1 BEFORE THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
2
3 L.M.-M., et al., . Case Number 19-CV-02676
4 Plaintiffs, .
5 vs. . Washington, D.C.
. December 3, 2019
6 KENNETH T. CUCCINELLI, II, .
et al., . 10:06 a.m.
7 .
Defendants. .
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TRANSCRIPT OF MOTION HEARING
10 BEFORE THE HONORABLE RANDOLPH D. MOSS
UNITED STATES DISTRICT JUDGE
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10 Proceedings recorded by stenotype shorthand.
Transcript produced by computer-aided transcription.
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1 P R O C E E D I N G S

2 (Call to order of the court.)

3 THE COURTROOM DEPUTY: Civil Action 19-2676, L.M.-M,

4 et al., versus Kenneth T. Cuccinelli, II, et al.

5 Will counsel please approach the podium and identify

6 yourselves for the record.

7 MR. LEWIS: Good morning, Your Honor. John Lewis for

8 the plaintiffs, and I am joined at counsel table by Ben Seel of

9 Democracy Forward, Manoj Govindaiah of RAICES, and Michelle

10 Mendez of CLINIC.

11 THE COURT: Okay. Good morning to all of you.

12 MR. RAMKUMAR: Good morning, Your Honor. Archith

13 Ramkumar for the defendants.

14 I will be handling each of the issues today except for the

15 Appointments Clause issue. My colleague at counsel table will

16 be handling the Appointments Clause issue today.

17 THE COURT: And who is your colleague at counsel

18 table?

19 MR. RAMKUMAR: Mr. Burnham, who will introduce himself

20 momentarily.

21 THE COURT: Okay. Thank you.

22 MR. BURNHAM: Good morning, Your Honor. James Burnham

23 from the Civil Division, joined by a colleague, Chetan Patil,

24 also from the Civil Division.

25 THE COURT: Okay. Good morning to you.

1 All right. Mr. Lewis, it is your motion. Why don't you
2 start things off.
3 MR. LEWIS: Good morning. May it please the Court.
4 John Lewis for the plaintiffs.
5 In this case an unlawful acting official inexplicably
6 issued a set of unlawful directives that eviscerate procedural
7 protections for asylum seekers fleeing persecution. All we are
8 asking the Court to do, though, is to temporarily reinstate the
9 policies that were in effect for over two decades.
10 It's our view that this Court's decision in *O.A.* disposes
11 of most of the jurisdictional issues. So unless the Court has a
12 different preference, I would propose to start with the merits.
13 THE COURT: I'm happy to hear whatever you want to
14 present.
15 MR. LEWIS: Okay.
16 THE COURT: Well, actually, let me ask you one
17 jurisdictional question to start with. Two of the plaintiffs in
18 the case, as I understand it, have received positive credible
19 fear determinations at this point; correct?
20 MR. LEWIS: That's correct, Your Honor.
21 THE COURT: So is the case at least moot as to them?
22 MR. LEWIS: So we are not seeking preliminary relief
23 on their behalf, because they're not at imminent threat of
24 deportation. We don't believe that their claims are, in fact,
25 moot, but it's not a question that the Court needs to decide on

1 this motion.
2 THE COURT: Well, I do like to decide jurisdictional
3 issues at each step. And so, I guess, my question is, what is
4 the argument as to why the case isn't moot as to them?
5 MR. LEWIS: Fair enough, Your Honor.
6 So even though they have been placed in Section 240
7 proceedings, the credible fear record is still relevant to that
8 determination. The immigration judge in those proceedings can
9 consider the original credible fear findings and in some cases
10 will look to the credible fear record to impeach or to shed
11 light on the statements that were made. So a defective record
12 at that process still inflicts ongoing harm throughout the rest
13 of the case.
14 But again, we don't think that this is something that the
15 Court has to decide on a preliminary injunction motion.
16 THE COURT: So would the relief that you would be
17 seeking with respect to those plaintiffs, then, be expungement
18 of that record, or what relief would you be seeking?
19 MR. LEWIS: I think that's right, Your Honor. Again,
20 I think, you know, this happened after we filed the complaint.
21 And so the complaint doesn't include a specific request for
22 relief of that nature. And I think it's something that we would
23 need to analyze and brief in due course. But I think it would
24 be something like that, yes.
25 THE COURT: So one of the reasons I'm asking this

1 question is, I am wondering whether I ought to exercise my
2 authority under Rule 65 just to consolidate the merits with the
3 preliminary injunction and to resolve this case on the merits at
4 this point.
5 I would like to hear from the parties on this, but it
6 doesn't seem to me that there's a whole lot more that a second
7 round of briefing is going to do in this case. And I don't know
8 why we should go through that exercise, and why I shouldn't
9 simply just decide the case as summary judgment.
10 And if the parties need to file any additional materials
11 with respect to summary judgment, I would welcome that. But I
12 guess I would like your views on why I shouldn't just treat this
13 as summary judgment at this point.
14 MR. LEWIS: So we are not opposed to that, Your Honor.
15 I think we've presented the factual showing that we would
16 largely present on motion for summary judgment.
17 The one issue is that the preliminary injunction papers
18 don't address all of the claims in the complaint. And so if
19 there needed to be additional briefing on the other claims or if
20 the Court proceeded in a partial summary judgment frame, that's
21 something that we would --
22 THE COURT: What are the other claims that are in the
23 complaint?
24 MR. LEWIS: The other claims are a First Amendment
25 claim about association with their lawyers. There's a notice

1 and comment claim alleging that this is a legislative rule that
2 requires notice and comment. There's an Appointments Clause
3 claim that's related to the Federal Vacancies Reform Act, and
4 then there's an ultra vires claim related to the FVRA as well.
5 THE COURT: Okay. All right. You are welcome to
6 proceed.
7 MR. LEWIS: Sure.
8 So the first claims I would like to focus on are the
9 substantive claims dealing with the substance of the directives,
10 and then I can talk about the Federal Vacancies Reform Act in a
11 bit.
12 As far as the statutory claim is concerned, under the
13 governing statutes, asylum seekers in credible fear proceedings
14 are entitled to certain procedural protections. When Congress
15 implemented the expedited removal system in 1997, it carved out
16 asylum seekers and gave them certain statutory rights to protect
17 them from erroneous deportation. And in implementing that
18 congressional mandate, the executive branch gave it careful
19 consideration and found that asylum seekers are entitled to 48
20 hours to prepare for their interviews.
21 Now, however, asylum seekers are only entitled to 24 hours.
22 THE COURT: Yet the 48 hours was not in a regulation.
23 My understanding is it was in a preamble to a regulation and
24 didn't have the force of a rule. Correct?
25 MR. LEWIS: So it's discussed in the preamble to the

1 regulation. We don't actually know the manner in which they
2 promulgated the 48-hour period. There may be some internal
3 agency document that hasn't been publicly revealed.
4 But we do know from Mr. Cuccinelli's decision memorandum in
5 the administrative record that from 1997 on the period was 48
6 hours. And then in 2015, they created the separate period for
7 people at family detention centers of 72 hours.
8 THE COURT: Okay.
9 MR. LEWIS: So one of the statutes and statutory
10 protections that asylum seekers are entitled to is the right to
11 consult with a third party of their choosing. And in practice,
12 that tends to be a counsel or a friend that has important facts
13 for their case. That right can only mean a right to
14 meaningfully consult. I don't think we would be here today if
15 the government had only offered asylum seekers a minute to
16 consult. I don't even think they would dispute that that's not
17 a meaningful opportunity.
18 So the question is, what is a meaningful opportunity? And
19 more specifically, how can 24 hours be a meaningful opportunity?
20 So we've cited to a number of cases in the papers that
21 refer to the right to consult as a right to counsel. But I
22 don't actually think that the Court needs to decide that this is
23 a right to counsel. The point is just that in analyzing similar
24 rights, courts have held that they entitle asylum seekers to a
25 meaningful opportunity. And what that means, we think, is

1 meaningful time to consult.
2 And what we've shown in the declarations that we've adduced
3 in this case is that 24 hours isn't enough time for most asylum
4 seekers to even make contact with an attorney. Most people pass
5 through these facilities without ever seeing an attorney. But
6 even when they're able to do so, they receive an hour or two.
7 In the case of L.M.-M., it was about an hour and a half,
8 and that is simply not enough time to fully talk to a lawyer, to
9 understand the process, to prepare to say claims that you may
10 never have voiced to another person before about your trauma and
11 persecution, and to perform all the other functions that counsel
12 serves.
13 THE COURT: How is the Court supposed to decide that
14 question? So if this were -- if the 24- or 48-hour period of
15 time were set forth in a regulation promulgated with notice and
16 comment, the Court would -- might well defer to the agency and
17 say, Well, is it reasonable, did the agency consider all the
18 relevant factors in making that determination?
19 Here, there's not a rulemaking in that way. I mean,
20 there's a rule, given the broad definition of a rule in the APA,
21 but there's not been a rulemaking. There's not a process for
22 which the Court to defer.
23 On the other hand, I don't really know -- it doesn't strike
24 me necessarily as just a question of law. Do I need to have a
25 factual hearing, make factual findings with respect to the

1 reasonableness? And is that in my authority in a case of this
2 nature to actually make factual findings with respect to
3 whether, in fact, the period of time was meaningful?
4 MR. LEWIS: So I think there are a couple of questions
5 there. The first is that, I think, Your Honor, as you noted,
6 this case would be a different one if they had promulgated this
7 via notice and comment rulemaking. There would be a different
8 set of deference doctrines that are applicable here, but they're
9 not.
10 In terms of how the Court can decide whether there's a
11 meaningful opportunity, I don't think that the Court needs to
12 hold a full-bore evidentiary hearing or take testimony on the
13 subject. I think the Court can consider the kind of factual
14 statements that are typically adduced at a preliminary
15 injunction motion or in a motion for summary judgment, here
16 specifically the affidavits we've put forward, which I would
17 note none of it is contested by the government in terms of how
18 this process plays out. And so I think that's more than
19 sufficient for the Court to make any factual findings that it
20 needs.
21 But I think the fundamental question is a legal question.
22 I think it's a question of what sort of floor is reasonable
23 under the statutes and regulations. And what we're submitting
24 is that 24 hours is not a meaningful floor. The Court doesn't
25 necessarily need to decide what is a meaningful floor. It just

