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11
12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**
14 **SAN FRANCISCO DIVISION**
15

16
17 THE CITY OF SEATTLE, et al.,

18 Plaintiffs,

19 v.

20 DEPARTMENT OF HOMELAND
21 SECURITY, et al.

22 Defendants.
23
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Case No. 3:19-cv-07151-MMC

**BRIEF OF AMICUS CURIAE
MORTON ROSENBERG IN SUPPORT
OF PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

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INTEREST OF AMICUS CURIAE

1
2 Morton Rosenberg is a leading authority on the Federal Vacancies Reform Act of 1998
3 (Act or FVRA). The Act is central to Plaintiffs’ challenges in this case, but they have not yet been
4 fully able to explore its history and context in their briefs. Before retiring in 2008, Mr. Rosenberg
5 spent over three decades as an analyst in the American Law Division of the Congressional
6 Research Service (CRS or Service). There, he advised Congress on many issues of constitutional
7 law, administrative law, and congressional practice and procedure, with a special emphasis on
8 Executive appointments.

9 In particular, Mr. Rosenberg was intimately involved in the enactment of the Act. He
10 testified before Congress during the legislative debate over the legislation. *See Oversight of the*
11 *Implementation of the Vacancies Act: Hearings on S. 1764 Before the Senate Committee on*
12 *Governmental Affairs*, 105th Cong., at 40, 170 (Mar. 18, 1998) (S. Hrg. 105-495) (*FVRA*
13 *Hearings*) (Statement of Morton Rosenberg, Specialist in American Public Law, Congressional
14 Research Service). He wrote the report for Congress detailing the problems with previous
15 appointments laws that lead directly to the Act’s enactment. *See* Morton Rosenberg, Cong.
16 Research Serv., *Validity of Designation of Bill Lann Lee as Acting Assistant Attorney General for*
17 *Civil Rights* (Jan. 1998) (*Rosenberg Memo I*), reprinted in *FVRA Hearings, supra*, at 62–131.
18 And after Congress passed the Act, he wrote another report informing Congress how it was being
19 implemented. *See* Morton Rosenberg, Cong. Research Serv., No. 98-892, Report for Congress,
20 *The New Vacancies Act: Congress Acts to Protect the Senate’s Confirmation Prerogative* (Nov.
21 1998) (*Rosenberg Memo II*).

22 His experience and expertise have been recognized by courts and commentators. His
23 writings have been cited by the Supreme Court, *see NLRB v. Sw. Gen., Inc.*, 137 S. Ct. 929, 935
24 (2017); the D.C. Circuit, *see Sw. Gen., Inc. v. NLRB*, 796 F.3d 67, 70 (D.C. Cir. 2015), *aff’d*, 137
25 S. Ct. 929 (2017); and in academic articles, *see* Joshua L. Stayn, *Vacant Reform: Why the Federal*
26 *Vacancies Reform Act of 1998 is Unconstitutional*, 50 Duke L.J. 1511, 1513 n.8 (2001); Brannon
27 P. Denning, *Article II, the Vacancies Act and the Appointment of “Acting” Executive Branch*
28 *Officials*, 76 Wash. U. L.Q. 1039, 1050 n.60 (1998). All have treated his views on the Act’s

1 legislative background as authoritative.

2 Mr. Rosenberg writes to provide the Court with his unique experience with and expertise
3 on the Act, and to detail why the appointment of Ken Cuccinelli to serve as Acting Director of
4 the U.S. Citizenship and Immigration Services (USCIS) violates the restrictions of the Act.²

5 BACKGROUND

6 The legality or illegality of Cuccinelli’s appointment to Acting Director depends on
7 whether the Executive complied with the Federal Vacancies Reform Act (FVRA or Act).
8 Congress passed the Act to limit the Executive’s ability to evade Senate confirmation, following
9 post-Watergate appointment abuses. Because Congress sought to prevent evasion of
10 constitutional advice-and-consent requirements, the Act’s requirements are strict.

11 **A. After Watergate, the President installed indefinitely “acting” appointees to evade** 12 **the Senate’s more rigorous confirmation process.**

13 The Federal Vacancies Reform Act emerged from Watergate’s fires, which smoldered for
14 decades. President Nixon’s Saturday Night Massacre decimated the Justice Department’s senior
15 ranks and reminded voters and leaders that principal officers must answer to the people and not
16 just the President. Brannon P. Denning, *Article II, the Vacancies Act and the Appointment of*
17 *“Acting” Executive Branch Officials*, 76 Wash. U. L.Q. 1039, 1061 (1998). That made
18 confirmations more politicized, which in turn made the “vetting process for potential
19 officeholders . . . more complex, difficult and protracted.” *Rosenberg Memo II, supra*, at 8. It also
20 left the federal government with far more Senate-confirmed offices than acceptable candidates to
21 fill them.

