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15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

17 LA CLÍNICA DE LA RAZA, ET AL.,
18 Plaintiffs,
19 v.
20 DONALD J. TRUMP, ET AL.
21 Defendants.

Case No. 4:19-cv-04980-PJH

**REPLY IN SUPPORT OF
PLAINTIFFS' MOTION FOR
RECONSIDERATION**

Courtroom: 3
Judge: Hon. Phyllis J. Hamilton
Trial Date: None set
Action Filed: August 16, 2019

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1 **I. INTRODUCTION**

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

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

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

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

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

22 **II. ARGUMENT**

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

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

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

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

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

26 Defendants now squarely concede that the premise of the Court’s ruling dismissing Counts
27 3, 5, and 8 was mistaken: “Plaintiffs are correct that the President did not appoint Acting Secretary
28 McAleenan under the FVRA.” Dkt. 184 at 2. There is thus no dispute regarding the narrow

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

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

19
20 **B. The Court Should Not Consider the Arguments Presented in Defendants' Opposition, Which Is a *De Facto* Motion for Reconsideration**

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

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

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

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

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

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

15
 16 **C. Even If This Court Considers Defendants’ Previously Rejected Theory, the
 Contentions Are Meritless**

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

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

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

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

8 **II. Succession Order/Delegation**

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

11 B. I hereby delegate to the officials occupying the identified positions in the
 12 order listed (Annex A), my authority to exercise the powers and perform the functions and
 13 duties of my office, to the extent not otherwise prohibited by law, in the event I am
 14 unavailable to act during a disaster or catastrophic emergency.

14 Order at 24.

15 On April 9, 2019, Secretary Kirstjen Nielsen signed an order that approved an amendment
 16 to Delegation No. 00106. *Id.* Specifically, her amendment stated: “I hereby designate the order
 17 of succession for the Secretary of Homeland Security as follows: Annex A of DHS Orders of
 18 Succession and Delegations of Authorities for Named Positions, Delegation No. 00106, is hereby
 19 amended by striking the text of such Annex in its entirety and inserting the following in lieu
 20 thereof,” followed by an order of succession listing CBP Commissioner (Mr. McAleenan’s then-
 21 position) third. *Id.* As the plain text of Secretary Nielsen’s amendment states, only Annex A—
 22 which provides the order of succession in case of disaster or emergency—was changed. The
 23 portion of Delegation No. 00106 providing for succession according to Executive Order 13753 in
 24 case of death, resignation, or incapacity remained unaltered. *Id.* at 25-26.²

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

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

8 When Secretary Nielsen resigned, McAleenan’s office of CBP Commissioner was *seventh*
9 in line under the order of succession for resignation in Executive Order 13753. 81 Fed. Reg.
10 90,667. At least two other offices higher in the line were then filled by Senate-confirmed
11 appointees. FAC ¶¶ 152-153. Accordingly, Mr. McAleenan did not lawfully assume the office of
12 Acting Secretary. In purporting to assume the office, Mr. McAleenan skipped ahead of the two
13 Senate-confirmed officials who preceded him under the unambiguous text of Delegation No.
14 00106 and Executive Order 13753.

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

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

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

3
4 **1. Two District Courts Have Now Interpreted the Amendment and Order
of Succession Exactly in Line with This Court's Opinion**

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

16 In *Casa v. Maryland*, the plaintiffs challenged various restrictions that the current
17 purported Acting Secretary Chad Wolf sought to place on asylum applicants' ability to obtain
18 work authorization. Analyzing the text and history of the succession orders, the court could not
19 “help but conclude that McAleenan assumed the role of Acting Secretary without lawful
20 authority.” 2020 WL 5798269 at *21. And because “McAleenan had not lawfully assumed the
21 office of ‘Acting Secretary,’ and because only the Secretary may designate such ‘further order of
22 succession,’” Mr. McAleenan's further changes to the succession order making Wolf next in line
23 after Mr. McAleenan resigned “were likewise without authority.” *Id.* The rules promulgated by
24 Mr. Wolf therefore were “likely to be invalidated under the APA.” *Id.*³ The court considered and
25

