**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' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

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## INTRODUCTION

The Executive's authority is significant—but not boundless. The President may appoint anyone he likes to lead the Department of Homeland Security and its agencies, so long as the Senate is willing to gives its advice and consent. Rather than obtain Senate confirmation, the President has instead decided to rely on acting officials to run the Department. But the Federal Vacancies Reform Act ("FVRA") establishes boundaries on who may serve as an acting official and for how long—boundaries that Congress put in place to prevent the executive branch from overreaching by using acting officials to circumvent the Constitution's requirements. The acting officials responsible for the Memorandum of Agreement ("MOA") at issue here were exercising the powers of their offices in violation of the FVRA, and for that reason the MOA cannot stand.

On top of that, the MOA is unlawful in its own right, as Defendants effectively acknowledge. Congress required anyone conducting credible fear interviews to receive training comparable to that received by full-time asylum officers—and Defendants admit they chose to provide significantly less training to CBP agents. Defendants do not dispute that their own regulations require non-adversarial interviews, yet they also implicitly admit that the MOA assigns inherently adversarial agents to conduct those interviews. And Defendants concede that their *post hoc* rationale for establishing the MOA runs counter to the facts they knew at the time.

Because Defendants' MOA—which is unlawful for multiple reasons—will cause Plaintiffs irreparable injury, and because the other preliminary injunction factors also weigh in favor of Plaintiffs' request, the motion for a preliminary injunction should be granted.

## ARGUMENT

### A. This Court Has Jurisdiction Over Plaintiffs' Claims

Defendants concede that the Court has jurisdiction to review the legality of the MOA. Opp. 17. But they contend the Court is powerless to remedy Defendants' illegal actions. In their view,

a June 2019 delegation signed by Ken Cuccinelli is the only written policy that authorizes and governs the use of CBP agents to conduct credible fear interviews. That is incorrect. And in any event, Plaintiffs can challenge both the 2019 delegation and the MOA.

### 1. Without the MOA, CBP Agents Would Not Have Conducted Plaintiffs' Credible Fear Interviews

Defendants' own evidence belies their contention that the MOA is irrelevant. The 2019 delegation itself provides that USCIS's "delegat[ion]" to CBP of its "[a]uthority . . . to make credible fear determinations" is "[s]ubject to the terms of a separate [MOA] . . . between" the USCIS Director and "the highest ranking official of CBP." Dkt. 17-4, Ex. 1, at 1. That stipulation was included for a reason: Under the 2003 DHS delegation to USCIS on which the 2019 redelegation to CBP is based, USCIS may not redelegate to CBP without the "consent" of the "Commissioner of CBP." Dkt. 17-1, Ex. 1, at 5. Because the 2019 delegation was issued unilaterally by USCIS, it could not provide the CBP Commissioner's consent and does not purport to do so. *See* Dkt. 17-4, Ex. 1. Instead, it expressly confirms the need for the Commissioner's "consent" (*id*. at 2), and specifies that its delegation of authority requires a separate agreement with CBP (*id*. at 1). The MOA purports to provide the necessary consent from CBP. As the initial July 2019 MOA made clear, the supposed benefit of using CBP agents for credible fear interviews became possible only "[u]nder this agreement." Dkt. 12-3, PI Mem., Ex. 1, at 1. The 2019 delegation, by itself, was therefore *not* legally sufficient to assign credible fear responsibilities to CBP.

The government's statements in *M.M.V.* confirm as much. Ashley Caudill-Mirillo, a USCIS official, submitted a sworn declaration in *M.M.V.* that cited *only* the July 2019 MOA in support of the statement that CBP had been "delegated authority to perform credible fear interviews." *M.M.V. v. Barr*, No. 19-2773, Dkt. 59-1, ¶ 19 (D.D.C. Dec. 27, 2019). Government

counsel, meanwhile, told the court in *M.M.V.* that it was the MOA that "assign[ed] CBP agents to USCIS, where they would . . . conduct credible fear interviews." *M.M.V.*, Dkt. 59, at 17. Neither Ms. Caudill-Mirillo nor counsel so much as mentioned the 2019 delegation. And the government succeeded in having the challenge to the use of CBP agents dismissed in *M.M.V.* on the basis that the suit was filed more than 60 days *after the MOA*, not the delegation. Ex. 50, Mem. Op., *M.M.V. v. Barr*, No. 19-2773, Dkt. 97 at 36–37 (D.D.C. Apr. 27, 2020).

Moreover, even if the delegation alone had given CBP authority to conduct credible fear interviews (which it did not), CBP still would not be conducting such interviews absent the MOA. The MOA states that it "sets forth terms under which USCIS and CBP can foster collaboration" by having CBP agents conduct credible fear interviews. Compl., Ex. A at 1. It also requires USCIS and CBP to undertake 63 tasks necessary to facilitate CBP's partnership in credible fear determinations. *Id.* at 1–3. It is thus clear that the agencies could not—and did not—simply assign CBP agents to carry out USCIS tasks under the 2019 delegation. Rather, the agencies entered into the government equivalent of a joint venture, defined by detailed terms in the MOA. Simply put, without the MOA at issue here, CBP agents would not have been able to conduct the credible fear interviews challenged here.

As a matter of legal requirement and logistical reality, the MOA was thus essential. And in any event, because an agency's action "must be measured by what [it] did, not by what it might have done," *Mo. Dep't of Soc. Servs. v. HHS*, 2019 WL 4709685, at *4 (D.D.C. Sept. 26, 2019) (citing *SEC v. Chenery Corp*., 318 U.S. 80, 93–94 (1943)), Defendants' choice to employ the MOA means that Plaintiffs can challenge that policy even if Defendants theoretically could have assigned credible fear responsibilities to CBP personnel in some other way. In short, the MOA is the policy

that enabled CBP law enforcement agents to conduct Plaintiffs' credible fear interviews. The Court need not reach the question of whether it has jurisdiction to review the 2019 delegation.

**2. In Any Event, This Court Has Jurisdiction to Review the 2019 Delegation**

Even if this Court had to invalidate the 2019 delegation to grant relief, which it does not, the Court would retain jurisdiction over Plaintiffs' claims.

