[NOT YET SCHEDULED FOR ORAL ARGUMENT]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MANZANITA BAND OF THE KUMEYAAY NATION *et al.*,
Appellants,

IIPAY NATION OF SANTA YSABEL,
Appellee

v.

CHAD WOLF, in his official capacity as Under Secretary of Homeland Security for Strategy, Policy, and Plans *et al.*,
Appellees

No. 20-5333

OPPOSITION TO PLAINTIFFS' EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

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Plaintiffs, several Indian tribes, challenge the construction of border barriers on federal land in California. The government has regularly consulted with plaintiffs and others in the area, beginning in March, even before construction. Plaintiffs nevertheless waited until September to bring this suit, which the district court promptly considered on a thorough record, determining on October 16 that an injunction was not warranted because plaintiffs have not demonstrated any imminent irreparable harm.

Four weeks later, plaintiffs now ask this Court to take extraordinary and unwarranted steps with only days for the government to respond and for this Court to act. The motion does not identify any particular harm that will occur unless this Court acts by November 20 (or any other deadline). And the record demonstrates that the district court correctly determined that plaintiffs have not identified any likelihood of irreparable harm, precluding the injunction they seek.

STATEMENT

Plaintiffs challenge two border-barrier construction projects. 85 Fed. Reg. 14,958, 14,959 (Mar. 16, 2020) (San Diego A); *id.* at 14960 (El Centro A). The barriers are being constructed on the Roosevelt Reservation, "a 60-foot strip of land along the international border that has been set aside for law enforcement purposes." A171;[1] Proclamation 758, 35 Stat. 2136 (1907). San Diego A replaces 14 miles of existing

[1] "A" designates the ECF pagination of the attachments to plaintiffs' motion, Doc. #1870961.

border fencing, next to a border road that has existed for "at least 30 years," and adds about two miles of new fencing. *See* A170. El Centro A adds about three miles of new barrier. *See* A170-71. Construction began in May and June of 2020. A169-71.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) authorizes the Secretary of Homeland Security to "take such actions as may be necessary to install additional physical barriers and roads . . . in the vicinity of the United States border." Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-554 (codified at 8 U.S.C. § 1103 note). Congress granted the Secretary of Homeland Security authority "to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section." IIRIRA § 102(c). In March 2020, the Acting Secretary of DHS exercised his authority under § 102(c)(1) of IIRIRA to waive certain statutes as "necessary to ensure the expeditious construction" of the two projects at issue here.

Before construction was due to begin, Customs and Border Protection (CBP) began consultation with over 25 tribes, including plaintiffs, "requesting their input" on the proposed projects. A175. CBP has shared design plans and maps of the proposed construction and surrounding area, and given the tribes full access to its archeological contractor's database of information about cultural resources. A176, A177-78. In addition to its own surveys and records reviews, CBP re-surveyed, with tribal cultural monitors present, five areas the tribes identified as having "a high

probability for cultural artifacts and other sensitive sites," as well as other areas, and shared the results with the tribes. A178, A183-85.

CBP is following a Cultural Resource Protocol and Communication Plan to avoid and mitigate any potential injury to cultural or religious resources. If any resources are encountered, the Plan "requires an immediate halt to construction within 100 feet of the resource until it can be treated appropriately." A184. "[T]he tribes and CBP will complete culturally appropriate repatriation efforts to address the discovery" of sensitive items. A184. CBP has arranged to have Kumeyaay cultural monitors onsite during construction at both projects, at government expense. A179. CBP has coordinated with the tribes throughout the execution of the projects, and currently holds "a recurring, biweekly call with the Kumeyaay Tribes." A183.

In late September, plaintiffs sought an expedited preliminary injunction to halt construction. *See* A44 & n.3. The district court concluded that plaintiffs' "failure to establish irreparable harm dooms a preliminary injunction, even if the other three factors favor relief," and denied the requested injunction. A45.

