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 MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

By Minute Order on October 5, 2020, this Court directed the parties to submit supplemental memoranda addressing two questions: (1) whether Matthew Albence had valid authority to act as Deputy Director of ICE to issue ICE Directive 11005.2 on August 2, 2019, and (2) if so, whether this capacity renders harmless any error from his issuance of the Directive in his alleged capacity as Acting Director. *See* Dkt. 56. The answer to both questions is "no."

First, months after briefing on the parties' cross-motions for summary judgment was completed, Defendants belatedly revealed that Albence was appointed to the position of Deputy Director by Kevin McAleenan, the purported Acting Secretary of Homeland Security. But McAleenan himself was serving as Acting Secretary unlawfully, and he therefore lacked authority to make this appointment. Every court to address the question has concluded that McAleenan did not validly became Acting Secretary under the Department of Homeland Security's rules for vacancies in the Secretary's office. That is also the conclusion of the Government Accountability Office. For the reasons set forth below, this Court should conclude the same.

Second, even if Albence did validly hold the position of Deputy Director when he issued ICE Directive 11005.2, it would not render harmless his decision to approve that Directive while under the mistaken impression that he was the agency's Acting Director. The record shows that Albence believed himself to be exercising the powers of the Acting Director when he issued the Directive, and Defendants have provided no evidence that he believed he had the power to take that action in his capacity as Deputy Director. Because this Court cannot be certain that Albence would have issued the Directive based on his Deputy status alone, the error was not harmless.

This Court need not reach either question, however, because only the Director of ICE or a valid Acting Director may "establish the policies for performing such functions as are . . . vested

in the [Director] by law." 6 U.S.C. § 252(a)(3)(A)(ii); *see id.* § 252(b), (c) (authorizing other ICE personnel only to "mak[e] policy recommendations" and "provide . . . advice to the [Director]"). It is undisputed that Albence was neither the Director nor Acting Director when he issued the Directive. It is also undisputed that deciding whether to "grant . . . an administrative stay of a final order of removal" to a U-visa petitioner, 8 U.S.C. § 1227(d)(1), is a "function[]" that has been "vested in the [Director] by law." 6 U.S.C. § 252(a)(3)(A)(ii); *see, e.g.*, Dkt. 40-6, §§ 2.W, 2.BB (vesting the Director with the function of "grant[ing] stays of removal" and "mak[ing] determinations . . . with respect to . . . 'U' nonimmigrants"). Finally, it is undisputed that the Directive "establish[ed] the policies for performing [this] function[]." 6 U.S.C. § 252(a)(3)(A); *see* Dkt. 34-1 at 1 ("This Directive sets forth U.S. Immigration and Customs Enforcement (ICE) policy regarding Stay of Removal requests . . . involving U nonimmigrant status (U visa) petitioners . . . ."). The conclusion is inescapable: establishing ICE's new U-visa stay policy was a function "required by statute to be performed by the [Director] (and only that officer)." 5 U.S.C. § 3348(a)(2)(A)(ii). And the policy is therefore void under the FVRA.

ARGUMENT

I. Matthew Albence's Appointment as Deputy Director of ICE Was Unlawful.

A. According to Defendants' recent filing, Matthew Albence was appointed Deputy Director of ICE on June 28, 2019, by the purported Acting Secretary of Homeland Security, Kevin McAleenan. Dkt. 55 at 2. McAleenan made this appointment "pursuant to his authority as the 'Head[] of Department.'" *Id.* (quoting U.S. Const. art. II, § 2, cl. 2).[1]

[1] As the second-in-command at ICE, *see* Dkt. 40-4 at ECF page 18, the Deputy Director "exercis[es] significant authority pursuant to the laws of the United States," *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018) (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)), and is therefore an "officer" under the Constitution. As their filing makes clear, Defendants agree: they view the

Kevin McAleenan, however, had no power to act as the "Head" of DHS, as three district courts and the Government Accountability Office have already concluded. *See Immigrant Legal Res. Ctr. v. Wolf*, No. 20-5883, 2020 WL 5798269 (N.D. Cal. Sept. 29, 2020) ("*ILRC*"); *CASA de Maryland, Inc. v. Wolf*, No. 20-2118, 2020 WL 5500165 (D. Md. Sept. 11, 2020) ("*CASA*"); *La Clínica de La Raza v. Trump*, No. 19-4980, 2020 WL 4569462 (N.D. Cal. Aug. 7, 2020) ("*La Clínica*"); U.S. Gov't Accountability Office, B-331650, *Legality of Service of Acting Secretary of Homeland Security and Service of Senior Official Performing the Duties of Deputy Secretary of Homeland Security* (Aug. 14, 2020), https://www.gao.gov/assets/710/708830.pdf. He therefore lacked authority to appoint Albence as an officer in that Department.

