IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MAKE THE ROAD NEW YORK, *et al.*, Plaintiffs, v. CHAD F. WOLF, Acting Secretary of the Department of Homeland Security, *et al.*, Defendants.	Case No. 19-cv-2369 (KBJ)

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae Constitutional Accountability Center states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC has a strong interest in preserving the checks and balances set out in our nation's charter, as well as the proper interpretation of laws that help maintain that balance.

INTRODUCTION

The Secretary of Homeland Security is empowered to make a range of decisions that have enormous consequences for those affected. To help ensure that the Secretary wields this power responsibly, the Constitution requires that he or she be appointed by the President with the advice and consent of the Senate. "By limiting the appointment power in this fashion," the Constitution seeks to make the officers who exercise the authority of the federal government "accountable to political force and the will of the people." *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1657 (2020) (quotation marks omitted). But despite that, the Department of Homeland Security (DHS) has operated without a Senate-confirmed Secretary for a year and a half. Meanwhile, lower-level officials, who were never vetted by the Senate for the Secretary's role, have run the Department and steered its policies.

In July 2019, the purported Acting Secretary of DHS, Kevin McAleenan, exercised an authority that federal immigration law assigns to the Secretary—expanding to its statutory limit

[1] No person or entity other than *amicus* and its counsel assisted in or made a monetary contribution to the preparation or submission of this brief. Plaintiffs consented to the filing of this brief. Defendants' position is as follows: "The government consents, contingent on it having the opportunity to respond in a separate document to arguments not raised in the plaintiffs' brief."

the reach of the "expedited removal" process, thereby "sweeping in all individuals without documentation who have resided in the United States for less than two years." *Make The Road New York v. Wolf*, 962 F.3d 612, 618 (D.C. Cir. 2020); *see* Designating Aliens for Expedited Removal, 84 Fed. Reg. 35,409, 35,413 (July 23, 2019). A person who is subject to expedited removal because of McAleenan's action may now be deported upon the order of an immigration officer, "without further hearing or review," unless that person indicates an intention to apply for asylum or a fear of persecution. 8 U.S.C. § 1225(b)(1)(A)(i). "Absent such an indication, all that stands between that individual and removal is a paper review by the officer's supervisor." *Make The Road*, 962 F.3d at 619.

Kevin McAleenan, however, had no legal authority to hold the position of Acting Secretary, and he therefore lacked the power to alter the nation's immigration policy in this way. The Federal Vacancies Reform Act of 1998 (FVRA) and the Homeland Security Act (HSA) place careful limits on service by acting officials in order to preserve the Senate's constitutional power over appointments. And under those laws, Kevin McAleenan never lawfully became the Acting Secretary of Homeland Security.

Because McAleenan illegally exercised the powers of a vacant office when he issued his designation expanding expedited removal, the FVRA requires that this designation "shall have no force or effect." 5 U.S.C. § 3348(d)(1). And because McAleenan acted without legal authority, the Administrative Procedure Act (APA) independently requires that his designation be set aside as "not in accordance with law" and "in excess of statutory jurisdiction, authority, or limitations." *Id.* § 706(2). Finally—and critically—McAleenan's unlawful act "may not be ratified," *id.* § 3348(d)(2), even by a properly serving Secretary or Acting Secretary.

For these reasons, Plaintiffs are likely to succeed on the merits of their claims.

ARGUMENT

I. The FVRA Is a Critical Check on the Manipulation of Appointments by the Executive Branch.

"Article II of the Constitution requires that the President obtain 'the Advice and Consent of the Senate' before appointing 'Officers of the United States.'" *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 934 (2017) (quoting U.S. Const. art. II, § 2, cl. 2). The Framers imposed that requirement as a check on the President, recognizing that giving him the "sole disposition of offices" would result in a Cabinet "governed much more by his private inclinations and interests" than by the public good. *The Federalist No. 76*, at 457 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Indeed, "the power of appointment to offices was deemed the most insidious and powerful weapon of eighteenth century despotism," and "[t]he manipulation of official appointments had long been one of the American revolutionary generation's greatest grievances against executive power." *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 883 (1991) (quotation marks omitted).

