No. 22-16552

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GONZALES & GONZALES BONDS & INSURANCE AGENCY, INC., *et al.*,

Plaintiffs-Appellees,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California

REPLY BRIEF FOR APPELLANTS

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INTRODUCTION

The rule at issue in this appeal helps the government to recover millions of dollars of unpaid surety bonds by authorizing U.S. Immigration and Customs Enforcement to decline to accept bonds from companies that do not pay their invoices. After reviewing the rule and determining that it was consistent with the Department's authorities, Secretary Alejandro Mayorkas formally ratified the rule in 2021. That ratification by a Presidentially appointed and Senate-confirmed officer cured any appointment-related deficiencies in the rule's promulgation, and the district court erred in concluding otherwise.

Plaintiffs maintain that Secretary Mayorkas's ratification was rendered ineffective by the Federal Vacancies Reform Act of 1998 (FVRA). But the text of the statute makes clear that its limited ratification bar applies only when the function or duty at issue is "required by statute" or by regulation "to be performed by the applicable officer (and only that officer)." 5 U.S.C. § 3348(a)(2)(A)(ii), (B)(i)(II). And plaintiffs have never identified any statute, regulation, or other law that requires the Secretary, and only the Secretary, to perform the rulemaking responsibilities at issue here. Instead, plaintiffs observe that two district courts have interpreted the FVRA differently and that the government did not pursue an appeal in those cases. But every court of appeals to address the question has agreed with the government that the plain text of the statute applies only to nondelegable functions or duties that are made exclusive to a specific office by statute or regulation. And the Supreme Court

has rejected improper efforts, like plaintiffs', to assign negative inferences to the federal government's litigation decisions.

Secretary Mayorkas's decision to ratify the rule disposes of plaintiffs' challenge, but this Court could also decide this case based on the district court's error in holding that the rule was unlawfully promulgated. Chad Wolf was validly serving as Acting Secretary when the rule was issued, and plaintiffs' attempts to cast doubt on the succession order that enabled him to assume office are inconsistent with the plain text and obvious intent of the order. This Court should accordingly reverse the judgment below and remand for further proceedings in district court.

ARGUMENT

I. The FVRA Did Not Preclude Secretary Mayorkas From Ratifying The Rule

Secretary Mayorkas, a Presidentially appointed and Senate-confirmed officer, reviewed and ratified the surety rule after concluding that it was consistent with the Department's authorities. Plaintiffs do not dispute that ratification of a rule by a validly appointed officer generally cures appointment-related deficiencies in the rule's promulgation. Nor do they suggest there was a flaw in Secretary Mayorkas's ratification. Plaintiffs nonetheless contend that the rule is invalid because the FVRA purportedly bars ratification of this rule. As the government has explained, that reasoning contravenes the text and purposes of the FVRA and is inconsistent with the

decisions of every other court of appeals that has interpreted the relevant provisions of the statute. *See* Opening Br. 17-22.

A. The FVRA precludes ratification of "[a]n action that has no force or effect under [5 U.S.C. § 3348(d)(1)]." 5 U.S.C. § 3348(d)(2). Section 3348(d)(1), in turn, specifies that an action has "no force or effect" when it is taken by a person not acting in conformance with the FVRA's requirements "in the performance of any function or duty of a vacant office." *Id.* § 3348(d)(1). The statute expressly defines the type of "function or duty" that must be performed for the ratification bar to apply—it is only those "function[s] or dut[ies] of the applicable office" that "[are] required by statute" or "regulation" "to be performed by the applicable officer (*and only that officer*)." *Id.* § 3348(a)(2)(A)(ii), (B)(i)(II) (emphasis added). Thus, the ratification bar "applies only to functions and duties that [the Presidentially appointed and Senate-confirmed] officer alone is permitted … to perform." *Kajmowicz v. Whitaker*, 42 F.4th 138, 148 (3d Cir. 2022) (alterations in original) (quoting *Arthrex, Inc. v. Smith & Nephew, Inc.*, 35 F.4th 1328, 1336 (Fed. Cir. 2022)). It does not apply to functions or duties, like the rulemaking authority exercised here, that can be delegated to other officials. *Kajmowicz*, 42 F.4th at 148-49 (citing *Arthrex*, 35 F.4th at 1335); *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives,* 920 F.3d 1, 12 (D.C. Cir. 2019) (per curiam) (observing in dicta that the text of the FVRA "only prohibit[s] the ratification of nondelegable duties").