The evidence before the district court showed that "no Kumeyaay burial sites or remains have been identified within the narrow strip of federal land where construction is taking place." A46. In addition, the government put "measures in place to avoid and mitigate any harm to [plaintiffs'] religion and culture," and those measures showed "concrete evidence" of success. A48, A49. On the evidence before it, the court could not "say with any confidence" that plaintiffs would "certainly face

injury at all," and in any event, the government has effective "measures in place to mitigate any potential harm." A51. The district court observed that plaintiffs' allegations of harm to sacred sites and natural resources reflected "concerns and fears" about project impacts, rather than actual "evidence that injuries are likely to occur." A53. Plaintiffs similarly established no infringement on their religious practice. In "no instance" has the government excluded tribal members from the project area; rather, the government's policy is to allow access. A54.

Undisputed evidence showed that consultation remains ongoing, and the government had "documented its efforts to consult with the Kumeyaay before and after construction began." A56. "At least at this preliminary stage," the court concluded, plaintiffs' harms "are theoretical, not actual." A55.[2]

ARGUMENT

An injunction pending appeal is an "exceptional remedy," and plaintiffs here cannot show that "the district court 'abused its discretion' in denying a preliminary injunction." *John Doe Co. v. Consumer Fin. Prot. Bureau*, 849 F.3d 1129, 1131 (D.C. Cir. 2017) (per curiam). Nor can they "demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22

[2] Plaintiffs have not returned to district court to introduce any additional evidence that would provide an indication that any harm has occurred in the nearly two months since they originally sought injunctive relief.

(2008). Bare assertions that harm is "inevitable," Mot. 4, do not satisfy the preliminary injunction standard, especially where the evidence militates against the conclusion that any harm is likely to occur. Plaintiffs are not likely to succeed on the merits of their legal claims in any event. And the balance of harms and the public interest weigh strongly against any injunction. Even if all the necessary elements were present, injunctive relief is "never awarded as of right," *Winter*, 555 U.S. at 24, but only as a matter of equitable discretion.[3]

Even if plaintiffs' claims were stronger, they have no basis to ask this Court for a favorable exercise of equitable discretion. Plaintiffs waited twenty-eight days, from October 16 to November 13, before seeking relief from the district court's decision. And although they have known about the construction project since March, they did not bring suit until September 23. That dilatory conduct precludes an equitable claim for extraordinary relief.

I. Plaintiffs Failed To Show Irreparable Harm

The district court correctly concluded that plaintiffs failed to show a likelihood of actual, concrete harm. To obtain a preliminary injunction, plaintiffs must show harm that is "both certain and great," "actual and not theoretical." *Chaplaincy of Full*

[3] The Ninth Circuit recently affirmed a California district court's decision denying a preliminary injunction sought by another tribe based on similar allegations about the same construction projects. *See La Posta Band of Diegueno Mission Indians v. Trump,* No. 20-55941, 2020 WL 6482173, at *1 (9th Cir. Nov. 4, 2020) (unpublished memorandum decision affirming district court's conclusion that plaintiffs had failed to show irreparable harm.).

Gospel Churches v. England, 454 F.3d 290, 297 (D.C. Cir. 2006). "[I]njunctive relief 'will not be granted against something merely feared as liable to occur at some indefinite time.'" *Wisconsin Gas Co. v. FERC,* 758 F.2d 669, 674 (D.C. Cir. 1985).

The district court, relying on uncontested evidence, *see* A45, explained that plaintiffs' assertions of harm lack an evidentiary foundation. The construction is occurring "on a narrow strip of federal land that serves as a law enforcement zone," and it "will largely replace fencing that has been in place for at least ten years." A52. The evidence before the district court showed that after months of consultation, surveys, research, and other efforts, no known burial sites, remains, or culturally significant artifacts had been found in the project area. *See* A46, A51. Moreover, mitigation measures made it unlikely that even if resources were to be discovered, imminent or irreparable harm would occur. A48, A49 (discussing "concrete evidence" of mitigation).

Plaintiffs asked the district court to infer a likelihood of harm based on a small number of items found outside the project areas. *See* A46. The court correctly concluded that those inferences would be too speculative to "establish actual, imminent injury." *See* A46-48.