1 needs to say that 24 hours is not meaningful, because as we've
2 shown in the declarations, most asylum seekers can't actually
3 even make contact with an attorney prior to their interviews.
4 So --
5 THE COURT: Is that an as-applied determination or a
6 facial challenge on that ground?
7 MR. LEWIS: I think that this challenge is properly
8 deemed facial. It doesn't turn on how much time an individual
9 person receives. It's a question of whether the floor that's
10 provided by the memorandum that Mr. Cuccinelli signed is a
11 reasonable one. And so I think the Court is really making a
12 facial determination. It's deciding whether that policy across
13 the board is lawful.
14 So I think that encapsulates why the shortened wait period
15 directive which shortens it to 24 hours is unlawful. We also
16 have a claim involving the new directive that denies
17 continuances unless somebody can show extraordinary
18 circumstances. I think the arguments for that directive are
19 very similar to the other directive. It also denies a
20 meaningful opportunity to consult.
21 But I think there's an additional reason why the
22 continuance directive is unlawful, because it violates USCIS's
23 binding regulation concerning continuances.
24 So that regulation says that an asylum seeker is entitled
25 to a continuance if they cannot participate effectively in the

1 interview. It enumerates a couple of circumstances, but that
2 list isn't meant to be exclusive.
3 What USCIS did through the continuance directive is
4 unlawfully cabin asylum officers' discretion to give those
5 continuances. Even if an asylum seeker can't participate
6 effectively in the interview, if the reasons behind that are not
7 extraordinary in nature, then asylum officers are now supposed
8 to deny the continuance.
9 And so what that really says is, even if you haven't had an
10 opportunity to talk to a lawyer, if you're not in the hospital
11 or you don't have another court proceeding at the same time,
12 there's no basis for continuing the interview.
13 And in practice, virtually all continuance requests are now
14 denied.
15 So we don't think that can be upheld under the line of
16 cases that begins with *Acardian* and terminates with *Clean Air*
17 *Project* that we cited in the papers, that a regulation is
18 binding if and when it's -- until it's repealed.
19 THE COURT: But doesn't that at least require an
20 as-applied analysis, I mean, where there's actually a request
21 for a continuance and the request was denied, and that would
22 only limit the relief to those who actually request a
23 continuance and did not reasonably receive them?
24 MR. LEWIS: I'm not sure that's right. Again, I think
25 the question is the lawfulness of the policy across the board

1 and not the law --
2 THE COURT: But that's not the way courts do law.
3 They don't simply say, Well, you know, I don't care if you were
4 injured or not by this, you know, come on in, and I can just
5 declare the policy as unlawful, and if I set the policy aside,
6 then you get to start over again. But if you didn't do anything
7 to actually assert your rights, typically, a court wouldn't say,
8 Well, you know, you've get a do-over again, unless you were
9 misled in some way, but there's not an argument here that they
10 were misled and told that they weren't entitled to a continuance
11 and, therefore, they didn't ask for one.
12 MR. LEWIS: So as a matter of standing, I think that's
13 completely right. And I'm not saying that somebody who never
14 sought a continuance is necessarily entitled to relief under
15 this, with the caveat that now that people understand that
16 continuances will never be granted, people don't ask for them
17 with the same frequency.
18 THE COURT: You don't have a class action here. So
19 the question is, the individual plaintiffs or RAICES, what is
20 their basis for standing? So with respect to the seven
21 individual plaintiffs, which, if any, of those requested a
22 continuance?
23 MR. LEWIS: So there are two mothers in the mix, and
24 then there are three children who are linked to the mothers'
25 claims. So of the two parents, M.A.-H. expressly requested a

1 continuance and was given 30 minutes and then told that she had
2 to proceed to the interview, which simply isn't enough time to
3 enable somebody to participate effectively. L.M.-M. did not
4 request a continuance, that's true.
5 But I think the overarching point is that because
6 continuances are no longer granted with any frequency
7 whatsoever, people don't necessarily know that continuances are
8 available for them.
9 THE COURT: That may go to a RAICES' standing, but
10 that doesn't help L.M. with respect to that claim, for example.
11 MR. LEWIS: Perhaps not, Your Honor. But I think as
12 Your Honor noted, RAICES continually seeks continuances on
13 behalf of their clients. And so RAICES also has standing to
14 press this claim in addition to M.A.-H. as well.
15 And the denial of continuances inflicts operational injury
16 on RAICES. It perceptively impairs its operations by preventing
17 it from seeking the time that it needs to make contact with and
18 consult with clients. So I think RAICES can assert this claim
19 full bore.
20 So I think that's it for the continuance denial directive.
21 So I would briefly touch on the no legal orientation directive,
22 which I think involves a slightly different set of issues. This
23 directive, as we understand it, is really only in effect at the
24 Dilley Detention Center, which previously offered legal
25 orientation.

1 So the issue with this directive is that under the same
2 regulation that concerns continuances, USCIS is required to give
3 asylum seekers information in a form that they can understand,
4 and that will enable them to participate effectively.
5 And for the kind of people that are detained at the Dilley
6 Detention Center, simply giving them a form that's not
7 necessarily translated in a language that they speak, that
8 doesn't answer any questions that they might have simply isn't
9 enough to live up to that statutory and regulatory mandate.
10 THE COURT: Is there a directive, though, with respect
11 to the legal orientation? Is there something that
12 Mr. Cuccinelli did with respect to that that you have in the
13 record?
14 MR. LEWIS: So we contend that there is. And the
15 question at this stage of the proceedings is whether plaintiffs
16 are likely to show that there is jurisdiction and not
17 necessarily whether the facts are in the record now to
18 definitively show that the Court has jurisdiction. I think
19 we've made that showing.
20 So the Cuccinelli memorandum and its emphasis on expediting
21 the process, I think, can be logically read to prevent people
22 from providing legal orientation.
23 In fact, if you look at the language of the memorandum
24 itself, it refers to the 72-hour period at family detention
25 centers as commencing on reorientation. So there's a

1 recognition that the process involves some additional
2 orientation at family detention centers.
3 And so again, I completely take Your Honor's point that the
4 Cuccinelli memorandum does not say stop providing legal
5 orientation. But I don't think that's the showing that's
6 required. I think the directive to stop providing legal
7 orientation logically flows from the Cuccinelli memorandum.
8 And I would also note that the government can clear up any
9 confusion on this score. They can explain how the decision was
10 made to stop providing legal orientation. But notably, they
11 don't. They just say that there's no written directive that
12 came down from USCIS headquarters. That leaves open whether
13 it's encapsulated in the memorandum or whether there was a
14 facility-specific written directive implementing the broader
15 overarching Cuccinelli directive.
16 So at this point I think there's more than enough for the
17 Court to have jurisdiction over this.
18 THE COURT: Is there reason to believe that any of the
19 named individual plaintiffs in this case face imminent removal?
20 MR. LEWIS: So they all have final orders of removal.
21 And what happens in due course is that --
22 THE COURT: Even those who actually have had
23 positive --
24 MR. LEWIS: Sorry. The five individual plaintiffs
25 that received negative determinations now have final orders of

1 removal. Right now, they don't face imminent removal because
2 the government has agreed to stay their removal pending the
3 outcome of this motion. But we have no reason to think that if
4 the Court were to deny the motion, that they wouldn't be on the
5 first plane out. And in fact, that's typically what happens.
6 If they can get a plane to send somebody back, they will. So it
7 may be a matter of days or maybe even a week. But there's
8 nothing else stopping them from being removed from the country.
9 THE COURT: And what relief are you seeking? If the
10 Court were to say, Okay, you're right, give them 48 hours to
11 prepare, the government then says to the individuals, Okay, you
12 now have 48 hours, we're going to have your -- we'll have a new
13 credible fear determination. They do that. They say, Haven't
14 demonstrated a credible fear, and we're going to put you back in
15 removal, and you're gone.
16 The government could do that; right?
17 MR. LEWIS: So as a matter of final relief that we
18 might get on ultimate disposition of the case, that is what we
19 would be asking for, to vacate the negative credible fear
20 determinations and then to commence the process over again for
21 them, to give them 48 hours. And then they come back in and do
22 a new interview, and the asylum officer makes a determination.
23 If it's negative, they go up to the immigration judge.
24 At this stage of the proceedings, of course, we are only
25 asking that the Court stay their removals. And I want to be

1 precise in my language. The Court should stay the removals
2 rather than enjoin them, given the different standards that are
3 applicable to injunctions of removals. The *Khan v. Holder*
4 makes clear that the stay standard is still applicable to stays
5 of removal.
6 THE COURT: So all you are asking at this point is
7 that the Court stay the removal of the five individuals?
8 MR. LEWIS: With respect to them. We are also asking
9 for an injunction of the policies as a whole. But as to the
10 individual plaintiffs, it's just a stay of their removals,
11 that's right, Your Honor.
12 THE COURT: And do they at this point now have
13 determinations under Section 1225(b) in a manner that would
14 support relief under 1252(e)(3)?
15 MR. LEWIS: So I think that gets at an underlying
16 question concerning 1252(e)(3). 1252(e)(3) doesn't require that
17 somebody be subject to a determination to permit --
18 THE COURT: No, I understand. I've held that
19 previously.
20 But my question precisely, there's two prongs to it.
21 There's two ways under 1252(e)(3). One way is where there's a
22 determination, and the other way is where it's a challenge to
23 the implementation of the policy under -- implemented under
24 1225(b).
25 MR. LEWIS: That's entirely right, Your Honor. And so

1 the individual plaintiffs have received those determinations.
2 They've received final determinations that they are removable,
3 and now they're subject to removal.
4 My point is just that that statute, as Your Honor noted on
5 *O.A.*, doesn't preclude RAICES from bringing suit either.
6 So unless there are further questions on the statutory
7 claim, I would like to move the Federal Vacancies Reform Act
8 claim. Or actually, let's move to the arbitrary and capricious
9 claim next, since the two are logically related, unless Your
10 Honor would prefer otherwise.
11 THE COURT: However you want to proceed.
12 MR. LEWIS: So I have explained why the statutes
13 prohibit the government from enacting the policies that they
14 did. But even if the statutes give them the authority to impose
15 24 hours in the other directives, those policies are still
16 arbitrary and capricious because the government didn't fully
17 consider the interests of asylum seekers and the organizations
18 that serve them and because the government didn't present any
19 evidence that these directives are necessary.
20 THE COURT: So I'm having trouble thinking through
21 that issue, because ordinarily that comes up in the context of
22 notice and comment rulemaking. And there are lots of things
23 that agencies do all the time where the Court doesn't set aside
24 a policy based on the fact that the agency didn't engage in
25 that, the type of *State Farm* consideration of all the issues.