Plaintiffs do not dispute that the ratification bar, by its terms, covers only actions "taken … 'in the performance of a[] function or duty'" of a vacant office. Nor do plaintiffs offer a different reading of section 3348's definition of "function or duty." In fact, plaintiffs do not analyze the FVRA's text at all, except to observe that the statute does not use the term "nondelegable." Response Br. 20 (citing *Asylumworks v. Mayorkas*, 590 F. Supp. 3d 11, 23 (D.D.C. 2022)). But, as the Third Circuit explained, "Congress need not have included th[at] term[] when it already included the parenthetical qualifier 'and only that officer[.]'" *Kajmowicz*, 42 F.4th at 148 (final alteration in original) (quoting 5 U.S.C. § 3348(a)(2)(A)(ii)). A "statute requires a specific officer (and only that officer) to perform the function only if the statute prohibits the delegation of that function." *Id.* at 149 (alterations and quotation marks omitted). When, in contrast, "a statute tasks an officer with certain responsibilities yet permits him to subdelegate them," as the Immigration and Nationality Act and Homeland Security Act do, "it does not require that officer (and *only that officer*) to exercise that authority." *Id.* (alterations and quotation marks omitted); *see* Opening Br. 20-21.

Plaintiffs mistakenly suggest that this straightforward reading of section 3348 is inconsistent with the Supreme Court's decision in *National Labor Relations Board v. Southwest General, Inc.*, 580 U.S. 288 (2017), and the Second Circuit's decision in *National Labor Relations Board v. Newark Electric Corp.*, 14 F.4th 152 (2d Cir. 2021). *See* Response Br. 20, 24. The Supreme Court's decision in *Southwest General* concerned the

meaning of an entirely different FVRA provision (5 U.S.C. § 3345(b)(1)), which prevents a person who has been nominated to fill a vacant office from performing the duties of that office in an acting capacity. *See* 580 U.S. at 293-96. It did not address the ratification bar or opine on the meaning of "function or duty" under section 3348. The Second Circuit likewise had no occasion to address these questions because, as plaintiffs acknowledge, "section 3348 expressly exempts from its purview actions taken by the General Counsel of the National Labor Relations Board." *Newark Electric Corp.*, 14 F.4th at 161.

In contrast, the courts of appeals that actually have addressed the definition of "function or duty" under section 3348 uniformly have interpreted that provision as covering only nondelegable functions and duties. *See* Opening Br. 17-19 (citing cases). Plaintiffs' efforts to distinguish those cases are unsuccessful. Plaintiffs observe that the Third Circuit in *Kajmowicz v. Whitaker*, did not address the validity of the Acting Attorney General's appointment. *See* Response Br. 23-24. But that is precisely the point: the court had no need to determine whether the Acting Attorney General was improperly serving because his actions were later ratified by a properly appointed officer. *Kajmowicz*, 42 F.4th at 147 ("If a lawfully appointed official ratifies his predecessor's action and does so in accordance with the law, that ratification may remedy a defect arising from the decision of an improperly appointed predecessor." (quotation marks omitted)). Here too, the court need not address the validity of Wolf's service if it determines that Secretary Mayorkas's ratification was effective.

Nor does it matter that *Kajmowicz* involved a regulation specifically delegating rulemaking authority, as opposed to a statute generally authorizing an officer to delegate his duties. *Contra* Response Br. 24-26. The relevant question for purposes of section 3348 is not whether a statute or regulation delegates the specific authority at issue; it is whether a statute or regulation specifically *prohibits* the delegation of that authority, "requir[ing]" that authority "to be performed by the applicable officer (and only that officer)." 5 U.S.C. § 3348(a)(2)(A)(ii), (B)(i)(II). That interpretation accords with the longstanding presumption—which plaintiffs do not challenge—that "absent affirmative evidence" of contrary congressional intent, "subdelegation to a subordinate federal officer or agency is … permissible." *Frankl v. HTH Corp.*, 650 F.3d 1334, 1350 (9th Cir. 2011) (quoting *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004)).