Thus, "[t]he Senate's advice and consent power is a critical 'structural safeguard [ ] of the constitutional scheme.'" *SW Gen.*, 137 S. Ct. at 935 (quoting *Edmond v. United States*, 520 U.S. 651, 659 (1997)). And the Appointments Clause, "like all of the Constitution's structural provisions, is designed first and foremost not to look after the interests of the respective branches, but to protect individual liberty." *Id*. at 949 (Thomas, J., concurring) (quotation marks omitted); *see Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 140 S. Ct. at 1657 ("the Appointments Clause helps to preserve democratic accountability").

"Over the years, Congress has established a legislative scheme to protect the Senate's constitutional role in the confirmation process." Morton Rosenberg, Cong. Research Serv., No. 98-892, *The New Vacancies Act: Congress Acts to Protect the Senate's Confirmation Prerogative*, at 5 (1998). Indeed, "[s]ince President Washington's first term, Congress has given

the President limited authority to appoint acting officials to temporarily perform the functions of a vacant . . . office without first obtaining Senate approval." *SW Gen.*, 137 S. Ct. at 935; *see Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 209-11 (D.C. Cir. 1998). "[F]rom the beginning," however, Congress has placed limits on such acting service. *Id.* at 210; *see, e.g.*, Act of Feb. 13, 1795, ch. 21, 1 Stat. 415, 415 (empowering the President to authorize persons "to perform the duties" of vacant offices, but providing that "no one vacancy shall be supplied, in manner aforesaid, for a longer term than six months").

In the 1860s, "Congress repealed the existing statutes on the subject of vacancies and enacted in their stead a single statute," the Vacancies Act, which has been in force since then, with modifications. *Doolin*, 139 F.3d at 210. "The Federal Vacancies Reform Act of 1998 . . . is the latest version of that authorization." *SW Gen.*, 137 S. Ct. at 934.

Congress enacted the FVRA in response to the executive branch's increasing refusal to comply with the Vacancies Act and the Appointments Clause. Beginning in the 1970s, the Justice Department took the position that the Vacancies Act was not "the exclusive statutory authority for temporarily assigning the duties and powers of a Senate-confirmed office," *The Vacancies Act*, 22 Op. O.L.C. 44, 44 (1998), and that "statutes vesting an agency's powers in the agency head and allowing delegation to subordinate officials" could be used as an alternative during a vacancy, enabling agencies to avoid complying with the limits of the Vacancies Act. *Id.* Because virtually all federal departments are governed by such "vesting-and-delegation" statutes, *id.* at 2, individuals "who were ineligible for appointment as acting officers under the terms of the Vacancies Act were frequently 'delegated' the title and duties of precisely the same office, meaning the act's restrictions had become largely toothless." Thomas A. Berry, *S.W. General: The Court Reins in Unilateral Appointments*, 2017 Cato Sup. Ct. Rev. 151, 155.

Dismayed by widespread evasion of the Vacancies Act, *id.* at 154, and seeking to vindicate the Act's "fundamental purpose . . . to limit the power of the President to name acting officials," S. Rep. No. 105-250, at 7-8 (1998), Congress enacted the FVRA "to create a clear and exclusive process to govern the performance of duties of offices in the Executive Branch that are filled through presidential appointment by and with the consent of the Senate," *id.* at 1. Accordingly, the FVRA carefully limits who may serve as an acting officer when a vacancy arises. By default, the "first assistant" to the vacant office must perform the functions and duties of that office. 5 U.S.C. § 3345(a)(1). The President "may override that default rule by directing [a different person] to become the acting officer instead," *SW Gen.*, 137 S. Ct. at 935, but the President's choice of whom to select is limited. *See* 5 U.S.C. § 3345(a)(2), (3). Moreover, the time period during which vacant offices may be filled by acting officials is limited. *See id.* § 3346.

