condition described in clause (i) and has had substantial experience adjudicating asylum applications.

Id. at § 1225(b)(1)(E) (emphasis added).[20] Thus, even setting aside the delegation and authorization barriers detailed above, CBP agents cannot conduct credible fear interviews as asylum officers unless they receive training "comparable to that provided to" full-time USCIS asylum officers tasked with adjudicating asylum applications (not just credible fear interviews) under 8 U.S.C. § 1158. And that has not happened here.

To meet the training requirements for full-time USCIS asylum officers (i.e., the prerequisite benchmark set by Congress for those conducting credible fear interviews), USCIS has consistently provided extensive training and materials to its asylum officer corps. In 2011, Ashley Caudill-Mirillo, then a Supervisory Asylum Officer, explained that USCIS Asylum Officers

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[20] These statutory requirements have been further developed in regulations. *See* 8 C.F.R. § 208.1(b). Those regulations require extensive and specific training for "asylum officers" on issues including "international human rights law, nonadversarial interview techniques, and other relevant national and international refugee laws and principles." *Id.* They also require USCIS to compile and disseminate to asylum officers information about human rights conditions and persecution in other countries. *Id.*

undergo "two six-week residential training programs," extensive training in conducting non-adversarial interviews, and specialized training for interviewing children and trauma-survivors, and continual weekly trainings.[21] More recently, in the context of a Government Accountability Office ("GAO") investigation concluded in February 2020, USCIS officials confirmed that new USCIS Asylum Officers receive 3 weeks of distance training, combined with *6 weeks of residential basic training*, in addition to 4 hours per week of ongoing training, and *additional* training to conduct screening in family residential units and in locations with heavy credible fear caseloads.[22]

This is neither aspirational nor superfluous: Asylum Division officials have declared that "the 9 combined weeks of distance and residential basic training *constitute the minimum* amount of formal training required for asylum officers to effectively screen credible and reasonable fear cases." *Id.* at 27 (emphasis added). USCIS also explained that in offices with heavy credible fear and reasonable fear caseloads, such as Houston and Arlington, they provide 3 to 4 weeks of *additional* credible and reasonable fear training for new asylum officers. *Id.*

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[21] Ex. 22 at 3, 4, 7 [Ashley Caudill-Mirillo, *Laws of Hospitality: Asylum and Refugee Law Panel* (May 2011), *available at* https://villagillet.files.wordpress.com/2011/05/caudill-mirillo_ashley_en.pdf]. That training covers the complex substantive law of asylum as well as grounding in psycho-social techniques critical to effectively interviewing refugees, including children, who are fleeing persecution. *See, e.g.*, Ex. 23 [USCIS, *RAIO Combined Training Course: Children's Claims* (May 11, 2017), https://www.aila.org/File/DownloadEmbeddedFile/72289 (81-page training module providing guidelines for adjudicating children's claims, covering child-sensitive interview techniques and considerations)]; Ex. 24 [USCIS, *RAIO Combined Training Program: Interviewing – Introduction to the Non-Adversarial Interview* (Dec. 20, 2019), https://www.uscis.gov/sites/default/files/files/nativedocuments/Interviewing_-_Intro_to_the_NonAdversarial_Interview_LP_RAIO.pdf (providing extensive guidelines on conducting non-adversarial interviews)].

[22] Ex. 25 at 27, 57 [GAO, Actions Needed to Strengthen USCIS's Oversight and Data Quality of Credible and Reasonable Fear Screenings (Feb. 2020), *available at* https://www.gao.gov/assets/710/704732.pdf].

There is good reason for asylum officers to undergo such extensive training. The legal requirements for immigration, asylum, and rights of non-*refoulement* are complex, to say the least. And an asylum seeker's fate is in the hands of the asylum officer who conducts a credible fear interview and the record he or she creates. Even if the determination is positive, interview summaries and notes become evidence in any later application for asylum.[23] And when the determination is negative, the interviewer's written record becomes the basis for the record reviewed in administrative oversight by immigration law judges. An incomplete or factually or legally inaccurate record therefore prejudices a migrant's asylum claim.

Yet CBP agents do not receive the training that is required for asylum officers per above. At most, by the government's own admission, CBP agents are given "approximately 80 hours of distance training" and "*up to* 120 hours of face-to-face training and additional on-the-job training" before conducting credible fear interviews. *See M.M.V. v. Barr,* 19-cv-02773-ABJ, Dkt. 72–2 ¶ 8 ("Caudill-Mirillo Suppl. Decl.") (emphasis added).[24] Moreover, the January 2020 MOA precludes any CBP agents from conducting credible fear interviews for longer than 180 days, Compl. Ex. A at p. 2 ¶ 4(B)(vii), thus ensuring that the agents will *never* gain the experience or the full training that is provided to and required for USCIS Asylum Officers.

This ends the inquiry. Without having undergone training "comparable" to the above, CBP agents categorically and by law cannot satisfy the statutory requirements of "asylum officers"

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[23] Review of the determination by an immigration judge does not cure the improper training. Even if the immigration judge determines that a negative determination was erroneous, the inadequate interview notes and erroneous record created by a CBP agent follow the asylum seeker throughout the later asylum process, threatening the integrity of a final determination.

[24] It is doubtful that CBP agents even receive this much training: Ms. Caudill-Mirillo claims "approximately 80 hours" are spent in the distance training module, but at least one distance module itself attached to her declaration requires only 72 hours, and it further "recommends that [CBP agents] do not spend more than the allotted amount of time on any individual topic . . . ." MMV, 19-cv-02773-ABJ, Dkt. 72–2 at Ex. 5 thereto at 3, 5.

permitted to conduct credible fear interviews, 8 U.S.C. § 1225(b)(1)(E), and yet they conduct credible fear interviews. Accordingly, CBP-conducted interviews of Plaintiffs and other migrants under the MOA are illegal under the INA and APA, and this illegal conduct should be enjoined.