On this point, the Federal Circuit's decision in *Arthrex, Inc. v. Smith & Nephew, Inc.*, is particularly instructive. There, the court concluded that reviewing patent-related rehearing requests was a delegable duty not subject to section 3348 because the Patent Act "bestows upon the [Patent & Trademark Office] Director a general power to delegate" his duties, and the plaintiff "identif[ied] no statute, regulation, or other law that limits the Director's delegable duties or suggests that rehearing requests are not delegable." 35 F.4th at 1338, 1339. Similarly here, the Homeland Security Act generally authorizes the Secretary to "delegate any of [his] functions to any officer, employee, or organizational unit of" the Department, 6 U.S.C. § 112(b)(1), and

plaintiffs have never identified a "statute, regulation, or other law" that limits those delegable duties or suggests that the rulemaking authority exercised here was nondelegable.[1]

Plaintiffs make no effort to distinguish *Arthrex* or explain why its reasoning should not apply equally here. Plaintiffs focus instead on the concurring opinion in *Kajmowicz*, in which Judge Fisher stated that in order to fall outside the FVRA's definition of "function or duty," "the authority in question, in addition to being delegable, must actually have been delegated." *Kajmowicz*, 42 F.4th at 154 (Fisher, J., concurring); *see* Response Br. 25-26. That reading lacks support in the text of the statute, which asks only whether a statute or regulation "require[s]" the action "to be performed by the applicable officer (and only that officer)," 5 U.S.C. § 3348(a)(2)(A)(ii), (B)(i)(II). But even if Judge Fisher's test were correct, it would be satisfied here. In 2003, the Secretary, exercising his authority under the Homeland

[1] That section 3348 refers to duties that are required by either statute or regulation to be performed by a particular officer does not mean that the provision encompasses delegable functions. *Contra* Amicus Br. 19-20. A duty established by regulation might be a delegation from one officer to another, but it is only a "function or duty" within the meaning of section 3348 if the regulation provides that only the delegee may perform the function. *See* U.S. Gov't Accountability Office, B-310780, *Federal Vacancies Reform Act of 1998—Assistant Attorney General for the Office of Legal Counsel, U.S. Department of Justice* 5 & n.12 (June 13, 2008), https://perma.cc/6DV8-MQ9Z (describing regulatory duties covered by section 3348 as "requir[ing] language that clearly signals duties or functions cannot be [further] delegated, such as providing final approval or final decisionmaking authority in a particular position," and citing as an example the delegation from the Secretary of Veterans Affairs to the General Counsel found in 38 C.F.R. § 2.6(e)(4)(iv), which provides that the "General Counsel … will make the determination in all instances").

Security Act, delegated to the Deputy Secretary the authority "to sign, approve, or disapprove any proposed or final rule, regulation or related document." ER-108; *see* ER-109 (citing Homeland Security Act as authority for the delegation). It is irrelevant that the Office of the Deputy Secretary was vacant when the surety rule was promulgated in July 2020. *Contra* Response Br. 19, 26. A valid delegation does not cease to exist if the office to which the duty is delegated is unoccupied. *Cf. Donovan v. National Bank of Alaska,* 696 F.2d 678, 682 (9th Cir. 1983) ("The acts of administrative officials continue in effect after the end of their tenures until revoked or altered by their successors in office." (quoting *United States v. Wyder,* 674 F.2d 224, 227 (4th Cir. 1982)). And the only question (even under Judge Fisher's interpretation) is whether the Secretary, in fact, delegated the authority in question to "another official besides the [Secretary]." *Kajmowicz*, 42 F.4th at 155 (Fisher, J., concurring). Because the Secretary's rulemaking responsibilities were delegated to another official in the 2003 delegation, it follows that those responsibilities were not "require[d] … to be performed by only the [Secretary]." *Id.*; *see* Opening Br. 21-22.

