IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

ASISTA IMMIGRATION ASSISTANCE, Inc., SANCTUARY FOR FAMILIES, Inc.,

Plaintiffs,

v.

TONY H. PHAM, Senior Official Performing the Duties of the Director, in his official capacity, *et al.*,

Defendants.

Case No. 3:20-cv-00206-JAM

Judge: Hon. Jeffrey A. Meyer

SUPPLEMENTAL REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

To defend the legitimacy of Kevin McAleenan's tenure as Acting Secretary of Homeland Security, Defendants' supplemental brief reprises the same arguments that courts have unanimously rejected in other litigation. Scarcely mentioning those decisions, much less engaging with their reasoning, Defendants continue to insist that McAleenan was made Acting Secretary by an April 2019 order that plainly did no such thing. And because the operative language of that order is so clearly at odds with their position, Defendants urge this Court to overlook that unambiguous language in favor of various inferences that, according to Defendants, must be drawn from the surrounding "context." No court has found these arguments persuasive, and this Court should not be the first to accept them. Because McAleenan never validly became Acting Secretary, his appointment of Matthew Albence as Deputy Director of ICE was unlawful. Albence therefore lacked authority as the Deputy Director to establish ICE's new U-visa stay policy—even assuming that a Deputy Director could establish such a policy without the approval of a Director—just as Albence lacked authority to establish the policy as the agency's "Acting Director."

Moreover, even if Albence validly held the position of Deputy Director, his decision to approve the stay policy as the agency's Acting Director was not harmless error. In arguing that it was, Defendants misstate the legal standard for harmless error and fail to offer any persuasive evidence suggesting that Albence would have issued the Directive had he realized he was not the Acting Director.

ARGUMENT

I. Because Kevin McAleenan Was Never a Legitimate Acting Secretary of Homeland Security, His Appointment of Matthew Albence Was Invalid.

A. Defendants maintain that McAleenan became Acting Secretary by virtue of the April 2019 order signed by former Secretary Kirstjen Nielsen, which amended the Department's internal

regulation governing vacancies, DHS Delegation 00106.

Accepting that argument requires, as Plaintiffs have already noted, "adding text to Nielsen's order that it does not contain . . . while ignoring text that the order *does* contain." Pls. Supp. Br. 8. Far from undermining that statement, Defendants' supplemental brief confirms its accuracy. Their brief, for example, makes the following claims about Nielsen's order:

- "[W]hen then-Secretary Nielsen changed the list of officers in Annex A . . . she also provided that Annex A would now perform two separate roles." Def. Supp. Br. 7.
- "Annex A's list was about to serve two different functions when Secretary Nielsen resigned: both the order of succession *and* the order for delegation of authority." *Id.* at 9.
- "Secretary Nielsen's order superseded the Executive Order and Section II.A . . . ." *Id.* at 11.
- "Secretary Nielsen . . . . provided that Annex A would govern matters of both succession and delegation going forward." *Id.* at 12.

Nielsen's order plainly did none of that. Here is the operative text:

Amending the Order of Succession in the Department of Homeland Security

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 DHS Orders of Succession and Delegations of Authorities for Named Positions, Delegation No. 00106, is hereby amended by striking the text of such Annex in its entirety and inserting the following in lieu thereof:

Annex A. Order for Delegation of Authority by the Secretary of the Department of Homeland Security.

1. Deputy Secretary of Homeland Security;

2. Under Secretary for Management;

3. Commissioner of U.S. Customs and Border Protection;

Dkt. 57-1 at ECF page 70. Nowhere does this order provide that Annex A will now perform two different roles. Nowhere does it purport to amend Section II.A of Delegation 00106. And nowhere

does it claim to supersede the line of succession for resignations set forth in Executive Order 13753.