Moreover, the lack of training given to CBP agents conducting credible fear interviews is evident in their work, which is rife with errors, confusions, and mistakes (including to the prejudice of Plaintiffs).

For example, the CBP agent who interviewed Plaintiff M.A.G.-M. wrote notes about [redacted] despite the fact that M.A.G.-M. is from [redacted] and never discussed [redacted] Ex. 9 [M.A.G.-M. Suppl. Decl.] at ¶ 13; Dkt. 8-4, TRO Ex. D [M.A.G.-M. Decl.] ¶ 12. The agent who interviewed Plaintiff A.B.-B., meanwhile, repeatedly used the [redacted] insisted that she confirm his incorrect understanding despite her contrary explanations, and cut her off, stating that they would discuss the [redacted] she suffered later—but then never followed up with questions about that [redacted] Ex. 6 [A.B.-B. Suppl. Decl.] at ¶¶ 5–6, 8–9; Dkt. 8-1, TRO Ex. A [A.B.-B. Decl.] ¶¶ 10–11, 13. Plaintiff A.P.S.'s interviewer failed to ask follow-up questions on important parts of her case, and failed to include the fact that the police did not investigate [redacted] n his summary of her claim. Ex. 7 [A.P.-S. Suppl. Decl.] at ¶¶ 5–6, 8. And the agent who interviewed Plaintiff L.E.-L. wrote that her [redacted] was killed by a cartel even though Plaintiff L.E.-L. explaining that it was her [redacted] that was killed by the cartel, a distinction that is significant given that L.E.-L. is fleeing persecution inflicted on account of [redacted] Ex. 8 [L.E.-L. Suppl. Decl.] at ¶ 4; Dkt. 8-3, TRO Ex. C [L.E.-L. Decl.] ¶¶ 4–7, 12. These errors are pervasive—it appears that CBP agents conducting such interviews do not understand the complex nature of asylum law, routinely provide incoherent analyses, and frequently miss obvious claims for asylum. *E.g.*, Ex. 10 [Herre Decl.] at ¶¶ 10–14.

Still other aspects of Plaintiffs' interviews confirm that CBP agents have not been properly trained to perform credible fear interviews. Asylum Officers are trained that they "must earn the trust of the child applicant," initiate recesses if necessary, and avoid interrupting a child's narrative answer.[25] But CBP agents instead have acted aggressively towards children and questioned them ineffectively. Plaintiff A.B.-B. described how a CBP interviewer questioned [redacted] insistently and aggressively until [redacted] was close to tears, and stopped only when another officer in the room intervened to end the questioning. Ex. 6 [A.B.-B. Suppl. Decl.] at ¶ 16; Dkt. 8-1, TRO Ex. A [A.B.-B. Decl.] ¶ 14. Another officer began his interview of Plaintiff [redacted] by stating "I already talked to your mom a lot about you," even though he had not, and caused the child to feel intimidated and uncomfortable with sharing her experience. Ex. 7 [A.P.-S. Suppl. Decl.] at ¶ 13; Dkt. 8-2, TRO Ex. B [A.P.-S. Decl.] ¶ 2, 11 ([redacted]. These are not legitimate interviewing techniques and reflect inadequate training.

In short, the interviews conducted by CBP agents, and the records of those interviews, reveal confusion and mistakes, and demonstrate that the CBP agents do not appreciate the relevance of facts critical to asylum claims and fail to elicit them as asylum officers are required to do. Those records also cannot constitute a reliable basis for decision making. There can thus be no doubt that the training CBP agents receive before conducting fear screening categorically fails the requirements in the INA or that Plaintiffs have suffered prejudice and harm as a result.

ii. ***CBP agents conduct adversarial interviews.***

Regulations implementing the INA also require the asylum officer conducting a credible fear interview to do so "in a nonadversarial manner." 8 C.F.R. § 208.30(d). Yet CBP agents are *law enforcement agents* and trained as such (not as asylum agents). As CBP states:

[25] Ex. 23 at 26, 32 [USCIS, RAIO Combined Training Course: Children's Claims].

> U.S. Customs and Border Protection, CBP, is one of the world's largest law enforcement organizations and is charged with keeping terrorists and their weapons out of the U.S.

See About CBP, U.S. Customs and Border Protection, https://www.cbp.gov/about (last visited April 13, 2020).

In fact, CBP is the law enforcement agency that first arrested or detained Plaintiffs (along with almost all other migrants subject to credible fear screening). Categorically, CBP law enforcement agents cannot conduct "nonadversarial" interviews of detainees that CBP agents themselves arrested or detained. It is a fundamental principle of law that "[l]aw enforcement officers function as adversaries" to those they detain because their role is "to investigate," to "locate and arrest, those who violate our laws," and "to facilitate the charging and bringing of persons to trial." *New Jersey v. T.L.O.*, 469 U.S. 325, 349 (1985) (Powell, J., concurring). This role is in stark contrast to "neutral and detached judicial officers with no stake in the outcome [of a case]." *United States v. Leon,* 468 U.S. 897, 917 (1984).

This is no doubt in part the reason that, in creating CBP, ICE, and USCIS, law enforcement functions were intentionally separated from adjudicative asylum functions as noted above. Setting aside that Congress forbids doing so as shown above, the neutral, "nonadversarial" adjudicative functions of USCIS categorically cannot be transferred or carried out by law enforcement agents in a "nonadversarial" manner as the law requires. And this would be true even if CBP agents were scrupulously polite in performing credible fear interviews.