The Third and Federal Circuits also explained why the additional arguments that amicus advances are unavailing. Like amicus, the plaintiff in *Kajmowicz* argued that an action is a "function or duty" within the meaning of section 3348 if a "statute assigns [the] duty to a single office rather than multiple offices." *Kajmowicz*, 42 F.4th at 149-50; *see* Amicus Br. 7-11. That reading, as the *Kajmowicz* court recognized, rewrites section 3348. Section 3348 is not triggered whenever a task is "assigned" by

statute only to the relevant officer, but rather when the task is "required" by statute or regulation "to be performed by" the relevant officer "(and only that officer)." 5 U.S.C. § 3348(a)(2)(A)(ii), (B)(i)(II); *see Kajmowicz*, 42 F.4th at 149 (observing that plaintiff's reading "elide[s]" the portion of section 3348 that says a function or duty must be "required by statute to be performed by" the applicable officer). And as explained, section 3348 was enacted against the longstanding background rule—established well before the FVRA's enactment—that an officer is not required to perform a duty herself (and can instead subdelegate the duty to her subordinates) unless there is affirmative evidence that Congress intended to make a particular duty nondelegable. *See* Opening Br. 20 (first citing *Loma Linda Univ. v. Schweiker*, 705 F.2d 1123, 1128 (9th Cir. 1983); and then citing *Tabor v. Joint Bd. for Enrollment of Actuaries*, 566 F.2d 705, 708 n.5 (D.C. Cir. 1977)). "By asking courts to consider whether the relevant statute 'require[s] … the applicable officer (and only that officer)' to perform the duty at issue, Congress directed courts to read statutes silent on the question of delegation with the subdelegation doctrine in mind." *Kajmowicz*, 42 F.4th at 150 (alterations in original). In contrast, amicus's proposed approach of "read[ing] an assignment of authority to one officer as prohibiting any other officer from exercising that authority … stand[s] the subdelegation doctrine on its head—presuming statutory silence implies exclusivity." *Id.*; *cf. Stand Up for California! v. U.S. Dep't of the Interior*, 994 F.3d 616, 624 (D.C. Cir. 2021) (observing that a statute can "mention a specific official only to make it clear that this official has a particular power rather than to

exclude delegation to other officials" (quoting *United States v. Mango*, 199 F.3d 85, 90 (2d Cir. 1999))), *cert. denied sub nom. Stand Up for California! v. Department of the Interior*, 142 S. Ct. 771 (2022).

It is quite common, moreover, for Congress to mention only the Secretary in granting statutory powers or duties to the Department of Homeland Security. *See, e.g.*, 6 U.S.C. § 469(a) (authorizing the Secretary to charge fees for credentialing and background investigations in transportation); 40 U.S.C. § 1315 (authorizing the Secretary to "protect the buildings, grounds, and property that are owned, occupied, or secured by the Federal Government"); 18 U.S.C. § 3056(a) ("Under the direction of the Secretary of Homeland Security, the United States Secret Service is authorized to protect the following persons …."). Under amicus's view, however, during a vacancy, none of those functions could be carried out by a subordinate official who indisputably had been properly delegated that responsibility. Amicus's view of the statute—which essentially treats all otherwise-valid preexisting delegations of an officer's responsibilities as rescinded in the event of a vacancy—would thus create precisely the administrative paralysis that Congress sought to avoid by its careful limitations in section 3348. *See* S. Rep. No. 105-250, at 31 (1998).

Amicus erroneously contends (at 16-19) that the government's interpretation conflicts with other sections of the FVRA. But the Federal Circuit squarely rejected amicus's suggestion that the government's interpretation "read[s] [5 U.S.C.] § 3347(b) out of the statute entirely." *Arthrex*, 35 F.4th at 1338 (first alteration in original)

(quotation marks omitted). The reference in section 3347(b) to statutes that generally authorize agency heads to delegate their duties speaks only to the scope of the statutes described in section 3347(a)(1), which establish alternative means (independent from the FVRA) for authorizing acting service in a vacant position. *See* 5 U.S.C. § 3347(b) (providing that general delegation statutes are "not a statutory provision to which subsection (a)(1) [of section 3347] applies"); *Arthrex*, 35 F.4th at 1338 (explaining that section 3347(b) "merely provides that a statute granting the head of an agency 'general authority … to delegate [his] duties' does not exempt the agency from the FVRA") (quoting 5 U.S.C. § 3347(b)). Section 3347(b) has no bearing on the definition of "function or duty" in section 3348(a), which governs uses of those terms "[i]n this section"—i.e., section 3348.[2]