Plaintiffs' assertion (Mot. 18) that artifacts and remains must inevitably exist in the project area depends on a definition of ancient villages that includes areas *between* sites evidenced by deposits on the ground, and that might occupy areas greater than ten square miles. *See* A154-155 (Carrico Decl.). But the district court correctly

recognized that evidence confirming there were *no* such sites or ground deposits within the project zone was more significant to the irreparable-harm inquiry than the mere possibility that construction might take place somewhere within a ten-mile square area that once could have been part of an expansive ancient village. Similarly, the court correctly recognized that the presence of a bone fragment outside the project area in Mexico was not enough to show a likelihood of harm when no human remains were known to have been found during construction, and protocols are in place to avoid harm by ensuring the government follows culturally appropriate measures for addressing such remains. *See* A46, A49.

The district court also correctly determined that plaintiffs failed to show irreparable harm based on their allegedly "limited" access to construction sites. A53. The record "does not show that the Government has prevented the Kumeyaay from advising on 'possible damages' to sites or artifacts." A54. CBP has hired tribal cultural monitors, who may monitor any activities. A54; *see also* A179-180. Notably, after specific areas plaintiffs identified were re-surveyed with tribal cultural monitors present, no significant new discoveries were made. *See, e.g.,* A182-84, A193. And the government has invited plaintiffs to provide additional cultural monitors. *See* A189-190. The court correctly found that plaintiffs' decision not to provide additional monitors undermines "their claim that they cannot oversee construction activities to mitigate potential damage." A55.

The district court correctly concluded that there was no factual basis for plaintiffs' allegations of harm to their free exercise rights. *See* A54. Plaintiffs do not dispute that CBP *has* allowed worship at project sites upon request, and they cite no evidence that they were ever denied entry to a site for religious purposes. Mot. 20-21. Plaintiffs cannot reasonably contend that their rights are violated by anything less than unrestricted access to active construction sites, *see id.* In any event, plaintiffs have failed to show that their rights are either "'threatened or in fact being impaired at the time relief is sought.'" A54 (quoting *National Treasury Emps. Union v. United States*, 927 F.2d 1253, 1254 (D.C. Cir. 1991)).

II. Plaintiffs Have Not Demonstrated A Likelihood Of Success On The Merits

Plaintiffs' motion (at 6-16) refers to multiple legal theories that the district court correctly concluded (A57) it need not address. This Court likewise can and should deny plaintiffs' motion because it is unsupported by record evidence of irreparable harm. In any event, plaintiffs' sketch of their legal arguments is insufficient to demonstrate a likelihood of success on the merits at this stage.

A. The Government Has Fully Complied With RFRA

Plaintiffs suggest (Mot. 8-10) that the government is burdening their exercise of religion in violation of RFRA, 42 U.S.C. § 2000bb-1(a), (b). They cannot prevail on that claim for the same reason the district court recognized that they have not identified any irreparable harm related to their religious practices: The construction

"takes place only on federal land." A52 (citing *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451-53 (1988)); *see also*, *e.g.*, *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983); *Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008) (en banc). And plaintiffs failed to demonstrate that any sacred site on the Roosevelt Reservation "will suffer actual damage." A53. The construction area contains no "places where the Kumeyaay conduct religious ceremonies regularly." A54 n.10. RFRA does not "afford an individual a right to dictate the conduct of the Government's internal procedures," or "divest the Government of its right to use what is, after all, *its* land," *Lyng*, 485 U.S. at 448, 453.[4]

Plaintiffs (Mot. 9) largely rest their argument on the same unsubstantiated claims of harm that the district court properly rejected. They point to no evidence to support the assertion (Mot. 8) that the government is "preventing the Tribes from engaging in religious ceremonies." Plaintiffs observe only that ceremonies would be required if human remains were disturbed, but the district court found it unlikely that such ceremonies would be needed. *See* A54 n.10. And plaintiffs do not suggest that they have been denied the opportunity to conduct any ceremonies that they have requested. For safety reasons, plaintiffs may indeed be asked to "negotiate with

[4] Although *Lyng* applied the Free Exercise Clause, it did so under a standard that RFRA expressly adopted. See 42 U.S.C. § 2000bb(b); *Boerne v. Flores*, 521 U.S. 507, 515 (1997). Plaintiffs purport to distinguish *Lyng* as involving harm to "subjective religious feelings," rather than "religious sites and ceremonies." Mot. 10. In fact the tribes in *Lyng* argued that "disturbance of the area's natural state" would make "traditional practices impossible." 485 U.S. at 451.

federal officials to engage in religious practices at or near" active construction being carried out with heavy machinery. Mot. 8. But as the district court pointed out, while there was evidence of one such negotiation, the result was that tribal "members could enter" the site and conduct their ceremonies. A54; *see also* A199 (tribal members are "free to access areas immediately adjacent to or even within the" construction areas to "engage in religious activities").