But CBP agents are anything but scrupulously polite. To the contrary, CBP agents conduct credible fear interviews in an illegal adversarial manner to the prejudice of Plaintiffs and other asylum seekers. Asylum officers are supposed to treat asylum seekers with respect and ensure that

they do not show impatience towards interviewees.[26] But the CBP agent who interviewed Plaintiff [redacted] interrogated her, cut her off, and became so frustrated that he forced her to pause so that he, the interviewer, could take a break from the interview. Ex. 6 [A.B.-B. Suppl. Decl.] at ¶¶ 7, 9, 14; Dkt. 8-1, TRO Ex. A [A.B.-B. Decl.] ¶ 12; Ex. 10 [Herre Decl.] ¶¶ 16, 18. The same agent was "very insistent and aggressive" with [redacted] "berating" the child "with questions about very traumatic experiences" to the point where an observer present for training purposes had to "interven[e]" and tell the agent to stop. Ex. 6 [A.B.-B. Suppl. Decl.] ¶¶ 3, 16; Dkt. 8-1, TRO Ex. A [A.B.-B. Decl.] ¶ 14. Similarly, Plaintiff A.P.-S. described the CBP agent who interviewed her as "confrontational and hostile," as "annoyed" that she tried to tell her story, and "did not take [her] seriously." Ex. 7 [A.P.-S. Suppl. Decl.] ¶¶ 4, 9; Dkt. 8-2, TRO Ex. B [A.P.-S. Decl.] ¶¶ 7–8, 11. The agent who interviewed Plaintiff M.A.G.-M. was likewise "aggressive and disrespectful," "kept interrupting [her] responses," yelled at her because her child was crying because of illness (Ex. 9 [M.A.G.-M. Suppl. Decl.] ¶¶ 3, 5–6), while the agent who interviewed L.E.-L. asked "inappropriate and unnecessary" questions about [redacted] and was "extremely dismissive." Ex. 8 [L.E.-L. Suppl. Decl.] ¶¶ 5–6; *cf.* Ex. 10 [Herre Decl.] ¶¶ 16, 18.

CBP agents' inability to be non-adversarial significantly affects asylum seekers' ability to receive relief to which they are entitled under the INA. All four adult Plaintiffs were interviewed by CBP agents who failed to elicit relevant material facts by choosing not to follow up on answers that suggested Plaintiffs had a credible fear of asylum, by cutting Plaintiffs off, or by intimidating Plaintiffs into being emotionally unable to recount the full extent of the persecution they suffered in their home countries. Ex. 9 [M.A.G.-M. Suppl. Decl.] ¶¶ 5–8, 10–12]; Ex. 7 [A.P.-S. Suppl.

[26] Ex. 24 at 31–33 [USCIS, Combined Training Program: Interviewing – Introduction to the Non-Adversarial Interview].

Decl.] ¶ 5–8, 10, 13; Ex. 8 [L.E.-L. Suppl. Decl.] ¶ 5; Ex. 6 [A.B.-B. Suppl. Decl.] ¶¶ 4–12. At least one agent failed to include material facts in his written summary, in violation of 8 CFR § 208.30(e)(1). Ex. 9 [M.A.G.-M. Suppl. Decl.] ¶ 9. And although asylum seekers are expressly permitted to have "a person or persons of [their] choosing" present at the interview (8 C.F.R. § 208.30(d)(4)), Plaintiff L.E.-L.'s declaration makes clear the CBP agents can be so hostile that they illegally exclude lawyers from interviews. Ex. 8 [L.E.-L. Suppl. Decl.] ¶ 3.

Nor is this conduct isolated to the interviews of Plaintiffs or the agents who conducted their interviews. *See* Ex. 10 [Herre Decl.] ¶¶ 5–9, 12–18. Rather, CBP agents generally conduct interviews that are "like a law enforcement interrogation of a criminal suspect." *Id.* They also engage in behavior that falls well outside neutral bounds, prejudicing survivors' rights to have the complete and accurate record of the basis for their asylum memorialized and considered. *Id.* (noting survivors of abuse may "shut down" under interrogation style questioning).

Unfortunately, such behavior is not surprising. CBP's difficult relationship with migrants has been well documented.[27] Reports indicate that CBP has a culture that tolerates both personal

[27] *See, e.g.*, Ex. 43 at 2–10 [Letter from Am. Immigration Council to Kevin K. McAleenan (Apr. 30, 2019)]; Ex. 27 [John Washington, *Bad Information: Border Patrol Arrest Reports Are Full of Lies That Can Sabotage Asylum Claims*, Intercept (Aug. 11, 2019), https://theintercept.com/2019/08/11/border-patrol-asylum-claim]; Ex. 35 at 5–8 [Human Rights First, *Crossing the Line: U.S. Border Agents Illegally Reject Asylum Seekers*, 5–8 (2017), *available at* https://www.humanrightsfirst.org/sites/default/files/hrf-crossing-the-line-report.pdf]; Ex. 36 [A.C. Thompson, *Inside the Secret Border Patrol Facebook Group Where Agents Joke About Migrant Deaths and Post Sexist Memes*, ProPublica (July 1, 2019), *available at* https://www.propublica.org/article/secret-border-patrol-facebook-group-agents-joke-about-migrant-deaths-post-sexist-memes]; Ex. 37 at 9 [Guillermo Cantor & Walter Ewing, *Still No Action Taken: Complaints Against Border Patrol Agents Continue to Go Unanswered*, American Immigration Council (Aug. 2017), *available at* https://www.americanimmigrationcouncil.org/sites/default/files/research/still_no_action_taken_complaints_against_border_patrol_agents_continue_to_go_unanswered.pdf]; Ex. 38 at 19 [U.S. Comm'n on Int'l Religious Freedom, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal* (2016), *available at* https://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf].

antipathy towards migrants[28] and misogyny.[29] This leaves CBP agents ill-suited to interview asylum seekers, especially when many of the detained women and children who seek asylum are survivors of rape, domestic violence, and other gender-based violence. *See* Ex. 10 ¶¶ 5–9, 15–18.