This Court should reject plaintiffs' invitation to rely on two district court cases to create a split with this contrary circuit authority. *See* Response Br. 18-22, 27-29 (discussing *Behring Reg'l Ctr., LLC v. Wolf*, 544 F. Supp. 3d 937 (N.D. Cal. 2021), and *Asylumworks*, 590 F. Supp. 3d 11). Those decisions pre-dated, and so did not engage with, the Third and Federal Circuits' thorough analyses of section 3348 in *Kajmowicz*

[2] For similar reasons, the government's interpretation is perfectly consistent with the other subsections of section 3348. *Contra* Amicus Br. 13-16. Vacancies in the offices of Department and agency heads are generally governed by section 3348 unless they are listed in 5 U.S.C. § 3348(e). But in order for the ratification bar to apply to the performance of their duties while the position is vacant and there is no acting official properly serving under the FVRA, Congress (or the agency, by regulation) must specify that the particular duty is nondelegable.

and *Arthrex*. And the Third Circuit explicitly rejected the interpretative arguments the *Behring* and *Asylumworks* courts found persuasive. *See Kajmowicz*, 42 F.4th at 149-50 (rejecting theory, adopted by *Behring* court, 544 F. Supp. 3d at 945-46, that when a statute assigns a duty to a single office rather than multiple offices, it does so exclusively); *id.* at 148-49 (declining to assign weight, as did the *Asylumworks* court, *see* 590 F. Supp. 3d at 23-24, to the fact that the statute does not use the word "nondelegable").

Plaintiffs' attempt to cast doubt on the government's position based on its decision not to appeal those two district court decisions is also improper. *Contra* Response Br. 19, 28-29. The Supreme Court has specifically cautioned against drawing such negative inferences from the federal government's litigation choices because the "government's litigation conduct in a case is apt to differ from that" of other litigants. *United States v. Mendoza*, 464 U.S. 154, 161 (1984). The federal government "is a party to a far greater number of cases on a nationwide basis than" any other litigant and "is more likely than any [other] party to be involved in lawsuits against different parties which nonetheless involve the same legal issues." *Id.* at 159-60. And "[u]nlike a private litigant who generally does not forgo an appeal if he believes that he can prevail, the Solicitor General considers a variety of factors, such as the limited resources of the government and the crowded dockets of the courts, before authorizing an appeal." *Id.* at 161; *see* 28 C.F.R. § 0.20. That the Solicitor

General declined to seek further review of other decisions in other cases says nothing about the merits of the government's argument here.

B. Retreating from the text of the statute, plaintiffs also advance arguments rooted in the FVRA's legislative history and purpose. Even if those arguments could overcome the plain meaning of the statute, *but see Bostock v. Clayton County*, 140 S. Ct. 1731, 1749-50 (2020) (declining to consider legislative history when the statutory text was unambiguous), they would not do so here. *See Arthrex*, 35 F.4th at 1337 (legislative history and purpose of FVRA "does not . . . justify departing from the plain language" of section 3348); *Kajmowicz*, 42 F.4th at 150-51 (similar).

Plaintiffs mistakenly suggest that the government's interpretation will "eviscerate the FVRA's remedial scheme," "rendering it essentially without any force or effect." Response Br. 21, 27 (quotation marks omitted); *see also* Response Br. 18-19; Amicus Br. 21-23. Congress, however, is perfectly capable of specifying that it wants to prohibit an officer from delegating his authority, thereby ensuring that an action taken by an improperly serving officer cannot later be ratified. *See, e.g.*, 31 U.S.C. § 1344(d)(3) (providing that the Secretary's authority to determine which Department employees are authorized to use official transportation "may not be delegated"); 54 U.S.C. § 306114 (providing that the Secretary "may not delegate his or her responsibilities pursuant to such section"); 5 U.S.C. § 3345(a)(2)-(3) (providing that "the President (and only the President)" may direct someone other than the first assistant to serve as acting officer); *see Stand Up for California!*, 994 F.3d at 622 (citing

additional example and observing that "[i]f Congress wants to make clear that a function or duty is exclusive, it may do so through clear statutory mandates").