To start, this Court may review claims that the 2019 delegation violates federal law under 28 U.S.C. § 1331 absent "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); PI Mem. 43–45. The government argues that 8 U.S.C. § 1252(a)(2)(A) "squarely removes from federal courts any jurisdiction to review issues 'relating to'" the expedited removal statute (Opp. 14), but it cites no authority for that proposition, which is at odds with the statutory text. Section 1252(a)(2)(A) instead bars four very specific types of claims unless they fall within the ambit of § 1252(e).

It is undisputed that only one of those four categories is relevant here. That category involves challenges to "procedures and policies adopted by" the relevant government official "to implement" the expedited removal process. 8 U.S.C. § 1252(a)(2)(A)(iv); PI Mem. 43. And Defendants do not dispute that officials appointed in violation of the FVRA cannot "adopt" procedures and policies within the meaning of § 1252(a)(2)(A)(iv), because their actions are without force and effect under 5 U.S.C. § 3348(d)(1).[1] Cuccinelli, whose appointment violated the FVRA (*see infra* pp. 10, 14–15), thus could not, and did not, "adopt[ ]" the 2019 designation. As a result, the jurisdiction-stripping language of § 1252(a)(2)(A) does not apply to review of the designation, and this Court has jurisdiction to review the designation under 28 U.S.C. § 1331.

[1] The opinion in *M.M.V.* wrongly asserts that this is solely a merits issue. Ex. 50 at 21–22. Because § 1252(a)(2)(A) plainly applies only to policies that are "adopted," it also bears directly on jurisdiction when a policy or procedure is issued by an improperly appointed official.

Moreover, even if § 1252(a)(2)(A)(iv) did apply to challenges to the 2019 delegation (which it does not), this Court would still have jurisdiction because § 1252(e)(3)(A) contains an exception to the jurisdiction-stripping provisions in § 1252(a)(2)(A) for claims that written policies and procedures are "in violation of law." 8 U.S.C. § 1252(e)(3)(A)(ii). There is no dispute that Plaintiffs' claims would fall within that exception if § 1252(a)(2)(A) applied.[2]

Defendants contend that the 60-day statute of limitations in § 1252(e)(3)(B) is jurisdictional and has expired with respect to the 2019 delegation. Opp. 14–15. That, too, is wrong. Defendants base this argument solely on *AILA v. Reno*, 18 F. Supp. 2d 38 (D.D.C. 1998). While the district court in *AILA* did hold that the 60-day period in § 1252(e)(3)(B) was jurisdictional, it did so based solely on the inference that it must be jurisdictional because it runs "from a fixed point." *AILA*, 18 F. Supp. 2d at 47. The D.C. Circuit adopted that holding without analysis. *AILA v. Reno*, 199 F.3d 1352, 1354 (D.C. Cir. 2000). Since *AILA*, however, the Supreme Court has repeatedly held that a statute of limitation is jurisdictional only if "Congress has 'clearly state[d]'" as much. *United States v. Kwai Fun Wong*, 575 U.S. 402, 409 (2015) (quoting *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013)). Because the D.C. Circuit in *AILA* never considered if the statute contained the requisite clear statement, the Supreme Court has implicitly overruled that decision.[3] *See, e.g.*, *Jackson v. Modly*, 949 F.3d 763, 776-78 (D.C. Cir. 2020)

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[2] The government's suggestion that any claim described by § 1252(e)(3)(A) cannot trigger jurisdiction under 28 U.S.C. § 1331 (Opp. 15) badly misunderstands the INA. Section 1252(e)(3)(A) is not an exclusive grant of jurisdiction that automatically supersedes other bases for jurisdiction. Rather, against the backdrop of § 1331 and the presumption of judicial review, § 1252(a)(2)(A) acts to strip jurisdiction over certain claims, and § 1252(e) represents a savings clause that carves out claims from § 1252(a)(2)(A). *See Make the Road N.Y. v. McAleenan*, 405 F. Supp. 3d 1, 27–28 (D.D.C. 2019), *appeal filed*, Oct. 31, 2019. It is nonsensical to ask whether a claim falls within § 1252(e)(3) without first determining that it falls within § 1252(a)(2)(A).

[3] The court in *Vijender v. Wolf*, No. 19-3337, 2020 WL 1935556, *3 (D.D.C. Apr. 22, 2020), held that *AILA* remained good law only by conflating the inference made in *AILA* with a finding of a clear textual statement.

(holding that the Supreme Court's analysis of one statute of limitations overruled precedent concerning a different statute of limitations). And it is hornbook law that this Court "is not bound to follow a decision that has been implicitly overruled." 18 Moore's Fed. Practice—Civil § 134.05[6] (2020).

Defendants do not argue that the deadline in § 1252(e)(3)(B) meets the Supreme Court's clear-statement test, and it does not. Section 1252(e)(3)(B) says only that a suit "instituted under this paragraph must be filed no later than 60 days after the date the challenged [action] is first implemented." It does not mention jurisdiction or include language that otherwise bears on a court's authority to hear a case. Rather, it describes only a plaintiff's "procedural obligations." *Fort Bend Cnty. v. Davis*, 139 S. Ct. 1843, 1851 (2019) (quotation omitted). Although some portions of § 1252 *are* jurisdictional, a non-jurisdictional deadline "does not become jurisdictional simply because it is placed in a section of a statute that also contains jurisdictional provisions." *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 155 (2013). And it would be particularly inappropriate for the limitations period to be seen as jurisdictional where, as here, the government withheld from the public the document it claims triggered that period for more than six months.

Because the 60-day deadline in § 1252(e)(3)(B) is not jurisdictional, it is subject to tolling. Tolling would be appropriate here, because the government held the 2019 delegation secret—despite timely relevant FOIA requests and litigation—until it filed its opposition in this case. *See, e.g.*, *Bowen v. City of New York*, 476 U.S. 467, 481 (1986); PI Mem. 17 n.14. Thus, even if the 2019 delegation were the only documentary prerequisite to the use of CBP agents to conduct credible fear interviews (it is not), and even if § 1252(a)(2)(A)(iv) applied to this case (it does not), this Court would retain jurisdiction over Plaintiffs' claims.

## B. Plaintiffs Are Likely to Succeed on the Merits

### 1. The MOA Violates the Federal Vacancies Reform Act.

#### a. Morgan's Performance of the CBP Commissioner's Functions and Duties in January 2020 Violated the FVRA's Limits on the Length of Acting Service.