* * *

The prejudicial impact of the lack of training and CBP's adversarial tactics are demonstrated not just by Plaintiffs' declarations but also by the overall credible fear determination rates issued by CBP agents. While USCIS Asylum Officers issued positive determinations in 71.4% of interviews over the past several years, CBP agents issued positive determinations at only about half this rate (and in only 29.2% of cases at Dilley). *See* Ex. 25 at inside cover [GAO Report]; Ex. 26 [CBP Activity Summary to Date]. Nor do recent policy changes account for this disparity: between July 16, 2019 and November 15, 2019, USCIS issued positive fear determinations in at least 62% of credible fear interviews at family detention centers.[30] From July 15, 2019 to November 19, 2019, CBP agents issued similar determinations in only 37.9% of cases.

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[28] *See, e.g.*, Ex. 36 (describing an online group in which Border Patrol agents joked about dead migrants); Ex. 39 [Alex Horton, *A Border Patrol Chief In a Racist Facebook Group Says She Didn't Realize It Was Racist*, Wash. Post (July 25, 2019), *available at* https://www.washingtonpost.com/nation/2019/07/25/border-patrol-chief-was-member-racist-facebook-group-says-she-didnt-notice].

[29] Ex. 36; *see also* Ex. 41 [Ryan Devereaux, *Border Patrol Agents Tried to Delete Racist and Obscene Facebook Posts. We Archived Them*, Intercept (July 5, 2019, 10:16 AM), *available at* https://theintercept.com/2019/07/05/border-patrol-facebook-group] (showing some Border Patrol agents' social media posts that, among other things, include sexually explicit illustrations demeaning female lawmakers and comments referring to women as "bitches" and "hoes").

[30] During this time period, 19,703 positive determinations, 10,570 negative determinations, and 3746 administrative closures were issued, which is a 62% rate of positive determinations and which includes CBP determinations. Ex. 30 [USCIS, Semi-Monthly Credible Fear and Reasonable Fear Receipts and Decisions, *available at* https://www.uscis.gov/tools/reports-studies/immigration-forms-data/semi-monthly-credible-fear-and-reasonable-fear-receipts-and-decisions]. Between July 15, 2019 and November 17, 2019, CBP agents issued 1219 positive determinations, 1641 negative determinations, and 359 administrative closures, which is a 37.9% rate of positive determinations. Ex. 26 [CBP Activity Summary to Date].

CBP officers are thus not interchangeable with Asylum Officers. If they were—if CBP agents were trained and carried out non-adversarial interviews the same as USCIS Asylum Officers—one would expect that the clearance rates for credible fear determinations would not differ so materially between USCIS Asylum Officers and CBP. The materially lower fear determination rate seen in CBP asylum screening appears instead consistent with the reported rationale behind the Administration's decision to push CBP agents into this adjudicative role—trained USCIS Asylum Officers have been replaced by CBP agents reportedly precisely because CBP agents would *not* act neutrally, but "would be tougher critics of asylum seekers" than Asylum Officers, whom Defendants view as "soft."[31]

Given the above, Plaintiffs are likely to succeed on their claim that the use of CBP agents to conduct credible fear interviews violates the INA. CBP agents are not trained according to the requirements set by law, nor can law enforcement agents conduct "nonadversarial" interviews of migrants they detain. This raises "substantial questions" as to whether CBP-conducted asylum screening complies with the applicable procedural requirements, which are "fair ground for litigation and . . . more deliberative investigation," as required to obtain a preliminary injunction. *Citizens for Responsibility & Ethics v. Cheney*, 577 F. Supp. 2d 328, 335 (D.D.C. 2008) (quoting *Wash. Metro Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977)).

Claim 4—Violation of APA, Arbitrary and Capricious:

Even if the MOA were not rendered unlawful by the FVRA, the HSA, and the INA (but it is), the MOA also must be set aside as arbitrary and capricious because it fails to comport with the fundamental principles of reasoned decision-making under the APA.

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[31] Ex. 42 [Jay Willis, *Stephen Miller Is Trying to Break the Asylum Process*, GQ (July 30, 2019), *available at* https://www.gq.com/story/asylum-border-patrol-interviews].

"Where the agency has failed to provide a reasoned explanation, or where the record belies the agency's conclusion, [a court] must undo its action." *Petroleum Commc'ns, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994). Specifically, an agency's action is arbitrary and capricious if it "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Here, the justification provided in the MOA is that a partnership between USCIS and CPB "will increase efficiency and effectiveness for DHS." Compl., Ex. A at 1. Those seven words are "not sufficient" to conclude that the MOA "was the product of reasoned decision making." *State Farm*, 463 U.S. at 52. The MOA makes no effort to explain how tasking CPB—a law enforcement agency—to conduct credible fear interviews promotes the "efficiency and effectiveness" of DHS, particularly when CPB has no experience doing so and has been assigned the entirely different role of law enforcement. "It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive." *Columbia Gas Transmission Corp. v. FERC*, 448 F.3d 382, 387 (D.C. Cir. 2006) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947)). The MOA should be found arbitrary and capricious for this reason alone.

The only other public justification Defendants have offered for the MOA "runs counter to the evidence before the agency." *State Farm*, 463 U.S. at 43. In the *M.M.V.* litigation, Defendants filed a declaration from Ashley Caudill-Mirillo, now Deputy Chief of the Asylum Division in USCIS, claiming that a "surge of credible fear cases" forced USCIS to seek help from CBP.

M.M.V. v. Barr, 19-cv-02773-ABJ, Dkt. 72–2 [Caudill-Mirillo Decl.] ¶ 18; *see also* Ex. 28 [S1 Talking Points] (claiming "historic levels" of credible fear and reasonable fear referrals). But such a rationale, even if true in 2019, does not support the January 2020 MOA challenged in this action.