Plaintiffs and amicus miss the point in observing that "most statutes that confer authority will permit subdelegation." Response Br. 26-27 (quotation marks omitted); *see* Amicus Br. 13-14, 18-19, 21. That is precisely why, in response to concerns that section 3348 might "cause an unintended shutdown of the Federal agency within which the vacancy exists due to administrative paralysis," S. Rep. No. 105-250, at 31, the Senate Report accompanying an earlier version of the bill declared that "[a]ll the normal functions of government … could still be performed" under the FVRA, *id.* at 18; *accord id.* at 30-31. In other words, Congress deliberately limited section 3348's definition of "function or duty" to nondelegable functions in order to "str[ike] a balance between deterring the Executive Branch from violating the [FVRA] and ensuring the Branch could continue to function when it did overstep the Act's limits." *Kajmowicz*, 42 F.4th at 151; *see Guidance on Application of Federal Vacancies Reform Act of 1998*, 23 Op. O.L.C. 60, 70 (1999) (explaining that "[w]hile the effect of the enforcement provisions [in section 3348(d)] is severe, the breadth of conduct to which the provisions apply is expressly limited by the definition of 'function or duty'"). Plaintiffs nowhere reckon with the implications of their interpretation, which "would effectively cripple the operation of the federal government" and threaten to nullify countless actions taken across executive agencies. *Kajmowicz*, 42 F.4th at 151; *see Arthrex*, 35 F.4th at 1337 (explaining that a broad reading of "functions or duties"

would call into question the validity of more than 668,000 patents signed by an inferior officer filling in for the Director); 23 Op. O.L.C. at 72 ("Congress … understood that if everything the [Presidentially appointed and Senate-confirmed] officer may have done in the performance of his or her duties had to be performed by the head of the Executive agency, the business of the government could be seriously impaired.").

Plaintiffs' discussion (Response Br. 21-22) of the references in the FVRA's legislative history to *Doolin Security Savings Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203 (D.C. Cir. 1998), is a non sequitur. Although the Senate Report indicated displeasure with *Doolin* in discussing generally why the FVRA needed revision, those concerns arose from the fact that one of the acting officials in that case had served in an acting capacity for four years, despite the FVRA's time limitations. S. Rep. No. 105-250, at 8. The Report also asserted that the court's ratification discussion "demand[ed] legislative response," raising concerns that there would be no consequence if ratification could cure "the actions of a person who served beyond the length of time provided by the Vacancies Act." *Id.* But Congress's "response" to that concern is in section 3348, and both the provision's plain text, *see supra* pp. 3-13, and the parts of the Report specifically addressing that provision make clear that the bar on ratification encompasses only "non-delegable functions or duties of the officer," S. Rep. No. 105-250, at 18; *see id.* (clarifying that "[d]elegable functions of the office could still be performed by other officers or employees" in the event of a vacancy).

II. Wolf Was Lawfully Serving As Acting Secretary When The Rule Was Promulgated

Because Secretary Mayorkas ratified the rule, it is unnecessary for this Court to decide the validity of Wolf's service as Acting Secretary. But if this Court reaches the issue, it should hold that Wolf was validly serving as Acting Secretary when the rule was promulgated. Before she resigned, Secretary Nielsen exercised the authority vested in her under 6 U.S.C. § 113(g)(2) to designate a new order of succession for the Office of Secretary. Kevin McAleenan assumed the role of Acting Secretary under that order and further amended the order to place the Under Secretary for Strategy, Policy, and Plans next in line. Wolf was serving in that role at the time of McAleenan's resignation in November 2019, and so he validly assumed the role of Acting Secretary before the rule was promulgated in July 2020.

Plaintiffs concede that "Wolf would have become Acting Secretary" under McAleenan's order. Response Br. 12. But plaintiffs contend that McAleenan never validly assumed office—and thus lacked the power to issue his order—because Secretary Nielsen was ineffective in amending the order of succession in the first instance.