Likewise, nothing in Nielsen's order indicates that it created a single line of succession to govern "all vacancies in the office, regardless of the reason," Def. Supp. Br. 4, and nowhere does the order contain "express language designating an *unqualified* order of succession," *id.* at 10 (emphasis added). Instead, its actual language does precisely the opposite—explicitly qualifying its reach by stating that it is "designat[ing] the order of succession for the Secretary of Homeland Security *as follows*." Dkt. 57-1 at ECF page 70 (emphasis added). Only one thing follows: an amendment to the text of Annex A, which governs temporary vacancies arising from disaster or catastrophic emergency. *See* Dkt. 57-1 at ECF page 3, ¶ II.B.

Therefore, just as Plaintiffs have asserted, Defendants' interpretation requires reading language into Nielsen's order that it lacks—indicating that Section II.A of Delegation 00106 is being amended so as to replace the executive order with a single line of succession governing all vacancies—and it requires overlooking clear language in the order foreclosing that interpretation (by specifying that the only change being made was to Annex A).

Only once in their supplemental brief do Defendants attempt to grapple with the inconvenient text of Nielsen's order. Conceding that Nielsen designated the Secretary's order of succession only "as follows," they respond:

> The order that "follows" was the amended list of officials in Annex A. Annex A was also introduced with another clause and title showing that it would simultaneously continue to serve its original function as an order for delegation of authority.

Def. Supp. Br. 8. As every court and the Government Accountability Office has recognized, this is not an accurate description of the text, but rather an effort to rewrite it. Had Nielsen intended to do more than amend Annex A, "then her order could have so stated." *La Clínica de La Raza v.*

Trump, No. 19-4980, 2020 WL 4569462, at *14 (N.D. Cal. Aug. 7, 2020).

Indeed, one does not have to imagine what Nielsen's order would have looked like if it had actually done what Defendants now claim. One can simply look at McAleenan's subsequent order of November 8, 2019, which did exactly that:

> **Amendment to the Order of Succession for the Secretary of Homeland Security**
>
> Section II.A of DHS Delegation No. 00106, *DHS Orders of Succession and Delegations of Authorities for Named Positions*, is amended hereby to state as follows: "In case of the Secretary's death, resignation, or inability to perform the functions of the Office, the order of succession of officials is governed by Annex A."

Dkt. 57-1 at ECF page 71. If Nielsen had already made the same change in April, as Defendants claim, then this portion of McAleenen's order would not "hereby" have "amended" anything, as it expressly purports to do. *Id.*

Defendants chose not to provide this Court with McAleenan's November 8 order, or even to acknowledge its existence. Little wonder why: every court to address this question has emphasized "the difference between Mr. McAleenan's amendment to Delegation 00106, which expressly amended Section II.A, and Secretary Nielsen's amendments, which did not." *Immigrant Legal Res. Ctr. v. Wolf*, No. 20-5883, 2020 WL 5798269, at *8 (N.D. Cal. Sept. 29, 2020); *see CASA de Maryland, Inc. v. Wolf*, No. 20-2118, 2020 WL 5500165, at *21 (D. Md. Sept. 11, 2020) ("unlike Nielsen's amendment, McAleenan actually changed the order of succession applicable in the event of a vacancy" following a resignation); *La Clínica*, 2020 WL 4569462, at *14 ("The fact that McAleenan amended Delegation No. 00106 to modify section II.A to cross-reference Annex A but Nielsen did not, reinforces the conclusion that at the time of Nielsen's resignation, Executive Order 13753 governed the order of succession.").

B. Because the text of Nielsen's order plainly contradicts their position, Defendants are

forced to argue that this Court should ignore the text of the order based on "context" supposedly indicating that Nielsen intended something other than what she prescribed. These "context" arguments, unpersuasive on their own terms, do not warrant overriding the clear language of Nielsen's order.