To the contrary, by late 2019 (and before the January MOA was executed), the rate of asylum seekers requesting credible fear interviews had dropped substantially. After a four-year period in which asylum officers conducted between 78,697 and 105,000 credible fear interviews per year, at the current pace for 2020, only about 52,120 such interviews will be performed this year.[32] That number represents not only the lowest total number of credible fear interviews in any year since 2015 but also a 50% year-over-year decrease from the roughly 105,000 interviews conducted in 2019. In fact, any surge ended before 2020: Although USCIS data shows that more than 36,000 interviews (about 34% of the annual total) were conducted in the first quarter of 2019, while only 13,919 (about 13% of the annual total) were conducted in the last quarter of the year.[33] Thus, there is no plausible basis for the representation that the MOA was necessary because USCIS currently faces a "surge" of credible fear interviews.

It is equally irrational for USCIS to seek out help from CBP. CBP, of course, is the only agency that Congress expressly prohibited from participating in USCIS functions. And unlike USCIS asylum officers performing credible fear interviews, CBP has reported an increased workload. Between fiscal year 2018 and fiscal year 2019, CBP enforcement actions jumped

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[32] *See* Ex. 29 at 2–3 [DHS, Credible Fear Cases Completed and Referrals for Credible Fear Interview (providing data through fiscal year 2018), *available at* https://www.dhs.gov/immigration-statistics/readingroom/RFA/credible-fear-cases-interview]; Ex. 30 [USCIS, *Semi-Monthly Credible Fear and Reasonable Fear Receipts and Decisions*]; Ex. 28 [S1 Talking Points].

[33] Ex. 30 [USCIS, *Semi-Monthly Credible Fear Decisions*]; Ex. 28 [S1 Talking Points].

68%—from 683,178 to 1,148,024.[34] And 2020 is on pace to outstrip even that number.[35] That increase caused then-CBP Commissioner McAleenan to complain in March 2019 that his agency's enforcement system was "at 'the breaking point.'"[36] Thus, by DHS's own lights, it makes no sense to assign CBP a significant new task that it has never handled.[37]

In short, Defendants have thus far "failed to provide any coherent explanation for [their] decision." *Fox v. Clinton*, 684 F.3d 67, 69 (D.C. Cir. 2012). By their own admission, Defendants are not facing a "surge" of credible fear interviews, so it is illogical to delegate responsibility for credible fear interviews to a law enforcement agency Defendants see as under-resourced.

For all of these reasons, the MOA is arbitrary and capricious and thus should be set aside under the APA, 5 U.S.C. § 706(2)(A). Plaintiffs are therefore likely to prevail on their fourth claim.

Claim 5—Violation of U.S. Constitution, Fifth Amendment Due Process:

Because Plaintiffs have a constitutionally protected interest in obtaining at least the procedures and procedural protections required by law, *U.S. ex rel. Knauff v. Shaughnessy*, 338

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[34] *See* Ex. 31 [CBP, *CBP Enforcement Statistics Fiscal Year* 2020, *available at* https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics].

[35] *See* Ex. 31 (reporting 333,802 actions in Q1 of fiscal year 2020).

[36] *See* Ex. 32 [Nick Miroff and Maria Sacchetti, *U.S. Has Hit 'Breaking Point' at Border Amid Immigration Surge, Customs and Border Protection Chief Says*, Wash. Post (Mar. 27, 2019), *available at* https://www.washingtonpost.com/national/us-has-hit-breaking-point-at-border-amid-immigration-surge-customs-and-border-protection-commissioner-says/2019/03/27/d2014068-5093-11e9-af35-1fb9615010d7_story.html].

[37] *See* Ex. 33 [Nat'l Treasury Empls. Union, *Statement on CBP Staffing Shortages to the House Homeland Security Subcommittee* (Dec. 2, 2019), https://www.nteu.org/legislative-action/congressional-testimony/statement-on-cbp-staffing-shortages-to-t] (reporting that the President of the National Treasury Employees Union—which represents more than 27,000 CBP employees—told Congress in December 2019 that CPB had a shortage of 2,700 employees at ports of entry alone).

U.S. 537, 544 (1950), the MOA and its implementation also raise substantial questions as to whether Plaintiffs' Due Process rights have been violated.

Under the Due Process Clause of the Fifth Amendment, no person shall be deprived of life, liberty, or property, without due process of law. U.S. Const. Amend. V. Non-citizens on U.S. soil have a constitutional right to due process of law. *Yick Wo v. Hopkins*, 118 U.S. 356, 368–69 (1886); *Matthew v. Diaz*, 426 U.S. 67, 77 (1976). And, as applicable here, non-citizens have a due process right to, at a minimum, "the process authorized by Congress." *Knauff*, 338 U.S. at 544.

For the reasons shown above, the MOA and its implementation have deprived Plaintiffs of the required procedures and standards for asylum officer interviews under 8 U.S.C. § 1225(b)(1)(B) & (E) and 8 C.F.R. § 208.3(d)–(e).[38] Depriving migrants and Plaintiffs of the procedures and protections authorized by Congress thus also violates their due process rights. Moreover, by failing to provide appropriately trained, neutral, non-adversarial asylum officers as described above, Plaintiffs' due process right to ultimately petition for asylum has thus also been impaired. *See Gutierrez-Rogue v. INS*, 954 F.2d 769, 773 (D.C. Cir. 1992) (acknowledging the "'Fifth Amendment procedural due process right to petition the government for political asylum,'" quoting *Maldonado-Perez v. INS*, 865 F.2d 328, 332-33 (D.C. Cir. 1989)).