Defendants concede that if the office of CBP Commissioner became vacant in April 2019, then the time limits set forth in 5 U.S.C. § 3346 expired well before January 2020. They argue that the office did not become vacant until November 2019, when Acting Secretary McAleenan resigned from DHS. But McAleenan became "unable to perform the functions and duties of the office [of CBP Commissioner]," 5 U.S.C. § 3345(a), in April 2019, when he took the post of Acting DHS Secretary. McAleenan's inability to perform those functions and duties is demonstrated by the fact that on the same day he took his new post as Acting Secretary, he assigned another official, John Sanders, to perform the functions and duties of the CBP Commissioner in his place. *See* PI Mem. 11; Decl. of Wayne Winterling, ECF No. 17-2, Ex. 1 (indicating that Sanders' designation would last "during the period [McAleenan] serves as the Acting Secretary" of DHS).

Vacancies under the FVRA do not require officeholders to have permanently relinquished their offices. Instead, a vacancy occurs when an officer "dies, resigns, *or is otherwise unable to perform the functions and duties of the office*." 5 U.S.C. § 3345(a) (emphasis added); *see id.* § 3348(b) (same); *id.* § 3345(a)(3) (basing restrictions on "the date of death, resignation, *or beginning of inability to serve* of the applicable officer" (emphasis added)). Confirming the natural reading of this language, the FVRA expressly covers "a vacancy caused by sickness." *Id.* § 3346(a) (waiving time limits for acting service during sickness). Officers who are temporarily unable to perform the functions of their offices due to sickness "continue to occupy their permanent offices," PI Opp. 37, in the same way that McAleenan continued to hold the position of CBP Commissioner during his tenure as Acting DHS Secretary. But in both situations the office is

deemed a "vacant office" under the FVRA, because the officeholder is "unable to perform the functions and duties of the office." 5 U.S.C. § 3345(a)(2), (a)(3).

Congress deliberately employed this broad language to prevent bureaucratic circumvention of the FVRA's restrictions. *See* S. Rep. No. 105-250, at 12 (1998) ("The section applies when an officer . . . dies, resigns, or is otherwise unable to perform the functions and duties of the office. *The law applies when any of those factual situations arises, regardless of how the situation is characterized*." (emphasis added)); *id.* (describing evasion of previous legislation through creative delegations of authority); 144 Cong. Rec. S12823 (daily ed. Oct. 21, 1998) (Sen. Thompson) ("To make the law cover *all situations when the officer cannot perform his duties*, the 'unable to perform the functions and duties of the office' language was selected. Sickness is the only exception to the 210 day limit . . . ." (emphasis added)).

What Defendants attempt here illustrates why Congress wrote the FVRA the way it did. Defendants assert that Morgan did not become Acting CBP Commissioner until November 14, 2019—after McAleenan resigned from DHS and the new Acting Secretary designated Morgan's position as the "first assistant" to the office of CBP Commissioner. PI Opp. 8, 37. But by then, Morgan had already served as CBP's Acting Commissioner for months. Indeed, the previous July he approved the first credible fear MOA as the "Acting Commissioner" of CBP. PI Mem., Ex. 1, at 5. In short, before November 14 Morgan was exercising the powers of the CBP Commissioner, and after November 14, Morgan continued doing exactly the same thing—nothing changed. *See, e.g.*, Compl., Ex. A, at 6 (January 2020 credible fear MOA, also approved by Morgan as "Acting Commissioner"). Yet according to Defendants, the fact that McAleenan "continue[d] to occupy [his] permanent office" until then (PI Opp. 37) means that Morgan can serve for months longer than the FVRA would otherwise allow. The statute Congress enacted is not so easily evaded.

Defendants claim that Acting Secretary McAleenan "continued to serve as the CBP Commissioner while serving as Acting Secretary" (*id.* at 38), instead of just formally retaining the title. But the only thing they assert McAleenan did as "Commissioner" was to direct *other* people to perform the CBP Commissioner's duties. *Id*. (citing the April 2019 delegation and September 2019 update). That simply proves Plaintiffs' point: McAleenan could not, and did not, "perform the functions and duties of the office" after becoming Acting Secretary. 5 U.S.C. § 3345(a).

Ultimately, if McAleenan had been able "to perform the functions and duties of the office" of CBP Commissioner after becoming Acting Secretary, 5 U.S.C. § 3345(a), he would not have needed to designate another person to perform "all . . . functions, authorities, privileges, powers, and duties" of the Commissioner, ECF No. 17-2, Ex. 1, at 1 (April 2019 delegation), nor would he have needed to revise that designation to eliminate its original time limit and ensure that it would remain in effect as long as he "serve[d] as the Acting Secretary," *id*., Ex. 2, at 1 (Sept. 2019 update).

In sum, the office of the CBP Commissioner became "vacant" for FVRA purposes on April 10, 2019, when McAleenan became Acting Secretary and simultaneously directed John Sanders to perform the duties of CBP Commissioner in his place. An acting official could serve as Commissioner "for no longer than 210 days beginning on the date the vacancy occur[red]," *id*. § 3346(a)(1)—that is, until November 6, 2019. Morgan's service as Acting Commissioner on January 30, 2020, when he approved the MOA, thus violated the FVRA.

**b. Morgan's Designation as Acting CBP Commissioner Violated the FVRA's Limits on the Selection of Acting Officials.**

Even if the office of CBP Commissioner became vacant in November 2019, as Defendants wrongly maintain, the selection of Morgan as Acting Commissioner would *still* violate the FVRA.

Defendants assert that Morgan became Acting Commissioner through the same type of maneuver previously used to install Ken Cuccinelli as Acting Director of USCIS. *See L.M.-M. v.*

*Cuccinelli*, No. 19-2676, 2020 WL 985376, at *1–2 (D.D.C. Mar. 1, 2020). *After* the office of CBP Commissioner was formally and permanently vacated in November, the Acting DHS Secretary designated Morgan's position of Chief Operating Officer as the new "First Assistant and most senior successor to the Commissioner of CBP" (PI Opp. 8), a change that attempted to bypass the statutorily created office of Deputy Commissioner. Morgan then supposedly became the Acting Commissioner "automatically," *id*., under 5 U.S.C. § 3345(a)(1). This attempted end-run around the FVRA is unlawful for at least two reasons.

