UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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

DEFENDANTS' SUPPLEMENTAL BRIEF

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INTRODUCTION

Following oral argument on the pending cross-motions for summary judgment, this Court requested supplemental briefing "addressing whether defendant Albence had valid authority to act as Deputy Director of ICE to issue ICE Directive 11005.2 on August 2, 2019, and if so, whether this capacity renders harmless any error from issuance of ICE Directive 11005.2 in Albence's alleged capacity as Acting Director of ICE." Dkt. 56.

The Court need only reach that issue if it concludes, as Defendants established in their earlier briefs, that setting policy for granting stays of removal to U-visa applicants is not an exclusive "function or duty" of the Director of ICE for purposes of 5 U.S.C. § 3348(a)(2)(A). Albence had full authority as Deputy Director of ICE to set policy for ICE during a vacancy in the office of Director, including policy on stays of removal for U-visa applicants. *See* Dkt. 40-1 at 26–29; Dkt. 49 at 21–26. As Deputy Director, Albence was the "highest ranking official" in ICE on August 2, 2019, and had full authority, delegated from the Secretary of Homeland Security, to establish policy for ICE. *See* Dkt. 40-5, Delegation to Department of Homeland Security Organizational Elements, Delegation No. 0160.1 (March 3, 2004). He likewise had full authority "to exercise the powers" of the Director of ICE. Dkt. 40-4, DHS Orders of Succession and Delegations of Authorities for Named Positions, Delegation No. 00106 (Dec. 15, 2016).

Plaintiffs maintain that the U-visa stay policy is an exclusive function or duty for purposes of § 3348, but they have not otherwise argued that a validly serving Deputy Director may not establish such policies. Instead, Plaintiffs challenge the validity of Albence's service as Deputy Director, on the argument that Kevin McAleenan, the Acting Secretary of Homeland Security who appointed him to that position, was himself not validly serving. That challenge is misguided: Acting Secretary McAleenan was appointed and served under a valid Order of Succession

established by then-Secretary of Homeland Security Kirstjen Nielsen, and the argument to the contrary depends on discounting the express language, structure, and context of the succession order. Moreover, because Albence was validly serving as Deputy Director, any error in signing the Directive as "Acting Director" was harmless. Plaintiffs concede that Albence maintained the Directive's policy after ICE formally acknowledged that the period in which he could serve as Acting Director had expired (indeed, Plaintiffs would otherwise lack standing even on their theory), and they can point to no evidence in the record to suggest that Albence would not have issued the Directive had it been correctly presented for his signature as "Deputy Director."

BACKGROUND

Since its amendment in 2016, the Department of Homeland Security's organic statute—that is, the Homeland Security Act (HSA)—gives the Secretary of Homeland Security the power to "designate such other officers of the Department in further order of succession to serve as Acting Secretary." 6 U.S.C. § 113(g)(2). In April 2019, then-Secretary of Homeland Security Kirstjen M. Nielsen[1] exercised this power and designated an order of succession for the office of the Secretary 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* Ex. 1, Designation of an Order of Succession for the Secretary (Apr. 9, 2019) ("April 2019 Order") (emphasis added); *see also* Ex. 2, Decl. of Neal J. Swartz ¶ 3 ("Swartz Decl."). That new order of succession, in turn, made the Commissioner of U.S. Customs and Border Protection (CBP) third in line to serve as Acting Secretary of Homeland Security. April 2019 Order at 2.

[1] Kirstjen M. Nielsen was nominated by the President to serve as the Secretary of Homeland Security on October 11, 2017, confirmed by the Senate on December 5, 2017, and sworn into the office on December 6, 2017.

