UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ASISTA IMMIGRATION ASSISTANCE, INC., et al., *Plaintiffs*, v. TONY H. PHAM, et al., *Defendants*.	Case No. 3:20-cv-00206-JAM Judge: Hon. Jeffrey A. Meyer

DEFENDANTS' SUPPLEMENTAL REPLY BRIEF

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INTRODUCTION

Plaintiffs rely solely on the GAO report in their effort to call into question Matthew Albence's appointment as Deputy Director of ICE, and Kevin McAleenan's authority as Acting Secretary of Homeland Security to make that appointment. But their arguments misinterpret the text of the agency's own internal documents and ignore the contemporaneous actions that then-Secretary Nielsen took when she exercised her congressionally delegated authority to modify the order of succession for the office of the Secretary. They offer no persuasive reason to do anything other than give effect to the plain text of Secretary Nielsen's order, which would resolve these motions in Defendants' favor.

As Defendants have demonstrated, the only defect in the Directive Plaintiffs seek to challenge is the use of the word "Acting" rather than "Deputy" in the signature block. There is no evidence whatsoever in the record that Albence would have somehow felt disempowered to sign the Directive as Deputy Secretary, and ample evidence that he did in fact stand behind and continue to implement the Directive after ICE formally acknowledged that his service as Acting Secretary had come to an end before the Directive issued. With no record evidence in their favor, Plaintiffs attempt to cast aside directly on-point Supreme Court precedent and place the burden on Defendants show *with certainty* that any error was harmless. This Court should decline that invitation, and conclude that any error in the Directive's signature block was harmless.

ARGUMENT

I. Former Acting Secretary McAleenan served under a valid 6 U.S.C. § 113(g)(2) order of succession that applied in the event of a vacancy.

In April 2019, then-Secretary of Homeland Security Kirstjen M. Nielsen exercised her authority under the Homeland Security Act ("HSA"), 6 U.S.C. § 113(g)(2), to designate a new

order of succession in the event of a vacancy: "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 . . . ." *See* ECF No. 58-1, at 2, Ex. 1 Designation of an Order of Succession for the Secretary (Apr. 9, 2019) ("April 2019 Order") (emphasis added). Her signed order states *five times* that she designated a succession order for the office of the Secretary, without qualification as to the reason for the vacancy. *Id.* The April 2019 Order supplied a single list of offices to control the "order of succession," and made no mention of either "catastrophic emergency" or "disaster." *Id.* The April 2019 Order placed this order of succession into Annex A, a document that likewise has never included the words "catastrophic emergency" or "disaster." *Id.* at 2; *see also id.*, at 20, Ex. 5, DHS Delegation 00106 Revision 8 ("Revision 8").

As Defendants explained in their opening brief, that April 2019 Order created an order of succession under Section 113(g)(2) that made the Commissioner of U.S. Customs and Border Protection third in line to serve as Acting Secretary of Homeland Security. *See* April 2019 Order at 2; *see also* ECF No. 58, at 4–13 ("Defs.' Mem."). That is why, under her own signed order, Nielsen swore in then-CBP Commissioner McAleenan as Acting Secretary the day of her own resignation. Plaintiffs' counterarguments fail to overcome the plain text of Secretary Nielsen's April 2019 Order.

Rather than follow the plaint text of Secretary Nielsen's order, Plaintiffs, and the cases they cite, instead rely on a different document that Secretary Nielsen never signed. *See* Pl.s' Mem. at 7; *see also Immigrant Legal Res. Ctr. v. Wolf*, No. 20-5883, 2020 WL 5798269 (N.D. Cal. Sept. 29, 2020); *CASA de Maryland, Inc. v. Wolf*, No. 20-2118, 2020 WL 5500165 (D. Md. Sept. 11, 2020); *La Clínica de La Raza v. Trump*, No. 19-4980, 2020 WL 4569462 (N.S. Cal. Aug. 7, 2020).