22 To alleviate this shortage of Senate-confirmable nominees, the Office of Legal Counsel
23 sought ways to stretch temporary acting appointments past the Vacancies Act’s strict time limits.
24 OLC claimed to find an option in agencies’ “housekeeping” statutes (such as those of the Justice
25 Department, *see* 28 U.S.C. §§ 509–10), which empower agency heads to delegate functions to
26

27 ² No party to the above-captioned action or any of their counsel authored this brief in whole or in
28 part or contributed money that was intended to fund preparing or submitting this brief.

1 subordinates. *Rosenberg Memo II, supra*, at 1. OLC argued that these delegating provisions gave
2 executive-agency heads “independent authority”—“apart from the Vacancies Act”—to fill vacant
3 offices. *Sw. Gen.*, 137 S. Ct. at 935.

4 This caused scandal. With “options” to bypass the Vacancies Act’s mandatory scheme for
5 temporary appointments, Presidents could routinely evade the specific conditions that Congress
6 had placed on those appointments. And things got worse over time: By 1998, twenty percent of
7 the 320 positions requiring Senate-confirmed appointees (and a full fourth of those positions
8 within the Justice Department) were staffed by temporary appointees; and most of these
9 temporary appointees had served far more than the 120 days allowed under the then-applicable
10 Vacancies Act. *Rosenberg Memo II, supra*, at 1.

11 **B. The Act reasserts congressional authority and limits presidential flexibility.**

12 Congress responded to these Executive encroachments with the Act, which returned
13 control over temporary appointments to Congress. The Act provides the “exclusive means” for
14 temporarily authorizing acting officials to perform the functions of virtually all Senate-confirmed
15 executive offices—“unless” Congress has provided a succession scheme specific to the agency.
16 5 U.S.C. § 3347(a). USCIS has no such scheme.

17 Under the Act, the Executive gets only “limited flexibility in appointing temporary
18 officers.” S. Rep. No. 105-250, at 13 (1998). If a Senate-confirmed officer “dies, resigns, or is
19 otherwise unable to perform the functions and duties of the office . . . [those] functions and duties
20 of the office” are automatically assumed by “the first assistant to the office of such officer.” 5
21 U.S.C. § 3345(a) & (a)(1). That “first assistant to the office” is usually a clearly pre-identified top
22 deputy of a presidentially appointed, Senate-confirmed officer—and that pre-identified person
23 automatically slots into the role. *Id.*

24 If the President prefers someone else, the Act allows him some choice—within strict
25 limits. One option is a designee who already serves in a presidentially appointed, Senate
26 confirmed office in some agency, *see id.* § 3345(a)(2)), assuring that the Senate has vetted the
27 candidate at least in part. Another option is a designee who has previously served in the relevant
28 agency for more than 90 days within the year preceding the vacancy, *see id.* § 3345(a)(3), ensuring

1 a level of experience that would enable the candidate to understand the office’s functions and
2 responsibilities. Those are the only options.

3 The FVRA then specifies that these designation options belong to the President “and only
4 the President”—even department heads may not exercise them. *See id.* § 3345(a)(1) & (2). And
5 they are not expandable—the President may not escape the Act’s exclusive scheme in any other
6 way, for instance by invoking an agency’s vesting and delegation or “housekeeping” statutes. *Id.*
7 § 3347(b). Congress locked down the acting-appointment scheme so tightly to address the
8 Executive abuses that motivated the FVRA’s overhaul of the law on acting appointments.

9 **C. Ken Cuccinelli is appointed to be Acting Director of USCIS.**

10 The Act is still the law, and it was the law in June 2019, when President Trump decided
11 that he wanted Ken Cuccinelli to serve as the Director of USCIS. Yet the President knew that the
12 controversial Cuccinelli could not be put in place through the standard procedure of nomination
13 and Senate confirmation. Indeed, Cuccinelli’s immigration views were deemed so extreme that
14 even Republicans opposed him, leaving slim chance that he could be confirmed to fill the role
15 permanently, even in a Senate controlled by the President’s party. *See, e.g.,* Jordain Carney, *GOP*
16 *Senator: Cuccinelli Couldn’t Win Senate Confirmation*, The Hill (June 10, 2019),
17 <https://tinyurl.com/y2djseg9> (Senator John Cornyn, the second-ranking Senate Republican, states
18 that Cuccinelli likely could not be confirmed to be permanent director of USCIS). Nor did
19 Cuccinelli meet the FVRA’s requirements for leading USCIS in an acting capacity. He had never
20 worked for USCIS, and the Senate had never confirmed him to any federal position. Thus, the
21 Act’s designation and succession scheme would not allow Cuccinelli to replace the then-Acting
22 Director, Mark Koumans.³

23 Undeterred, the administration tried to install Cuccinelli anyway. The Acting Secretary of
24 Homeland Security, Kevin McAleenan, invented a new USCIS position: Principal Deputy
25

26 ³ Koumans had been the agency’s then-designated first assistant, who became Acting Director
27 after the Senate-confirmed Director, Francis Cissna, resigned effective June 1, 2019. Nick Miroff
28 et al., *Trump to Place Ken Cuccinelli at the Head of the Country’s Legal Immigration System*,
Wash. Post (May 24, 2019), <https://tinyurl.com/yx9vdpnx>.