Defendants' primary argument rests on the supposed distinction between "orders of succession," which they describe as "lists of officials who may become Acting Secretary in the event of a vacancy," and "delegations of authority," which they say "simply allow an official to exercise certain powers of the office of the Secretary." Def. Supp. Br. 5. As Defendants note, Nielsen's order indicates that it is establishing the "order of succession" for the Secretary's office and cites 6 U.S.C. § 113(g)(2) (empowering the Secretary to designate a "further order of succession") as among the authorities empowering her to do so. According to Defendants, the distinction between these two terms is so clear and firmly entrenched that Nielsen could not possibly have designated an "order of succession" under § 113(g)(2) to govern situations involving disaster and emergency, because—they say—those situations are covered only by a "delegation of authority." In other words, by invoking § 113(g)(2) and using the term "order of succession," the preamble to Nielsen's order *must* mean that she intended to amend Section II.A of Delegation 00106 (governing resignations) because Section II.B (governing disasters and emergencies) "was not an order of succession—it was a delegation of authority." Def. Supp. Br. 12.

Defendants' premise is unsound, as Plaintiffs have already explained. *See* Pls. Supp. Br. 8-9. The Homeland Security Act, DHS's Delegation 00106, and Nielsen's order itself all refute the notion that the term "order of succession" is restricted to permanent vacancies following death or resignation, while "delegation of authority" covers situations in which an incumbent officer is temporarily unable to act.

Section 113(g) states that the "order of succession" it empowers the Secretary to create will govern not only a "vacancy in office," but also situations in which "absence" or "disability" prevents a Secretary from being "available to exercise the duties of the Office." 6 U.S.C. § 113(g)(1). That language clearly encompasses situations in which a Secretary is "unavailable to act during a disaster or catastrophic emergency." DHS Delegation 00106, § II.B, Dkt. 57-1 at ECF page 3. Defendants are simply wrong, therefore, to claim that Nielsen "would have had no reason to invoke Section 113(g)(2)" if she were only amending the list of officials who could act as Secretary during a disaster or emergency. Def. Supp. Br. 5.

Likewise, Delegation 00106 twice uses the term "order of succession" to describe its various annexes, *see* Dkt. 57-1 at ECF pages 3-4, ¶¶ II.C, II.G, while it also "delegate[s] authority" to the officials listed in those annexes "to exercise the powers and perform the functions and duties of the named positions in case of," among other things, "death" and "resignation," *id.* ¶ II.D.

Finally, while Nielsen's order is titled "Amending the Order of Succession in the Department of Homeland Security," and while it proclaims its intent to designate an "order of succession" for the Secretary's office, the revised version of Annex A that ensues is titled "Order *for Delegation of Authority* by the Secretary of the Department of Homeland Security." Dkt. 57-1 at ECF page 70 (emphasis added).

Neither the Homeland Security Act nor DHS's own practices, therefore, draw the firm distinction between the terms "order of succession" and "delegation of authority" that Defendants claim they do. Indeed, Defendants belie their own claim: they assert that Nielsen "changed *the order of succession for all vacancies* in the office of Secretary," including vacancies arising from disaster or emergency, Def. Supp. Br. 4 (emphasis added), even as they elsewhere insist that the provision for disasters and emergencies in Section II.B is actually "an order for delegation of

authority, not an order of succession," *id.* at 12.

Nor does Defendants' distinction hold as a matter of logic. They claim that orders of succession, "which are lists of officials who may become Acting Secretary in the event of a vacancy," are entirely different from delegations of authority, "which simply allow an official to exercise certain powers of the office of the Secretary." *Id.* at 5. That distinction might be valid when a Secretary delegates only "certain powers," *id.*, of the Secretary's office to someone else, as under 6 U.S.C. § 112(b)(1). But when a Secretary is "unavailable to act" during a disaster or emergency, DHS Delegation 00106, *supra*, § II.B, and someone else is permitted to step in and wield *all* of the Secretary's "authority to exercise the powers and perform the functions and duties of [the] office," *id.*, then this stand-in official is clearly serving as the Acting Secretary, whether or not that label is used. Under those conditions, a "delegation of authority" is indistinguishable from an "order of succession."

Thus, the boundary between these two terms, to the extent it is valid in this context at all, is not nearly firm enough to justify the weighty inference that Defendants seek to draw from it—namely, that Nielsen's order should be read to mean something other than what its language plainly says, simply because it invokes § 113(g)(2) to designate an "order of succession."