As Plaintiffs themselves put it, "DHS personnel" attempted to implement the April 2019 Order in Revision 8.5 to DHS Delegation No. 00106. ECF No. 57, at 7 ("Pls.s' Mem."); *see also* ECF 58-1 at 56, Ex. 8, DHS Delegation Order 00106 Revision 8.5 ("Revision 8.5"). But the HSA is clear that only "the Secretary" may designate the "order of succession to serve as Acting Secretary." 6 U.S.C. § 113(g)(2). Despite Plaintiffs' assertions, Congress did not "empower[] the Department" or "DHS personnel" to establish the order of succession for the office of Secretary; it empowered *the Secretary* to do so. Secretary Nielsen never signed or otherwise issued Revision 8.5, so that document is simply irrelevant to the extent that it purports to contradict the April 2019 Order that Secretary Nielsen *did* sign.

When Plaintiffs do consider the April 2019 Order, their argument requires them to invent "language specifying that the *only* change being made was to Annex A" and its order of delegation, which does not appear anywhere in the Order, and to ignore the five separate times that the document specifies that it creates an "order of succession." Pl.s' Mem. at 8 (emphasis added); April 2019 Order at 1–2. In Plaintiffs' telling, despite "hereby designat[ing] the order of succession for the Secretary of Homeland Security" pursuant to "6 U.S.C. § 113(g)(2)," Secretary Nielsen actually took *no* action under § 113(g)(2) and instead *only* changed a *delegation* under §112—despite never even mentioning that provision.

Plaintiffs attempt this sleight of hand by ignoring not only the April 2019 Order, but also the text of Revision 8.5 itself—despite their claim that it controlled the order of succession when Secretary Nielson resigned. Plaintiffs argue that § 113 can apply to instances of "absence" or "disability" as well as vacancies, suggesting that Secretary Nielsen intended to change *only* Annex A's order of delegation in the event a disaster or catastrophic emergency. *See* Pl.s' Mem. at 9. That argument misreads the plain text of the April 2019 Order, contending that Secretary Nielsen's

unqualified order of succession was in fact only meant to apply in *limited* circumstances. Even aside from ignoring the plain text of the actual order that Secretary Nielsen signed, moreover, Plaintiffs' argument also ignores the plain text of Revision 8.5—twice over. Revision 8.5 expressly distinguishes between "the Secretary's death, resignation, or inability to perform the functions of the Office" and "unavailab[ility] to act during a disaster or catastrophic emergency," in the latter case "delegat[ing]" powers to the officials listed in Annex A pursuant to §112. Revision 8.5 at 1, 3. Revision 8.5 also expressly distinguishes between "delegat[ion]" of authority pursuant to § 112, governed by Annex A, and the "succession of officials" in the event of "the Secretary's death, resignation, or inability to perform the functions of the Office." Revision 8.5 at 1. Even on Plaintiffs' own terms, they simply cannot explain why Secretary Nielsen exclusively invoked § 113 to make a change to a *delegation* under § 112.

Plaintiffs try to bolster their argument by pointing to a subsequent amendment to Delegation No. 00106 signed by Acting Secretary McAleenan, which states that "[i]n 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." Pl.s' Mem. at 9–10; ECF 57-1 at 71. According to Plaintiffs, McAleenan's revision would be superfluous if Secretary Nielsen's April 2019 Order revised Annex A to govern the order of succession in cases of vacancy. As an initial matter, it would not be "superfluous" for Mr. McAleenan to amend Secretary Nielsen's order as a precautionary matter to address the alleged deficiencies that are now in dispute in various lawsuits. But Plaintiffs' argument further ignores the fact that McAleenan's revision *changed the list of offices* in the order of succession previously set by Secretary Nielsen. *Compare* April 2019 Order at 1 *with* ECF 57-1 at 71. McAleenan's November 2019 revision was therefore an independent alteration of the order of succession under Section 113(g)(2).

In short, Plaintiffs ask this Court to conclude that Secretary Nielsen made *no change* to the order of succession despite stating five times over that she was designating her "desired order of succession." April 2019 Order at 1. To do so, they assign controlling effect to a document which they admit was prepared by "DHS personnel" who have no power to designate the order of succession for the office of Secretary, rather than to the succession order that Secretary Nielsen actually signed. The relevant document is instead the April 2019 Order, which did precisely what it said: establish the "order of succession" for the office of Secretary. That order of succession governed when Secretary Nielsen resigned, and made McAleenan Acting Secretary of Homeland Security. In that capacity, as Plaintiffs do not dispute, he had, and validly exercised, the authority to appoint Albence as Deputy Director of ICE.