Plaintiffs' theory, like the district court's, rests on the mistaken premise that Secretary Nielsen, by amending Annex A of the preexisting Delegation 00106, updated only the list of individuals to whom authority is temporarily delegated when the Secretary is unavailable during an emergency—not the order of succession

following the Secretary's resignation. *See* Response Br. 7, 11, 13-14; Amicus Br. 26-27. As the government has explained, however, that reasoning overlooks the plain text and obvious intent of Secretary Nielsen's order. *See* Opening Br. 25-26. In the order, Secretary Nielsen made clear that she was amending Annex A to "designate" a new "order of succession for the Secretary of Homeland Security." ER-23; *see also* ER-22 ("[Y]ou have expressed your desire to designate certain officers of the Department of Homeland Security (DHS) in order of succession to serve as Acting Secretary."). As authority for her actions, she cited "6 U.S.C. § 113(g)(2)," ER-23, which authorizes the Secretary to establish an "order of succession" if there is a "absence, disability, or vacancy in [the] office," 6 U.S.C. § 113(g)(1)-(2). *See* ER-22 ("By approving the attached document, you will designate your desired order of succession for the Secretary of Homeland Security in accordance with your authority pursuant to Section 113(g)(2) of title 6, United States Code."). It is thus evident that Secretary Nielsen exercised her authority under the Homeland Security Act to designate Annex A, not only as the temporary delegation of authorities in the event of a disaster, but as the permanent order of succession in the event of a vacancy.

Plaintiffs give no meaning to Secretary Nielsen's repeated references to "designat[ing]" an "order of succession," ER-22-23, by insisting that her order delegated her duties only during a temporary absence. *See* Opening Br. 26-27 (describing the difference between succeeding to an office and temporarily exercising delegated powers). Nor do plaintiffs explain why Secretary Nielsen would cite 6

U.S.C. § 113(g)(2)—which authorizes the Secretary to designate an order of succession in the event of a vacancy—if she were exercising only the authority to delegate her duties under 6 U.S.C. § 112. *See* Opening Br. 27. Rather, plaintiffs mistakenly focus on Secretary Nielsen's failure to amend Part II.A of Delegation 00106. *See* Response Br. 11, 13-14. But the government has also explained why Part II.A never itself established an order of succession. To the contrary, Part II.A reflected the recognition that, when Delegation 00106 was issued in 2016, only the President could establish an order of succession under the FVRA, *see* 5 U.S.C. § 3345(a)(2)-(3), and so succession was governed by an Executive Order. *See* ER-27. After Delegation 00106 was issued, however, Congress enacted 6 U.S.C. § 113(g), empowering the Secretary to establish her own order of succession for the Office, "[n]otwithstanding [the FVRA]." 6 U.S.C. § 113(g)(1), (2). And it is that express authority that Secretary Nielsen relied on when she "designate[d]" a new "order of succession" in the 2019 order. ER-23 (citing 6 U.S.C. § 113(g)(2)). It is thus plaintiffs' reading—not the government's—that "ignore[s] official agency policy documents and invalidate[s] the plain text of the … 2019 Delegation," Response Br. 15 (alteration and quotation marks omitted).[3]

[3] That McAleenan later chose, out of an abundance of caution, to amend the text of Part II.A, *see* ER-25, has no bearing on the legal effect of Secretary Nielsen's 2019 order. *Contra* Response Br. 15; Amicus Br. 28.

Plaintiffs offer no substantive response to these arguments. Instead, plaintiffs rely heavily on a handful of district court cases concluding that Wolf's service was invalid and urge this Court to ascribe meaning to the government's decisions not to pursue appeals in those cases. *See* Response Br. 7-8, 11-12, 13-17. But each of those decisions (which obviously are not binding on this Court) adopted the same flawed reasoning as the district court here. And as explained, it would be a violation of the Supreme Court's clear instructions for this Court to draw negative inferences from the government's litigation decisions in other cases. *See supra* p. 12-13.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below and remand for further proceedings in district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 4,889 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/ Anna O. Mohan
Anna O. Mohan

CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2023, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

s/ Anna O. Mohan
Anna O. Mohan