Claim 6—Violation of Rights of Protection from Removal and *Refoulement*:

The use of adversarial law enforcement officers to conduct fear interviews, which also screen for eligibility for withholding of removal and relief asylum eligibility, likewise violates the

[38] *See also, e.g.*, 8 C.F.R. §§ 208.1 (training), 208.2(a) (jurisdiction), 208.13(b) (asylum standard), 208.16 (standard for withholding removal per Convention Against Torture), 208.18(a) (defining torture), 208.30(d) (right to consult attorney or advocate, right to non-adversarial interview, right to record memorializing all material facts), 208.30(e) (right to complete factual record, supervisory review, and determination by legal standard).

United States' statutory and treaty obligations not to return Plaintiffs to countries in which they will be persecuted.

The 1951 Refugee Convention and the 1967 Protocol relating to the Status of Refugees, to which the United States is party, prohibits the return of individuals to countries where they would directly face persecution on a protected ground as well as to countries that would deport them to conditions of persecution. These obligations require that the United States not "expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." United Nations Convention Relating to the Status of Refugees, art. 33, July 28, 1951, 189 U.N.T.S. 150; *see also* Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267; United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, Art. 3.

Congress has codified these prohibitions in the "withholding of removal" provision at INA § 241(b)(3), 8 U.S.C. § 1231(b)(3), which bars removal of an individual to a country where it is more likely than not that he or she would face persecution. *See also* 8 C.F.R. § 208.16(c), (d); FARRA § 2242(a), Pub. L. No. 105-207, Div. G Title XXI, 112 Stat. 2681 (codified at 8 U.S.C. § 1231). Only an immigration judge can decide if an individual faces a risk of persecution and is entitled to withholding of removal after full removal proceedings in immigration court. 8 C.F.R. § 1208.16(a).

The MOA and its implementation, however, permit CBP agents to conduct screening, including with the goal, resulting as described above in these law enforcement officers not abiding by or respect the safeguards that protect against *refoulement* (through lack of training, lack of

experience, and/or personal bias). Thus, in addition to this improper implementation of CBP agents violating the INA as described above, it also violates 8 U.S.C. § 1231(b)(3) and its implementing regulations.

B. Plaintiffs Will Suffer Irreparable Harm If Preliminary Relief Is Not Granted

"[T]he basis of injunctive relief in the federal courts has always been irreparable harm." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (quoting *Sampson v. Murray*, 415 U.S. 61, 88 (1974)). Plaintiffs must be "likely to suffer irreparable harm in the absence of preliminary relief." *Winter*, 555 U.S. at 20. An irreparable harm "must be actual and not theoretical" and "beyond remediation." *Chaplaincy*, 454 F.3d at 297 (quoting *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam)). Such injuries must go beyond "money, time, and energy." *Id.* The irreparable harm analysis "assumes, without deciding, that the movant has demonstrated a likelihood that the non-movant's conduct violates the law," and "examine[s] only whether that violation, if true, inflicts irremediable injury." *Id.* at 303.

Courts in this Circuit have readily found irreparable injury when plaintiffs bring challenges to recently adopted immigration policies and procedures. *See, e.g.*, *Make the Road*, 405 F. Supp. 3d at 60–63; *Grace v. Whitaker*, 344 F. Supp. 3d 96, 146 (D.D.C. 2018); *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 191 (D.D.C. 2015). The same is true here.

Assuming, as the Court must, that Plaintiffs did not receive lawfully conducted credible fear interviews, Plaintiffs have and will suffer irreparable harm in two respects.

First, as result of the negative fear determinations, Plaintiffs remain detained at the Dilley detention facility.[39] "Courts in this and other jurisdictions have found that deprivations of physical liberty of the type suffered by Plaintiffs are the sort of actual and imminent injuries that constitute

[39] As noted above, Plaintiffs L.E.-L. and I.I.E.-L. have been released from detention.

irreparable harm." *Aracely, R. v. Nielsen*, 319 F. Supp. 3d 110, 155 (D.D.C. 2018). Moreover, "[c]ourts have . . . recognized that the 'major hardship posed by needless prolonged detention' is a form of irreparable harm." *Ramirez v. U.S. Immigration & Customs Enf't*, 310 F. Supp. 3d 7, 31 (D.D.C. 2018) (quoting *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 191 (D.D.C. 2015)). "[D]etention harms [plaintiffs] in myriad ways, and as various mental health experts have testified, it is particularly harmful to minor children." *R.I.L-R*, 80 F. Supp. 3d at 191. Here, Plaintiffs remain detained as a result of receiving an unlawfully conducted credible fear interview, and seven of them are minors. Compl. ¶¶ 13–17.

Second, Plaintiffs suffer irreparable harm if they are they are forced to return to countries where they face the risk of being harmed. Plaintiffs' declarations establish that they fled their countries of origin to escape from harms including death threats from drug cartels, physical beatings, and sexual abuse, all of which are likely to reoccur should they be forced to return. *See* Dkt. 8-2, TRO Ex. B [A.P.-S. Decl.] ¶¶ 3, 5–6, 9, 12; Ex. 7 [A.P.-S. Supp. Decl.] ¶ 2; Ex. 8 [L.E.-L Suppl. Decl.] ¶¶ 2, 4–5, 8, 11; Dkt. 8-3, TRO Ex. C [L.E.-L. Decl.] ¶ 3–8, 11; Ex. 9 [M.A.G.-M. Suppl. Decl.] ¶¶ 3–8; Dkt. 8-4, TRO Ex. D [M.A.G.-M. Suppl. Decl.] ¶ 2, 11–12; Ex. 6 [A.B.-B. Suppl. Decl.] ¶¶ 2, 10, 13; Dkt. 8-1, TRO Ex. A [A.B.-B. Decl.] ¶¶ 3–7, 15.