Similarly, the government's ongoing consultation efforts with plaintiffs and other tribes cannot reasonably be characterized (Mot. 8-9) as somehow coercing plaintiffs to abandon or refrain from exercising their religious faith. Plaintiffs remain free to decide whether or not to work with the government to minimize any effects of construction, as the record confirms. *See* A180. And the government has continued consultation efforts even when tribal members are reluctant or unwilling to participate. *See* A181, A185, A198-99.

B. The Government Satisfied IIRIRA By Providing Ample And Timely Opportunities for Consultation

Plaintiffs also claim that the government failed to adequately comply with IIRIRA's directive to "consult with . . . Indian tribes . . . to minimize the impact on" resources near the border, IIRIRA § 102(b)(1)(C)(i). But the statute plaintiffs rely on creates no right of action, as this Court recently held, permitting only limited review where a plaintiff asserts that government action is *ultra vires*. *North Am. Butterfly Ass'n v. Wolf*, 977 F.3d 1244, 1262 (D.C. Cir. 2020). Plaintiffs cannot show that the

government violated "a specific prohibition in the statute that is clear and mandatory," or took actions "far outside the scope of the task that Congress gave it." *Id.* at 1263.

Plaintiffs contend that the government should have consulted with the tribes earlier. But "Section 102 does not provide any specific limitation or guidance concerning when or how consultation is to occur." *In re Border Infrastructure Envt'l Litig.*, 284 F. Supp. 3d 1092, 1126 (S.D. Cal. 2018), *aff'd*, 915 F.3d 1213 (9th Cir. 2019).

In any event, the government *did* consult with the tribes before beginning construction. It told the tribes about the project in March, shared maps and plans, and sought the tribes' input on potential impacts. A175-76. These pre-construction steps demonstrate a good-faith effort to accommodate cultural and religious concerns that CBP takes "very seriously." A187. The government cannot reasonably be faulted for continuing to consult *during* construction, especially when any risk of harm can be averted by culturally appropriate treatment of resources when they are discovered. *See, e.g.,* A43, A162-63 (care of human remains); A49 (isolates protected by flagging).

Nor can plaintiffs prevail on their claim that the consultation is somehow inadequate. Section 102(b)(1)(C)(i) does not specify the scope or extent of consultation, and plaintiffs agree that "consultation *is* happening." A56. The government's good-faith consultation here did not fall "so far short as to render it *ultra vires*." *Butterfly Ass'n*, 977 F.3d at 1263. To the contrary, the evidence contradicts

plaintiffs' assertions that the government has "rejected opportunities to integrate . . . meaningful input" from the tribes, or left concerns "unaddressed." Mot. 7. The government re-surveyed dozens of project acres in response to tribal concerns. A178, A182, A183. It pays for cultural monitors, who can observe whatever work they choose, inspect soils, and stop work if sensitive resources are discovered. A179-180, A184, A191. It has addressed the tribes' concerns, *see* A189-92, and given specific and well-supported reasons why some accommodations could not be made. *See, e.g.*, A178 (cadaver dogs would be prohibitively expensive, and could not work in the high desert heat). Plaintiffs have no colorable basis to argue that the government's consultation was so far outside the bounds Congress contemplated in IIRIRA that its actions were *ultra vires*.

C. *The Waiver Of Other Legal Requirements Was Not* Ultra Vires

Finally, plaintiffs raise claims based on several statutes that they acknowledge were specifically waived by Acting Secretary Chad Wolf pursuant to IIRIRA § 102(c). They contend (Mot. 11-12) that the waiver was invalid on the ground that Wolf was not authorized to exercise the statutory waiver authority. That claim too is subject only to *ultra vires* review, and plaintiffs are unlikely to prevail on the merits.