1 Director of USCIS. He then amended the internal USCIS Order of Succession to transfer the Act’s
2 “first assistant” function from Koumans (the previous USCIS Acting Director) to this newly
3 created office (Principal Deputy Director). Finally, on June 10, 2019, Acting Secretary
4 McAleenan appointed Cuccinelli to be the inaugural Principal Deputy Director, and thus to be
5 Acting Director of USCIS.⁴

6 On what authority did Acting Secretary McAleenan rely to accomplish this administrative
7 reshuffling of USCIS? He invoked “general authority” statutes that allowed agency functions to
8 be distributed throughout the agency. *See* 5 U.S.C. §§ 301, 302. And he invoked DHS’s
9 housekeeping statute. *See* 6 U.S.C. § 112. In other words, he relied on the same types of statutes
10 that earlier administrations had used to evade vacancy-filling laws, and whose abuse Congress
11 stopped with the Act.

12 SUMMARY OF ARGUMENT

13 Under the Appointments Clause, “Congress may by Law vest the Appointment of such
14 inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads
15 of Departments.” U.S. Const. art. II, § 2. This authority allows Congress to determine the structure
16 of Executive Branch agencies, block patronage appointments, and ensure that the President is
17 choosing qualified professionals instead of “unfit characters.” *The Federalist No. 76* (Alexander
18 Hamilton). Since 1792, Congress has also used this power to enact statutes allowing agencies to
19 continue running even if their Senate-confirmed leaders resign and create vacancies. These laws
20 ensure that the agencies do not freeze in place while a permanent replacement is found.

21 Even while providing some authority to appoint acting agency heads during temporary
22 vacancies, Congress has jealously guarded its absolute prerogative to determine whether, when,
23 and how these officers may wield power without Senate confirmation. Indeed, the FVRA, 5
24 U.S.C. §§ 3345–3349d, was conceived after Congress had to “reclaim[]” its “Appointments
25 Clause power” and reassert its authority over temporary appointments. *See Sw. Gen., Inc. v.*
26

27 ⁴ The events leading up to Cuccinelli’s appointment are further detailed in Stephen Migala, *The*
28 *Vacancies Act and a Post-Vacancy First Assistant of USCIS*, at 12–14 (Sept. 9, 2019),
<https://ssrn.com/abstract=3450843>.

1 *NLRB*, 796 F.3d 67, 70 (D.C. Cir. 2015), *aff'd*, 137 S. Ct. 929 (2017). The Act provides for two—
2 and only two—ways of filling vacancies outside of a recess appointment: (1) Nominate a
3 replacement, and persuade the Senate to confirm that nominee, or (2) follow the Act’s specific
4 rules and procedures, which identify who may be named an acting official and under what
5 circumstances.

6 But the administration followed neither of these paths, instead executing a complex series
7 of administrative maneuvers that moved the appointment further and further away from meeting
8 the Act’s strict requirements and Congress’s mandated design. In creating a new “first assistant”
9 position *after* the vacancy arose—for the sole purpose of enabling its new occupant to become
10 the acting agency head—the administration violated the Act’s plain terms. These maneuvers also
11 subverted the Act’s purpose of ensuring that only qualified, competent individuals serve—even
12 temporarily—as stewards of our nation’s highest offices. The Acting DHS Secretary then further
13 insulted the Act’s design, and disrespected Congress’s coequal role in agency appointments, by
14 divesting the lawfully appointed first assistant and Acting USCIS Director of his congressionally
15 vested responsibilities—all to create room for the newly minted, pseudo-first assistant. Even
16 worse, the appointment was performed by the Acting DHS Secretary and not by the President,
17 who is the only person that the Act authorizes to make any acting appointments at all. Finally, the
18 Acting DHS Secretary wielded generic agency statutes to appoint Cuccinelli, in violation of the
19 prohibition in 5 U.S.C. § 3347(b), and eerily echoing the abusive tactics that motivated Congress
20 to pass the Act in the first place.