Moreover, Defendants' argument rests on another flawed premise. They insist that Nielsen's order of succession adopted pursuant to § 113(g)(2) cannot have been meant to address only the scenarios covered by Section II.B of Delegation 00106 (disaster and catastrophic emergency), because § 113(g)(2) is a carve-out from the FVRA, and "the circumstances addressed by Section II.B are not the kind of vacancy that would trigger the FVRA." Def. Supp. Br. 6. Defendants cite no authority supporting that proposition, and it is wrong. The FVRA covers more than permanent vacancies that arise when an officer "dies" or "resigns." 5 U.S.C. § 3345(a). It

applies to *every* situation in which an officer "is otherwise unable to perform the functions and duties of the office." *Id.* And it expressly covers scenarios in which an incumbent officer is temporarily prevented from performing his or her duties, *see id.* § 3346(a) (referencing "a vacancy caused by sickness"), as the Justice Department's Office of Legal Counsel has recognized and as the Vacancies Act has always done, *see* Pls. Supp. Br. 9 n.4.[1]

Defendants protest that if this is true, then former Secretary Jeh Johnson lacked the authority to establish Section II.B (and Annex A) in the first place because it was not until a week later that the Homeland Security Act was amended to add § 113(g), giving the Secretary the power to establish an order of succession that could supplant the FVRA. But that conclusion does not follow. Section II.B, as approved by Johnson, included an important caveat: it purported to delegate all of the Secretary's powers during a disaster or catastrophic emergency "to the extent not otherwise prohibited by law." Dkt. 58-1 at ECF page 16. Thus, to the extent that the FVRA prohibits an official who is exercising power under Section II.B from carrying out some functions of the Secretary, Section II.B makes clear that it does not, on its face, purport to override that limitation. In practice, to be sure, an official serving under Section II.B could theoretically have still violated the FVRA, but Section II.B was in effect for only a week before § 113(g)(2) was added to the U.S. Code, permitting DHS Secretaries to issue orders of succession that deviate from the FVRA. And even if Defendants were right that Johnson lacked the authority to establish Section II.B (and Annex A), so what? The phenomenon of executive branch department heads pushing the limits of the Vacancies Act through the use of their "delegation" authority is hardly a

[1] *See also Muffley ex rel. NLRB v. Massey Energy Co.*, 547 F. Supp. 2d 536, 543 (S.D. W. Va. 2008) (a recusal triggers the FVRA because the recused officer is "unable to perform the function and duties of the office"); *In re Grand Jury Investigation*, 916 F.3d 1047, 1055-56 (D.C. Cir. 2019) (the Attorney General's recusal constituted "absence or disability" under the Justice Department's succession statute and therefore "created a vacancy").

new development. *See, e.g.*, Pls. Summ. Judg. Mem. 6-8 (describing how the FVRA was a response to that practice).

In sum, the murky "context" to which Defendants point offers no reason to disregard the unambiguous text of Nielsen's order. Neither her use of the term "order of succession" nor her invocation of § 113(g)(2) are in tension with the straightforward reading of that plain text. They certainly do not provide such clear indications of a contrary meaning as to override the order's plain language, which "changed Annex A, and Annex A only." *CASA de Maryland*, 2020 WL 5500165, at *22.

C. None of Defendants' other arguments is any more persuasive. They claim that "[b]efore Secretary Nielsen's order, there was no order of succession under Section 113(g)(2)," which supposedly justifies an inference that Nielsen must have meant to replace the executive order, not merely adjust Annex A, by citing § 113(g)(2) and designating an order of succession. As already explained, that inference does not follow, because an "order of succession" under § 113(g)(2) can cover situations in which "absence" or "disability" prevents the Secretary from being "available to exercise the duties of the Office." 6 U.S.C. § 113(g)(1). In addition, Defendants' premise is wrong. Secretary Nielsen amended Delegation 00106 at least three times before April 2019. *See* Dkt. 57-1 at ECF page 6 (indicating dates of revisions to various annexes). Each time that Nielsen approved these revisions, she possessed the power of § 113(g)(2) to establish the further order of succession for the Secretary's office. And each time, she preserved Section II.A and its reliance on Executive Order 13753 as providing the line of succession following resignations, just as she did in April 2019. As Defendants themselves acknowledge, Nielsen "did not need to expressly invoke" that statutory source of power in order to make her use of it effective. Def. Supp. Br. 9. And significantly, her April 2019 order is titled: "*Amending* the Order of Succession in the

Department of Homeland Security." Dkt. 57-1 at ECF page 70 (emphasis added).