For example, one of the plaintiffs stated that the Cártel de Jalisco Nueva Generación ("CJNG") beat and abused her on account of her sexual orientation, killed her partner, and beat her mother. Ex. 8 [L.E.-L. Suppl. Decl.] ¶¶ 2, 4–5, 8, 11. Just last month, the U.S. Department of Justice deemed the CJNG a "remorseless criminal organization" that is "one of the fastest growing transnational criminal organizations in Mexico."[40] According to scholars, CJNG is "a highly

[40] Ex. 46 [*DEA-Led Operation Nets More Than 600 Arrests Targeting Cártel Jalisco Nueva Generación*, Department of Justice (Mar. 11, 2020), https://www.justice.gov/opa/pr/dea-led-operation-nets-more-600-arrests-targeting-c-rtel-jalisco-nueva-generaci-n].

resilient and geographically dispersed entity" engaged in extortion, kidnap for ransom, petroleum theft, human labor, sex trafficking, and more.[41] CJNG's "extreme savagery in Mexico includes beheadings, public hangings, acid baths, even cannibalism."[42] And the U.S. State Department, for its part, recently found that "significant" human rights issues in Mexico "included reports of the involvement by police, military, and other government officials and illegal armed groups in unlawful or arbitrary killings, forced disappearance, and torture; . . . [and] violence targeting persons with disabilities and lesbian, gay, bisexual, transgender, and intersex persons."[43]

The risk of harms such as these "demonstrate[] that [plaintiffs] have suffered irreparable injuries." *Grace*, 344 F. Supp. 3d at 146 (finding irreparable injury where credible fear determination process was found unlawful); *see also Vo Van Chau v. U.S. Dep't of State*, 891 F. Supp. 650, 656 (D.D.C. 1995) (finding "the ongoing threat of repatriation" contributed to finding of irreparable harm). Currently, "every day . . . leaves plaintiffs in limbo and in fear of removal," *Kirwa v. United States Dep't of Def.*, 285 F. Supp. 3d 21, 43 (D.D.C. 2017), which is a "harm that is 'certain and great,'" *Stellar IT Sols., Inc. v. United States Citizenship & Immigration Servs.*, No. CV 18-2015 (RC), 2018 WL 6047413, at *11 (D.D.C. Nov. 19, 2018).

In sum "[n]o relief short of enjoining the unlawful credible fear policies in this case could provide an adequate remedy." *Grace*, 344 F. Supp. 3d at 146; *see also Make the Road.*, 405 F. Supp. 3d at 62 (finding non-citizens established irreparable harm where they might be removed

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[41] Ex. 18 [Nathan P. Jones, *The Strategic Implications of the Cártel de Jalisco Nueva Generación*, 11 J. Strat. Security 19 (2018)].

[42] Ex. 34 [*El Mencho's American Empire*, Courier Journal (Nov. 24, 2019), *available at* https://www.courier-journal.com/in-depth/news/crime/2019/11/24/el-menchos-mexican-drug-cartel-cjng-empire-devastating-small-towns/4181733002].

[43] Ex. 45 [U.S. Department of State, MEXICO 2019 HUMAN RIGHTS REPORT (Mar. 11, 2020), *available at* https://www.state.gov/wp-content/uploads/2020/02/MEXICO-2019-HUMAN-RIGHTS-REPORT.pdf].

through inadequate processes). The irreparable harm here is beyond remediation and justifies immediate injunctive relief.

C. The Balance of Equities and Public Interest Tip Strongly in Plaintiffs' Favor

In determining whether to grant a preliminary injunction, a court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24 (quoting *Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 542 (1987)). A court must also evaluate whether granting a preliminary injunction is in the public's interest. *Id.* at 20.

Here, the balance of the equities and the public interest tip strongly in favor of issuing a preliminary injunction. Regarding the equities, Plaintiffs have explained the significant harms that they will face if preliminary relief is not granted. They could be removed the country on a moment's notice and, if that occurs, face the risk of violence, persecution, sexual predation, or torture in their home country. *See* Ex. 7 [A.P.-S. Supp. Decl.] ¶¶ 2–3; Dkt. 8-2, TRO Ex. B [A.P.-S. Decl.] ¶¶ 3–6, 12; Ex. 8 [L.E.-L. Suppl. Decl.] ¶¶ 2, 4–5, 8, 11; Dkt. 8-3, TRO Ex. C [L.E.-L. Decl.] ¶¶ 3–8; Dkt. 8-4, TRO Ex. D [M.A.G.-M. Decl.] ¶¶ 2–8; Dkt. 8-1, TRO Ex. A [A.B.-B. Decl.] ¶ 3–7; Ex. 6 [A.B.-B. Suppl. Decl.] ¶¶ 2, 13. The Supreme Court has long recognized that these are incredibly significant interests that may be a matter of life and death. *See, e.g.*, *Bridges v. Winston*, 326 U.S. 135, 164 (1945); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

By contrast, the government "cannot suffer harm from an injunction that merely ends an unlawful practice or reads a statute as required to avoid constitutional concerns." *R.I.L-R v. Johnson*, 80 F. Supp. 3d at 191 (citing *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013)). An agency policy concerning expedited removal that violates federal law may, like other illegal agency actions, be enjoined. *Grace*, 344 F. Supp. 3d at 141–44, *appeal filed*, No. 19-5013. The

additional relief requested here concerning Plaintiffs themselves is "very slight." *Ramirez v. U.S. Immigration & Customs Enf't*, 310 F. Supp. 3d 7, 32 (D.D.C. 2018).

The public interest also strongly favors Plaintiffs. There is always "a public interest in preventing aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm." *Nken v. Holder*, 556 U.S. 418, 436 (2009). Indeed, "the public has a significant interest in avoiding the erroneous application of a policy that can result in the swift and largely unreviewable deportation, without almost any procedural safeguard." *Make the Road*, 405 F. Supp. 3d at 65.