21 In short, the appointment of Ken Cuccinelli to serve as Acting Director of USCIS is miles
22 outside the limited and specific space provided by Congress for officials to act in a Senate-
23 confirmed office. Cuccinelli’s appointment is unlawful and invalid, and it voids the actions at
24 issue in this case under both the Administrative Procedure Act and the FVRA itself.
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ARGUMENT**I. The FVRA prohibits the Executive from filling an existing vacancy by designating a new first assistant.**

In defending Cuccinelli’s appointment, the government insists that the Act allows the Executive to create a new “first assistant” *after* an office becomes vacant—thereby replacing one “first assistant” with another to enable the latter to become the acting head of a Senate-confirmed office. But the Act cannot be evaded so easily.

A. Post-vacancy “first assistants” are forbidden by the Act’s text.

Although Congress permits some agencies, including USCIS, to designate the office that will serve as “first assistant” under the Act’s succession scheme, this designation must take place before the office becomes vacant. Once the office is vacant, the first assistant “automatically” slots into the role and becomes the “acting officer” under subsection (a)(1). *Sw. Gen., Inc.*, 137 S. Ct. at 935. The Act allows only one mechanism to displace that person: designate another person from among the options provided under subsections (a)(2) and (a)(3). That narrow set of options does not include designating a new “first assistant” to replace the one who has already assumed the role of acting officer. So the only first assistant who may become the acting head of a Senate-confirmed office is the first assistant at the time the office became vacant. Because Cuccinelli was not that person, he may not act as head of USCIS.

That alone dooms the government’s defense of Cuccinelli’s title. But a textual clue in section 3345 further undermines the government’s theory of appointment by do-over. Subsection (a)(1)—which makes the first assistant the default acting agency head—reinforces the President’s lack of post-vacancy options; it does so by using a definite article: “*the* first assistant.” The President may not designate “*a*” first assistant and fill the slot with any person of his choosing—there may be only one. By contrast, when giving the President multiple options (like the designation options in subsections (a)(2) and (a)(3)), Congress used an indefinite article: “*a* person” and “*an* officer or employee.”

When the USCIS directorship became vacant, somebody other than Cuccinelli was “*the*” first assistant. That person may become the acting director. Cuccinelli may not.

B. Post-vacancy “first assistants” also defy the Act’s history, structure, and purpose.

This restriction—against designation of first assistants after a vacancy opens—is ultimately rooted in history. Through much of history, first assistants could be designated only by statute. *See Doolin v. Office of Thrift Supervision*, 139 F.3d 203, 209 n.3 (D.C. Cir. 1998) (“If the position of ‘first assistant’ is not created by statute, one line of authority indicates that § 3345 and § 3346 of the Vacancies Act do not apply.”).⁵ Even Congress, then, could not enact a specific law after a vacancy to appoint persons or fill specific vacancies. *See Buckley v. Valeo*, 424 U.S. 1, 139–40 (1976); *Springer v. Gov’t of Philippine Islands*, 277 U.S. 189, 202 (1928). Both *Buckley* and *Springer*, moreover, noted the difference between (1) Congress allowing the duties of a vacant office to devolve to an existing officer before a vacancy occurred, and (2) Congress appointing someone to an existing vacancy, outside the specific bounds of the Appointments Clause. Because the latter practice simply did not exist, Congress saw no need to expressly bar it.

Prohibiting the government from designating post-vacancy first assistants is necessary not only to respect historical practice. It also is essential to prevent the Act’s restrictions on the President’s temporary appointment powers from becoming illusory. After all, what good is the temporal requirement in subsection (a)(3)—requiring an employee promoted from within the agency to have served at least 90 days within the year before the vacancy—when the President could at any time evade that requirement by hiring someone new and designating his office the operative “first assistant”? Remarkably, the government’s reading would mean that the President’s designee need not have any experience in an agency before assuming temporary leadership positions within it, or have assumed any Senate-confirmed office.

With the wave of a pen, the government thus virtually erases these qualifications, meant to ensure the competence and loyalty of those who would safeguard nation’s highest offices, and

⁵ *See also, e.g.*, 2 Op. O.L.C. 113, 115 n.5 (1978) (“Moreover, the Attorney General has interpreted the term ‘first assistant’ as applying only to officials whose appointment has been specifically provided for by statute”); 19 Op. Att’y Gen. 503, 504 (1890) (opinion of then-Solicitor General, later President, and later Chief Justice W.H. Taft) (“I think that section 178, in the expression ‘the assistant or deputy of such chief or of such officer,’ can only refer to assistants or deputies whose appointment is specifically provided for by statute”); 28 Op. Att’y Gen. 95 (1909) (concluding the same).

1 removes essential conditions that Congress demanded before it would accept designees even
2 temporarily in those offices. But the Government may not accomplish implicitly through one
3 subsection what another forbids explicitly. That would enable the very manipulation that
4 Congress sought to prevent by enacting the Act.