Congress specified that the FVRA is "the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office" requiring Senate confirmation, *id.* § 3347(a), with two limited exceptions. One exception accommodates recess appointments. *See id.* § 3347(a)(2). The other exception permits agency organic statutes to supplant the FVRA, or provide an alternative to it, if they expressly designate a particular official to temporarily perform the functions and duties of a vacant office, *id.* § 3347(a)(1)(B), or if they expressly authorize the head of the department to designate an official to do so, *id.* § 3347(a)(1)(A). If an office is not validly being filled pursuant to the FVRA or one of these exceptions, however, "the office shall remain vacant." *Id*. § 3348(b)(1).

To prevent department heads from evading these restrictions by purporting to "delegate" the powers of a vacant office to others, the FVRA specifies that statutes giving "general authority to the head of an Executive agency . . . to delegate duties statutorily vested in that agency head to,

or to reassign duties among," other agency personnel—*i.e.*, so-called vesting-and-delegation statutes—do not provide an exception to the FVRA's limits. *Id.* § 3347(b).

Finally, to encourage compliance with these limits, Congress provided that an agency action "shall have no force or effect" if it was taken by a person performing a function or duty of a vacant office without authorization by the FVRA or one of its exceptions. *Id.* § 3348(d)(1). Importantly, these void actions "may not be ratified" by other officials. *Id.* § 3348(d)(2); *see* S. Rep. No. 105-250, at 8 ("[I]f any subsequent acting official . . . can ratify the actions of a person who [violated] the Vacancies Act, then no consequence will derive from an illegal acting designation. This result also undermines the constitutional requirement of advice and consent.").

II. Kevin McAleenan Never Lawfully Became the Acting Secretary of Homeland Security.

A. In creating the office of DHS Secretary, Congress incorporated and supplemented the FVRA's rules for the filling of vacancies. Consistent with the FVRA, the HSA establishes a Deputy Secretary who is designated as "the Secretary's first assistant" for purposes of the FVRA. 6 U.S.C. § 113(a)(1)(A). Under the FVRA, only this "first assistant," the Deputy Secretary, would be able to serve automatically as the Acting Secretary during a vacancy. *See* 5 U.S.C. § 3345(a)(1). The HSA modifies this rule, providing 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). The HSA also empowers the Secretary to extend this line of succession further to account for situations in which 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). The FVRA permits this type of express deviation from its rules in an agency-specific succession statute. *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 Secretary to expand upon that list by establishing a "further" line of succession beyond those two officials.

Exercising that power, the Secretary has established a further line of succession in the Department's internal regulation governing vacancies, known as Delegation 00106. *See* DHS Delegation No. 00106 (Revision No. 08.5), *DHS Orders of Succession and Delegations of Authorities for Named Positions* (Apr. 10, 2019); *CASA de Maryland, Inc. v. Wolf*, No. 20-2118, 2020 WL 5500165, at *20 (D. Md. Sept. 11, 2020) ("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 . . . positions within the agency."). Specifically, Delegation 00106 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. 14, 2016). Under Delegation 00106, therefore, that list of officials, in that order, are to serve as Acting Secretary following a Secretary's resignation.[2]

[2] 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), (a)(3). One week later, 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 has adhered to the line of succession set forth in Executive Order 13753, incorporating that executive order by reference as the source governing vacancies caused by resignations. *See* DHS Delegation No. 00106, *supra*, § II.A. Indeed, by April 2019 the DHS Secretary had amended Delegation 00106 at least three times, *see id.* at 1-1 (indicating dates of revisions), and each time the Secretary preserved Section II.A and its reliance on Executive Order 13753 to provide the line of succession following resignations.

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. Under Executive Order 13753, and therefore under Section II.A of Delegation 00106, the 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 regulation. *See Immigrant Legal Res. Ctr. v. Wolf*, No. 20-5883, 2020 WL 5798269, at *7 (N.D. Cal. Sept. 29, 2020) ("*ILRC*") ("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 ("[W]hen 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 the agency's own order of succession."). Because McAleenan "assumed the role of Acting Secretary without lawful authority" under the HSA, *id.*, his tenure 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 alternative succession statute like the one in the HSA is being followed. *See* 5 U.S.C. § 3347(a).