Under the Homeland Security Act (HSA), only the Secretary of Homeland Security may appoint the ICE Deputy Director or any other officer of the Department.[2] If such an appointment is made by someone who is not a Secretary or validly serving Acting Secretary, the appointment "shall have no force or effect." 5 U.S.C. § 3348(d)(1). The appointment would also be "not in accordance with law" and "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(A), (C).

Because Kevin McAleenan was not validly serving as the Acting Secretary of Homeland Security when he appointed Albence to be ICE Deputy Director, the appointment was invalid, and

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Deputy as an "inferior" officer, whose appointment Congress has vested in the "Head" of DHS, pursuant to Article II's "Excepting" Clause.

[2] The HSA does not expressly authorize the Secretary to create offices such as the Deputy Director of ICE or to make appointments to such offices. Nevertheless, those powers may be implicit in the Secretary's statutory authority as "head of the Department." 6 U.S.C. § 112(a)(2); *see Pennsylvania v. HHS*, 80 F.3d 796, 804-05 (3d Cir. 1996). If so, however, that statutory authority is limited to the Secretary alone: any provision authorizing *other* DHS officials to appoint officers like the Deputy Director would violate Article II's Excepting Clause, which permits the power of appointing inferior officers to be vested by law only "in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2.

Albence never became the Deputy Director.

B. In creating the office of DHS Secretary, Congress supplemented the FVRA's rules governing the filling of vacancies. Consistent with the FVRA, the HSA establishes a Deputy Secretary who "shall be the Secretary's first assistant" for purposes of the FVRA. 6 U.S.C. § 113(a)(1)(A). Under the FVRA, only the Secretary's "first assistant" (i.e., the Deputy Secretary) would be able to serve automatically as the Acting Secretary. *See* 5 U.S.C. § 3345(a)(1). Congress modified this rule in the HSA, establishing that, in the absence of a Deputy, the Department's third-in-line officer should serve as the Acting Secretary. *See* 6 U.S.C. § 113(g)(1). Congress also empowered the Department to establish a further line of succession to fill the Secretary's office automatically when the top three positions are all vacant: notwithstanding the FVRA, "the Secretary may designate such other officers of the Department in further order of succession to serve as Acting Secretary." *Id.* § 113(g)(2). This type of agency-specific succession statute is permitted by the FVRA. *See* 5 U.S.C. § 3347(a)(1)(A).

The HSA, in short, prescribes a specific order of succession that automatically goes into effect when the Secretary's office is vacant, and it empowers the Department to expand upon that list by establishing a further line of succession beyond those two officials.

Exercising that power, the Department established a further line of succession in an internal regulation governing vacancies. *See* DHS Delegation No. 00106 (Revision No. 08.5), *DHS Orders of Succession and Delegations of Authorities for Named Positions* (Apr. 10, 2019) (Ex. A at ECF page 3); *CASA*, 2020 WL 5500165, at *20 ("Delegation Order 00106 has been the DHS' repository for changes to the order of succession for the office of the Secretary and twenty-eight other PAS positions within the agency."). Specifically, this internal regulation incorporates the line of succession for the Secretary's office that was first provided in a 2016 executive order: "In case of

the Secretary's . . . resignation, . . . the orderly succession of officials is governed by Executive Order 13753." DHS Delegation No. 00106, *supra*, § II.A.