That signed order constituted the controlling order of succession when Nielsen resigned in April 2019. *See* Swartz Decl. ¶ 6 ("[T]hen-Secretary Nielsen's signed order amending the DHS order of succession for Acting Secretary, pursuant to her authority under 6 U.S.C. § 113(g)(2), was effective when she signed the order on April 9, 2019 . . . ."); *see also* Ex. 10, Letter from Neal J. Schwartz, Associate General Counsel for General Law, DHS, to Hon. Michael R. Pence, President of the Senate (Apr. 11, 2019) (vacancy in the office of Secretary). When she resigned, the first two offices in the succession order were vacant, *see* Swartz Decl. ¶ 5; *see also* Ex. 3, Letter from Neal J. Swartz, Associate General Counsel for General Law, DHS, to Hon. Michael R. Pence, President of the Senate (Apr. 16, 2018) (vacancy in the office of Deputy Secretary); Ex. 4, Letter from Neal J. Swartz, Associate General Counsel for General Law, DHS, to Hon. Michael R. Pence, President of the Senate (Apr. 11, 2019) (vacancy in the office of Under Secretary for Management). Thus, as the next official in line, CBP Commissioner Kevin McAleenan[2] began serving as Acting Secretary of Homeland Security.

Acting-Secretary McAleenan appointed Matthew Albence as Deputy Director of ICE on June 28, 2019. *See* Dkt. 55 at 2.

On August 14, 2020, the Government Accountability Office issued a decision ("GAO Decision") concluding that Secretary Nielsen's April 2019 Order had only changed the order of officials eligible to exercise the Secretary's delegated authority during a disaster or catastrophic

[2] Kevin McAleenan was nominated by the President to serve as the Commissioner of U.S. Customs and Border Protection on May 22, 2017, confirmed by the Senate on March 19, 2018, and sworn into office on March 20, 2018.

emergency but had not changed the order of succession for vacancies in the office of Secretary, and thus that McAleenan had not lawfully served as Acting Secretary.[3]

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.

The GAO Decision is erroneous, and the Court should not adopt its reasoning. Then-Secretary Nielsen's April 9, 2019 order exercised her authority under the HSA, 6 U.S.C. § 113(g)(2), to designate a new succession order for the office of Secretary of Homeland Security. This order applied to all vacancies in the office, regardless of the reason. Secretary Nielsen's resignation triggered application of her succession order, and McAleenan thus began serving as Acting Secretary.

1. Then-Secretary Nielsen's April 2019 order expressly stated *five* times that she was designating a new "order of succession," employing unqualified language. *See* April 2019 Order. As the Secretary of Homeland Security, Secretary Nielsen was the only person within DHS with the authority to designate an order of succession. *See* 6 U.S.C. § 113(g)(2). Thus, her signed order controlled the order of succession when she resigned.

Beyond Secretary Nielsen's use of unqualified language, the statutory authority she relied upon—Section 113(g)(2) of the HSA—shows that she changed the order of succession for all vacancies in the office of Secretary of Homeland Security. Section 113(g)(2) empowers the Secretary to designate an "order of succession" for officers to serve as Acting Secretary in the event of a vacancy. Secretary Nielsen's order expressly cites this statutory authority three times.

[3] *In re Department of Homeland Security—Legality of Service of Acting Secretary of Homeland Security and Service of Senior Official Performing the Duties of Deputy Secretary of Homeland Security*, B-331650 (GAO Aug. 14, 2020).

Plaintiffs may oppose this conclusion by relying on *Casa de Maryland v. Trump*, No. 8:20-cv-02118-PX, 2020 WL 5500165, at *20-23 (D. Md. Sept. 11, 2020), and *Immigrant Legal Resource Center v. Wolf*, No. 20-cv-05883-JSW, 2020 WL 5798269, at *7-8 (N.D. Cal. Sept. 29, 2020), which both concluded that by amending Annex A, Secretary Nielsen's order only amended § II.B of DHS Delegation 00106, which sets an order for delegating authority during disasters or emergencies. *See also Nw. Immigrant Rts. Project v. USCIS*, No. CV 19-3283 (RDM), 2020 WL 5995206, at *14 (D.D.C. Oct. 8, 2020) ("assum[ing], without deciding," the same). But those courts erroneously confused orders of succession and delegations of authority. Delegations of authority, which simply allow an official to exercise certain powers of the office of the Secretary, are different from orders of succession, which are lists of officials who may become Acting Secretary in the event of a vacancy.