B. Despite the above, the government has insisted that McAleenan validly became Acting Secretary upon Nielsen's resignation pursuant to the DHS order of succession adopted under § 113(g)(2). Every court to address that contention has properly rejected it, as has the Government Accountability Office. *See ILRC*, 2020 WL 5798269, at *7-9; *CASA*, 2020 WL 5500165, at *20-23; *La Clínica de La Raza v. Trump*, No. 19-4980, 2020 WL 4569462, at *13-14 (N.D. Cal.

Aug. 7, 2020); 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.

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 providing the line of succession for the Department's various offices. *See Memorandum for the Secretary from John M. Mitnick, General Counsel, DHS*, at 1 (Apr. 9, 2019) (memorializing Nielsen's "approval of the attached document"); *id.* at 2 (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").[3]

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 ("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 this order, DHS updated Delegation 00106 accordingly. Consistent with Nielsen's order, Annex A of the updated regulation now contained a revised line

[3] All of the DHS documents cited in this brief are included in the Declaration of Juliana Blackwell, *CASA de Maryland v. Wolf*, No. 20-2118 (D. Md. Aug. 3, 2020) (Dkt. No. 41-1).

of succession for cases of "disaster or catastrophic emergency," DHS Delegation No. 00106, *supra*, § II.B, which matched the revised line of succession approved by Nielsen, *see id.* Annex A. 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.

Claiming that Nielsen intended something different, the government has tried to explain away this amendment to Delegation 00106 as a ministerial error that failed to implement her order correctly. 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. 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 (quotation marks omitted).

In short, Nielsen's order and DHS's subsequently revised Delegation 00106 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.

C. 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*." *Memorandum for the Secretary*, *supra*, at 2 (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").

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 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). The Department's 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). When

DHS personnel amended that document to implement McAleenan's order, they were not belatedly correcting a mistake they made seven months earlier, as DHS has claimed. 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 Delegation 00106 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*.

DHS Delegation No. 00106 (Revision No. 08.5), *supra*, § II.A (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*.

DHS Delegation No. 00106 (Revision No. 08.6), *supra*, § II.A (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. Indeed, if Nielsen had already made that change, then this portion of McAleenen's November order would not "hereby" have "amended" anything, as it expressly purports to do.

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.[4]

[4] One of the courts that held that McAleenan did not validly become Acting Secretary under the HSA concluded that he was nonetheless eligible to be named to that role 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. That court did not address whether the President actually *did* designate McAleenan as Acting

D. Because the plain text of Nielsen's order contradicts the government's position, the government has been forced to argue that this text should be ignored 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.

The government's primary argument is 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. Nielsen's order indicates that it is establishing the "order of succession" for the Secretary's office, and it cites 6 U.S.C. § 113(g)(2) (allowing the Secretary to designate a "further order of succession") as among the authorities empowering her to do so. According to the government, Nielsen could not possibly have designated an "order of succession" under § 113(g)(2) to govern situations involving disaster and emergency, because—the government argues—those situations are covered only by a "delegation of authority" in DHS's regulation. 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 meant to amend Section II.A of Delegation 00106 (governing resignations) because Section II.B (governing disasters and emergencies) was not an order of succession but rather "a delegation of authority."

This argument is premised on a supposedly black-and-white distinction between "orders of succession" and "delegations of authority," as well as the idea that an "order of succession" applies only to permanent vacancies following an officer's death or resignation. But that premise is false. The Homeland Security Act, Delegation 00106, and Nielsen's order itself all refute the

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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.

notion that the term "order of succession" is restricted to permanent vacancies following death or resignation. Those authorities also reveal that there is no distinction in usage between the terms "order of succession" and "delegation of authority" so clear and firmly entrenched as to justify overriding the plain language of Nielsen's order.

