

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

DON'T SHOOT PORTLAND et al.,

Plaintiffs,

v.

CHAD F. WOLF, in his official capacity as  
Acting Secretary of Homeland Security,

Defendant.

Case No. 1:20-cv-2040-CRC

**NOTICE**

Defendants respectfully notify Plaintiffs and the Court about what appears to be an inadvertent factual inaccuracy regarding the ratification of Mr. Wolf's prior delegable actions, made in Defendants' Motion to Dismiss ("Defs.' Mot."), ECF No. 24.

As the basis for Defendants' ratification argument, *see* Defs.' Mot. 42-44, Defendants explained that, in the event that Chad F. Wolf had not been properly designated Acting Secretary of Homeland Security in the first instance, then under Plaintiffs' theory, "after the President submitted Mr. Wolf's nomination" to serve as Secretary of Homeland Security on September 10, 2020, Federal Emergency Management Agency ("FEMA") Administrator Peter Gaynor, who "would have been the officer next in line" under Executive Order 13753, "would have begun serving as Acting Secretary under the FVRA," *id.* at 42-43. Defendants further explained that "after the President submitted Mr. Wolf's nomination, 'out of an abundance of caution,'" Mr. Gaynor "exercised 'any authority' he might possess as Acting Secretary" under the FVRA and Executive Order 13753 and "designated an order of succession for the office under [6 U.S.C.] § 113(g)(2)." *Id.* at 43; *see also* ECF No. 24-2 at 9.

Late yesterday evening (Thursday, November 12, 2020), however, the Department of Homeland Security ("DHS") conveyed to the Department of Justice that it had learned that FEMA records indicate that Mr. Gaynor's September 10, 2020, succession order may have been signed approximately one hour before Mr. Wolf's nomination was formally submitted to the Senate.

Based on due diligence conducted so far as to the precise timing of events, it appears likely, based on the facts known to counsel for Defendants at this time, that Mr. Gaynor's succession order was signed on September 10, 2020, but approximately one hour *before* Mr. Wolf's nomination for the office of Secretary of Homeland Security was submitted to the Senate later that day, which (if true) would be inconsistent with counsel for Defendants' prior factual understanding, and with the most natural reading of some of the language in Defendants' reply brief. *See, e.g.*, Defs.' Mot. 42-43.

Defendants also continue to evaluate the legal effect, if any, of this apparent sequence of events on Defendants' ratification argument, and intend to provide a further update when they file their reply brief in support of their motion to dismiss, which is currently due on November 19, 2020. Under the circumstances, however, Defendants concluded it was necessary to notify the Court of this potential inaccuracy as quickly as possible.

Dated: November 13, 2020

Respectfully submitted,

JEFFREY BOSSERT CLARK  
Acting Assistant Attorney General

BRIGHAM J. BOWEN  
Assistant Branch Director

/s/ Jason C. Lynch  
JASON C. LYNCH (D.C. Bar No. 1016319)  
MICHAEL P. CLENDENEN  
JEFFREY A. HALL  
JORDAN L. VON BOKERN  
Trial Attorneys  
United States Department of Justice  
Civil Division, Federal Programs Branch  
1100 L Street NW, Rm. 11214  
Washington, DC 20005  
Tel: (202) 514-1359  
Email: Jason.Lynch@usdoj.gov

*Attorneys for Defendants*