First, a "first assistant" to an office must, by any definition, be an "assistant" to that office—in some way "subordinate to the principal." *L.M.-M.*, 2020 WL 985376, at *16. But Morgan, like Cuccinelli, "does not qualify as a 'first assistant' because he was assigned the role of principal on day-one." *Id.* Upon joining CBP in July 2019, Morgan was immediately given the powers of the CBP Commissioner, *see* ECF No. 17-2, Ex. 1, at 1, and he "performed the duties of the Commissioner," PI Opp. 7. As detailed above, Acting DHS Secretary McAleenan did not perform any duties of the Commissioner's office from that point on. By design, therefore, Morgan has never served "'in a subordinate capacity' to any other official at" CBP. *L.M.-M.*, 2020 WL 985376, at *16. Morgan's nominal designation as the "first assistant" to a vacant office in November does not change that, because "labels—without *any* substance—cannot satisfy the FVRA's default rule under any plausible reading of the statute." *Id.* at *17.

Second, even if Morgan's designation as "first assistant" could be materially distinguished from Cuccinelli's (PI Opp. 39 n.13), it would nevertheless be unlawful because it occurred *after* the Commissioner's office became vacant. The text, structure, and purpose of the FVRA all plainly indicate that in order to become an acting officer as a "first assistant" under § 3345(a)(1), a person must already be the first assistant when the vacancy arises.

The FVRA is clear. "If an officer . . . dies, resigns, or is otherwise unable to perform the functions and duties of the office . . . the first assistant to the office of such officer shall perform the functions and duties of the office temporarily." 5 U.S.C. § 3345(a)(1). Both the Supreme Court and the D.C. Circuit have acknowledged the obvious: because this provision is a mandatory "default rule," a first assistant takes over "automatically" when the vacancy occurs. *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 935 (2017); *see id*. at 937 (referring to "first assistants who automatically assume acting duties under subsection (a)(1)"); *SW Gen., Inc. v. NLRB*, 796 F.3d 67, 70 (D.C. Cir. 2015) ("The FVRA provides that, in the event of a vacancy in a [Senate-confirmed] position, the 'first assistant' automatically takes over in an acting capacity.").

Morgan's elevation did not occur automatically, by default, or in conformity with this rule. When McAleenan permanently relinquished the office of CBP Commissioner in November, the Deputy Commissioner, not Morgan, was the "first assistant" to that office. Nevertheless, Acting Secretary Chad Wolf approved a request to re-designate Morgan as the "first assistant" to the Commissioner, bypassing the Deputy Commissioner. Decl. of Juliana Blackwell, ECF No. 17-1, Ex. 4. Who made that request? Mark Morgan himself. *See id.* (memorandum from Mark Morgan to the Acting Secretary). That ploy violates the plain language of § 3345(a)(1), under which the powers of a vacant office are conferred on an already-serving first assistant by operation of law.

Defendants point to the alternative appointment mechanisms in § 3345(a)(2) and (a)(3), which allow presidents to designate acting officials after a vacancy arises, to argue that, because these alternatives exist, the natural reading of the statute should be ignored—and agencies should be able to fill vacant offices whenever they want, with whomever they want, by designating those persons as "first assistants" under § 3345(a)(1). PI Opp. 32. But that result does not follow. As explained, subsection (a)(1) takes effect "automatically" by virtue of the statute (*SW Gen.*, 137 S.

Ct. at 937), and the only conceivable moment when it does so is the moment the vacancy occurs. By contrast, § 3345(a)(2) and (a)(3) empower the President to "override that default rule" (*id.* at 935) at a later point (subject to the time limits on acting service found in 5 U.S.C. § 3346).

Defendants also maintain that giving effect to the plain meaning of § 3345(a)(1) would render superfluous the FVRA provision preventing a person from serving as an acting officer if they are nominated to the office by the President and "did not serve in the position of first assistant" during the year preceding the vacancy. 5 U.S.C. § 3345(b)(1). In Defendants' telling, if § 3345(a)(1) prevents a person from being appointed first assistant after the fact, then there was no need for this separate prohibition, because everyone it affects would already have been barred by § 3345(a)(1). That argument conveniently ignores the alternative appointment mechanisms in § 3345(a)(2) and (a)(3): As the Supreme Court has held, the prohibition in § 3345(b) applies to *all three* prongs of § 3345(a), not just to (a)(1)'s "first assistant" provision. *SW Gen.*, 137 S. Ct. at 935. The role of § 3345(b)(1)(A)(i) is therefore to provide limits on those who can serve as acting officials under § 3345(a)(2) and (a)(3). Nothing in that provision signals "the possibility that a person could be appointed as first assistant after a vacancy has arisen." PI Opp. 33.

"Perhaps sensing the weakness of [their] textual arguments," Defendants "fall[ ] back on legislative history." *SW Gen.*, 796 F.3d at 76; *see* PI Opp. 33-34. But the very passage of the committee report that Defendants cite confirms Plaintiffs' interpretation: under § 3345(a)(1), "the first assistant *on the day of the vacancy[ ]* automatical[ly] function[s] as the acting officer." S. Rep. No. 105-250, at 13 (emphasis added). *Cf. SW Gen.*, 137 S. Ct. at 943 ("ambiguous legislative history" cannot "muddy clear statutory language" (quoting *Milner v. Department of Navy*, 562 U.S. 562, 572 (2011))).

Finally, the structure of § 3345 refutes Defendants' interpretation. Congress took care to specify that when a vacancy arises, the *only* alternative to a first assistant's automatic service as the acting officer is that "the President (and only the President)" may direct others to perform that role instead—and even then, the President's options for whom to select are significantly limited. 5 U.S.C. § 3345(a)(2), (a)(3); *see* S. Rep. No. 105-250, at 12-13. Defendants' interpretation would eviscerate those limits entirely: *any* higher agency official (not just the President) could install *anyone* as the acting officer (not just people who qualify under (a)(2) and (a)(3)), simply by designating a new position as the vacant office's "first assistant." That interpretation transforms the default rule of § 3345(a)(1) into an unbounded means by which an administration may fill vacant offices with its own hand-picked designees without Senate confirmation.