In the HSA, § 113(g) states that the "order of succession" it empowers the Secretary to designate 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 No. 00106, *supra*, § II.B. The government is simply wrong, therefore, to claim that Nielsen would have had no reason to invoke § 113(g)(2) if she were only amending the list of officials who could act as Secretary during a disaster or emergency.

Likewise, Delegation 00106 twice uses the term "order of succession" to describe its various annexes, *see id.* ¶¶ 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." *Memorandum for the Secretary*, *supra*, at 2 (emphasis added).

Neither the HSA nor the Department's own practices, therefore, draw the firm distinction between the terms "order of succession" and "delegation of authority" that the government claims

they do. Indeed, the government belies its own claim by asserting that Nielsen's change to the order of succession "applied to any vacancy" in the Secretary's office, including vacancies arising from disaster or emergency, 85 Fed. Reg. at 46,804, even as the government simultaneously insists that the provision for disasters and emergencies in Section II.B is actually a "delegation of authority," not an "order of succession."

Nor does the government's distinction hold as a matter of logic. As the government would have it, an "order of succession" allows an official to become the Acting Secretary, while a "delegation of authority" merely allows an official to exercise certain powers of the Secretary. That distinction might be valid when a sitting Secretary permits another official to exercise *some* of the Secretary's functions, as under 6 U.S.C. § 112(b)(1). But when a Secretary is "unavailable to act" during a disaster or emergency, DHS Delegation No. 00106, *supra*, § II.B, and another official steps in with permission to 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 the government seeks 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." Instead, her use of that term "at best states the obvious—that Nielsen had the authority to change the succession order as applied to the office of the Secretary," not that she "changed two separate succession lists applicable to each scenario." *CASA*, 2020 WL 5500165, at *22.

In defending its position, the government has also relied on a second flawed premise. The

government insists that an "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 emergency), because § 113(g)(2) provides a carve-out from the FVRA, and the circumstances addressed by Section II.B are supposedly not the kind of vacancy that would trigger the FVRA. The government has cited no authority for 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.[5]

The government has countered that if this is true, then former DHS 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 HSA was amended to add § 113(g), giving the Secretary the power to designate an order of succession that could supplant the FVRA. But that conclusion does not follow. Section II.B includes an important caveat: it purports to delegate all of the Secretary's powers during a disaster or catastrophic emergency "to the extent not otherwise prohibited by

[5] *See* 5 U.S.C. § 3346(a) (referencing "a vacancy caused by sickness"); Office of Legal Counsel, *Designating an Acting Dir. of the Bureau of Cons. Fin. Protect.*, 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); *see also 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"); *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").

law." DHS Delegation No. 00106, *supra*, § II.B. Thus, to the extent that the FVRA prohibits an official who is exercising power under Section II.B from performing some of the Secretary's functions, Section II.B makes clear that it does not, on its face, purport to override that limitation. And even if Johnson *did* lack the authority to establish Section II.B (and Annex A), the phenomenon of executive branch department heads pushing the limits of the Vacancies Act through their "delegation" authority is hardly a new development. *See supra* at 4-6.

In sum, the "context" to which the government has pointed 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) is in tension with the straightforward reading of that plain text. They certainly do not offer such clear indications of a contrary meaning as to override the order's plain language, which "changed Annex A, and Annex A only." *CASA*, 2020 WL 5500165, at *22.

III. Because McAleenan's Tenure Was Unlawful, His Expedited-Removal Designation Must Be Set Aside Under the APA.

The illegality of McAleenan's service as Acting Secretary means that his purported expansion of expedited removal cannot stand. That result is required both by the APA (discussed in this section) and by the FVRA (discussed in the next section).

Agency actions that are taken in violation of the FVRA's limits must be set aside as "unlawful" under the APA. 5 U.S.C. § 706(2). Congress also imposed additional penalties on certain FVRA violations that go beyond the normal APA remedies for unlawful agency action. *See id.* § 3348(d) (providing that such actions are void *ab initio* and may not be ratified). But those additional FVRA penalties apply only when an illegally serving official performs a "function or duty" of a vacant office, as that term is defined in § 3348, which generally requires that the function or duty in question be one that "only that officer" could take. *Id.* § 3348(a)(2)(A)(ii).