Acting Secretary Wolf had authority to issue the waivers. When he acted, he was serving as Acting Secretary of Homeland Security pursuant to an order of succession issued by then-Acting Secretary McAleenan. McAleenan served as Acting

Secretary pursuant to an order of succession issued by then-Secretary Nielsen. Both orders of succession were issued pursuant to the Homeland Security Act of 2002, 6 U.S.C. § 113(g)(2), which authorizes the Secretary to "designate such other officers of the Department in further order of succession to serve as Acting Secretary," "[n]otwithstanding chapter 33 of title 5"—*i.e.*, the Federal Vacancies Reform Act of 1998 (FVRA).

Contrary to plaintiffs' argument, Secretary Nielsen's order established an order of succession pursuant to § 113(g)(2), making McAleenan the Acting Secretary. Moreover, if Nielsen's order did *not* establish an order of succession, her authority eventually passed under the FVRA to the head of the Federal Emergency Management Authority (FEMA), who issued an order of succession under § 113(g)(2) that likewise placed Wolf in the position of Acting Secretary. Acting pursuant to that order, Wolf ratified his waivers. Thus, the waivers were authorized regardless of the effect of Nielsen's order.

i. Secretary Nielsen Validly Prescribed an Order of Succession

On April 9, 2019, Secretary Nielsen issued an order titled "Amending the Order of Succession in the Department of Homeland Security." A214. The memorandum that accompanied the Order informed Nielsen: "By approving the attached document, you will designate your desired order of succession for the

Secretary of Homeland Security in accordance with your authority pursuant to Section 113(g)(2) of title 6, United States Code." A214. The Order itself states:

> By the authority vested in me as Secretary of Homeland Security, including the Homeland Security Act of 2002, 6 U.S.C. § 113(g)(2), I hereby designate the order of succession for the Secretary of Homeland Security as follows:
>
> Annex A . . . of Delegation No. 00106 is hereby amended by striking the text of such Annex in its entirety and inserting the following in lieu thereof [followed by a list of officials captioned Annex A].

A215. The Order thereby designated the list of officials in Annex A of Delegation 00106 as the order of succession under § 113(g)(2). Delegation 00106 was an existing DHS document that set forth orders of succession and delegations of authority for various positions, including but not limited to the Secretary. *See* A253-286. Annex A listed officers who would receive temporary delegations of authority from the Secretary in the event of unavailability due to disasters or emergencies. *See* A253, A257. Secretary Nielsen's Order both revised the list of officers in Annex A and adopted the revised Annex A as the order of succession in the event of vacancy in her office.

Prior to Nielsen's Order, the order of succession had been prescribed by Executive Order (EO) 13753, issued pursuant to the FVRA. *See* 81 Fed. Reg. 90,667 (Dec. 14, 2016). Because § 113(g)(2) expressly provides that the order of succession designated by the Secretary governs "[n]otwithstanding" the FVRA, Nielsen's Order

superseded the order of succession in EO 13753. McAleenan became Acting Secretary pursuant to the order of succession in Nielsen's Order.

Plaintiffs argue that the Order did not alter the order of succession for vacancies, but instead only revised the delegation of authority in the event of a disaster or emergency. Mot. 13. They note that Nielsen's Order did not amend Part II.A of Delegation 00106, which stated that "[i]n case of the Secretary's death, resignation, or inability to perform the functions of the Office, the orderly succession of officials is governed by Executive Order 13753." A253. Plaintiffs reason Part II.A, therefore, continued to govern the order of succession in the event of a vacancy.

But Part II.A did not itself prescribe the order of succession, and therefore did not need to be amended. The document was signed by then-Secretary Johnson on December 15, 2016, *see* A255, *before* Congress gave the Secretary the authority to prescribe the order of succession, *see* Pub. L. No. 114-328, § 1903, 130 Stat. 2000, 2672 (2016). Accordingly, when Part II.A stated that the order of succession "is governed by" EO 13753, it was not establishing an order of succession, but merely identifying the document that did so. There was thus no need for Nielsen to amend Part II.A. By designating an order of succession pursuant to § 113(g)(2), Secretary

Nielsen's Order superseded EO 13753 by operation of law. Nothing more was required.[5]