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

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

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

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

15
 16
 17 _____
 18 appointed under the HSA and not the FVRA. *See Casa de Maryland*, 2020 WL 5500165, at *17
 19 (“[N]owhere does this enforcement provision [§ 3348(d)] specify that it applies to those acting
 20 officials who serve pursuant to an *exception* to the FVRA—one of the agency-specific succession
 21 statutes”). The court apparently reached this conclusion based on a mistaken belief that section
 22 3348 is “cabined to those acting officers serving under section 3345.” *Id.* at 19. In fact, section
 23 3348(d) expressly applies to “[a]n action taken by any person who is not acting under 5 U.S.C. §§
 24 3345, 3346, or 3347.” 5 U.S.C. § 3348(d)(1) (emphasis added). Section 3347 is the provision of
 25 the FVRA that allows for acting officials to be appointed pursuant to agency-specific statutes. *See*
 26 5 U.S.C. § 3347(a)(1). Thus, section 3348(d)(1) expressly applies when an action is taken by a
 27 person who is not serving *either* under the FVRA’s appointment provisions (section 3345) *or*
 28 under an agency-specific statute that creates an exception to the FVRA (section 3347). The
 District of Maryland’s decision failed to account for section 3348’s express reference to section
 3347 as well as section 3345. This error appears to have been immaterial to the outcome in the
 District of Maryland’s decision, because the court reached the conclusion that actions taken by the
 unlawfully-serving McAleenan and Wolf were likely void for other reasons, without needing to
 invoke section 3348(d). *See Casa de Maryland*, 2020 WL 5500165, at *20, *21, *23.

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

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

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

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

22 **3. Defendants’ Reliance on a Distinction Between “Succession” and**
23 **“Delegation” Is Unfounded**

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

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

4 First, the statutory source for the purported distinction between an “order of succession”
5 and a “delegation” contradicts Defendants’ argument. Defendants cite 6 U.S.C. § 113(g)(2) as
6 “empower[ing] the Secretary to designate an ‘order of succession’ for officers to serve as Acting
7 Secretary *in the event of a vacancy.*” Opp. 3 (emphasis added). But the emphasized language, “in
8 the event of a vacancy,” does not appear in section 113(g). Rather, section 113(g) specifies who
9 shall serve as Acting Secretary if “by reason of *absence, disability, or vacancy* in office, neither
10 the Secretary nor Deputy Secretary is *available to exercise the duties* of the Office of the
11 Secretary,” 6 U.S.C. § 113(g)(1) (emphasis added), and goes on to say that the Secretary may
12 designate additional officers “in further order of succession to serve as Acting Secretary.” *Id.*
13 § 113(g)(2). Thus, the idea of an “order of succession” pursuant to section 113(g) of the HSA is
14 not limited to “vacancies,” but also encompasses circumstances where the Secretary is not
15 “available to exercise the duties” of the office due to “absence” or “disability.” *Cf. English v.*
16 *Trump*, 279 F. Supp. 3d 307, 322 (D.D.C. 2018) (“Defendants argue, with some force, that
17 [unavailability to act is] commonly understood to reflect a temporary condition, such as not being
18 reachable due to illness or travel,” rather than a permanent condition such as a vacancy.) That is
19 precisely what Section II.B of Delegation No. 00106 does: It specifies an order of succession
20 among officials—by listing them on Annex A—who may “exercise the powers and perform the
21 functions and duties” of the Secretary’s office in the event the Secretary is “unavailable to act
22 during a disaster or catastrophic emergency.” Dkt. 167-1, at 2. There is nothing surprising about
23 Secretary Nielsen’s use of the phrase “order of succession” to refer to the order of succession set
24 out in Annex A in case of her unavailability due to emergency. *See Casa de Maryland*, 2020 WL
25 5500165, at *22 (“the changes that Nielsen *did* make to Annex A” were made “pursuant to her
26 authority under section 113(g)”); *ILRC*, 2020 WL 5798269, at *8.