1 Are there cases that talk about applying that prong, the
2 arbitrary and capricious test, to rules that are not subject to
3 notice and comment?
4 MR. LEWIS: So yes, Your Honor. And I think the most
5 recent example is Judge Jackson's decision in *Make the Road*
6 concerning the expedited removal notice that didn't receive
7 notice and comment before it was enacted.
8 I think the standard across the board is whether the
9 agency's action is arbitrary and capricious. The forum that the
10 agency takes action doesn't make that standard inapplicable.
11 I think the nature of the Court's review may turn in some
12 sense on the significance of the agency's action. A more
13 significant action deserves more search and review. But I don't
14 think that the forum the agency decided to enact this in means
15 that it gets less search and review.
16 In fact, I think typically, it's the other way. We cite to
17 the *Christensen* and *Barnhart* decisions in the papers, that
18 things that are not subject to notice and comment review don't
19 typically receive *Chevron* deference.
20 THE COURT: But in the context of something that's not
21 subject to notice and comment rulemaking, how do you know
22 whether they've given consideration to those issues or not? I
23 mean, an agency can just issue a directive saying, This is how
24 we're going to do things. The agency head can say, you know,
25 From now on, this is what we're going to do. And the agency

1 head may have met for three weeks in a conference room and done
2 nothing but consider all the relevant ramifications, and there's
3 a one-sentence rule that comes out.
4 In a notice and comment rulemaking or in agency
5 adjudications, there's some statement of the agency's reasons
6 and a requirement that there be a statement of agency reasons.
7 And so I suppose another way of putting my question is, is
8 there a requirement where an agency acts in a manner that --
9 without notice and comment rulemaking, acts about an
10 adjudication, that it explain the reasons for its decision?
11 MR. LEWIS: I think the answer is yes. I don't think
12 that the explanation necessarily gets memorialized in a written
13 document like the one that we have here. But if the directive
14 is challenged in court, the agency will have to supply the
15 administrative record, and it will usually point to something
16 that encapsulates the reasoning that led it to adopt, you know,
17 the thing at issue.
18 And I think in some cases, courts have remanded to the
19 agency to provide that fuller explication if the administrative
20 record isn't sufficient to enable the Court to reach a decision.
21 But I think these questions are far afield from what we
22 have here, which is a written memorandum that documents why
23 USCIS made these decisions, as well as a 141-page record that
24 they say, you know, provides evidence that supports that
25 determination. We say that it doesn't. But there is enough

1 here for the Court to decide the legality of the directives.
2 And so if Your Honor looks at the memorandum, there is no
3 detailed consideration of the interests of asylum seekers.
4 There's no consideration of the interests of RAICES and other
5 legal services organizations.
6 And under the Supreme Court's decisions in *FCC v. Fox* and
7 the D.C. Circuit decisions applying that analysis, that's a per
8 se reason why the directives are arbitrary and capricious. They
9 didn't consider the interests of the people that would be most
10 directly affected by the policy at issue.
11 And in that respect, I think this court -- this case is a
12 lot like the *Make the Road* decision, where the agency invokes
13 similar nebulous considerations about the situation at the
14 southwest border but never looked at the interest of immigrants.
15 It didn't consider the dark side of the policy that it was
16 enacting. An agency can't have that sort of single-minded focus
17 on the good that they're trying to achieve without looking at
18 the downsides.
19 But I think even if Your Honor thinks that there's enough
20 consideration of those interests in the directive, the directive
21 is also sort of unlawful on its face. The only evidence that
22 they provide for these directives is the situation at the
23 southwest border. And I'm not paraphrasing. That's the literal
24 language that comes from Mr. Cuccinelli's directive. There is
25 no explanation, indeed, even of what the situation at the

1 southwest border is, what problem the agency is trying to solve.
2 But if we can infer that it means border crossings, it
3 means that there are too many people crossing the border,
4 there's still not any evidence to support that judgment.
5 There's no statistics concerning border crossings. There's no
6 analysis of why the policies that were in effect before are
7 ineffective or why the new policies will do any better.
8 And given that these policies were in effect for over two
9 decades, at least the 48-hour period -- and at that time the
10 agency engaged in a careful consideration of what was
11 reasonable -- the lack of any detailed consideration in this
12 memorandum, I think, is conclusive evidence that the directives
13 are arbitrary and capricious.
14 So unless Your Honor has questions about the APA issue, I
15 would just briefly touch on The Rehabilitation Act issue before
16 moving to the FVRA claim.
17 THE COURT: Okay.
18 MR. LEWIS: So the asylum directives also violate The
19 Rehabilitation Act because they deprive asylum seekers with
20 disabilities of meaningful access to the asylum process.
21 The only two questions --
22 THE COURT: Would you agree with respect to that that
23 the only plaintiffs that would have standing are actual
24 individuals with disabilities? And so, for example, RAICES
25 wouldn't have standing under The Rehabilitation Act?

1 MR. LEWIS: I agree that as far as individuals
2 concerned, the only individuals with standing are individuals
3 with disabilities, and we are not seeking relief for people that
4 don't have disabilities.
5 But as far as RAICES is concerned, there are actually a
6 fair number of cases saying that organizations that serve people
7 with disabilities fall within the zone of interest of the
8 statute and can assert their own Article III injuries from
9 something that violates The Rehabilitation Act.
10 And I think that's exactly the case here. As we show in
11 the Meza declaration at 9, 10, and 21, RAICES frequently serves
12 individuals with disabilities. So it has an interest in the
13 rules that are applied to them. It frequently seeks
14 continuances for individuals with disabilities. It provides
15 additional services to people that come through that have
16 disabilities. So I think RAICES also has standing to assert
17 this claim.
18 So I think that takes care of the first question that the
19 government raises, whether the plaintiffs have disabilities.
20 For M.A.-H., for example, we have a medical evaluation that the
21 government hasn't sought to contest in any way.
22 The other question is whether the directives deny asylum
23 seekers with disabilities of meaningful access to the process.
24 And we have shown that, too. We've shown that individuals with
25 disabilities need more time as they move through the system.

1 It's harder for them to relay the facts of their case, to
2 concentrate, to remember details, to understand the process.
3 And so I think the harms of the directives actually fall the
4 hardest on asylum seekers with disabilities.
5 THE COURT: Does someone have to assert their
6 disability for there to be standing? For instance, how is an
7 agency to know that they have to accommodate somebody if the
8 person doesn't come to them and say, I've got PTSD, and
9 therefore, I need an accommodation?
10 MR. LEWIS: So agencies, and particularly agencies
11 that deal with immigration, have dealt with these sorts of
12 questions before. There's a decision from the Board of
13 Immigration Appeals, matter at M.A.-M, which we don't cite in
14 the papers, but explains how agencies can make these
15 determinations. They look for indicia of incompetence. They
16 can tell from talking to somebody that they may have a
17 disability.
18 But in practice, I think what actually happens is that the
19 organization that's representing them comes forward and says,
20 This individual has a disability, they need more time, and they
21 may seek a continuance on that fact.
22 THE COURT: Did RAICES do that here with respect to
23 anyone?
24 MR. LEWIS: Well, so RAICES doesn't represent the
25 individual plaintiffs in those proceedings. RAICES operates at

1 Karnes, and these individuals are at Dilley.
2 But it's my understanding that at least in the case of
3 M.A.-H., it was relayed to the asylum officers that were
4 processing their application. RAICES, when they're representing
5 individuals, frequently does inform immigration officials that
6 people have disabilities.
7 THE COURT: Is that in the declarations?
8 MR. LEWIS: Yeah. So -- yes, Your Honor. The Meza
9 declaration at 9, 10, and 21 explains how RAICES deals with
10 asylum seekers with disabilities and I think specifically notes
11 that RAICES will take on the burden of advocating for people
12 that have disabilities for reasonable accommodations and
13 informing the agency of that problem.
14 THE COURT: Okay.
15 MR. LEWIS: So in that respect, I think those cases
16 are on all fours with the two cases we cite in the papers,
17 *Franco-Gonzales* and *Palamaryuk*, where courts have similarly
18 enjoined policies that harm immigrants with disabilities, that
19 prevent them from fully consulting with their attorneys or with
20 others. And so I think everything is there for the Court to
21 enjoin the policies on a preliminary basis.
22 So that's the substance of the directives. But I think
23 there's also another important problem with these directives,
24 which is the authority of the person who implemented them. So
25 turning to the Federal Vacancies Reform Act.