5 For these reasons, the Act’s legislative history repeatedly warns that if no first assistant
6 exists when the vacancy occurs, the Executive may not appoint a new one; the Executive’s only
7 option is to exercise the designation options in subsections (a)(2) or (a)(3). *See* S. Rep. No. 105-
8 250, at 13 (“If there is no first assistant, no one is permitted by law to become an acting officer
9 until the President designates”); *id.* at 7 (“If there is no first assistant, the President must
10 designate another . . . official.”); *id.* at 14 (“[I]f there is no first assistant, and no presidential
11 designation, no one may serve as acting officer . . . the original vacancy, not the subsequent
12 departure of the acting officer, is the measuring event.”); 23 Op. O.L.C. 60, 63, 70 (1999)
13 (effectively stating same in Questions 12 & 39).

14 Until very recently, the Executive has respected the wishes of the Congress that drafted
15 the Act, recognizing that its authority to name first assistants ceases the moment a vacancy occurs.
16 For instance, the GAO warned candidates aspiring to hold acting offices that they should have
17 documentation “verify[ing] that the position (and the individual) was designated as first assistant
18 prior to the occurrence of the vacancy”—even if that required production of the “statute,
19 regulation, or other documentation that designates the individual’s position as first assistant.”
20 Letter from Carlotta C. Joyner, Dir., Strategic Issues, to Fred Thompson, Chairman, U.S. Senate
21 Comm. on Governmental Affairs, Eligibility Criteria for Individuals to Temporarily Fill Vacant
22 Positions Under the Federal Vacancies Reform Act of 1998, GAO-01-468R, at 2 (Feb. 23, 2001),
23 <https://tinyurl.com/y66vju63>. OLC reached a similar conclusion shortly after Congress passed the
24 Act: “The better understanding,” it opined, “is that you must be the first assistant when the
25 vacancy occurs in order to be the acting officer by virtue of being the first assistant.” Guidance
26 on Application of Federal Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 63–64 (1999).

1 **C. OLC’s contrary opinion misreads and misapplies the Act.**

2 OLC has since changed that initial interpretation, in a 2001 opinion concluding that
3 section (a)(1) allows the designation of a “first assistant after the vacancy occurred,” and
4 dismissing its prior opinion as “erroneous.” 25 Op. O.L.C. 177, 179 (2001),
5 <https://tinyurl.com/y4jelqmr>. But the government’s commitment to this new position has
6 wavered. Just three years ago, the government appeared to reverse itself yet again, insisting that
7 “[FVRA] curtails Presidents’ ability to elevate their chosen nominees to [presidentially appointed,
8 Senate-confirmed positions] on an acting basis through designations as first assistants occurring
9 only after (or soon before) [that] vacancy arose—thereby cutting off an avenue for
10 ‘manipulat[ing]’ the FVRA’s restrictions on categories of individuals qualified to serve.” Pet’r
11 Br. 38, *NLRB v. Sw. Gen., Inc.*, No. 15-1251, 2016 WL 4363344, at *38 (quoting S. Rep. No.
12 105-250, at 13).

13 The circumstances underlying that 2001 OLC memo also diverge sharply from those at
14 issue here. For the vacancy addressed by the OLC memo, the designated first assistant assumed
15 an office that (1) was entirely unoccupied and (2) already existed. As is customary when a new
16 president takes office, the prior first assistant had resigned, along with the Attorney General and
17 all other cabinet officials. Those circumstances make the OLC opinion virtually irrelevant to the
18 current ones. It is one thing to read the Act to allow the Executive to fill a predetermined first
19 assistant position when it is already vacant. Quite another to allow the Executive to designate an
20 entirely new first assistant position and to oust another first assistant already on the job.

21 In any event, the reasoning of OLC’s 2001-era opinion is unpersuasive. It hinges almost
22 entirely on section 3345(b)(1), which bars many people from serving as an acting officer if they
23 have been nominated to the office and have not previously served in the position of first assistant
24 to the office. The government reasoned this provision would become superfluous “if an individual
25 who was not the first assistant when the vacancy occurred is already flatly prohibited from serving
26 in an acting capacity”—presumably because the Government assumed that section 3345(b)(1)(A)
27 applied only to those who would be coming into the office as the first assistant under section
28 (a)(1). 25 Op. O.L.C. at 179. But the Supreme Court rejected that assumption in *Southwest*

1 *General*, concluding “that the prohibition in subsection (b)(1) applies to anyone performing acting
2 service under the FVRA” not only to “first assistants performing acting service under subsection
3 (a)(1).” 137 S. Ct. at 938. The passage of time has thus diminished OLC’s argument considerably.
4 *See also* Stephen Migala, *The Vacancies Act and a Post-Vacancy First Assistant of USCIS*, at 15–
5 26 (Sept. 9, 2019), <https://ssrn.com/abstract=3450843> (highlighting problems with the OLC
6 opinion).