Executive Order 13753, in turn, lists sixteen DHS officials who are authorized to take over as Acting Secretary during a vacancy, in the sequence provided. *See* Exec. Order No. 13753, § 1, 81 Fed. Reg. 90,667 (Dec. 16, 2016). Under the Department's internal regulation, therefore, that list of officials, in that order, are to serve as Acting Secretary following a Secretary's resignation.[3]

The last Senate-confirmed DHS Secretary, Kirstjen Nielsen, resigned in April 2019. At that point, Kevin McAleenan was the Commissioner of U.S. Customs and Border Protection (CBP). Under Executive Order 13753 and the Department's internal regulation, the CBP Commissioner is *seventh* in line to become Acting Secretary following a resignation. *See* Exec. Order No. 13753, *supra*, § 1. Nevertheless, McAleenan purported to take over as Acting Secretary, even though other officials higher in the line of succession were available to serve. In doing so, McAleenan unlawfully departed from the "further order of succession to serve as Acting Secretary," 6 U.S.C. § 113(g)(2), set forth in DHS's internal regulation. *See ILRC*, 2020 WL 5798269, at *7 ("Pursuant to that order of succession, Mr. McAleenan was seventh in line and, thus, was not eligible to assume the role of Acting Secretary."); *CASA*, 2020 WL 5500165, at *21 ("when Nielsen vacated the office, and McAleenan assumed the position of Acting Secretary, he was not next in line . . . . McAleenan's leapfrogging over [the proper official] therefore violated

[3] When Executive Order 13753 was issued in 2016, DHS had not yet been given the statutory power to establish a further line of succession for the Secretary's office. The President's authority to issue the executive order came from his discretionary power under the FVRA to select specific officials besides the first assistant to fill a vacancy. *See* 5 U.S.C. § 3345(a)(2), (3). Soon after, however, the HSA was amended to add 6 U.S.C. § 113(g), which permitted DHS to establish a further line of succession. In exercising that new power, DHS adhered to the line of succession set forth in Executive Order 13753, incorporating it by reference as the source governing vacancies caused by resignations. *See* DHS Delegation No. 00106 (Revision No. 08.5), *supra*, § II.A.

the agency's own order of succession."). And because McAleenan "assumed the role of Acting Secretary without lawful authority," *id.*, his service violated the FVRA, which is "the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office" unless an agency-specific succession statute like the HSA applies. *See* 5 U.S.C. § 3347(a).

C. Despite the above, the government will likely insist, as it has elsewhere, that McAleenan validly became Acting Secretary upon Nielsen's resignation pursuant to DHS's line of succession. Every court to address that contention has rejected it, as has the Government Accountability Office. This Court should too.

In support of its position, the government has cited an order signed by Secretary Nielsen on April 9, 2019. This order stated that it was revising Annex A to Delegation 00106, the internal DHS regulation that provides the lines of succession for the Department's offices. *See Memorandum for the Secretary from John M. Mitnick, General Counsel, DHS* (Apr. 9, 2019) (Ex. A at ECF page 69) (memorializing Nielsen's "approval of the attached document," identified as "Annex A"); Ex. A at ECF page 70 (the attached document, which reads: "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").

Crucially, however, Annex A governs only who may exercise the Secretary's powers during a disaster or catastrophic emergency that prevents the Secretary from acting, *not* who may exercise the Secretary's powers following a resignation. *See* DHS Delegation No. 00106, *supra*, § II.B (Ex. A at ECF page 3) ("I hereby delegate to the officials occupying the identified positions in the order listed (Annex A), my authority to exercise the powers and perform the functions and duties of my office . . . in the event I am unavailable to act during a disaster or catastrophic

emergency."); *CASA*, 2020 WL 5500165, at *21 ("On Nielsen's last day of service, she amended Annex A of Delegation Order 000106, which applied only to succession 'in the event of disaster or emergency.'").

The day after Nielsen signed her order, DHS updated its internal regulation accordingly. Consistent with Nielsen's order, Annex A of the updated regulation now contained a revised line of succession for cases of "disaster or catastrophic emergency," DHS Delegation No. 00106, *supra*, § II.B (Ex. A at ECF page 3), which matched the revised line of succession approved by Nielsen, *see id.* Annex A (ECF page 7). Also consistent with Nielsen's order, the updated regulation left intact the line of succession for cases involving "the Secretary's . . . resignation," which were still "governed by Executive Order 13753." *Id.* § II.A (ECF page 3).