The HSA recognizes that basic proposition. One of its other provisions, 6 U.S.C. § 112(b)(1), empowers the Secretary to *delegate* her authority to other officials in the agency, even when the Secretary continues to occupy her office. If Secretary Nielsen had intended only to amend the order for delegated authority during an emergency, she would have had no reason to invoke Section 113(g)(2). *Compare* 6 U.S.C. § 112(b)(1) (allowing Secretary to delegate authority), *with id.* § 113(g)(2) (allowing Secretary to designate a further order of succession); *see also Stand Up for California! v. DOI*, 298 F. Supp. 3d 136, 141 (D.D.C. 2018) (McFadden, J.).

2. Secretary Nielsen's intent is even clearer when the April 2019 order is read in the context of earlier revisions to DHS Delegation No. 00106. On December 16, 2016, then-Secretary of Homeland Security Jeh Johnson signed Revision 8 to DHS Delegation No. 00106. *See generally* Ex. 5, *DHS Orders of Succession and Delegations of Authorities for Named Positions*, DHS Delegation No. 00106, Revision No. 08 (Dec. 15, 2016) (signed at page 3). This signed revision

addressed two different kinds of orders: (1) an order of succession (*i.e.*, a list of officials who could become Acting Secretary in the event of a vacancy); and (2) an order for delegation of authority.

First, Section II.A of Revision 8 to DHS Delegation No. 0106 explained that, "[i]n case of the Secretary's death, resignation, or inability to perform the functions of the Office," the order of succession would be governed by Executive Order 13753. *Id.* This was not an order of the Secretary, and did not invoke any authority vested in the Secretary, because under the existing version of the HSA, the Secretary had no authority to designate an order of succession. At that time, only the President had the authority (under the FVRA) to designate an order of succession. *See* 5 U.S.C. § 3345(a)(2)-(3) (allowing the President to designate an acting official). Section II.A thus expressly tracked the FVRA: it noted that the President's order of succession would apply to a vacancy covered by the FVRA. Section II.A even listed the same triggering events as the FVRA. *Compare id. with* 5 U.S.C. § 3345(a). It was only *after* Johnson had signed Revision 8 that Congress gave the Secretary the power to designate an order of succession that would apply "[n]otwithstanding" the FVRA. *See* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 1903, 130 Stat. 2000 (2016) (codified at 6 U.S.C. § 113(g) (Dec. 23, 2016)).

Second, in Section II.B, Secretary Johnson separately exercised his own authority under 6 U.S.C. § 112(b)(1)—authority that the Secretary had long possessed—and delegated the authorities of his office to a list of officials in the event that he was temporarily "unavailable to act during a disaster or catastrophic emergency." This was not an order of succession—the circumstances addressed by Section II.B are not the kind of vacancy that would trigger the FVRA, and the Section II.B delegation would not make someone exercising that authority an Acting

Secretary of Homeland Security.[4] *Cf. English v. Trump*, 279 F. Supp. 3d 307, 322 (D.D.C. 2018) ("Defendants argue, with some force, that [unavailability to act is] commonly understood to reflect a temporary condition, such as not being reachable due to illness or travel," rather than a permanent condition such as a vacancy.). And, as explained, the Secretary had no statutory authority to designate an order of succession at that time.

This context, along with the text of Secretary Nielsen's April 2019 order, shows that, when then-Secretary Nielsen changed the list of officers in Annex A—a document setting an order for delegation of authority of the Secretary—she also provided that Annex A would now perform two separate roles. It would both (1) designate the agency's first order of succession under Section 113(g)(2), and (2) amend the list of officials in the order for delegation of authority.

As to the first role, Secretary Nielsen established the first order of succession under Section 113(g)(2); it would apply in the case of a vacancy that would otherwise have been covered by the FVRA. Before Secretary Nielsen's order, there was no order of succession under Section 113(g)(2). Rather, as acknowledged by Section II.A, the President's order of succession under Executive Order 13753 governed when the Secretary's office was vacant, because then-Secretary Johnson lacked the statutory authority to create an order of succession. Thus, when Secretary Nielsen invoked Section 113(g)(2)—which she expressly did three times in the April 9, 2019 order—she exercised the Secretary's authority under that statute and designated an order of succession that applied "[n]otwithstanding chapter 33 of title 5," 6 U.S.C. § 113(g)(2). As a matter

[4] The FVRA is generally the "exclusive means for temporarily authorizing an acting official," unless another statute provides otherwise. 5 U.S.C. § 3347(a). Until the enactment of Section 113(g)(2) of the HSA, there was no other statute providing for the designation of an Acting Secretary of Homeland Security.

of law, that order of succession would supersede the order of succession under Executive Order 13753 when an official on the Secretary's list was able to serve as Acting Secretary.