However, even when the FVRA's penalty provision does not apply because its definition

of "function or duty" is not met, agency actions taken by a person whose acting service violates the rest of the FVRA are "not in accordance with law" and must be "set aside" under the APA. 5 U.S.C. § 706(2)(A). In other words, actions taken by an illegally serving official must be set aside under the APA even if the function in question is not assigned exclusively to the vacant office. *See L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 34 (D.D.C. 2020).

While the FVRA's penalty provision sets forth a specific definition of "function or duty" for purposes of that section, 5 U.S.C. § 3348(a)(2), the "functions and duties" that the rest of the FVRA governs include a broader array of agency actions. The FVRA's text makes this clear: Section 3348 states that its narrower definition of "function or duty" applies only "[i]n this section." *Id*. § 3348(a). And the FVRA uses phrases like "in this section" with precision and intent, as the Supreme Court has explained:

> Now add "under this section." The language clarifies that subsection (b)(1) applies to all persons serving under § 3345. Congress often drafts statutes with hierarchical schemes—section, subsection, paragraph, and on down the line. Congress used that structure in the FVRA and relied on it to make precise cross-references.

SW Gen., 137 S. Ct. at 938-39 (citations omitted). By specifying that § 3348's definition of "function or duty" applies only "in this section," Congress "ma[d]e [a] precise cross-reference[]," *SW Gen.*, 137 S. Ct. at 939, to clarify that this definition does not apply elsewhere in the FVRA. That definition, therefore, governs only whether the penalties of § 3348 apply, not the meaning of "functions and duties" elsewhere in the Act.

The upshot is that demonstrating a violation of 5 U.S.C. § 3345, § 3346, or § 3347 does not require showing that the challenged action was one that "only that officer" could take. 5 U.S.C. § 3348(a)(2). This means that the action can be illegal, and therefore grounds for invalidation under the APA, even if it is not an action that is exclusively assigned to the vacant office. Thus, the standard remedies for unlawful agency action under the APA remain available even when the

unique penalties of § 3348 do not apply. *See SW Gen., Inc. v. NLRB*, 796 F.3d 67, 79, 80-81 (D.C. Cir. 2015); *Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 564 (9th Cir. 2016).

McAleenan's designation expanding expedited removal violated 5 U.S.C. §§ 3345 and 3347 because he was not eligible to serve as Acting Secretary under either provision when he made that designation. Under the APA, this "unlawful" action must be "set aside." 5 U.S.C. § 706(2).

IV. Under the FVRA, the Expedited-Removal Designation Is Void and May Not Be Ratified.

In enacting the FVRA, Congress was concerned that the standard remedies for unlawful agency action might not be sufficient to deter violations of the Act. The FVRA therefore imposes additional, uniquely severe penalties on certain violations of its rules. If "any person" performs "any function or duty" of a vacant office, without validly serving as an acting officer under the FVRA or an agency's succession statute, then that action "shall have no force or effect." 5 U.S.C. § 3348(d)(1); *see SW Gen.*, 137 S. Ct. at 938 n.2 ("the general rule" is that "actions taken in violation of the FVRA are void *ab initio*"). By making such actions "void" and not merely "*voidable*," *SW Gen.*, 796 F.3d at 79, this penalty forecloses defenses such as harmless error and the *de facto* officer doctrine, *see id.* The FVRA further provides that actions deemed void under this provision "may not be ratified." 5 U.S.C. § 3348(d)(2); *see* S. Rep. No. 105-250, at 19 ("A lawfully serving acting officer cannot ratify the actions of a temporary officer whose service does not comply with the Vacancies Reform Act.").

These penalties are triggered when an illegally serving official performs a "function or duty" of a vacant office, as defined in § 3348. That term includes "any function or duty of the applicable office that is established by statute and is required by statute to be performed by the applicable officer (and only that officer)." 5 U.S.C. § 3348(a)(2)(A) (punctuation and headings omitted). Because that standard is easily met here, McAleenan's designation of the scope of

expedited removal was void *ab initio* and may not be ratified.