The government has claimed this was an "inadvertent, ministerial error" that failed to implement Nielsen's order correctly. Prelim. Inj. Opp. at 26 n.10, *CASA de Maryland v. Wolf*, No. 20-2118 (D. Md. Aug. 3, 2020). But DHS personnel did exactly what Nielsen's order told them to do: they "replaced Annex A and made no other changes to Delegation No. 00106." *La Clínica*, 2020 WL 4569462, at *13; *see CASA*, 2020 WL 5500165, at *22 ("Nielsen's order changed Annex A, and Annex A only."). Thus, when Nielsen resigned, "the orderly succession of officials [was] governed by Executive Order 13753 . . . not the amended Annex A, which only applied when the Secretary was unavailable due to disaster or catastrophic emergency." *La Clínica*, 2020 WL 4569462, at *13 (alteration in original) (quotation marks omitted).

In short, Nielsen's order and DHS's subsequently revised internal regulation are consistent with each other and are perfectly clear: Nielsen altered the line of succession for cases of disaster or catastrophic emergency, but she did not alter the line of succession for resignations, which remained governed by Executive Order 13753. And under that executive order, Kevin McAleenan

was not entitled to become Acting Secretary when Nielsen resigned.

D. Contrary to the unambiguous record, the government has claimed that Nielsen's order actually established a new, consolidated line of succession for *all* vacancies, including those caused by resignations, eliminating any further reliance on the line of succession provided in the executive order. *See* 85 Fed. Reg. 46,788, 46,804 (Aug. 3, 2020) ("On April 9, 2019, then-Secretary Nielsen . . . establish[ed] the order of succession for the Secretary of Homeland Security. This change to the order of succession applied to any vacancy . . . . [and it] superseded . . . the order of succession found in E.O. 13753."). That, however, is simply not what Nielsen's order says. Rather, her order states: "I hereby designate the order of succession for the Secretary of Homeland Security *as follows*." Ex. A at ECF page 70 (emphasis added). The only thing that "follows" is an amendment to the text of Annex A. And that annex governs only vacancies during a disaster or catastrophic emergency.

The government's position thus requires adding text to Nielsen's order that it does not contain (language specifying that she was creating a single line of succession to govern all vacancies, eschewing further reliance on Executive Order 13753), while ignoring text that the order *does* contain (language specifying that the only change being made was to Annex A). *See CASA*, 2020 WL 5500165, at *22 (refusing to read Nielsen's order "to also apply in the case of resignation," given "its clear language limiting application to disaster and emergency").

Despite the order's plain language, the government has argued that Nielsen's use of the term "order of succession" must mean that she actually meant to alter the line of succession for resignations, not just the line of succession for disasters and emergencies. But the term "order of succession" is not used only in reference to vacancies that arise when an officer resigns or otherwise permanently leaves office. For instance, the very statute that permits DHS to establish

a "further order of succession" for the Secretary's office, 6 U.S.C. § 113(g), explicitly states that this "order of succession" governs situations in which the Secretary and Deputy Secretary are not "available to exercise the duties of the Office of the Secretary" due to "absence" or "disability," *id.* Indeed, the government's argument is self-contradictory: by its own account, the "order of succession" that Nielsen approved in April did not apply only to permanent vacancies caused by resignations, but rather "to any vacancy," including those caused by disasters or catastrophic emergencies. 85 Fed. Reg. 46,788, 46,804 (Aug. 3, 2020). Thus, the government acknowledges (as it must) that an "order of succession" can govern short-term vacancies caused by an officer's temporary unavailability due to disaster or emergency.[4]

The use of the term "order of succession" in Nielsen's order, therefore, "at best states the obvious—that Nielsen had the authority to change the succession order as applied to the office of the Secretary. It does not support that Nielsen changed two separate succession lists applicable to each scenario." *CASA*, 2020 WL 5500165, at *22.