1 Mr. Cuccinelli was ineligible to serve as acting director
2 of USCIS because he was not the first assistant to the position
3 at the time the position became vacant. What they did to
4 leapfrog the existing first assistant is create an entirely new
5 office of principal deputy director, designate that office as
6 the first assistant, and then appoint Mr. Cuccinelli to that
7 position.
8 What is crucial here is if that set of actions suffices
9 here, it suffices anywhere. There's no reason they can't do the
10 same things to appoint anybody else that they want to an acting
11 vacancy. And I think that raises two really crucial questions.
12 If the government's reading is true, what is the limit? And
13 two, what is the point? What does the FVRA do if it doesn't
14 place any meaningful limitation on the President's ability to
15 make acting appointments? Luckily, though, the FVRA does not
16 permit the government's reading.
17 In understanding the FVRA, I think its actually helpful to
18 start with constitutional first principles. The Senate's advice
19 and consent role is a critical structural safeguard of the
20 constitutional order.
21 THE COURT: You know that I was the head of the Office
22 of Legal Counsel at the time that the Federal Vacancies Reform
23 Act was enacted?
24 MR. LEWIS: I did. But in a manner of clearing my
25 throat --

1 THE COURT: Fair enough.
2 MR. LEWIS: So as Your Honor knows well, the Federal
3 Vacancies Reform Act gives the President limited power to make
4 acting appointments. Under (a)(1), it creates a default rule
5 that the acting official shall automatically be filled by the
6 first assistant at the time the vacancy comes open, or the
7 President has discretionary power to fill the position with
8 another person.
9 I think there are two features of that text and structure
10 that indicate the first assistant has to be serving at the
11 opening of the vacancy.
12 The first is the language and structure at (a)(1). (a)(1)
13 says that when the position becomes vacant, the acting official
14 shall ascend. It creates a trigger that is mandatory and
15 self-executing. When the position becomes open, the first
16 assistant automatically ascends to the role.
17 THE COURT: Well, so that's not quite what it says. I
18 think if it used the word "when," you would have a much stronger
19 textual argument. What it says, though, it actually says, "If
20 the Senate-confirmed individual dies, resigns, or is otherwise
21 unable to perform the functions and duties of the office, then
22 the first assistant shall perform those duties."
23 So I mean, I know that at times, the words "when" and "if"
24 can be used interchangeably, but it's not entirely clear to me
25 that -- as a textual matter, that your reading is compelled in

1 that it -- that (a)(1) can only textually be read to say that
2 the first assistant must be serving at the time the vacancy
3 occurs. That may be one reading of it, but I guess it's not --
4 it's not 100 percent clear to me.
5 I understand your purpose argument and -- in your argument
6 that the reading that's been adopted here undermines the purpose
7 of the Act. But I'm still struggling a little bit with the
8 textual argument, but frankly for both sides, and just as a
9 matter of -- I guess I'm not yet convinced by other side that
10 the plain text dictates one answer or the other. Let me put it
11 that way.
12 MR. LEWIS: I take Your Honor's point that "when"
13 would be stronger or at least more explicit. It would more
14 explicitly compel the result that we're asking for. But I am
15 not actually sure as a matter of plain meaning there's a
16 meaningful difference between if an event happens and when that
17 event happens. If I say that, you know, if my car breaks down,
18 I will walk to work today, I think that's textually equivalent
19 to saying, when my car breaks down, I will take the bus to work
20 today. If the "if" clause doesn't happen, I don't think it
21 would be interpreted to, you know --
22 THE COURT: I think everyone agrees here and the
23 Supreme Court has held that (a)(1) is the default provision, and
24 it's been referred to as automatic and that it kicks in, and
25 then as soon as the office holder resigns or dies or is unable

1 to perform the functions of the office, the first assistant
2 automatically then takes on that role. And so I take that.
3 I guess the question then, though, is, the first assistant
4 then resigns, which is something that happens, for example,
5 between administrations. Does that -- is there something in the
6 text that then says that whoever then assumes the responsibility
7 of the office of the first assistant cannot perform those
8 functions?
9 MR. LEWIS: So I think there are a couple of separate
10 points there. I think the courts have said not just that it's
11 automatic or it's default or it's mandatory. But as the Supreme
12 Court said, it's self-executing. It doesn't require any
13 affirmative action by anybody to be called into effect.
14 But I think the separate question is, you know, what
15 Congress thought when it was enacting this language. And I
16 think Congress was fairly explicit in the Senate report,
17 specifically at page 17 but at other pages, too, that if there
18 is no first assistant, the President has to select somebody else
19 under (a)(2) or (a)(3).
20 THE COURT: Now you're at the legislative history, and
21 I guess my question is, before you get to the legislative
22 history, you need to exhaust the text. And is there anything
23 else you can say to me about the text that gets you to the
24 result that you think is the correct result here?
25 MR. LEWIS: Fair enough, Your Honor. I think the

1 other textual/structural implication that's really key is that
2 the Congress also enacted (a)(2) and (a)(3), which give the
3 President limited authority to make acting appointments subject
4 to specifically delineated circumstances. And so a reading of
5 (a)(1) that reads (a)(2) and (a)(3) implicitly out of the
6 picture can't be the correct reading of (a)(1).
7 And I don't think that's a sort of congressional intent
8 argument. I think that's an argument from text and structure
9 about interpreting the statute as a comprehensive whole.
10 So I think (a)(1) in its own terms lends itself to the
11 result that we are seeking, but its interaction with (a)(2) and
12 (a)(3) makes that point even clearer.
13 THE COURT: So the legislative history says we don't
14 define the term "first assistant" because, I don't know, it's
15 well-understood what that term means or, you know, we rely on
16 the historical understanding.
17 What was the historical understanding in 1998 of what the
18 term "first assistant" meant?
19 MR. LEWIS: So I don't actually think it was as clear
20 as the Senate thought it was when it wrote the report. If you
21 look back in the case law concerning first assistants, there
22 really isn't that much interpretation of what the words mean on
23 their face. There's an assumption that the deputy to a position
24 or the next person up in the structural scheme will serve as the
25 first assistant. And I think that is the sort of crystallized

1 meaning that Congress was enacting when it enacted the
2 language "first assistant."
3 I don't think any of that history, frankly, resolves this
4 particular question that we are considering. I don't think
5 there was a question of, you know, when does the person need to
6 have been the first assistant. If anything, it's just the
7 question of what is a first assistant, like what kind of person
8 is that.
9 THE COURT: So you don't think there's anything in the
10 historical record that speaks to the question of when the
11 individual had to have assumed the position of first assistant?
12 MR. LEWIS: I don't think so, Your Honor. I certainly
13 haven't seen it. I think the preeminent question before the
14 FVRA was enacted was whether somebody has to be appointed under
15 the statute or whether they can be appointed under the
16 regulation, which isn't a point that we are taking issue with
17 here.
18 But I think that's really the only question as far as the
19 meaning of "first assistant" is concerned that, you know,
20 anybody really had a thinking on.
21 But I think this really isn't a question of the meaning of
22 "first assistant" proper. It's a question of how the statute
23 elevates the first assistant and when the statute elevates the
24 first assistant.
25 THE COURT: One of the oddities about the question of

1 whether it is by regulation or statute is that the D.C. Circuit
2 in *Doolin* noted that OLC had at least at that point in time
3 concluded that it had to be by statute. And I think the D.C.
4 Circuit, to be fair, was agnostic on the question but noted that
5 that was an unsettled question.
6 The Congress then responds to *Doolin* by enacting the
7 Vacancies Reform Act, as well as responding to other things, but
8 then in the legislative history says, as I read it, as long as
9 the person is appointed by statute or by regulation, it's
10 sufficient.
11 MR. LEWIS: Yes, Your Honor. I think OLC has changed
12 its tune on that particular question.
13 THE COURT: No, I'm actually more concerned with what
14 Congress has on that, the question, I mean, and what Congress
15 thought about it than what OLC thought.
16 MR. LEWIS: So as far as I understand it, Congress
17 thought, at the time of the enactment of the FVRA, that somebody
18 could be appointed by the regulation. I think the Senate report
19 says so explicitly.
20 We do raise a separate claim under the FVRA about the
21 manner in which the designation was made.
22 THE COURT: Was it made by regulation here?
23 MR. LEWIS: It was made by an internal directive. It
24 wasn't like a notice and comment rulemaking or anything with any
25 more formality than that. More specifically --

1 THE COURT: But that's typically the case, I think,
2 with respect to regulations of this type. So I think, for
3 example -- you know, you can correct me on this, but my belief
4 is that the regulation that designates, for example, that the
5 Office of Legal Counsel performs the duties of the Attorney
6 General with respect to providing advice within the executive
7 branch is -- it's in the C.F.R., but I'm not aware of any notice
8 and comment rulemaking that led to that. I think that under the
9 APA, you're not required to engage in notice and comment
10 rulemaking with respect to internal housekeeping provisions of
11 that type.
12 So I take it -- well, I take it by that, then, you do think
13 that the designation -- the creation of the Office of Principal
14 Deputy Director was created by regulation?
15 MR. LEWIS: That's right. Not, as Your Honor noted,
16 in notice and comment rulemaking, and I agree with Your Honor
17 that it's typically not by notice and comment rulemaking. But
18 it wasn't anything that was publicly promulgated, and it wasn't
19 anything that was intended to have sort of lasting significance.
20 The orders, you know, memorializing these directives say
21 that they will terminate upon the nomination of somebody else
22 for USCIS director. It was clear this was not an ongoing
23 revision to the agency's structure. It was a one-time-only
24 thing for Mr. Cuccinelli to serve.
25 And so, you know, we have some other claims related to the

1 manner in which the office was created and how you can designate
2 a first assistant. But for the purposes of this motion, that's
3 really just color. For this motion, the only claim that we are
4 asserting under the FVRA is that Mr. Cuccinelli wasn't the first
5 assistant at the time that the vacancy came open.
6 So I think those questions are important, but they're not
7 necessarily questions that the Court has to resolve on this
8 posture.
9 So I think the last point that I would make on the FVRA is,
10 you know, the government has spent a lot of time talking about
11 how this will hamstring the executive branch. And I really
12 don't think that that is true in practice. I think we cite to
13 an article from CNN in 2017 that said during the 2017
14 transition, the Administration didn't select a single post
15 vacancy first assistant to fill a Cabinet position.
16 In practice, the Administration has officials under (a)(2)
17 or (a)(3) to fill those roles. And those are sufficient to
18 uphold the executive's legitimate prerogatives.
19 But to the extent that there is a conflict here, I think
20 the Court has to go back to what really was the fundamental
21 purpose of the FVRA, which was not to make it easy for the
22 President, to really place limitations on his power to appoint
23 acting officials, in the hope that he would then be compelled to
24 go to Congress and not have the easy out of appointing whoever
25 he wants under the statutory scheme.