Defendants ask this Court to disregard the FVRA's plain text because adhering to it, they say, "would upend the functioning of the Executive Branch." PI Opp. 30. But they cite nothing to support their hyperbolic claim. Under § 3345(a)(1), an already serving first assistant—typically "a career official with knowledge of the office," S. Rep. No. 105-250, at 12—will automatically fill any vacancy, and if there is no first assistant or if the President prefers someone else (during a presidential transition or otherwise), the President can designate anyone who qualifies under § 3345(a)(2) or (a)(3). The statute therefore gives the executive branch full authority to assure continuity of operations. It just cannot do so in ways that violate the limits Congress set.

Morgan's purported elevation to Acting Commissioner of CBP under § 3345(a)(1) thus violates the text, structure, and purpose of the FVRA. And it is undisputed that the acts of an official serving in violation of the FVRA are void under that statute, 5 U.S.C. § 3348(d)(1), and must be set aside under the APA, 5 U.S.C. § 706(2). *See* PI Mem. 12–14.

### c. Because Cuccinelli's Service as Acting Director of USCIS Violated the FVRA, He Could Not Lawfully Delegate USCIS's Authority to CBP.

The MOA is also unlawful under the FVRA for another reason: USCIS and CBP "entered into" the MOA under the supposed authority of Ken Cuccinelli's 2019 delegation. Compl., Ex. A, at 1. But Cuccinelli lacked the authority to make that delegation.

Cuccinelli was purportedly installed as Acting Director of USCIS in June 2019 by being designated the Director's "first assistant." *See* PI Opp. 8. His designation, however, violated the FVRA, because Cuccinelli was never the "first assistant" to the office of USCIS Director, much less the first assistant when that office became vacant. *See* PI Mem. 20-22; *L.M.-M.*, 2020 WL 985376, at *15–19. That violation of the FVRA renders Cuccinelli's June 2019 delegation to CBP void. And because the MOA rests upon an illegitimate delegation of agency authority, the MOA is itself unlawful and must be set aside under the APA. 5 U.S.C. § 706(2)(A), (C).

Defendants also maintain that Cuccinelli had authority to delegate USCIS's powers to CBP by virtue of his position as Principal Deputy Director. Even if Cuccinelli validly held that position (*but see infra*), this argument falls short. Defendants rely on the fact that a 2003 DHS delegation to USCIS permits the agency's "highest ranking official" (not just its Director) to transfer to CBP the authorities conferred by that document. ECF No. 17-1, at 9. But because the Secretary must redelegate tasks in ways consistent with the language of the Homeland Security Act ("HSA") (6 U.S.C. § 112(b)(1)), he could not override the statutory requirement that the USCIS Director establish and oversee USCIS's policies for performing the agency's functions (*id.* § 271(a)(3)(A)-(B)). And that mandate surely encompasses establishing policies under which USCIS delegates its functions to CBP.[4]

[4] For similar reasons, a delegation of USCIS's authority to another agency that was made by an unlawfully serving Director is "void" under 5 U.S.C. § 3348(d), because establishing the

In any event, Cuccinelli's appointment is void because it was made by McAleenan, whose appointment as Acting Secretary itself violated the FVRA. PI Mem. 18–19. Defendants' sole contrary argument—that "then-Secretary Nielsen established a new succession order that placed the CBP Commissioner third in the line of succession for Acting Secretary" (Opp. 36)—is simply false. Although Nielsen altered the order of succession for cases of "disaster or catastrophic emergency," her order expressly states that "[i]n the event of the Secretary's . . . resignation . . . the orderly succession of officials is governed by Executive Order 13753," as it had been since 2016. Dkt. 17-1, Ex.2, at 1. And McAleenan was not entitled to become Acting Secretary under the order of succession in that Executive Order. PI Mem. 18–19.

**2. The MOA Violates the HSA**

The MOA also violates the HSA. It is undisputed that the HSA gives authority over credible fear interviews solely to USCIS and not to CBP. PI Mem. 14–17. Defendants nevertheless suggest that using CBP agents to adjudicate credible fear determinations does not invade USCIS's area of responsibility. Opp. 18. That argument ignores the statutory language. The HSA does not just give USCIS the sole *authority* to conduct credible fear interviews; it confers the "function" of conducting those interviews on USCIS (not CBP) and makes all "personnel" involved in that function part of USCIS (not CBP). 6 U.S.C. § 271(b). If those statutory delegations have any meaning—as they must—the MOA contravenes § 271 by requiring officials from a different agency to perform that task. And contrary to Defendants' argument, the MOA does "require[ ]" CBP employees to "join" the USCIS function of performing credible fear interviews. Opp. 18 (quotation omitted).

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policies for such delegations is a "function or duty" that "is required by statute to be performed by" the USCIS Director "and only that officer." 5 U.S.C. § 3348(a)(2)(A).

Further, Congress did not—as the government asserts (Opp. 19)—give USCIS the authority to delegate tasks to CBP in 6 U.S.C. § 271(a)(5). That section allows USCIS to "implement innovative pilot initiatives to eliminate any . . . backlog," including by transferring its own "personnel" to different tasks. 6 U.S.C. § 271(a)(5). But it does not give USCIS the authority to delegate its functions to CBP agents. Neither does any other statute. *See* PI Mem. 15.

That ends the matter. The MOA does not conform with the HSA. And Defendants have not raised, and have thus forfeited, any argument that the 2003 delegation somehow cures the MOA's violation of the statute.[5] The MOA thus violates the HSA and is void under the APA.

**3. The MOA Violates the Immigration and Nationality Act (INA)**

**a. CBP Agents Lack Training Required to Conduct Credible Fear Interviews.**

The INA requires that individuals conducting credible fear interviews receive "professional training in country conditions, asylum law, and interview techniques comparable to that provided to full-time adjudicators of" asylum applications. 8 U.S.C. § 1225(b)(1)(E). Far from demonstrating that the training of CBP agents meets this standard, Defendants effectively concede that it does not: According to the declaration of Ms. Caudill-Mirillo, Defendants decided that "[t]he full scope of training required for USCIS asylum officers is not necessary for [CBP agents] assigned to the limited role of conducting credible fear interviews." Caudill-Mirillo Dec. ¶ 11. Thus, Defendants have not been providing CBP agents "training ... comparable to that provided to" full-time asylum officers, as the statute requires, 8 U.S.C. § 1225(b)(1)(E).