Plaintiffs likewise err in arguing that Nielsen's Order affected only delegations of authority for disasters or emergencies because it merely revised Annex A. Mot. 13 (referring to Annex A as "Appendix A"). It is correct that Annex A was used to specify the officials to whom the Secretary had temporarily *delegated* authority, pursuant to 6 U.S.C. § 112(b)(1), during unavailability due to disaster or catastrophic emergency. A253 (Part II.B). But Nielsen's Order put Annex A to an additional use, using it to "designate [the] order of *succession*," A215 (emphasis added), pursuant to § 113(g)(2), which applies in cases of "absence, disability, or vacancy in office," 6 U.S.C. § 113(g)(1), (2). There would have been no reason for Nielsen's Order to invoke § 113(g)(2) if it merely amended the delegations of authority in the event of disasters or emergencies.

The meaning of the Order is confirmed by contemporaneous official actions by DHS. Nielsen personally swore in McAleenan as Acting Secretary pursuant to the Order,[6] and the agency itself treated McAleenan as the Acting Secretary, *see* Dkt. 16-6

[5] Plaintiffs note that Part II.A was not changed in a revised version of Delegation 00106 issued after Nielsen's Order. *See* A217. But the revisions, were not signed by Nielsen and were made purely for internal purposes. A205-06. That Part II.A was not updated does not change the legal effect of Nielsen's Order.

[6] https://theborderobserver.wordpress.com/2019/04/11/cbp-commissioner-kevin-mcaleenan-sworn-in-as-the-acting-dhs-secretary/ (last visited November 17, 2020).

at 7 (official notice of McAleenan's acting service). Even if the terms of the Order were ambiguous, that contemporaneous understanding would be entitled to significant weight. *Cf. Kisor v. Wilkie*, 139 S. Ct. 2400, 2415-18 (2019).

Plaintiffs further assert—in a single sentence, without any argument—that even if Nielsen's order placed McAleenan in the position of Acting Secretary, McAleenan's own order of succession is invalid because only the Secretary, not the Acting Secretary, can issue an order of succession pursuant to § 113(g)(2). Mot. 14. Plaintiffs did not make this argument in district court, and by failing to raise it below, they have forfeited it on appeal. *See, e.g., Bryant v. Gates*, 532 F.3d 888, 898 (D.C. Cir. 2008) (claim is "doubly forfeit" when it was not raised in district court and appellate brief provided only a "single, conclusory statement"). Even if they had raised it below, it fails on its own terms.

The Acting Secretary may perform all of the functions and duties of the Secretary's office, for "an acting officer is vested with the same authority that could be exercised by the officer for whom he acts." *In re Grand Jury Investigation*, 916 F.3d 1047, 1055 (D.C. Cir. 2019). There is no textual basis for treating the Secretary's authority under § 113(g)(2) differently in this regard from the countless other authorities conferred on the Secretary by the Homeland Security Act. And there can be no constitutional objection to an Acting Secretary's exercise of the authority in § 113(g)(2). As this Court recognized in *Grand Jury*, the Acting Attorney General *was*

the "Head of Department" for purposes of appointing inferior officers under the Appointments Clause. 916 F.3d at 1054. The same principle should apply here.

ii. Wolf Has Ratified The Waivers

Supposing plaintiffs were correct that Nielsen's Order did not designate an order of succession, the vacancy created by Nielsen's resignation would have been governed by the FVRA and EO 13753. Under the terms of that Executive Order, the Administrator of FEMA, Peter Gaynor, would have become the Acting Secretary on September 10, 2020, the date on which the President submitted Wolf's nomination as Secretary to the Senate.[7]

That same day, Gaynor exercised "any authority" he might possess as Acting Secretary to designate a new order of succession under § 113(g)(2). A209. Because § 113(g)(2) applies "[n]otwithstanding" the FVRA, the order superseded EO 13753, the only possible source of authority for Gaynor's own service, and the order therefore provided that "[u]pon my signature, any authority that I may have been granted by the FVRA will terminate." *Id.* Wolf was the most senior official in the line of succession prescribed by Gaynor's order. Accordingly, if Wolf was not already

[7] Acting service under the FVRA is limited to 210 days, but that time limit is lifted when a nomination to the vacant office is submitted. *See* 5 U.S.C. § 3346(a)(2). When the President submitted Wolf's nomination, *see* www.congress.gov/nomination/116th-congress/2235, Gaynor was the most senior officer in EO 13753's order of succession.