Designating the scope of expedited removal is clearly a function or duty "established by statute" that is "required by statute to be performed by the [Secretary of Homeland Security] (and only that officer)." *Id*. The expedited-removal statute assigns the making of such designations to "the sole and unreviewable discretion" of the Secretary, who may modify them "at any time." 8 U.S.C. § 1225(b)(1)(A)(iii)(I). "There could hardly be a more definitive expression of congressional intent to leave the decision about the scope of expedited removal . . . to the Secretary's independent judgment." *Make The Road*, 962 F.3d at 632. "That statutory language confines the judgment to the Secretary's hands," assigning it "to one decisionmaker, and one decisionmaker alone." *Id.* Rendering that judgment, in short, is a function required by statute to be performed by the Secretary and *only* the Secretary. 5 U.S.C. § 3348(a)(2)(A).

The statute, to be sure, does not expressly prohibit the Secretary from delegating this power over expedited removal to another official. But express prohibitions on delegation are not required in order for a statutory function or duty to qualify as exclusive under § 3348, for two reasons.

First, Congress deliberately rejected such a requirement when it enacted the FVRA. Minority members of the Senate who objected to the bill over its perceived rigidity—specifically singling out § 3348 as "a sanction of administrative immobilization," S. Rep. No. 105-250, at 35—made various suggestions to ameliorate those concerns, several of which were incorporated into the final statute. One of those suggestions, however, was conspicuously not accepted: "It is imperative that the bill unequivocally ensure that the affected functions and duties of the office are only those that are *expressly deemed nondelegable* by statute or regulation." *Id.* at 36 (emphasis added). "Given that the drafters did not adopt that alternative, the natural implication is that they did not intend [it]." *Lozano v. Montoya Alvarez*, 572 U.S. 1, 16 (2014). Had Congress wanted to

limit the penalties of § 3348 to functions that are expressly deemed nondelegable, "it had an easy way to do so," but "Congress did not adopt that ready alternative." *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1659 (2017).

Second, even outside the FVRA context, in cases where it is disputed whether an agency's organic statute prevents a specific power that is assigned to an officer from being delegated to others, courts have never required an express prohibition to find delegation foreclosed. On the contrary, it has long been established that delegation may be prohibited "by implication," if such an intent can be "fairly inferred from the history and content of the Act." *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 121-22 (1947). The proper standard is whether the statute, "fairly read, was intended to limit the power" to one official, taking into account the statute's "purpose and legislative history." *United States v. Giordano*, 416 U.S. 505, 514 (1974). Delegation restrictions, therefore, do not require an express prohibition, or any particular verbal formulation, but merely "affirmative evidence of a contrary congressional intent." *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004); *see, e.g.*, *Shook v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 132 F.3d 775, 782 (D.C. Cir. 1998) (rejecting requirement that statute "expressly prohibit" delegation, and finding delegation foreclosed based on "implied limitation").

With respect to designating the scope of expedited removal, Congress provided virtually no "legal standards constraining the Secretary's discretionary judgment," and it instead "deliberately chose . . . to commit such enforcement and resource judgments to the Secretary's 'sole and unreviewable discretion[.]'" *Make The Road*, 962 F.3d at 633 (quoting 8 U.S.C. § 1225(b)(1)(A)(iii)(I)). The fact that "the Secretary alone has the power to make the designation entirely independent of the views of others," *id.* at 634, confirms Congress's clear intent that those important designations are to be made by the Secretary, and only the Secretary.

In sum, Kevin McAleenan performed a "function or duty" that is exclusively assigned to the Secretary's office when he issued his expedited-removal designation. Because he did so without legal authority under the FVRA or the HSA, his unlawful designation is void and "may not be ratified." 5 U.S.C. § 3348(d)(2).

CONCLUSION

For the foregoing reasons, Plaintiffs are likely to succeed on the merits of their claims.

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Respectfully submitted,

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