Instead, CBP agents receive only "the in-house training provided to USCIS asylum officers

[5] By its plain terms, the 2003 delegation cannot do so. *See* Dkt. 17-1, Ex. 1, at 5 (permitting redelegations only if such redelegations are not "proscribed by statute"). Further, that delegation allows USCIS to transfer functions solely to the "Commissioner of CBP"—here, someone who lacked the authority under the FVRA to accept the transfer. *See supra* pp. 9–13.

as a prerequisite to conducting credible fear interviews." Caudill-Mirillo Dec. ¶ 11. As Plaintiffs explained, USCIS provides full-time adjudicators:

- at least nine weeks of training, including a six-week residential program,
- four weeks of *additional* credible fear training for new Asylum Officers in locations with heavy credible and reasonable fear caseloads, and
- four hours a week of ongoing training.

PI Mem. at 24.[6] Yet USCIS is providing CBP agents with only "up to" six weeks of non-residential training, Caudill Decl. ¶ 11; Opp. 21. These two training regimens are not "comparable." "[C]omparable" means "[s]imilar or equivalent," Ex. 47 [Am. Heritage Dictionary 180 (4th ed. 2001)], and somewhere from 33% to 50% *less* training—which could not cover all of the same topics or information—is not "similar or equivalent."

By requiring training comparable with "full-time adjudicators of [asylum] applications" as the benchmark, Congress ensured that any officer conducting credible fear interviews was trained in the areas necessary to properly conduct those interviews. 8 U.S.C. § 1225(b)(1)(E). And USCIS itself has recognized that the lesser training received by CBP agents is insufficient. The agency recently told the Government Accountability Office that the nine weeks of formal training provided to full-time adjudicators "constitute the *minimum* amount of formal training required for asylum officers *needed to effectively screen credible and reasonable fear cases*." Dkt. 12-27, U.S. Government Accountability Office, *Actions Needed to Strengthen USCIS's Oversight and Data Quality of Credible and Reasonable Fear Screenings* 27 (emphasis added). As USCIS's admission

[6] Ms. Caudill-Mirillo has explained that professional full-time Asylum Officers are "specially trained in international law and adept in country conditions" to be "capable of responding to the unique needs of asylum-seekers." Caudill, Laws of Hospitality: Asylum and Refugee Law Panel, Dkt. 12-24, at 3. She explained further that training for the Asylum Corps developed into "thorough [immigration and asylum] legal training," as well as "training from mental health professionals who have experience working with survivors of torture," "extensive training in intercultural communication" and continual training "in order to better respond to the needs of the immigrant populations served by their office." *Id*.

shows, the considerable differences between the training regimens for CBP agents and true asylum officers unquestionably affect the reliability of the process. Indeed, the declarations filed by Plaintiffs and by an immigration attorney at Dilley—which Defendants make no attempt to rebut—show that CBP agents systematically commit important errors during credible fear interviews. PI Mem. 27–28 (detailing training problems reflected in failure to ask follow-up questions, omitting information from the record, and aggressive and improper interview techniques).

The differences between a decision made by an inadequately trained CBP agent and a decision made by an asylum officer fully trained in country conditions, trauma, and all aspects of the asylum process are highlighted by comparing the credible fear decisions before this Court and a typical credible fear decision issued by an Asylum Officer. *See* Ex. 48 [sample USCIS Asylum Officer CFI Notes].[7] In sharp contrast to the CBP-agent decisions that Plaintiffs received, the Asylum Officer decision relies heavily on multiple references to country conditions (*id.* at 11–12), reflects repeated efforts to elicit information relevant to the claim (*id.* at 19, 21–22), and shows the systematic use of follow-up questions (*id.* at 30–32).

These differences have adverse consequences for those interviewed by CBP agents. Defendants ignore their own data showing that CBP agents conducting credible fear interviews issue positive credible fear findings at approximately *half* the rate of professional USCIS Asylum Officers over the same time period. PI Mem. 31–32. And as Plaintiffs explained, and as Defendants do not and cannot dispute, the records created by unqualified and improperly trained CBP agents in an illegal process will follow asylum seekers throughout the immigration process. In particular, the immigration judge who reviews a CBP agent's credible fear determination "de novo" does so on the basis of the erroneous, incomplete record that results from the agent's lack

[7] Pin cites reference the PDF pagination.

of training—making the immigration judge's review inescapably tainted by Defendants' violation of the INA.[8] The MOA thus negates the value and protection of review by an immigration judge.

**b. CBP Agents Cannot, and Do Not, Conduct Non-Adversarial Interviews.**

Defendants cannot show that the MOA is consistent with the requirement in 8 C.F.R. § 208.30(d) that credible fear interviews be non-adversarial.

As Plaintiffs showed (PI Mem. 27–28), CBP agents' role as law enforcement agents charged under 8 U.S.C. § 1225(b)(1)(A)(i)(a) with immediately removing non-citizens makes them categorically adversarial to the interests of non-citizens.[9] Indeed, Defendants effectively concede as much by arguing that they have "minimize[d]" this problem by stating in the MOA that CBP agents must be non-adversarial. Opp. 21. But while the text of the MOA can—and does—illegally force that adversarial relationship into the realm of non-adversarial interviews, Defendants cannot erase the inherent incompatibility between the adjudication of credible fear and the statutory mission of CBP agents simply by putting words in the MOA. PI Mem. 27–32. Nor

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[8] Many immigration judges see their role "as strictly appellate in nature, and will only consider that which was submitted to the [interviewing agent] or referenced in" the agent's record. Katherine Shattuck, *Preventing Erroneous Expedited Removals: Immigration Judge Review and Requests for Reconsideration of Negative Credible Fear Determinations*, 93 WASH L. REV. 459, 496 (2018). Indeed, "in 25 percent . . . of the cases in which the credible fear notes were cited as a basis to find that the applicant lacked credibility, the immigration judge specified that the applicant was not credible because at the immigration hearing, (s)he added detail to the claim originally expressed during the credible fear interview," which further illustrates the prejudice of incomplete or erroneous notes. *See* Ex. 49 at 58 [U.S. Comm'n on Int'l Religious Freedom, *Report on Asylum Seekers in Expedited Removal*, Vol. I (2005)], https://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/Volume_I.pdf

[9] The distinction between law enforcement agents required to execute the expedited removal statute and asylum officers empowered to conduct credible fear interviews to exempt non-citizens from expedited removal is plain in the INA's text. If a noncitizen is inadmissible under certain provisions, the law enforcement agent charged with the inspection "shall order the alien removed from the United States without further hearing or review" unless the noncitizen requests asylum or indicates a fear of persecution. 8 U.S.C. § 1225(b)(1)(A)(i)(a). If the noncitizen seeks asylum, the law enforcement agent "shall refer the alien for an interview by an asylum officer." *Id*. § 1225(b)(1)(A)(i)(b).

can the narrow prohibition on CBP agents interviewing asylum seekers they recall encountering at the border (Opp. 22) cure the problem that the role of CBP agents is inherently adversarial to *all* detained asylum seekers.