The text of Secretary Nielsen's order cited 6 U.S.C. § 113(g)(2), and used that authority to "designate the order of succession for the Secretary of Homeland Security as follows." April 2019 Order. 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. But Annex A's amended list was followed by a new provision that had not appeared in the prior, delegation-only version of Annex A. The new provision noted that "[n]o individual who is serving in an office herein listed in an acting capacity, by virtue of so serving, shall act as Secretary pursuant to this designation." *Id.* That reference to a "*designation*"—rather than a "delegation"—constitutes yet another textual and structural acknowledgment that Annex A had executed the Secretary's new authority under Section 113(g)(2). *See* 6 U.S.C. § 113(g)(2) (authorizing the Secretary to "designate such other officers . . . in further order of succession to serve as Acting Secretary").[5] Reading Secretary Nielsen's order only to govern delegations in the event of temporary incapacity to serve in an emergency, rather than to govern the designation of authority to serve as Acting Secretary in the event of a vacancy, would thus require the Court to read *out* of Secretary Nielsen's order all three references to 6 U.S.C. § 113(g)(2), to disregard its structure (what introduces and concludes its list

[5] That additional sentence at the conclusion of Annex A is a mainstay in true orders of succession: "[W]hen Presidents issue orders of succession as an advance exercise of their authority to name acting officials under the [FVRA], they often specify that '[n]o individual who is serving in an office . . . in an acting capacity, by virtue of so serving, shall act as [the agency head] pursuant to this order.'" Office of Legal Counsel, *Designating an Acting Director of National Intelligence*, 43 Op. O.L.C. __, *8 (Nov. 15, 2019), https://www.justice.gov/olc/file/1220586/download; 43 Op. O.L.C. ___ at *8 nn.3-4 (citing illustrative orders of succession).

of officials), and to read Johnson's document as creating an order of succession that he lacked the statutory power to designate.

As to the second role, Secretary Nielsen's order changed the order for delegation of authority in the case of a disaster or catastrophic emergency by issuing a new version of Annex A. To do so, Secretary Nielsen did not need to expressly invoke Section 112(b)(1) any more than Secretary Johnson had, because Annex A (through Section II.B) already was, by its terms, a delegation of authority. Thus, by changing the officials listed in Annex A, she changed the delegation order. But, given her express invocation of Section 113(g)(2), 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.

The official actions Secretary Nielsen took after signing her order confirm that she did not merely alter Secretary Johnson's delegation order in Section II.B, but also designated a new order of succession for vacancies under Section 113(g)(2). For example, on her last day in office, Secretary Nielsen sent a farewell email to the agency and issued a press release announcing that Kevin McAleenan "will now lead DHS as your Acting Secretary."[6] The same day, she personally swore McAleenan in to that role.[7] Neither act supports the GAO's reading of Secretary Nielsen's order.

[6] Email from Kirstjen M. Nielsen, Secretary of Homeland Security (Apr. 10, 2019, 04:35 EST) (attached as Ex. 6); *see also* Press Release, DHS, Kirstjen M. Nielsen, Secretary of Homeland Security, Farewell Message from Secretary Kirstjen M. Nielsen (Apr. 10 2019), https://www.dhs.gov/news/2019/04/10/farewell-message-secretary-kirstjen-m-nielsen.

[7] *CBP Commissioner Kevin McAleenan sworn-in as the Acting DHS Secretary; Opens New DHS Headquarters*, Border Observer, https://theborderobserver.wordpress.com/2019/04/11/cbp-commissioner-kevin-mcaleenan-sworn-in-as-the-acting-dhs-secretary/ (last visited Oct. 13, 2020).