In reality, the government is attempting to conflate what Secretary Nielsen did in April 2019 with what Kevin McAleenan later did in November of that year. That month, McAleenan

[4] Further underscoring this point, the purpose of an "order of succession" adopted under § 113(g)(2) is to avoid the FVRA's limits on who may serve by default during a vacancy. *See* 5 U.S.C. § 3347(a)(1). And the FVRA unequivocally governs vacancies that arise when an incumbent is temporarily "unable to perform the functions and duties of the office." *Id.* § 3345(a); *see id.* § 3346(a) (referencing "a vacancy caused by sickness"); Office of Legal Counsel, *Designating an Acting Director of the Bureau of Consumer Financial Protection*, 2017 WL 6419154, at *3 (Nov. 25, 2017) ("an officer is 'unable to perform the functions and duties of the office' during both short periods of unavailability, such as a period of sickness, and potentially longer ones"). Indeed, the Vacancies Act, which the FVRA amended, has *always* covered temporary vacancies caused by an incumbent's inability to act. For 130 years, the Act referred to "death, resignation, absence, or sickness," Act of July 23, 1868, ch. 227, § 2, 15 Stat. 168, 168, and Congress broadened that language even further in the FVRA, *see* 5 U.S.C. § 3345(a), in order "[t]o make the law cover all situations when the officer cannot perform his duties," 144 Cong. Rec. S12823 (daily ed. Oct. 21, 1998) (Sen. Thompson).

signed an order that purported to change the Secretary's line of succession again. Unlike Nielsen, however, McAleenan altered the line of succession for vacancies caused by resignations—replacing the list of officials set forth in Executive Order 13753 with the list set forth in Annex A: "Section II.A of DHS Delegation No. 00106 . . . is amended hereby to state as follows: 'In case of the Secretary's . . . resignation, . . . the order of succession of officials is governed by Annex A.'" Kevin K. McAleenan, Acting Secretary of Homeland Security, *Amendment to the Order of Succession for the Secretary of Homeland Security* (Nov. 8, 2019) (Ex. A at ECF page 71). The Department's internal regulation was then changed accordingly. *See* DHS Delegation No. 00106 (Revision No. 08.6), *DHS Orders of Succession and Delegations of Authorities for Named Positions*, § II.A (Nov. 14, 2019) (Ex. A at ECF page 36). When DHS personnel amended that regulation to implement McAleenan's order, they were not belatedly correcting a mistake they made seven months earlier, as DHS has claimed. *See* Prelim. Inj. Opp. at 27 n.10, *CASA de Maryland v. Wolf*, No. 20-2118 (D. Md. Aug. 3, 2020). Rather, as the record plainly shows, "McAleenan amended Delegation No. 00106 . . . to cross-reference Annex A but Nielsen did not." *La Clínica*, 2020 WL 4569462, at *14.

To reiterate, here is what Section II.A of DHS's internal regulation provided in April 2019 after Nielsen's order was implemented:

> In 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, amended on December 9, 2016*.

Ex. A at ECF page 3 (emphasis added). And here is the revised text that McAleenan ordered to be substituted for that language in November:

> 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*.

Id. at ECF page 71 (emphasis added). The government has never explained "why it was necessary

for Mr. McAleenan to amend Section II.A of Delegation 00106, if Secretary Nielsen had already accomplished that change." *ILRC*, 2020 WL 5798269, at *8.

In sum, when the Secretary's office became vacant in April 2019, the line of succession provided in Executive Order 13753 still prescribed who would serve as Acting Secretary following a resignation. And for that reason, no legal authority permitted Kevin McAleenan to become the Acting Secretary.[5] His appointment of Matthew Albence as Deputy Director was therefore invalid.

II. Albence's Deputy Director Status Would Not Render Harmless His Decision to Issue the Directive Under the Mistaken Belief that He Possessed the Powers of an Acting Director.

Even if Defendant Albence validly held the position of Deputy Director, his issuance of Directive 11005.2 while under the mistaken belief that he was the agency's Acting Director cannot be deemed harmless under the APA. *See* 5 U.S.C. § 706 ("due account shall be taken of the rule of prejudicial error"). The "standard for demonstrating lack of prejudicial error is strict," and "[a]gency mistakes constitute harmless error . . . only where they *clearly* had no bearing on the procedure used or the substance of decision reached." *N.Y. Pub. Interest Research Grp. v. Whitman*, 321 F.3d 316, 334 n.13 (2d Cir. 2003) (quoting *Sierra Club v. U.S. Fish and Wildlife Serv.*, 245 F.3d 434, 444 (5th Cir. 2001)) (emphasis added).