Defendants also fleetingly assert that this Court "should defer to DHS's interpretation of Secretary Nielsen's order." Def. Supp. Br. 10. But "the possibility of deference" to an agency's interpretation of its own rules "can arise only if a regulation is genuinely ambiguous . . . . after a court has resorted to all the standard tools of interpretation." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019). Neither Nielsen's order nor DHS's subsequent implementation of that order in Delegation 00106—both of which are perfectly in agreement with one another—are ambiguous. And even if they were, "not all reasonable agency constructions of those truly ambiguous rules are entitled to deference." *Id.* Rather, "the agency's interpretation must in some way implicate its substantive expertise." *Id.* at 2417. For example, deference might be appropriate when the Transportation Security Administration assesses security risks, *id.*, but interpreting common terms in statutes and agency documents "fall[s] more naturally into a judge's bailiwick," *id.* Here, DHS's "substantive expertise" plainly does not lie in construing succession orders.

Finally, because the text of Nielsen's order and Delegation 00106 are unavailing, Defendants urge this Court to consider instead "[t]he official actions Secretary Nielsen took after signing her order," which demonstrate an expectation that McAleenan would be serving as Acting Secretary. Def. Supp. Br. 9. For all we know, however, Nielsen believed that McAleenan was being designated to serve as Acting Secretary by the President under the FVRA. And in any event, Defendants' argument is essentially a plea that Nielsen's order "does not mean what it says, and that this Court should deduce Nielsen's true intent to change the succession order so that McAleenan would replace her, as evident from her contemporaneous public statements and DHS press releases." *CASA de Maryland*, 2020 WL 5500165, at *20. But the meaning of the order "is plain, and the Government provides no support for this Court to look beyond the Order itself." *Id.*

For all these reasons, Defendants have failed to undermine the conclusion reached by other courts and the GAO: Kevin McAleenan was never lawfully the Acting Secretary of DHS under the Homeland Security Act. And for that reason, his appointment of Matthew Albence as ICE Deputy Director was invalid.

II. Albence's Approval of the Directive in His Purported Role as "Acting Director" Was Not Harmless Error.

Defendants concede—as they must—that when Albence approved the Directive as ICE's "Acting Director," he did not in fact hold that position. They dismiss this mistake as harmless error, on the flawed theory that it is Plaintiffs' burden to show that Albence would not have taken the same action had he recognized that he was no longer the Acting Director. But this is a case where the burden falls on the government. And based on the evidence in the record, the assertion that Albence would have issued the Directive as the Deputy Director is pure speculation.

First, Defendants misstate the standard governing where the burden lies under a harmless error analysis. It is true that "the burden of showing that an error is harmful *normally* falls upon the party attacking the agency's determination." *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (emphasis added). But Defendants twist that description of what "normally" happens into a hard and fast rule, despite the Court's admonition against "the use of mandatory presumptions and rigid rules." *Id.* at 407; *see N.Y. Pub. Interest Research Grp. v. Whitman*, 321 F.3d 316, 334 n.13 (2d Cir. 2003) (placing the burden on the government to show that an agency error "clearly had no bearing on the procedure used or the substance of decision reached" (quoting *Sierra Club v. U.S. Fish and Wildlife Serv.*, 245 F.3d 434, 444 (5th Cir. 2001))). This is a case where it makes perfect sense to place the burden on the government, as the question turns on evidence that is exclusively within the government's control. Unlike the typical case, Plaintiffs here are not "in a position at least as good as" or "better than" the government to explain how the agency's error (Albence's

mistaken belief that he was the Acting Director) affected the outcome. *Shinseki*, 556 U.S. at 410.