Second, Plaintiffs proved that this problem is not theoretical. Defendants do not dispute the evidence showing that CBP agents treated Plaintiffs—and countless other asylum seekers—adversarially. Rather, they contend that, by highlighting the real-world effects of Defendants' illegal policy, Plaintiffs are somehow challenging the results of individual credible fear hearings on the merits. Opp. 22. That is not the challenge Plaintiffs bring. Instead, Plaintiffs challenge the systemic violation of law and required procedures that follows from the MOA's sanction to use inherently adversarial agents—inadequately trained ones, no less—to conduct interviews that the law requires to be non-adversarial.[10] That violation (like the inadequate training of CBP agents) infects every interview, no matter the result of any particular determination.

**4. The MOA Violates the APA**

Defendants' justification for the MOA—that it will "increase efficiency and effectiveness for DHS," Compl., Ex. A at 1—is arbitrary and capricious. Defendants provide no explanation for how tasking a law enforcement agency facing severe resource constraints to conduct credible fear interviews for USCIS promotes efficiency or effectiveness. *See* PI Mem. 33–35. Courts "may not supply a reasoned basis for the agency's action that the agency itself has not given." *AT&T Corp. v. FCC*, 236 F.3d 729, 735 (D.C. Cir. 2001). And "[a]rbitrary and capricious review strictly prohibits [courts] from upholding agency action based only on [their] best guess as to what

[10] Defendants' view that Plaintiffs are challenging an unwritten policy (Opp. 22) is nonsensical. Far from relying on a verbal directive, Plaintiffs assert that the MOA itself violates the law by assigning law enforcement officers to conduct non-adversarial interviews and by establishing conditions under which adversarial interviews systematically occur.

reasoning truly motivated it." *Williams Gas Processing-Gulf Coast Co., L.P. v. FERC*, 475 F.3d 319, 329 (D.C. Cir. 2006).

Defendants now offer the *post hoc* explanation that the MOA was put in place to address a "surge" at the border. Opp. 24. But "[n]o principle of administrative law is more firmly established than that a court must review discretionary actions in terms of the rationale on which the agency acted, rather than 'accept ... counsel's post hoc rationalizations.'" *Ashland Oil, Inc. v. FTC*, 548 F.2d 977, 981 (D.C. Cir. 1976). The MOA says nothing about a surge, and Defendants have failed to produce any other contemporaneous documents suggesting that motivation.

Regardless, even if it were proper for this Court to consider that justification, it still would provide no basis for upholding the MOA because the number of credible fear interviews had already dropped sharply in the second half of 2019 and early 2020 to lower than even previous "pre-surge" norms. PI Mem. 33–35. Defendants do not dispute the existence of that drop or their awareness of it. Indeed, they cannot—it is manifest in their own data. Defendants, in other words, do not dispute that their "explanation for [their] decision runs counter to the evidence before" them when they entered into the MOA. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Instead, Defendants claim that they simply ignored the monthly data in favor of only annual data. Opp. 25. But a decision to ignore current trends in interview numbers when assessing short-term personnel needs is plainly arbitrary.

Defendants also suggest—again, after the fact and for the first time in this litigation—that the January MOA was justified because of USCIS's "apparent assessment" that these decreases were "temporary." Opp. 25. But Defendants' own actions belie that argument. Defendants concede that, by the end of March 2020, "most" agents had been returned to their CBP duties. Caudill-Mirillo Decl. ¶ 3. If the unstated rationale for the MOA was to hedge for fluctuations and

forestall a future backlog, it would have made no sense to send most of those assigned under the MOA back to CPB offices in the month or so after the MOA was signed. Defendants' stated rationale is thus no more than a *post hoc* litigation position—and an implausible one at that.

**5. The MOA Violates the Due Process Clause and *Non-Refoulement* Obligations**

Contrary to Defendants' characterization, Plaintiffs are not asserting a liberty interest in being admitted to the United States. Rather, Plaintiffs seek the due process for which even Defendants must concede Plaintiffs are entitled—the procedure authorized by Congress under the INA. *See Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950); *Rafeedie v. INS*, 880 F.2d 506, 512–13 (D.C. Cir. 1989)). As detailed above, due to the illegal MOA, Plaintiffs have not been afforded credible fear interviews under procedures authorized by Congress, and thus have been denied due process. Defendants' actions have also interfered with Plaintiffs' procedural due process right to file for asylum. *See Gutierrez-Rogue v. INS*, 954 F.2d 769, 773 (D.C. Cir. 1992).

With respect to Plaintiffs' *non-refoulement* claim, Defendants have nowhere disputed that, if Defendants' MOA violates the law, Plaintiffs will prevail in this cause of action as well.

**C. Plaintiffs Are Likely to Suffer Irreparable Harm**

Plaintiffs have presented evidence of irreparable harm. PI Mem. 39–40. In fact, Defendants concede—as they must, in light of the record evidence—that "significant harms" may befall Plaintiffs if returned to their home countries. Opp. 40.

Defendants argue that these harms do not qualify as irreparable, but that argument cannot be squared with governing law. The irreparable-injury inquiry "assumes, without deciding, that the movant has demonstrated a likelihood that the non-movant's conduct violates the law." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 303 (D.C. Cir. 2006). But Defendants' contentions rest on the notion that Plaintiffs will not prevail on their claims because their negative credible fear determinations have been reviewed by immigration judges. Opp. 40.