Finally, the Court should defer to DHS's interpretation of Secretary Nielsen's order, because it is the agency's own internal document. *Cf. Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019) (explaining that the Court "ha[s] deferred to 'official staff memoranda'" (citation omitted)).

In sum, the GAO's reading of Secretary Nielsen's order is at odds with the order's express language designating an unqualified order of succession. It ignores the order's structure, the context provided by the intervening grant of statutory authority, and multiple references to an "order of succession" designated under Section 113(g)(2). And it is inconsistent with the official acts Secretary Nielsen took on her last day as Secretary, and violates basic deference principles.

3. The GAO's analysis—which binds neither DHS, nor this Court—suffers from at least two additional fundamental flaws, and should thus be disregarded.

First, the GAO Decision wrongly assumes that the controlling document is Revision 8.5 to DHS Delegation No. 00106, and hangs its analysis on that administrative document. *See* GAO Decision at 6 & n.10 (christening DHS, *Orders of Succession and Delegations of Authorities for Named Positions*, Delegation No. 00106, Revision No. 08.5 (Apr. 10, 2019) as "April Delegation") (attached as Ex. 8); GAO Decision at 9 (claiming that Secretary Nielsen "only amended Annex A "[w]hen [she] *issued* the April Delegation" (emphasis added)). The GAO Decision thus focuses on the "plain language" and the "express terms" *of the wrong document*. *See id.* at 7, 8, 9. As the Secretary, Secretary Nielsen was the only person in the agency who could designate an order of succession, 6 U.S.C. § 113(g)(2), and she never signed or otherwise issued Revision 8.5 to DHS Delegation No. 00106. But she *did* sign her April 9 order—and that order controls. More than simply analyzing the wrong document, the GAO Decision explicitly tosses aside the plain language in the memorandum that Secretary Nielsen signed on the line reading "[a]pprove." *See id.* at 9 ("Notwithstanding the General Counsel's statement in the Memorandum asserting the

Secretary's intentions in amending the April Delegation, the plain language of the delegation controls, and it speaks for itself."); *see also* GAO Decision on Reconsideration[8] at 2 ("[G]iven that the plain language of the April Delegation is clear, there is no need to refer to the [April 9] Memorandum.").

The GAO Decision similarly erred in concluding that, in February 2019, Secretary Nielsen adopted Executive Order 13753 as her own order of succession under Section 113(g)(2). *See id.* at 5. To draw this conclusion, it again relies on an internal administrative document (Revision 8.4 to DHS Delegation No. 00106) that Secretary Nielsen never signed. *See id.* at 5 n.7 (citing *DHS Orders of Succession and Delegations of Authorities for Named Positions*, DHS Delegation No. 00106, Revision No. 08.4 (Feb. 15, 2019) (attached at Ex. 9)). But in the February 2019 document the GAO Decision cites, Secretary Nielsen set an order of succession for the *Office of Strategy, Policy, and Plans*—not for the Office of the Secretary—in Annex U.[9] Based on the faulty assumption that Secretary Nielsen designated her own order of succession for the Office of the Secretary in February 2019, the GAO Decision wrongly assumes that Secretary Nielsen needed to say that her order superseded Section II.A. *Cf. id.* at 9. She did not. Rather, Secretary Nielsen's order superseded the Executive Order and Section II.A—both of which were based entirely on the default provisions in the FVRA—as a matter of law. *See* 6 U.S.C. § 113(g)(2) (Secretary's designated order of succession governs in the event of a vacancy, "[n]otwithstanding" the default provisions in the FVRA).

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[8] *In re Department of Homeland Security—Legality of Service of Acting Secretary of Homeland Security and Service of Senior Official Performing the Duties of Deputy Secretary of Homeland Security—Reconsideration*, B-332451 (GAO Aug. 21, 2020).

[9] *See* Memorandum from Kirstjen M. Nielsen, Secretary, DHS, to Claire M. Grady, Under Secretary for Management and Senior Official Performing the Duties of the Deputy Secretary (attached as Ex. 7).