1 THE COURT: And I take it that you have two separate
2 arguments. One is that the individual actually had to fill the
3 position of first assistant at the time the vacancy occurred,
4 and the other argument is that that particular position of first
5 assistant had to exist at the time the vacancy occurred and that
6 you cannot create a new position afterwards.
7 MR. LEWIS: That's right, Your Honor. And I think the
8 first reading is what we think is most faithful to the statutory
9 scheme, that the person needs to be in place at the time the
10 vacancy comes open. But then we do have this more limited
11 reading that at least the office needs to have existed at the
12 time of the vacancy.
13 And I think the advantage of that reading is that it's hard
14 to imagine how that would impose any limitation on the
15 executive's ability to fill vacancies. If they have a position
16 there that is already designated as the first assistant but it's
17 vacant, they can go back and put somebody in at a later date.
18 Again, we don't think that that is the best reading of the
19 statute, but it's at least one way the Court could accommodate
20 the interests of both the executive and the legislative
21 branches.
22 And so I think that's all that I have to say on the merits.
23 THE COURT: Okay.
24 MR. LEWIS: I would just touch briefly on the scope of
25 the remedy that the Court may order --

1 THE COURT: Before you do that, can you say something
2 about irreparable injury?
3 MR. LEWIS: Sure.
4 So I think the plaintiffs have irreparable injury for
5 largely the same reasons that they have standing. The
6 individual plaintiffs will face irreparable injury if they are
7 returned to their home countries, and this is something that
8 courts across the board have held as irreparable injury.
9 The critical question as a matter of causation is whether
10 the action that we are seeking to enjoin will inflict that
11 irreparable injury upon them, and the action that we're seeking
12 to enjoin or stay, as is the case of the individual plaintiffs,
13 is their removal. It's the application of their orders of
14 removal.
15 So as a matter of causation and redressability, I don't
16 think there's any question that continuing the stay of their
17 removals will prevent them from suffering that irreparable
18 injury.
19 I think much the same is true --
20 THE COURT: So the government says in response to that
21 argument that the injury here that you are alleging is the
22 depravation of an extra 24 hours in preparation time and that
23 you actually, in order to show irreparable injury and, I
24 suppose, standing perhaps even as well, need to show a nexus
25 from that, and then saying that had you had the additional 24

1 hours, it's likely that you would have been able to make a more
2 substantial showing, and it's likely as a result of that, then,
3 that you would have had a positive credible fear determination,
4 and in which case you would then not be subject to removal.
5 What do you say to that?
6 MR. LEWIS: So as a matter of standing, because I
7 think that's the first context in which they raise this
8 argument, for the individual plaintiffs, there's both a
9 procedural injury and a substantive injury. And what the D.C.
10 Circuit's procedural injury cases have required is a connection
11 between the procedural injury and the substantive injury.
12 They've been fairly explicit that the plaintiff does not need to
13 show that a different outcome would have obtained. Certainly,
14 they have to show that it could have obtained, that there's a
15 possibility that if the procedure were fixed, they would get the
16 relief that they're seeking. But they don't have to show that
17 it's, you know, an inevitable consequence of it.
18 And so here, we've shown that yes, they faced procedural
19 injury, they were deprived of the time that they were entitled
20 to under the statutes. But as a result, they face substantive
21 injury as well, their return to the country that they fled
22 originally.
23 So that injury is the relevant injury for standing and for
24 irreparable harm purposes. They don't need to show that they
25 faced irreparable injury from the 24 hours. They have to show

1 that they faced irreparable injury from the substantive injury
2 that they're claiming, that if they are returned to their
3 homelands, they will face violence and persecution.
4 THE COURT: But do they have to show that there's a
5 nexus between the depravation of the 24 hours and their removal?
6 MR. LEWIS: I think "nexus" is kind of a loaded term.
7 I think what the cases have said is a connection.
8 THE COURT: Nexus, connection --
9 MR. LEWIS: Nexus, connection. Tomato, tomato. But I
10 think the relevant connection is that they were processed under
11 the improper procedures and that the result of those procedures
12 inflicts substantive harm upon them. I don't interpret the D.C.
13 Circuit to have required any more than that.
14 But if there's some showing that more is required, we say
15 in the declarations from M.A.-H. and L.M.-M. that they couldn't
16 present all of the claims that they wanted to assert in those
17 credible fear proceedings. They didn't fully understand the
18 proceedings. They didn't have an opportunity to fully speak to
19 their lawyers.
20 And I think also in practice, the various declarations from
21 the people that work at these facilities say that negatives have
22 gone way up since the directives have been in effect.
23 THE COURT: Well, I was going to ask you, what are the
24 statistics?
25 MR. LEWIS: So there aren't statistics in the

1 declarations proper. It's kind of hard to track this sort of
2 information. But the Cambria declaration at paragraph 18, the
3 Fluharty declaration at paragraph 22, and the Meza declaration
4 at paragraph 25 all attest that negatives have gone up since
5 these directives have taken effect.
6 And I think that isn't really, you know, outside the
7 Court's common sense. I mean, logically, if you give people
8 less time to prepare for an interview, they're going to fare
9 worse. And so as a consequence, there are far more negatives,
10 as I understand it, than there were before.
11 THE COURT: What about irreparable injury to RAICES?
12 MR. LEWIS: So as to RAICES, again, I think the
13 relevant injury is the injury that they're claiming for
14 standing, the impairment of their operations.
15 And what the D.C. Circuit has said is that to be
16 irreparable in nature, that injury has to be substantial and it
17 has to be beyond remediation.
18 The Meza declaration says repeatedly that these practices
19 or these directives have harmed their operations. They
20 prevented it from providing the same services to asylum seekers
21 that they were providing before.
22 And I think those injuries are also quintessentially beyond
23 remediation. After somebody has been deported from the country,
24 the proceeding has run its course.
25 THE COURT: No, no, I get the point about remediation.

1 What I pause a little bit more over is whether the injury is
2 severe enough to satisfy the standard of irreparable injury.
3 And I know that the law on this is not terribly clear on exactly
4 where that line is drawn.
5 MR. LEWIS: Yeah, I think Your Honor is right, that
6 the line is fairly unclear, and it's not really subject to
7 quantification in any way. But I think the showing based on the
8 Meza declaration shows that it is substantial. It has made it
9 virtually impossible for RAICES to make contact with asylum
10 seekers before their interviews. It's increased the number of
11 negative determinations they then have to appeal. And it's also
12 forced them to resort to things that they weren't doing before
13 or that they weren't doing to the same degree, like the hotline
14 that they have set up to actually try to make contact with these
15 folks.
16 So I think from the perspective of a small non-profit
17 that's trying to provide services to some of the most vulnerable
18 populations, the injury is pretty commensurately severe.
19 And so I -- to linger just briefly on the balance of the
20 equities and the public interest factors as well, I think we've
21 met those factors. Those factors merge on a preliminary
22 injunction. The courts are fairly clear that the government has
23 no legitimate interest in subjecting asylum seekers to unlawful
24 policies and then sending them back to the places that they fear
25 persecution.

1 The question is what's on the other side of the ledger
2 here. And I think as far as that showing is required, it's the
3 government's burden to explain why enjoining these directives
4 will result in harm. And for many of those same reasons as on
5 the arbitrary and capricious claim, I don't think they've made
6 that showing. There's no evidence that implementing these
7 directives will lead to any concrete harm at the southwest
8 border.
9 And these policies again were in effect for over two
10 decades, including in times when there were far more border
11 crossings that there are now. And there's simply no reason --
12 THE COURT: The burden to the government, I think, is
13 that if the Court concludes that these directives or the
14 directive is unlawful, the government may have to start over as
15 to a whole lot, a large number of asylum applications. And
16 that's a pretty substantial burden to the government.
17 MR. LEWIS: So it's not a burden that would
18 necessarily be imposed at the preliminary stage, but I take Your
19 Honor's question to be, if it merges the --
20 THE COURT: Well, I see. So you're asking me with
21 RAICES not to say that they need to go back and do it again, but
22 that just going forward, the directive doesn't take place and
23 then just to grant relief with respect to the five remaining
24 individuals?
25 MR. LEWIS: That's right, Your Honor. I think there

1 may be people in a sort of liminal state where they've been
2 processed under the directives but they are still waiting for
3 their flight out. And I think for people in those situations,
4 there may be a claim that they should be reprocessed.
5 What we're not asking for is the Court to order the
6 government to return people from countries that they were
7 already deported to and then provide them with new proceedings.
8 THE COURT: But I assume we're talking about thousands
9 of people where you might have to reprocess, the government
10 might have to reprocess their asylum applications.
11 MR. LEWIS: Well, I -- again, I don't think the
12 government has put in any averments on this Court. I'm not
13 actually sure what the exact number on a week-over-week basis,
14 the people that might actually have to be reprocessed. But I
15 think however the Court comes down on that question, I don't
16 think that would prevent the Court from enjoining the policies
17 moving forward.
18 And again, at this point we are only asking to stay the
19 policies. We're not asking the Court to order the government to
20 rerun the processes. At final judgments, you know, vacating the
21 policies and vacating any determinations based on the policies,
22 that may be something that we have to consider. But at this
23 point it's just a stay moving forward. It's not allowing the
24 directives to continue to have any effect pending final
25 adjudication.