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

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

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

22 **4. Defendants’ Contention that Delegation No. 00106 Is an “Internal** 23 **Administrative Document” Is Unfounded**

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

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

6 Defendants further contend that Delegation No. 00106 (as amended) could not have been
7 an order establishing succession under section 113(g)(2) of the HSA because the original version
8 of Delegation No. 00106 was signed before HSA section 113(g)(2) became law.⁵ Defendants
9 assert that Secretary Nielsen’s amendment constitutes the first exercise of the Secretary’s authority
10 under Section 113(g)(2) and thus, despite amending only the Annex to Delegation No. 00106
11 governing the order of succession for unavailability for disaster or emergency, the amendment
12 must be viewed as designating an order of succession for all circumstances permitted by Section
13 113(g). Not only is this argument unsupported by the text of the amendment, it is again belied by
14 DHS’s own practice.

15 DHS has amended Delegation No. 00106 at least six times since section 113(g)(2) was
16 added to the HSA and before Secretary Nielsen’s amendment. *See* Dkt. 167-1 at 5 (noting
17 revisions to Annexes G, R, U, X, Y, and Z postdating § 113(g)(2)’s December 23, 2016 enactment
18 and preceding April 10, 2019 amendments of Annexes A and B). Defendants identify no stand-
19 alone value for the annexes and none appears on their face. Rather, each annex has meaning only
20 by reference to Delegation No. 00106’s instructions, including Section II.A. and II.B. Likewise,
21 DHS issued a revised version of Delegation No. 00106 the day after Secretary Nielsen’s
22 amendment that left Section II.A in place and unchanged; the revised document continued to
23 reference Executive Order 13753 in case of death or resignation, and only the text of Annex A was
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25 _____
26 ⁵ Defendants incorrectly state that Secretary Johnson signed Delegation No. 00106 before
27 “Congress gave the Secretary” the authority in section 113(g)(2) to designate an order of
28 succession. (Dkt. 184 at 4 n.2). Though the Court need not wade into this issue, the timeline is
more nuanced than Defendants present. Both Executive Order 13753 and Secretary Johnson’s
signature on Delegation No. 00106 occurred *after* both houses of Congress had approved section
113(g), but before President Obama signed it into law.

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

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

6 Defendants' position runs counter to every authority to consider this issue, and even to
7 their own prior interpretation. DHS plainly understood Secretary Nielsen's order to have left
8 Delegation No. 00106 in place and to have modified only the text of its Annex A, as it issued a
9 revised version of Delegation No. 00106 in response that restated the entire document with only
10 Annex A altered. Mr. McAleenan later confirmed that view when he purported to further amend
11 Delegation No. 00106 to revise section II.A so that the order of succession in case of death,
12 resignation, or incapacity would also be governed by Annex A, rather than by Executive Order
13 13753. That action makes sense only if Delegation No. 00106, including section II.A, remained in
14 effect and governed the order of succession.

15 This Court likewise concluded in its prior Order that Secretary Nielsen left Delegation No.
16 00106 in place and amended only the Annex A governing succession for unavailability due to
17 disaster or emergency. The GAO reached the same conclusion in its August 14, 2020 opinion, as
18 did the District of Maryland in the *Casa* decision and another Court in this District just days ago.
19 It is only Defendants, having realized that they failed to follow their own documents, that now
20 strain to find some way to give Secretary Nielsen's order a reading it cannot bear. Defendants
21 offer this Court no reason to reconsider its prior, well-reasoned, and correct ruling on this issue.

22 **III. CONCLUSION**

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

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Respectfully submitted,

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