This ignores Plaintiffs' allegations that the credible fear interviews conducted by CBP agents illegally undermined the immigration judge review that followed it. *Supra* pp. 18–19. Defendants cannot prevail on this prong of the analysis by presuming that Plaintiffs will lose on their claims.[11]

**D. The Balance of the Equities and Public Interest Tip in Plaintiffs' Favor**

The balance of the equities tip strongly in Plaintiffs' favor because the "effect ... of ... withholding ... the requested relief" would be substantial. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Plaintiffs could be removed at any moment and, if that occurs, they risk being subject to violence, persecution, sexual predation, or torture. PI Mem. 41.

Because Plaintiffs' credible fear interviews were not conducted in accordance with the law, there is a strong public interest in preventing "wrongful removal." *Nken v. Holder*, 556 U.S. 418, 436 (2009). And, per above (*supra* pp. 18–19), review by immigration judges does not cure the inadequate credible fear interview process and record created by the MOA. Nor can Plaintiffs reasonably litigate their claims from abroad, as Defendants contend (Opp. 41-42), given that it is undisputed that Plaintiffs may be physically harmed or killed if forced to do so. "Not to put too fine a point on it, the death threats, if carried out, would moot and defeat the review process." *Sean B. v. McAleenan*, 412 F. Supp. 3d 472, 488 (D.N.J. 2019); *see Compere v. Nielsen*, 358 F. Supp. 3d 170, 182 (D.N.H. 2019) (concluding plaintiff would be unlikely to be able to litigate from Haiti due in part to security threats). In other words, "under [the] Kafkaesque procedure [Defendants propose], [Plaintiffs] will be removed back to the very country where they fear persecution and torture while awaiting a decision on whether they should be subject to removal because of their fears of persecution and torture." *Devitri v. Cronen*, 289 F. Supp. 3d 287, 294 (D. Mass. 2018).

[11] Defendants also ignore the "major hardship posed by needless prolonged detention" resulting from their illegal conduct. *Compare* PI Mem. 38–39 (citing *Ramirez v. U.S. Immigration & Customs Enf't*, 310 F. Supp. 3d 7, 31 (D.D.C. 2018), *with* Opp. 40 (silent on same).

Nor would a preliminary injunction stop enforcement of the expedited removal system as Defendants suggest. *See* Opp. 41-42. Such an injunction would "simply require[] that the Government" implement expedited removal "in the way it has done for at least two decades." *Casa de Maryland, Inc. v. Trump*, No. PWG-19-2715, 2019 WL 7565389, at *3 (D. Md. Nov. 14, 2019). Indeed, because the MOA "likely is without Congressional authority" (*id.*), it is "Defendants who—based on" the MOA—"seek to override statutes enacted by Congress." *Doe v. Trump*, 284 F. Supp. 3d 1172, 1178-81 (W.D. Wash. 2018). And Defendants have not provided any evidence to back the proposition that it would "strain" their resources to allow four mothers and their children to stay in the United States while they litigate their claims. *See* Opp. 41.

Finally, Defendants argue the public interest weighs against invalidating the actions of DHS leadership because the government needs to maintain continuity of operations. *Id.* at 42. But the submission of nominees to the Senate in conformance with the Constitution's Appointments Clause is sufficient to ensure that continuity. And it should go without saying that permitting Defendants to act in an unlawful manner is counter to the public interest. *See* PI Mem. 41–43.

**E. An Injunction Is Appropriate Relief**

Injunctive relief is appropriate and should not be limited to Plaintiffs. Defendants argue that 8 U.S.C. § 1252(e)(1) prohibits injunctions in cases brought under § 1252(e)(3). Opp. 43. But while § 1252(e)(1) prohibits "declaratory, injunctive, or other equitable relief," it does so only in "any action pertaining to [an order of expedited removal] except as specifically authorized in a subsequent paragraph of" § 1252(e). 8 U.S.C. § 1252(e)(1). Section 1252(e)(1) does not parse different types of equitable relief, as Defendants contend, but instead limits the types of cases in which that relief may be awarded. *Make the Road New York v. McAleenan*, 405 F. Supp. 3d 1, 68 n.37 (D.D.C. 2019), *appeal filed* Oct. 31, 2019; *Grace v. Whitaker*, 344 F. Supp. 3d 96, 142

(D.D.C. 2018), *appeal filed* Jan. 30, 2019.[12] And there is no dispute that this case is authorized by § 1252(e)(3). Indeed, Congress clearly limited relief elsewhere under § 1252, which is why the government's interpretation that a "determination" provides only for a declaratory judgment has been rejected as "implausible." *See Make the Road New York*, 405 F. Supp. 3d at 68 n.37.

Nor is § 1252(f) applicable here, as it bars only suits to restrain the implementation of the INA's removal provision. It does not affect "jurisdiction over . . . *statutory* claims[,] because those claims did not 'seek to enjoin the operation of the immigration detention statutes, but to enjoin conduct . . . not authorized by the statutes.'" *Jennings v. Rodriguez*, 138 S. Ct. 830, 851 (2018) (citing *Rodriguez v. Hayes*, 591 F.3d 1105, 1120 (9th Cir. 2010)); *see Grace*, 344 F. Supp. 3d at 143; *R.I.L.-R. v. Johnson*, 80 F. Supp. 3d 164, 184 (D.D.C. 2015).

Finally, as Defendants recognize, preliminary equitable relief should "balance the equities as the litigation moves forward." *Trump v. IRAP*, 137 S. Ct. 2080, 2087 (2017). Here, the undisputed record evidence shows that the MOA causes significant harm to *all* asylum seekers interviewed by CBP agents. *E.g.*, Herre Decl. [Dkt. 12-12]. And preventing application of the MOA pending a final ruling on the merits would place only a minimal burden on Defendants, who concede that "most" CBP interviews have ended. Caudill Decl. [Dkt. 17-6] ¶ 3.

## CONCLUSION

For these reasons, Plaintiffs respectfully ask that this Court preliminarily enjoin Plaintiffs' removal from the United States and implementation of the MOA pending disposition of this matter.

[12] Contrary to Defendants' assertion (Opp. 43), the opinion in *L.M.-M.* does not foreclose injunctive relief. *See L.M.-M.*, 2020 WL 985376, at *24.

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Respectfully submitted,

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