1 And I think if Your Honor has questions on this, the
2 appropriate course might be to enter the preliminary injunction
3 and then to tee the case up for quick cross-motions for summary
4 judgment, and at that point the government can put in whatever
5 evidence that they want concerning the effects of reprocessing.
6 But they haven't made that showing at this point.
7 THE COURT: I suppose one of the questions I have that
8 I started off with is, why do that twice? And if there's
9 something else that the parties want to submit, you can submit
10 something in the next week, and let's just do this on summary
11 judgment.
12 MR. LEWIS: So we would be prepared to do so in short
13 order. I think the critical question here is timing. These
14 directives are in effect now, and people are being processed
15 through the centers based on the directives.
16 So if a briefing were months or something, I think that
17 would be a different question.
18 THE COURT: I agree with that, if it were months.
19 Okay.
20 MR. LEWIS: So again, we would be prepared to proceed
21 quickly at cross-motions for summary judgement, and we can get
22 into more of these questions. But I think to the extent the
23 Court is prepared to rule on the preliminary injunction motion,
24 I think we've made the showing that's required at this point.
25 THE COURT: All right. Thank you.

1 MR. LEWIS: And just briefly on the scope of the
2 injunction, if the Court orders a preliminary injunction, we
3 would contend that that injunction should be nationwide. The
4 policies here, for the most part, are facially unlawful. Most
5 of our claims cut to the face of the directives. And they're
6 being applied nationwide to asylum seekers just like our
7 individual plaintiffs and resulting in the same harms. So --
8 THE COURT: I guess I don't get that. Why would I
9 grant preliminary relief to people who are not parties who are
10 appearing in front of me?
11 I get it for RAICES and that if RAICES is working at
12 particular facilities, that may mean as a practical matter
13 relief has to apply to everybody who are at those facilities,
14 because it's not practical to sort through who RAICES is
15 representing and who they are not.
16 But if there are facilities where RAICES doesn't even
17 operate and none of the individuals there -- I guess I'm
18 puzzling a little bit over what my authority would be to grant
19 relief to people who are not before the Court.
20 MR. LEWIS: I think there's a specific answer to
21 RAICES, and then there is the more general question.
22 As to RAICES in particular, the only place where it has
23 these sorts of programmatic operations is at Karnes. But as the
24 Meza declaration avers, RAICES does provide services to
25 individuals at other detention facilities, and RAICES's clients

1 are occasionally transferred from Karnes to other facilities.
2 So to the extent the Court wants to provide complete relief
3 to RAICES, that requires going outside of Karnes.
4 But as to --
5 THE COURT: Assuming I got to that point, I might need
6 evidence with respect to what the scope of that was, and that
7 would be your burden to actually show me where it actually
8 mattered to RAICES.
9 I mean, I know that there's a great deal of debate about
10 nationwide injunctions. And I get it at final judgment, because
11 at final judgment, if the Court has declared a policy unlawful,
12 it's unlawful. And as I did in the *O.A.* case where I concluded
13 that the regulation was unlawful, the regulation is set aside.
14 But at the preliminary injunction stage where you are
15 coming to me and saying, We need extraordinary relief because we
16 are going to suffer irreparable injury, I guess I need further
17 explanation of why that would extend to anybody who is not a
18 plaintiff in the case.
19 MR. LEWIS: Uh-huh. So setting aside the RAICES
20 arguments, I think there are two reasons why the Court is
21 authorized to issue more sweeping relief than just the
22 individual plaintiffs. I think one is the meaning of the
23 *National Mining Association* case.
24 I take Your Honor's point --
25 THE COURT: But that was a final judgment. That's a

1 big difference.

2 MR. LEWIS: But I think courts have interpreted it as

3 also applying to the context of preliminary injunctions. Most

4 recently, Judge Jackson in the *Make the Road* decision said that

5 the same sort of analysis is appropriate at both stages.

6 But I understand Your Honor in the *Reptile Keepers* case to

7 have endorsed a more limited version of that reading. But I

8 think the crucial thing that makes this case different from the

9 *Reptile Keepers* case is here, there is evidence of harm to other

10 similarly situated parties. We put in declarations from the

11 people that operate at other detention facilities where they

12 attest that their clients are suffering from the very same

13 harms.

14 And so I think that evidentiary showing entitles the Court

15 to issue broader relief than just the individual plaintiffs.

16 And you know, we cite to a number of cases in the papers --

17 THE COURT: One of the things -- to the extent you're

18 relying on 1252(e), I'm not allowed to certify a class. And

19 actually, what you're really asking me for is to grant some form

20 of class-wide preliminary relief where a class hasn't even been

21 certified.

22 MR. LEWIS: I don't think that we're asking the Court

23 to order a class.

24 And I think the Court's analysis in *O.A.* bears somewhat on

25 this point. The Court vacated the policy and granted relief

1 across the board and then got to the separate question of
2 whether it needed to certify a class. I don't actually think
3 that a class needs to be certified to give the kind of relief
4 that we are asking for.
5 I think under either *National Mining Association* and cases
6 interpreting that or under general equitable principles and the
7 harm flowing to other similarly situated parties, that kind
8 of relief --
9 THE COURT: Is there any precedent from the D.C.
10 Circuit or the Supreme Court suggesting that the *National Mining*
11 rationale applies at the preliminary injunction stage?
12 MR. LEWIS: I don't think the D.C. Circuit has weighed
13 in on that point. I think it's only a matter of district court
14 decisions that have actually applied *National Mining*
15 *Association*, at least within the D.C. courts. And most
16 recently, *Make the Road* gave the biggest explication of that
17 reasoning.
18 THE COURT: So here's the problem I'm having with
19 that, which is -- I understand *National Mining*, and I understand
20 what I did in *O.A.*, and I understand the Administrative
21 Procedure Act to say that when a Court concludes that a
22 regulation or rule is unlawful, the Court should set that rule
23 aside. And when you set it aside, that applies to everybody,
24 and that makes sense to me.
25 I don't understand why that rationale applies at the

1 preliminary injunction stage where I would not have set a rule
2 aside, but I would just have concluded that you've demonstrated
3 exigent circumstances and a likelihood of success on the merits,
4 and because we want to maintain the status quo so your clients
5 are not injured before you can get to final judgment, that I
6 would enter a preliminary injunction.
7 MR. LEWIS: So I actually think that there are two
8 analytical leaps there. I think on the one hand, there's
9 vacature to injunction. And I think *National Mining Association*
10 says, for the same reasons that the Court can set aside the
11 policy on its face, it can issue a permanent injunction that the
12 government can't apply the policies anymore.
13 And then I think there's a leap from permanent injunction
14 to preliminary injunction, and I don't think that that leap is
15 insuperable either. I think courts have applied the same
16 standards to both permanent and preliminary. And I think the
17 reason for that is, as far as injunctive relief is concerned,
18 it's a similar showing at both the preliminary and the permanent
19 stages. There's the same -- you have to win at a permanent
20 injunction, so there's a focus on the merits. And then there's
21 the same balancing of harms that applies at the preliminary
22 injunction stage as well.
23 So I think the question is, what is the Court's injunctive
24 equitable authority? And that equitable authority is broad and
25 sweeping, as we know from *Brown v. Plata*, and we know that the

1 scope of the violation determines the scope of the remedy, per
2 *Califano v. Yamasaki.*
3 So I think *National Mining Association* authorizes the
4 Court, when it's issuing injunctive relief, whether that's
5 preliminary or permanent, to issue relief beyond the individual
6 plaintiffs, to issue programmatic relief that sweeps beyond the
7 one individual plaintiff, if that's the case.
8 The one other thing that I think is relevant here is the
9 nature of 1252(e)(3). I think 1252(e)(3) evinces Congress's
10 intent that these challenges be handled on a systematic basis,
11 that there not be these little individual cases across the
12 country that sort out the lawfulness of the policy, but that
13 there's a case going through D.D.C. in particular that
14 adjudicates the lawfulness of the policy.
15 The other wrinkle is that under (e)(3) --
16 THE COURT: Although you could argue just the
17 opposite, because the Congress said no class actions.
18 MR. LEWIS: They said no class actions, but again,
19 we're not seeking a class action. We're bringing a systemic
20 challenge based on individuals and organizations.
21 THE COURT: I know, but you're actually saying, We
22 want the equivalent of a class action without having to kind of
23 jump through the hoops of a class action. You want the relief
24 of a class action, but you don't actually want to certify a
25 class. Presumably, Congress didn't say no class actions because

1 it thought that it would be burdensome to actually have a
2 hearing on class certification. They said no class actions,
3 presumably because they wanted the relief to be particularized
4 in some respect or the cases to be particularized in some
5 respect and not done across larger swaths of individuals.
6 MR. LEWIS: So two points on that. I think *National*
7 *Mining Association* is clear that the Court can order
8 programmatic relief even if there's not a class certified. Even
9 if the Court is just adjudicating one individual's claims, it
10 still has the power to set the policy aside and, for the reasons
11 that I explained earlier, also enjoin without the specter of a
12 class.
13 I think the other thing about class certification is that
14 that allows the Court to resolve the claims of individuals in a
15 more definitive manner, when here we're just asking for the
16 Court to set policies aside. We're not asking for the Court to
17 go in and consider the facts of individuals' cases in a more
18 nuanced way.
19 And so for example, we're not asking the Court to order
20 class-wide relief that everybody gets a positive credible fear
21 determination. We are just asking the Court to set aside these
22 particular policies. And that benefit will flow to the other
23 individuals who weren't named in the case, but that doesn't mean
24 that it's a classwide decision.
25 And then just the last point I would make about 1252(e)(3)