Second, the GAO Decision does not grapple with its unusual reading of Secretary Nielsen's order because it confuses orders of succession and delegations of authority. It concludes that Secretary Nielsen designated an order of succession when she amended Annex A because she altered Section II.B and "[e]ach ground," that is, Section II.A and Section II.B, "had its own order of succession." Decision at 5. Thus, the GAO concludes that Secretary Nielsen "effectively established two different orders of succession." *Id.* at 7. But it is only able to reach this conclusion by ignoring the difference between orders of succession and delegations of authority, and the different sources of the Secretary's statutory authority for each. *Compare* 6 U.S.C. § 113(g)(2) (order of succession), *with* § 112(b)(1) (delegation of authority). As explained, when Secretary Nielsen signed her order, Section II.B in DHS Delegation No. 00106 was not an order of succession—it was a delegation of authority. So if, as the GAO Decision concludes, Secretary Nielsen's order applied only to Section II.B, then she set an order for delegation of authority, not an order of succession. And under that reading, the GAO Decision has no explanation for how—by signing an order to "amend the order of succession" under § 113(g)(2)— Secretary Nielsen *actually* did nothing but amend the order for delegation of authority under § 112(b)(1). In fact, she employed both powers and thus provided that Annex A would govern matters of both succession and delegation going forward.

Secretary Nielsen thus validly designated McAleenan to serve as Acting Secretary following her resignation. In that capacity, Acting-Secretary McAleenan had full authority to

appoint the Deputy Director of ICE. *See* 6 U.S.C. § 112; *cf. id.* § 113 (Deputy Director of ICE not listed as a position requiring Presidential appointed with the advice and consent of the Senate).

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

As defendants have acknowledged, Albence could no longer serve as Acting Director of ICE after August 1, 2019. *See* Dkt. 43-1 at 5. As a result, the Directive's signature block was not accurate in describing Albence as the "Acting Director." But if that inaccuracy might qualify as an error, it was harmless.

The Administrative Procedure Act contains "the same kind of 'harmless-error' rule that courts ordinarily apply in civil cases." *Shinseki v. Sanders*, 556 U.S. 396, 406 (2009); *see* 5 U.S.C. § 706 ("[A] court shall review the whole record . . . and due account shall be taken of the rule of prejudicial error"); *see also Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 659–60 (2007) (describing 5 U.S.C. § 706 as an "administrative law . . . harmless error rule.").

As the Supreme Court has explained, "the burden of showing that an error is harmful normally falls upon the party attacking the agency's determination." *Shinseki*, 556 U.S. at 409. The Court has thus expressly rejected "the creation of a special rule . . . placing upon the agency the burden of proving that a[n] . . . error did not cause harm." *Id.* at 410.

To show prejudicial error here, Plaintiffs would thus have to demonstrate that Albence would not have issued the Directive if the word "Acting" in the Directive's signature block had been replaced with the word "Deputy." There is simply no support in the record for that implausible suggestion. In fact, there is ample evidence to the contrary.

As Plaintiffs point out in their Local Rule 56(a)(1) "Statement of Undisputed Material Facts," DHS submitted FVRA paperwork to the GAO on August 5, 2019 (three days after the issuance of the Directive) stating that Albence discontinued his service as Acting Director on

August 1, 2019. *See* Dkt. 44-1 at 4. But Plaintiffs seek prospective declaratory and injunctive relief enjoining the implementation of the Directive. *See* Dkt. 34 at 27, First Am. Compl., Prayer for Relief. Indeed, Plaintiffs' standing argument depends on the proposition that "ICE has changed its standards for granting stays of removal, [and] Plaintiffs must divert resources to meet these new standards." Dkt. 51 at 4. *See also, e.g.*, *Knife Rights, Inc. v. Vance*, 802 F.3d 377, 388 (2d Cir. 2015) (noting that standing to seek injunctive relief requires "imminent threat of future harm." (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 112–13 (1983)).

The record demonstrates that Albence continued to apply the Directive after acknowledging that his time for service as Acting Director had expired before the issuance of the Directive, making it clear that he stood by the Directive in his continuing capacity as Deputy Director. Any error in the signature block was thus harmless.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 13, 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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