II. Any error in signing the Directive as "Acting Director" was harmless.

Because Albence was validly serving as Deputy Director, he had the authority to issue the Directive in that capacity rather than as Acting Director. Plaintiffs nevertheless claim that the Directive must be set aside because its signature block described Albence as "Acting Director" rather than "Deputy Director." But this Court must take "due account" of "the rule of prejudicial error," and nothing in the record even remotely suggests that a different signature block would have made any difference. 5 U.S.C. § 706. Here, the very official who signed the Directive continued to implement it long after officially acknowledging that he was no longer serving as Acting Director on the date the Directive issued. There is thus no basis in the record to conclude that a different signature block would have made any difference.

The relevant facts are simple. *First*, Albence signed the Directive on August 2, 2019, with a signature block inaccurately describing him as "Acting Director." *Second*, DHS formally notified the GAO on August 5, 2019, that Albence's service as Acting Director had concluded on August

1, 2019. *Third*, after August 5, 2019, and through the conclusion of his tenure at ICE, Albence took no action to rescind the Directive or in any way to suggest that he believed that as Deputy Director—which he had acknowledged was his only office at the time the Directive issued—he had not validly issued the Directive. *Fourth*, ICE continued to implement the Directive even after Albence left the agency, and continues to do so.

If Albence had at any point concluded that he lacked the authority as Deputy Director to *issue* the Directive, it would necessarily have followed that he lacked the authority to continue to *implement* it. That he stood by the policy long after acknowledging that he was not Acting Director on August 2, 2019, is conclusive evidence that he believed the Directive was within his power to issue as Deputy Director, and that he would have issued in that capacity. Of course, it is hardly surprising that Albence would not have independently attempted to contradict the considered and consistent legal judgment of ICE counsel that he had the power as Deputy Director to issue the Directive—not to mention the judgment of this Court, which need reach the question of harmless error only if it concludes that the Deputy Director in fact could issue the Directive.

Tellingly, Plaintiffs cannot point to any case ever to have concluded that a mere error in a signature block constituted prejudicial error, when the official in question had full authority to take the challenged action under a different title. The best Plaintiffs can do is cite *SW General, Inc. v. NLRB*, 796 F.3d 67, 80 (D.C. Cir. 2015), in which the D.C. Circuit could not conclude that a *different* General Counsel would have issued the same charging decision, *id.*, and *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 35 (D.D.C. 2020), in which Judge Moss likewise could not "be confident" that the same policies "'would have issued under an' Acting Director '*other than*' Cuccinelli," *id.* (quoting *S.W. General*, 796 F.3d at 80) (emphasis added)). This case presents the

far more straightforward question of whether *the same person* would have taken the same action, which he had full legal authority to do. To ask that question is to answer it.

Plaintiffs thus resort to arguing, directly contrary to the Supreme Court's holding in *Shinseki v. Holder*, 556 U.S. 396, 406 (2009), that the burden should be placed on the agency to show that an error was not harmful, rather than on the party challenging agency action to show that it was. *See* Pl.'s Mem. at 12.[1] But regardless of where the burden lies, the record in this case is unambiguous that Albence was Deputy Director, not Acting Director, when he issued the Directive, and that he continued to implement it *as Deputy Director* for the remainder of his tenure at ICE. If he had ever concluded that he could not have issued the Directive in that capacity, he would have been required to cease implementing it—yet that never happened. The only possible conclusion is thus that the signature block made no difference in fact, and would have made no difference if it had accurately described Albence as Deputy Director. Any error was harmless.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Defendants' Motion for Summary Judgment, in Defendants' Opposition to Plaintiffs' Cross-Motion for Summary Judgment and Reply in support of their Motion for Summary Judgment, and in Defendants' Supplemental Brief, Defendants respectfully ask the Court to grant summary judgment in their favor on all claims.

Respectfully submitted,

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[1] Plaintiffs assert, in a footnote, that the Supreme Court did not reverse the Federal Circuit in *Shinseki* for placing the burden on the agency. *See* Pl.s' Mem. at 12 n.6. In fact, the Supreme Court identified "[t]hree related features of the Federal Circuit's framework, taken together," that departed from the correct harmless error analysis. *Shinseki*, 556 U.S. at 407. The second of those three features was "impos[ing] an unreasonable evidentiary burden upon the" agency. *Id.* at 408.

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CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2020, the foregoing Supplemental Brief was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing. Parties may access this filing through the Court's system.

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