The public interest is also furthered by ensuring Defendants' compliance with the law. The D.C. Circuit has concluded that "there is a substantial public interest 'in having governmental agencies abide by the federal laws that govern their existence and operations.'" *League of Women Voters of United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) (quoting *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994)); *see also Jacksonville Port Auth. v. Adams*, 556 F.2d 52, 59 (D.C. Cir. 1977) (noting the "overriding public interest . . . in the general importance of an agency's faithful adherence to its statutory mandate"). As such, "[t]he public interest surely does not cut in favor of permitting an agency to fail to comply with a statutory mandate." *Ramirez v. U.S. Immigration & Customs Enf't*, 310 F. Supp. 3d 7, 33 (D.D.C. 2018).

Here, as explained above, Defendants' actions are contrary to the statutory mandates as laid out in, for example, the FVRA, the HSA, the INA, the APA, and so the public interest cuts against Defendants. Not only that, but the public interest is also served when "administrative agencies comply with their obligations under the APA." *Damus*, 313 F. Supp. 3d at 342. And the public interest is unquestionably served by preventing improperly appointed officials from usurping authority that is conditional on Senate confirmation. In short, it "cannot [be] emphasized

enough that the public's interest in procedural safeguards against unconstrained administrative agency action is especially strong." *Make the Road*, 405 F. Supp. 3d at 65–66. Thus, ultimately, the balances of the equities and the public interest tip strongly in favor of issuing preliminary relief.

D. Contrary to Defendants' View, This Court Has Jurisdiction Over This Case

At the TRO hearing, the government suggested that this Court lacks jurisdiction over Plaintiffs' claims. That argument is baseless. There is a "strong presumption in favor of judicial review" of administrative action. *INS v. St. Cyr*, 533 U.S. 289, 298 (2001); *see also, e.g.*, *Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1173 (D.C. Cir. 2003) (review of *ultra vires* allegations available even where organic statute expressly prohibits APA review). To overcome that presumption, the government bears the heavy burden of demonstrating "clear and convincing evidence of a contrary congressional intent." *Bd. of Governors of Fed. Reserve Sys. v. Mcorp Fin., Inc.*, 502 U.S. 32, 44 (1991).

There is no such evidence here. To be sure, by enacting 8 U.S.C. § 1252(a)(2)(A), Congress precluded judicial review of four types of claims related to the expedited removal process. But where, as here, Plaintiffs seek the facial invalidation of policies related to expedited removal, only one of those four jurisdiction-stripping provisions is even potentially implicated. That provision prohibits review only of "procedures and policies *adopted by*" the relevant government official "to implement" expedited removal, "except as provided in" 8 U.S.C. § 1252(e). 8 U.S.C. § 1252(a)(2)(A)(iv) (emphasis added).

First, this narrow language does not apply to Plaintiffs' claims. Improperly appointed officials whose actions are without force and effect under the FVRA cannot "adopt[ ]" claims on behalf of an agency. For that reason, § 1252(a)(2)(A) has no application here—with the result that in this case, as in the vast majority of cases challenging federal administrative action, this Court has jurisdiction under 28 U.S.C. § 1331.

But second, this Court would still have jurisdiction even if Morgan, McAleenan, and Cuccinelli had all been unanimously confirmed by the Senate, because Plaintiffs' claims would, in that instance, fall squarely within the language of 8 U.S.C. § 1252(e). That section gives this Court the authority to review claims that "a written policy directive, written policy guideline, or written procedure issued . . . to implement" the expedited-removal provisions of 8 U.S.C. § 1225(b) "is not consistent with [the INA] or is otherwise in violation of law." 8 U.S.C. § 1252(e)(3)(A). Plaintiffs do just that; they argue that the MOA—the written policy under which CBP officers conduct credible fear interviews—violates the FVRA, the HSA, the INA, the APA, and the United States Constitution. Thus, this Court thus has jurisdiction even if the language of § 1252(a)(2)(A)(iv) applies to this case.

Nor may the government elide that conclusion by arguing that this suit is untimely under the 60-day statute of limitations in § 1252(e)(3)(B). Under the plain text of that section, the 60-day period begins to run from the date the challenged policy "is first implemented." 8 U.S.C. § 1252(e)(3)(B). In *M.M.V. v. Barr*, 1:19-cv-02773-ABJ (D.D.C.), the government adopted the position that the July 2019 MOA was first implemented either when it became effective or on the next day a CBP agent conducted a credible fear interview. *M.M.V.*, Dkt. 59, at 14. Thus, the government argued, plaintiffs had to sue no more than 60 days after the later of those two dates. *M.M.V.*, Dkt. 59, at 14–15.

Again, that is precisely what Plaintiffs have done here: filed suit within 60 days after the effective date of the MOA and thus within 60 days after the first interviews conducted under its auspices. And if the government seeks to recant its *M.M.V.* argument here, it would have to do so

on the supremely implausible ground that the MOA was implemented *before* it was effective.[44] Time travel having not yet been perfected, the suit is timely.[45]

CONCLUSION

WHEREFORE, Plaintiffs respectfully request that this Court grant the motion and preliminarily enjoin Plaintiffs' removal from the United States and enjoin continued implementation of the MOA pending disposition of this matter.

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Falls Church, VA

Respectfully submitted,

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[44] The plain terms of the July 2019 MOA make clear that, absent a signed extension, it would expire on January 6, 2020, 180 days after it became effective. Ex. 1, at 4–5. USCIS and CBP did not sign an extension; they signed a new MOA. Compl., Ex. A. The consequence is that CBP agents' interviews of Plaintiffs, which began at the end of January 2020, could not have implemented the earlier MOA.

[45] The government's underlying premise—that the 60-day deadline is jurisdictional—is also incorrect. Under recent Supreme Court precedent, a statute of limitations is jurisdictional "only if Congress has 'clearly stated' as much." *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632 (2015) (citing cases). Section 1252(e)(3) contains no such clear statement.