7 The 2001 OLC opinion also dwells on a minor change, to a single line in section 3345,
8 made when the Vacancies Act was recodified as the FVRA in 1998. In particular, the phrase “the
9 first assistant of the *officer*” was changed to “the first assistant to the *office* [of such officer].” 25
10 Op. O.L.C. at 179. OLC insists that this change freed Executive officials to designate first
11 assistants whenever they liked, because (claimed OLC) an “officer” referred to a definite person
12 with a definite assistant who could exist only on the date that the vacancy arose, while an “office”
13 is more generic. But this reed is far too thin. As the Act’s legislative history makes clear, this
14 change was technical, not substantive. *See* S. Rep. No. 105-250, at 12 (“As under current law, the
15 term ‘first assistant’ is used to refer to the first assistant to the ‘officer.’ However, the practice
16 under current law, which would be continued by this bill, is that the first assistant is actually the
17 first assistant to the vacant office.”); 144 Cong. Rec. S12,822 (daily ed. Oct. 21, 1998) (statement
18 of Senator Thompson) (“[T]he change in wording is not intended to alter case law on the meaning
19 of the term ‘first assistant.’”). And as OLC’s 2001 interpretation has been undermined by
20 intervening events, as well as by its own incomplete and incorrect reasoning, it may not allow the
21 Executive to contravene the Act’s plain language, history, and purpose.

22 Ultimately, then, Cuccinelli cannot serve as the first assistant to the Director of USCIS
23 after the director position became vacant.

24 **II. The Act prohibits the Executive from stripping a first assistant of the duties and**
25 **responsibilities that accompany an acting agency position.**

26 The statutory problem created by assigning Cuccinelli the role of first assistant is only one
27 side of the legally fraught equation in this case. The Executive’s decision to divest Koumans of
28 his position as first assistant and acting director of USCIS—solely to give that role to Cuccinelli—

1 presents an entirely separate problem, and a serious breach of the boundaries between the
2 Executive and Legislative Branches in the area of temporary appointments.

3 That is because Congress has conveyed, through the FVRA, powers that attach to
4 whichever office assumes the role of first assistant to a Senate-confirmed position—even in
5 agencies, like USCIS, for which Congress has not specified the particular office to serve as first
6 assistant. Those powers are triggered when a vacancy in the Senate-confirmed office occurs,
7 making that office the one that “shall perform the functions and duties of the office temporarily,”
8 and vesting those functions and duties in a particular officer until the vacancy is filled (or the
9 President properly delegates someone else to fulfill the role). 5 U.S.C. § 3345(a)(1). That is a
10 proper exercise of Congress’s Appointment authority, because Congress may act by devolving
11 upon a certain office particular powers and duties, including those to temporarily perform the
12 duties of another, higher office. *See* Migala, *supra*, at 40 & n.160 (citing *Shoemaker v. United*
13 *States*, 147 U.S. 282, 301 (1893); *Weiss v. United States*, 510 U.S. 163, 176 (1994)).

14 As a result, the full weight of Congress’s appointment powers lies behind the conveyance
15 of power to temporarily assume higher office that accompanies the role of first assistant. That
16 power is absolute, and the Executive branch must yield to it. Thus, when the designated first
17 assistant assumes an agency’s powers as its acting head, neither the President nor anyone else
18 within the Executive may strip those powers away—except through means that Congress itself
19 has provided. Accordingly, after the office designated as first assistant has ripened into Acting
20 Director of USCIS, the administration may no more transfer that designation from one office to
21 another than the Senate-confirmed Director of USCIS could sluff off all of the office’s power and
22 responsibility onto anyone he or she chooses. This means that while it may arguably be a matter
23 of administrative reshuffling to change the designation of a first assistant *before* there is a
24 vacancy—when there is no one occupying the office of acting head of USCIS and assuming the
25 powers of the office—the situation changes after a vacancy has triggered the transfer of power to
26 the first assistant. Once that occurs, the choice to divest an office of the first assistant role lies
27 beyond the power of the Secretary and the Executive.
28

1 **III. The manner in which this transfer of first assistant authority took place also violates**
2 **the Act.**

3 The constitutional and statutory problems with the Cuccinelli appointment are not isolated
4 to the transfer of first assistant authority that made it happen. The manner in which the
5 appointment was undertaken likewise creates a series of problems under the FVRA.

6 The first problem is the identity of the person doing the replacing. It was not the President
7 who hired Cuccinelli as Principal Deputy Director or transferred to that newly created office the
8 role of first assistant to the Director. It was Kevin McAleenan, the Acting Secretary of Homeland
9 Security. But the constitutional appointments authority may be specifically vested by statute
10 alone. And the FVRA, the only applicable appointments statute, is blunt: The authority to
11 designate officials to serve as acting heads of Senate-confirmed offices belongs to “the President
12 (and only the President).” 5 U.S.C. § 3345(a)(2) & (3). There is no authority—none—that allows
13 the President’s appointment authority to be wielded by others within in the Executive Branch.