validly serving as Acting Secretary pursuant to the order of succession issued by McAleenan, he became Acting Secretary pursuant to Gaynor's succession order.[8]

On September 17, 2020, "out of an abundance of caution," Wolf ratified "each of [his] delegable prior actions as Acting Secretary," which includes the waivers at issue here. *See* 85 Fed. Reg. 59,651, 59,651-52 (Sept. 23, 2020).[9] Assuming *arguendo* that Wolf lacked authority when he issued the waivers, his ratification cures any such deficiency. This Court has "repeatedly held that a properly appointed official's ratification of an allegedly improper official's prior action . . . resolves the claim on the merits by 'remedy[ing] [the] defect' (if any) from the initial appointment." *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 13 (D.C. Cir. 2019); *see also FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 708-709 (D.C. Cir. 1996). Thus, even if Wolf had not been validly serving as Acting Secretary when he issued the waivers, his ratification cured any defect.[10]

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[8] Plaintiffs assert that the Homeland Security Act "does not implicitly authorize [the Acting Secretary] to transfer the Secretary's authority to another official without congressional or presidential involvement." Mot. 15. Section 113(g)(2) *expressly* authorizes the Secretary, and hence the Acting Secretary, to establish a further order of succession that governs "notwithstanding" the FVRA. Wolf's actions pursuant to Gaynor's succession order follow directly from the express terms of that provision.

[9] Although the FVRA prohibits the ratification of actions taken by any person improperly serving as an acting officer, 5 U.S.C. 3348(d)(2), that prohibition applies only to *non*-delegable duties, *see id.*, §§ 3348(a)(2)(A)(ii), (B)(i)(II).

[10] DHS has recently informed the Department of Justice that Gaynor's September 10 succession order was likely signed approximately one hour before the Senate received the formal submission of Wolf's nomination. To avoid any issues relating to the sequence of those events, Gaynor re-issued the order of succession on

III. Plaintiffs' Proposed Schedule Is Inequitable

Plaintiffs (Mot. 23) also urge this Court to set an extraordinarily expedited briefing schedule and to hear oral argument by December 15, 2020. They identify no specific event that will cause irreparable harm in the absence of such a compressed schedule. They allude only to the possibility that barrier "construction may be completed by [the] end of December." Mot. 4 n.2. But they do not contend that their claims will be moot after that time.

Having waited nearly a month to file a notice of appeal and injunction pending appeal, plaintiffs now ask the Court to hear oral argument less than a month after the opening brief, and barely a week after the reply brief. There is no reason to burden the parties and the Court by so limiting the ability to prepare for oral argument. Plaintiffs also would compel the government to file a response brief a mere 15 days after plaintiffs' opening brief—a period that would include the Thanksgiving holiday—even though they would have had more than twice that time since the district court's decision to prepare their own opening brief. That inequitable

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November 14, 2020 at 5:45 PM—a time when Wolf's nomination was indisputably "pending in the Senate" for purposes of making the FVRA available, 5 U.S.C. §3346(a)(2), if it had not been superseded by Neilsen's succession order. *See* https://www.dhs.gov/sites/default/files/publications/20_1114_gaynor-order.pdf. Wolf then re-ratified his prior actions involving delegable duties on November 16. https://www.dhs.gov/sites/default/files/publications/20_1116_as1-global-ratification.pdf.

allocation of briefing time cannot be justified in light of plaintiffs' repeated litigation delays.

The government does not oppose expedition, but the Court should establish a reasonable schedule that allows deliberate presentation of the issues. The government respectfully requests a minimum of 28 days (in addition to any holidays) to prepare and file its response brief. The Court can determine whether and when to set the case for oral argument based on its own assessment, after reviewing the principal briefs.

CONCLUSION

For the foregoing reasons, the Court should deny plaintiffs' emergency motion for an injunction pending appeal, and should establish a reasonably expedited schedule for briefing.

Respectfully submitted,

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NOVEMBER 2020

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing response complies with the requirements of Federal Rule of Appellate Procedure 27(d) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this response complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because it contains 5,099 words according to the count of Microsoft Word.

/s/ Anne Murphy
ANNE MURPHY