Second, even if it were Plaintiffs' burden, they have met it. As explained in Plaintiffs' supplemental brief, the uncontroverted record shows that Albence believed he was exercising the powers of the Acting Director when he issued the Directive, and no evidence suggests that he believed he had the power to issue the Directive in his capacity as Deputy Director without the approval of a Director. Such "uncertainty" about whether Albence would have issued the Directive had he properly complied with the FVRA's time limits "is sufficient to conclude that . . . the FVRA violation is non-harmless." *SW Gen., Inc. v. NLRB*, 796 F.3d 67, 80 (D.C. Cir. 2015).

Defendants make one cursory attempt in their supplemental brief to show that Albence would have issued the Directive in his capacity as Deputy Director. They point to the fact that on August 5, 2019—three days *after* Albence approved the Directive as ICE's "Acting Director"—DHS submitted paperwork to the GAO acknowledging that his tenure as Acting Director had expired on August 1, yet the Directive was not withdrawn. But this fact is unhelpful to Defendants. That the paperwork was not submitted until August 5 further confirms that when Albence approved the Directive, on August 2, he was still operating under the misapprehension that he was the Acting Director—as evidenced by his signing of the document as ICE's "Acting Director." Furthermore, if this mistake were understood at the time as merely a ministerial error (the use of the wrong signature block), nothing prevented Albence from correcting that error upon learning of it by reissuing the Directive under the title of Deputy Director. But as this Court pointed out during the hearing, Albence never did so, even more than a year after DHS's acknowledgement to the GAO, and even though correcting the mistake would have had the benefit (under this view of the law) of insulating the Directive from an FVRA challenge. Finally, the mere fact that Albence "continued to apply the Directive" after learning of his mistake, Def. Supp. Br. 14, does not prove that he

would have originally issued it as the Deputy Director. An equally plausible inference is that he was simply content to let that mistake stand until it was successfully challenged in court.

In sum, a "case-specific application of judgment," *Shinseki*, 556 U.S. at 407, based on the record before this Court requires concluding that the error here was not harmless.

* * *

None of the issues discussed above need be addressed, however, because only the Director of ICE or a valid Acting Director may "establish the policies for performing" the "function[]" of adjudicating stay-of-removal requests filed by U-visa petitioners. 6 U.S.C. § 252(a)(3)(A). Despite holding neither position, Albence purported to establish just such a policy, and the FVRA requires that this policy "have no force or effect." 5 U.S.C. § 3348(d)(1).

Defendants' supplemental brief confirms yet again their sweeping contrary view: notwithstanding the FVRA and the Appointments Clause, the DHS Secretary may unilaterally vest anyone with "full authority to exercise the powers of the Director of ICE . . . . during a vacancy in the office of Director." Def. Supp. Br. 1 (quotation marks omitted). As Plaintiffs have explained, there is nothing special about the Deputy Director position, which DHS's rules simply place first in line to inherit the Director's powers. *See* Dkt. 40-4 at ECF page 18. Defendants' view—that the FVRA places no enforceable restrictions on who may exercise the powers of the ICE Director during a vacancy—allows the very "manipulation of official appointments," *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 883 (1991), that the FVRA and the Appointments Clause are meant to prevent. *Cf.* Dkt. 40-4 at ECF page 18 (placing ICE's Principal Legal Advisor fifth in line to exercise the Director's powers, preceded by three career officials and the Deputy Director); Dkt. 55-1 at ECF page 10 (indicating that after Albence retired, Acting DHS Secretary Chad Wolf passed over those three career officials and directed Principal Legal Advisor Tony Pham "to perform the functions and duties of the Director").

CONCLUSION

For the foregoing reasons, and those previously provided, Plaintiffs' motion for summary judgment should be granted.

Respectfully submitted,

Dated: October 19, 2020

/s/ *Brianne J. Gorod*
Brianne J. Gorod

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CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2020, the foregoing document was filed with the Clerk of the Court, using the CM/ECF system, causing it to be served on all counsel of record.

Dated: October 19, 2020

/s/ Brianne J. Gorod
Brianne J. Gorod