1 is that it imposes a 60-day statute of limitations. So even if
2 this Court is 100 percent convinced that we are right on the
3 merits and 100 percent convinced that other people will face
4 harms, those others can't claim the benefit of any preliminary
5 relief by coming in and bringing a new case.
6 And by the same token, no other court will consider it. So
7 there's none of the concerns about disrupting the consideration
8 of other courts.
9 THE COURT: Right. Well, I was cognizant of that when
10 I asked the question. But again, that seems to cut both ways.
11 I mean, if there are people who have not brought suit in a
12 timely manner, why should they then get the benefit of a
13 preliminary injunction? Maybe they get the benefit of a policy
14 being set aside, if that's the correct result under *National*
15 *Mining*, but I'm still stumbling at the preliminary injunction
16 stage of why people who didn't timely sue get the benefit of a
17 preliminary injunction.
18 MR. LEWIS: So I have to quibble with the assumption
19 there, because I think the issue is not people timely bringing
20 their claims. There are people who could have come into the
21 United States on September 8th, after the statute of limitations
22 ran.
23 THE COURT: Fair enough.
24 MR. LEWIS: But then -- I don't think, you know, it's
25 really a question of delay or timeliness. I think it's a

1 question of the relief the Court is entitled to issue across the
2 board.
3 THE COURT: Right. Okay. Anything further?
4 MR. LEWIS: That's it. Thank you, Your Honor.
5 THE COURT: Thank you.
6 You may proceed.
7 MR. RAMKUMAR: May it please the Court, Archith
8 Ramkumar for the defendants.
9 This Court should deny the preliminary injunction motion
10 because plaintiffs have not demonstrated a substantial
11 likelihood of success on the merits, as is their burden, nor
12 have they demonstrated that they are likely to suffer
13 irreparable harm in the absence of preliminary relief.
14 With the Court's permission, I would like to begin with the
15 threshold jurisdictional matters and specifically whether or not
16 RAICES can even proceed in this lawsuit.
17 Now, at the outset, the government disagrees with
18 plaintiffs' characterization of *O.A.* as disposing of that
19 argument. As Your Honor is aware, *O.A.* involved individual
20 plaintiffs who were all individual aliens, but critically, this
21 Court had no occasion to consider the relevant position here,
22 which is whether an organization can invoke the provisions of
23 Section 1252(e)(3).
24 And as the D.C. Circuit held in *AILA*, the answer is
25 unequivocally no.

1 THE COURT: So assume that the government -- I mean,
2 that RAICES cannot invoke 1252(e)(3). Why can't it just bring
3 suit under 1331?
4 MR. RAMKUMAR: The answer to that, Your Honor, is
5 8 U.S.C. 1252(a)(2)(A)(iv), which provides that policies and
6 procedures like the policies being challenged here are immunized
7 from judicial review, except as provided in subsection (e). And
8 so as a result, subsection (e) is a requirement that all the
9 plaintiffs in this lawsuit --
10 THE COURT: Read me the language that you are relying
11 on. Which provision?
12 MR. RAMKUMAR: It was 8 U.S.C. 1252(a)(2)(A)(iv), Your
13 Honor.
14 THE COURT: Just a second here. I'm sorry. Which
15 provision is it?
16 MR. RAMKUMAR: It should be 1252(a)(2)(A)(iv).
17 THE COURT: So then show me why in (e)(3) an
18 organization cannot bring suit.
19 MR. RAMKUMAR: Yes, Your Honor. And so that brings us
20 bake to *AILA* and the D.C. Circuit's interpretation of Section
21 1252(e)(3). So in *AILA*, the D.C. Circuit specifically
22 considered the question of whether organizations like RAICES can
23 invoke Section 1252(e)(3), and this is 199 F.3d at 1359 to 60.
24 After serving exhaustively both Section 1252(e)(3) and other
25 subsections of Section 1252, the D.C. Circuit stated in no

1 uncertain terms that challenges based on Section 1252(e)(3) can
2 be brought by and only by aliens affected by the policies being
3 challenged.
4 And that was not an isolated occurrence. The opinion is
5 replete with holdings that the congressional intent underpinning
6 Section 1252 strongly evinces that only individual aliens can
7 enjoy the benefit of Section 1252(e)(3).
8 And as further support, the D.C. Circuit relied on, for
9 example, Section 1252(f), which limits injunctive relief
10 enjoining the operation of certain provisions, including
11 Section 1225, except as to individual aliens, and Section
12 1252(g), which immunizes from judicial review decisions to
13 commence proceedings.
14 Again, organizations cannot undergo removal proceedings.
15 Proceedings cannot be commenced against organizations. So based
16 on that holding, the government would submit that this Court
17 lacks jurisdiction over RAICES claims, and again would further
18 submit that in *O.A.*, Your Honor had no occasion to consider this
19 question, because there was no organizational plaintiff there.
20 THE COURT: Yeah, there was.
21 MR. RAMKUMAR: Or I'm sorry. Because the (e)(3)
22 discussion by Your Honor focused more on whether or not the
23 individual's transition from expedited to full removal
24 proceedings brought them outside the scope of 1252(e)(3).
25 THE COURT: I see.

1 MR. RAMKUMAR: And in any event, Your Honor concluded
2 that 1252(e)(3) was inapplicable because there was no systematic
3 challenge there. So for each of those reasons, the government
4 would submit that *O.A.* is inapplicable.
5 Now, in response, the plaintiffs rely heavily on Judge
6 Jackson's opinion in *Make the Road*. That decision, which is now
7 currently being appealed, is obviously not binding on this
8 Court. But furthermore, Judge Jackson distinguished *AILA* on the
9 grounds that it dealt exclusively with third-party standing.
10 And so she found that the holdings in *AILA* did not apply outside
11 the context of third-party standing.
12 As the government noted in its brief, it respectfully
13 disagrees with that conclusion. Again, given the comprehensive
14 examination in *AILA* of the issue, its conclusions about what the
15 statute does and does not permit apply with equal force in this
16 context as well.
17 So for that reason, the government submits that RAICES's
18 claims cannot proceed before this Court and this Court lacks
19 jurisdiction over those claims. And for largely similar
20 reasons, the government would submit that RAICES is outside the
21 applicable zone of interest, because once again, the D.C.
22 Circuit has made clear that organizations cannot invoke
23 Section 1252(e)(3).
24 Now, next, the individual plaintiffs lack standing. And
25 Your Honor briefly touched on this when opposing counsel was

1 speaking about the causal link between an injury they are
2 asserting and the harm they are claiming. And at this point
3 both parties seem to agree that the relevant standard is what is
4 the nexus or causal link between the procedures being challenged
5 and the substantive result relied on for their claim of
6 irreparable harm.
7 But the government would submit that that causal link is
8 completely absent here, and as a result, the causation and
9 redressability requirements are not met, because there is no
10 explanation as to how, as opposing counsel articulated, a
11 different result even could have obtained.
12 And in large measure, that turns on how circumscribed a
13 credible fear finding is. Specifically, whether or not
14 individuals deemed to have a positive credible fear turns
15 entirely on whether they demonstrate a credible fear of
16 persecution based on a protected ground or torture.
17 Now, that is a very limited inquiry, and as a result, the
18 forum leaves room for the possibility that an individual can
19 generally be deemed credible but still not be found to have a
20 credible fear of persecution based on a protected ground or
21 characteristic or torture.
22 So the burden on the plaintiffs is to demonstrate or
23 identify what information germane to a credible fear finding was
24 omitted that they would have otherwise been able to volunteer
25 had the directives and the desire been in place.

1 THE COURT: Why does this differ from the context, for
2 example, where an individual or an organization might have
3 standing to challenge the failure of an agency to prepare an
4 environmental impact statement under NEPA?
5 And in that context, the individual doesn't have to say had
6 the environmental impact statement been prepared, that 15-story
7 building would not have been built in my backyard. They just
8 have to show that they have a process right, and they have a
9 process right that was deprived -- that they were denied.
10 And why wouldn't individuals, at least for purposes of
11 Article III standing, give -- irreparable injury may be a
12 separate question, but for Article III standing, why isn't
13 enough that they were simply deprived of a property right?
14 MR. RAMKUMAR: So in response, it's the government's
15 understanding that even in those cases, there has to be a causal
16 link between the process right that you identified and the
17 substantive result.
18 So it's not the government's position that they have to
19 demonstrate or conclusively show a different result of their
20 credible fear proceeding, but at a minimum, they have to
21 identify what relevant information was not provided that they
22 would have been able to provide so that a different result --
23 THE COURT: I read one of the declarations which
24 seemed to say so. One of the declarations said, for example,
25 that she didn't bring up the questions of physical abuse because

1 she had a toothache and didn't have enough time and wasn't sort
2 of prepared with respect to what the issues are that she was
3 supposed to raise in the process.
4 MR. RAMKUMAR: Certainly, Your Honor, and I was going
5 to address the declarations next.
6 But the point again is, with respect to the domestic abuse
7 allegations, for example, it's the plaintiff's burden to link
8 those allegations to an ultimate finding of credible fear based
9 on persecution or membership in a protected social group, and
10 they have not done so here.
11 So there is a scenario, for example, where allegations of
12 domestic violence could result in a credible fear finding if
13 there is a showing of membership in a social group with
14 immutable characteristics and a further showing that
15 persecution, like the persecution being alleged in the
16 declarations, was central to the membership that the applicants
17 suffered.
18 But critically, that showing has not been made here, and
19 it's the plaintiffs' burden to make that showing. So they have
20 not linked the allegations in their declarations to an ultimate
21 finding of a positive credible fear. And that is the harm
22 that -- since that is the harm they are alleging, it is their
23 burden to do so.
24 For those reasons, the government submits that the
25 individual plaintiffs lack standing in this case.