In determining whether an error is harmless, courts must rely on a "case-specific application of judgment, based upon examination of the record." *Shinseki v. Sanders*, 556 U.S. 396, 407 (2009). While "the burden of showing that an error is harmful *normally* falls upon the

[5] One of the courts that held that McAleenan was not validly appointed under the HSA concluded that he was nonetheless eligible to be designated Acting Secretary by the President under the FVRA, pursuant to 5 U.S.C. § 3345(a)(2) or (a)(3). *See La Clínica*, 2020 WL 4569462, at *14. The court did not address whether the President actually *did* designate McAleenan as Acting Secretary under the FVRA, and it has since "granted leave to file a motion to reconsider that decision," because the government has consistently "taken the position . . . that Mr. McAleenan was not appointed pursuant to the FVRA." *ILRC*, 2020 WL 5798269, at *7 n.9.

party attacking the agency's determination," *id.* at 409 (emphasis added), the Supreme Court has repeatedly "warned against . . . the use of mandatory presumptions and rigid rules," *id.* at 407. In some circumstances—such as when the relevant evidence is in the possession of the agency rather than the party challenging the agency action—shifting the burden is appropriate. *Cf. id.* at 410 (explaining that when the party defending a flawed agency decision "makes a strong argument that the evidence on the point was overwhelming regardless, it *normally* makes sense to ask the party seeking reversal" to demonstrate otherwise, because that party "*will likely* be in a position at least as good as, and often better than, the opposing party to explain how he has been hurt by an error" (emphasis added)).[6]

In any event, "the 'burden' of showing that an error was harmful is not . . . a particularly onerous requirement." *Id.* And here, regardless of where the burden lies, this Court cannot conclude with any level of confidence that Albence would have issued the Directive had he understood that he was no longer the Acting Director and was entitled to rely only on his authority as Deputy Director.

As the record shows, Albence believed himself to be ICE's Acting Director—and hence authorized to exercise the powers of the Director—when he approved the Directive. *See* Dkt. 34-1 at 7 (showing that Albence approved the Directive by signing his name over the title "Acting Director, U.S. Immigration and Customs Enforcement"). Defendants have furnished no evidence to the contrary. And notably, during the time that Albence served as Acting Director of ICE, a different person (Derek Benner) served as the "Acting Deputy Director." Am. Compl. ¶ 45; *see*

[6] The Supreme Court reversed the lower court in *Shinseki* not because it placed the harmless-error burden on the agency in that particular case, but rather because it adopted a "complex, rigid, and mandatory" framework that placed the burden on the agency "[i]n every case" involving a particular type of error. *Shinseki*, 556 U.S. at 407.

U.S. Department of Homeland Security, *ICE Leadership* (archived Aug. 2, 2019), https://web.archive.org/web/20190802000256/https://www.ice.gov/leadership. Given Benner's position as Acting Deputy Director at the very time that Albence approved the Directive, Albence could not have understood himself to be exercising the authority of the Deputy Director when he signed the Directive as ICE's "Acting Director." Finally, Defendants have offered no evidence that Albence believed he possessed the authority, as *Deputy* Director, to establish a policy like the Directive without the approval of a validly serving Director.

In any event, this Court need not speculate about what Albence would have done in a counterfactual scenario. *See SW Gen., Inc. v. NLRB*, 796 F.3d 67, 80 (D.C. Cir. 2015), *aff'd*, 137 S. Ct. 929 (2017) ("we cannot be confident that the complaint against Southwest would have issued under" a different General Counsel, and this "uncertainty is sufficient to conclude that . . . the FVRA violation is non-harmless under the Administrative Procedure Act"); *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 35 (D.D.C. 2020) (same). The uncontroverted record shows that Albence believed himself to be exercising the powers of the Acting Director when he issued the Directive, and Defendants have provided no evidence even suggesting that he understood himself to have the power to issue the Directive in his capacity as Deputy Director. That record sufficiently demonstrates that the error here was not harmless.

CONCLUSION

For the foregoing reasons, if the Court reaches the issue, Matthew Albence lacked authority to serve as Deputy Director of ICE, and even if he validly held that office, his issuance of Directive 11005.2 under the purported authority of ICE's Acting Director was not harmless error. Plaintiffs' motion for summary judgment should therefore be granted.

Respectfully submitted,

Dated: October 13, 2020

/s/ *Brianne J. Gorod*
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CERTIFICATE OF SERVICE

I hereby certify that on October 13, 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 13, 2020

/s/ Brianne J. Gorod
Brianne J. Gorod