14 The second problem is the statutory authority that McAleenan relied upon to justify it. In
15 his memorandum announcing Cuccinelli’s appointment, McAleenan nowhere cited the FVRA or
16 purported to rely on its provisions allowing for the designation of acting officials. Instead, he
17 cited DHS’s enabling statute, and generic delegation statutes providing authority to agency heads
18 to delegate functions within the agency. *E.g.*, Migala, *supra*, at 14 (reproducing the memorandum
19 which cited 5 U.S.C. §§ 301, 302; 6 U.S.C. § 112). Whatever role these vesting and delegation
20 statutes might play in assigning the role of first assistant before a vacancy occurs, the FVRA states
21 that they cannot be used to provide the President options outside the FVRA to fill an existing
22 vacancy. *See* 5 U.S.C. § 3347(b). That is because Congress enacted the FVRA in direct response
23 to abuses of enabling and delegation statutes like these.

24 Indeed, the Cuccinelli episode reads like a sad retelling of the crises that finally motivated
25 Congress to end appointment abuses and enact the FVRA. Things came to a head in 1997, when
26 the Senate Judiciary Committee refused to refer Bill Lan Lee, President Clinton’s nominee to
27 head the Office of Civil Rights, to a floor vote. *See, e.g.*, Steven A. Holmes, *G.O.P Leader Says*
28 *Nominee Will Be Halted*, N.Y. Times, Nov. 10, 1997, at A22, <https://tinyurl.com/yyxtzmt2>. The

1 President responded by directing the Attorney General to appoint Lee as “Acting” Assistant
2 Attorney General for Civil Rights by delegating those responsibilities to him, planning for him to
3 serve beyond the Vacancies Act’s time limits. That action produced public outcry and calls to
4 amend the Vacancies Act to explicitly prohibit such presidential end-arounds.⁶

5 The parallels between the illegal appointments of Lee and Cuccinelli are striking. Both
6 were hired from outside the government and would have been ineligible to displace a first
7 assistant under the then-governing vacancies statutes. Both faced significant resistance from the
8 Senate that would have prevented them from ever obtaining a permanent confirmation. And to
9 bypass these barriers, both were hired by department heads to positions that did not previously
10 exist, to positions termed a “Principal Deputy,” and by use of general vesting and delegation
11 statutes, including 5 U.S.C. §§ 301 and 302, in an effort to evade the FVRA.⁷

12 The only real difference is that, unlike Cuccinelli, Lee took office only after the Deputy
13 resigned, meaning there was no “first assistant” or already acting deputy for him to displace.
14 Cuccinelli, conversely, stepped into an acting office that was already occupied: Deputy Director
15 Koumans was not removed and not resign. He remains able to serve, as he has resumed his
16 position as Deputy. Cuccinelli’s appointment—also displacing an existing office and displacing
17 the acting official—is thus worse than the appointment that led Congress to overhaul the entire
18 temporary appointment regime. And that is still another reason why Cuccinelli’s appointment
19 violates Congress’s statutory appointments scheme and must be deemed unlawful.

22 ⁶ E.g., John M. Broder, *Clinton, Softening Slap at Senate, Names “Acting” Civil Rights Chief*,
23 N.Y. Times, Dec. 16, 1997, at A1, <https://tinyurl.com/yyssl4g3>; Stewart M. Powell, *Lee Wins*
24 *Civil Rights Job Despite GOP Block: President Dodges Senate Opposition and Names L.A.*
Lawyer to Post on an Acting Basis, S.F. Examiner, Dec. 15, 1997, at A1.

25 ⁷ Compare Migala, *supra*, at 14 (Memorandum from Kevin McAleenan, Acting Secretary DHS,
26 to Kenneth Cuccinelli, re: Appointment as Principal Deputy Director (June 10, 2019)), with DOJ
27 Order No. 2134-97, “Designating Bill Lann Lee as Acting Assistant Attorney General for the
28 Civil Rights Division” (Dec. 15, 1997), *reprinted in Oversight of the Implementation of the*
Vacancies Act: Hearing on S. 2176 Before the S. Comm. on Governmental Affairs, 105th Cong.
102 (Mar. 18, 1998) (S. Hrg. 105-495).

1 **IV. Vacatur of USCIS’s actions and an injunction prohibiting future actions are the**
2 **appropriate remedies for these numerous and serious legal infirmities.**

3 The remedy for this unlawful appointment is clear: Cuccinelli must be enjoined from
4 taking any further action as Acting USCIS Director. Federal courts have repeatedly remedied
5 illegal appointments this way. *See Williams v. Phillips*, 360 F. Supp. 1363, 1371 (D.D.C. 1973)
6 (“[T]he Court finds that the defendant Phillips was not appointed lawfully to his post as Acting
7 Director of OEO. An injunction will issue to restrain him from taking any actions as Acting
8 Director of OEO.”); *see also Olympic Fed. Sav. & Loan Ass’n v. Dir., Office of Thrift Supervision*,
9 732 F. Supp. 1183, 1202 (D.D.C.), *appeal dismissed and remanded*, 903 F.2d 837 (D.C. Cir.
10 1990). Cuccinelli’s actions or influences that are the subject of Plaintiffs complaint must also be
11 vacated. This latter result flows from two separate statutes.

12 First, vacatur is required under the terms of the Act itself. The FVRA has its own
13 enforcement mechanism; if an agency’s functions or duties are being performed temporarily by
14 someone whom the Act does not authorize to perform them, then actions taken by this person
15 “shall have no force or effect” and “may not be ratified.” 5 U.S.C. § 3348(d). In other FVRA
16 lawsuits, the government has argued that vacatur of *ultra vires* agency action is appropriate only
17 when the purported official performed some statutory or regulatory duty that expressly specified
18 itself to be non-delegable. But the FVRA’s text reflects no such qualification.

19 Such a drastic limitation would also undermine the very purpose of the FVRA’s statutory
20 remedy. This enforcement mechanism was created to overturn a decision of the D.C. Circuit,
21 *Doolin v. Office of Thrift Supervision*, 139 F.3d 203, 204, 211 (D.C. Cir. 1998), holding that
22 actions by temporary officers acting *ultra vires* should be considered harmless when they are later
23 ratified by a properly appointed official. *See* S. Rep. No. 105-250, at 8 (*Doolin*’s harmless error
24 conclusion in light of a subsequent ratification action “demands legislative response”); *see also*
25 *Migala, supra*, at 35 (discussing the anti-ratification provision). Congress’s “legislative response”
26 was to make vacatur the automatic, universal, and mandatory remedy for *all* violations of the
27 FVRA’s appointment provisions—going so far as to preclude allowing even subsequent
28 ratification to cure an FVRA violation. In drafting a remedial provision so absolute, Congress did

1 not mean to have that remedy apply to only a smattering of applications in a few isolated statutory
2 contexts; it certainly did not intend to do so through legislative silence in *other* statutes. There is, in
3 sum, no basis for the government’s self-serving attempt to leave the Act toothless.

4 Application of the statutory remedy requires vacatur of all USCIS actions that Plaintiffs
5 have challenged. Here, 6 U.S.C. § 271(a)(3)(A), (B), or (D) offer the only authorities under which
6 a USCIS Director could exert his authority.⁸ Because each authority in 6 U.S.C. § 271(a) is
7 “required by statute to be performed by” the USCIS Director, and because that statute does not
8 empower any other officer with that authority (i.e. the duty is assigned to “only that officer” in
9 the subject statute), the actions taken by Mr. Cuccinelli qualify as “action[s]” that have “no force
10 or effect” under the FVRA’s enforcement mechanism. 5 U.S.C. § 3348.

11 Second and separately, vacatur is also required under the terms of the APA, and the D.C.
12 Circuit’s decision in *Southwest General* explains why. *See Sw. Gen., Inc. v. NLRB*, 796 F.3d 67
13 (D.C. Cir. 2015). There, the D.C. Circuit noted that even without application of the FVRA’s
14 enforcement mechanism, relief is still available under two APA-based irregularity doctrines: (1)
15 prejudicial error under 5 U.S.C. § 706; and (2) structural error. The “burden of demonstrating that
16 the FVRA violation is non-harmless under the [APA] . . . is not a particularly onerous
17 requirement.” *Sw Gen.*, 796 F.3d at 80–81. In particular, if a court “cannot be confident that the
18 [agency action] would have issued under an Acting [official] other than [the one in question],”
19 then that “uncertainty is sufficient” for relief. *Id.* For the actions at issue here, such confidence is
20 impossible.

21 But for Cuccinelli’s input and prejudice, the result challenged would either not have
22 occurred or would have differed materially. And structural violations, such as those underlying
23 an Appointment Clause claim—which naturally results from an FVRA violation—require even
24 less direct impact and “will proceed even where any possible injury is radically attenuated.”
25 *Landry v. FDIC*, 204 F.3d 1125, 1131 (D.C. Cir. 2000). That burden is more than met here.

26
27
28 ⁸ 6 U.S.C. § 271(a)(3)(A) is a cross reference, which includes § 271(b), that, in turn, authorizes
the USCIS Director to set policies, like the ones at issue here.

CONCLUSION

For the foregoing reasons, Mr. Cuccinelli’s actions should be preliminarily enjoined.

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Respectfully submitted,

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*Admission *Pro Hac Vice* Pending