1 In addition, just very briefly, as Your Honor observed, to
2 the extent that there are individual plaintiffs who have not
3 suffered an injury based on specific challenges, they would not
4 have injury in fact.
5 So for example, the plaintiff that did not ask for a
6 continuance would lack standing to challenge the continuance
7 denial directive. And I will touch on this briefly when we
8 arrive at The Rehabilitation Act, but those individuals who the
9 plaintiffs have not demonstrated suffer from a concrete
10 disability would lack standing to have a challenge under The
11 Rehabilitation Act and would lack injunctive relief under that
12 claim should such relief ensue.
13 Now, next, I want to touch on the reorientation and
14 specifically the lack of subject matter jurisdiction over the
15 reorientation claim, because it is not a written policy.
16 THE COURT: Reorientation -- okay. Go ahead.
17 MR. RAMKUMAR: So as the government submitted with its
18 papers, it submitted a declaration from USCIS stating that there
19 is no centralized agency policy as to whether or not the
20 reorientation that plaintiffs assail occurs. And as a result,
21 per the plain text of Section 1252(e)(3), this Court lacks
22 jurisdiction over that claim because Section 1252(e)(3) applies
23 only to written policies and procedures, and the district court
24 in *AILA* made this precise point.
25 Now, plaintiffs in response say it is reasonable to presume

1 that the implementation of the memorandum that they challenge
2 resulted in the no reorientation. But again, the district court
3 in *AILA* made this very point. Such implementation decisions are
4 squarely outside the purview of Section 1252(e)(3), which by its
5 terms is explicitly circumscribed to written policies or
6 procedures.
7 As a result, this Court lacks jurisdiction over that claim,
8 and the burden is not on the government to demonstrate where or
9 when that came from but, rather, whether it came from a
10 centralized written policy, and it did not do so in this case.
11 So with those threshold issues finished, the government
12 would now like to turn to the merits, starting specifically with
13 the first claim opposing counsel started with, the statutory and
14 regulatory claim.
15 So at the outset, this Court can dispose of that claim and
16 find that plaintiffs have not shown a substantial likelihood of
17 success on the merits because they cannot point to a single part
18 of the text of either the statute or the implemented regulations
19 that were violated. Neither the statute nor the regulations
20 requires a particular period of time for an individual to
21 consult. Neither the statute nor the regulations requires --
22 THE COURT: Back up just a second there. The statute
23 does provide an opportunity to consult; right?
24 MR. RAMKUMAR: It does, Your Honor. The government --
25 THE COURT: And I take it you would agree that if the

1 government said you get one second from the time you arrived to
2 do whatever you want to consult, that would violate the statute?
3 MR. RAMKUMAR: So that hypothetical, Your Honor, is
4 far afield from --
5 THE COURT: No, I understand. But my point, though,
6 is that the concept of an opportunity to consult must mean a
7 meaningful opportunity to consult. Congress wouldn't legislate
8 something that was just completely meaningless, and Congress
9 would not legislate something that it intended the executive
10 branch to be able to eviscerate by treating it in such a -- in a
11 backhanded way; right?
12 MR. RAMKUMAR: So the government would agree with
13 that, Your Honor, up to a point, but it would disagree with the
14 manner in which plaintiffs have imported the meaningful
15 consultation requirement from the full removal proceedings
16 context to the expedited removal proceedings context. And that
17 is primarily what I want to focus on. Because again, just to
18 reiterate, their claim here has no constitutional component.
19 Their claim is simply and straightforwardly that the policies
20 they challenge violate the plain text of the statute and the
21 regulations. And it is their burden to show where in the text
22 that those violations occurred.
23 And as the government has demonstrated, there is no textual
24 violation, and the cases that they rely on involve the right to
25 counsel in full removal proceedings.

1 THE COURT: So how do I decide that issue? If you
2 agree that saying that you have 15 minutes from the time you
3 arrive at the facility to consult would be a violation of the
4 statute, and the plaintiffs seem to agree that 48 hours is
5 sufficient, how do I as a Court decide where between those two
6 poles the statutory line lies?
7 MR. RAMKUMAR: So Your Honor, I would point the Court
8 to the term "unreasonable delay," because that appears to be the
9 crux of the parties' dispute. So the statute essentially
10 provides for a limited consultation right prior to a credible
11 fear interview, so long as it does not unreasonably delay the
12 process.
13 THE COURT: Right.
14 MR. RAMKUMAR: And the regulations add substantial
15 detail but are to the same effect. So the ultimate question for
16 this Court is whether the agency has exceeded its statutory
17 authority such that it has made an unreasonable interpretation
18 of the term "unreasonable delay."
19 And Your Honor, the government would submit that there is
20 no evidence of that in this case, just as a purely legal matter.
21 THE COURT: Well, I think there is some evidence in
22 the case; right? There are declarations that talk about the
23 fact that there wasn't enough time for the individuals to
24 consult and for RAICES to consult with their clients.
25 MR. RAMKUMAR: So the government sees that question as

1 different and distinct, just solely focused on the question of
2 whether or not the policies promulgated unreasonably interpreted
3 term "unreasonable delay."
4 The government would submit that the plaintiffs have not
5 demonstrated that that is the case, because once again, this
6 turns largely on how circumscribed the consultation right is in
7 the expedited removal context in contrast with the right to
8 counsel in full removal proceedings.
9 And plaintiffs' cases, almost all the cases that they rely
10 on involved a full-blown right to counsel and full removal
11 proceedings and also had a due process clause component.
12 But I would point Your Honor specifically to the *Quinteros-*
13 *Guzman* case which both parties rely on. Now, that case
14 specifically concluded that there is no right to counsel in
15 expedited removal proceedings and specifically found that there
16 is no right to counsel as provided by the expedited removal
17 statute or its implementing regulations. And it contrasted that
18 with 8 U.S.C. 1362, which provides for a full-blown right to
19 counsel in full removal proceedings.
20 Now, that contrast is relevant if Your Honor decides it has
21 to assess what "meaningful consult" means, because it has to
22 take into account the context in which this consultation right
23 arises, namely a expedited streamlined process.
24 THE COURT: Right. But I also have to do that in
25 light of the fact that the government has now vastly expanded

1 the concept of expedited removal, and it's not now simply a
2 circumstance in which it applies only to people who are
3 immediately at the border for the short period after they
4 arrive. It's a much more expansive process now than it was
5 several months ago.
6 MR. RAMKUMAR: So, Your Honor, the government has
7 proposed to expand the scope of individuals potentially amenable
8 to expedited removal. But the government would submit that that
9 potential expansion does not impact whether or not expedited
10 removal proceedings are more streamlined or limited than full
11 removal proceedings.
12 And again, the reason that matters is primarily because of
13 the cases and authorities that plaintiffs rely on to state that
14 8 U.S.C. 1225(b)(1)(B)(iv) requires an opportunity to
15 meaningfully consult. Essentially --
16 THE COURT: Let me ask you this, though: What is the
17 reason for reducing the period of time from 48 to 24 hours?
18 MR. RAMKUMAR: So this dovetails with the arbitrary
19 and capricious claim, but the agency gave two concrete reasons
20 why it was making the change that it did.
21 The first reason was to avoid undue delay, in light of the
22 situation at the southwest border. And the second --
23 THE COURT: That doesn't mean anything to me, I have
24 to say. Undue delay, yes, the statute says there shouldn't be
25 undue delay, and we get that. Okay. Fine. I don't know what

1 "undue delay" means. And "the situation at the southwest
2 border," you know, that's a pretty vague phrase.
3 MR. RAMKUMAR: Certainly, Your Honor. And then
4 there's a second component, however, to the explanation, and
5 that second component is important.
6 The agency also noted that in light of improvements to the
7 Form M-444 credible fear form, coupled with the situation
8 alluded to, those two components drove the agency to make the
9 policy changes that it did, and the government would submit that
10 the record amply supports that second component. The old
11 credible fear forms, the Forms M-444, are in the record. And
12 for example, the new credible fear form highlights in bold what
13 asylum seekers have to show.
14 So essentially, the agency found that because the new form
15 was easier to understand and more streamlined, coupled with the
16 situation it alluded to, those two components allowed it to
17 conclude that the policy changes were necessary.
18 THE COURT: But that's different from consulting.
19 Presumably, the reason for permitting consultation is to say
20 that maybe the government isn't necessarily always the friend of
21 the people who are in removal proceedings and that maybe someone
22 who is more friendly to them may be able to help them more than
23 the government would. So it's not clear to me that it's
24 sufficient for the government to say, Well, we're providing
25 better information ow, so they don't really need to consult as

1 much.
2 The real question is whether they were given a meaningful
3 opportunity to consult. The Congress provided for that
4 opportunity, and you can't take that away by simply saying,
5 Well, we gave them more information.
6 MR. RAMKUMAR: Two responses to that point, Your
7 Honor.
8 First, the government would submit that the changes to the
9 credible fear form are relevant to the right to consult, because
10 that form is the first piece of information that informs an
11 alien of his or her right to counsel when they arrive at a
12 family residential center, and so the fact that --
13 THE COURT: I thought you told me that you don't have
14 the right to counsel in the expedited removal --
15 MR. RAMKUMAR: My apologies for misspeaking. The
16 limited consultation right in expedited removal proceedings.
17 But that form is the form that informs aliens of that limited
18 consultation right. And so the government would submit that
19 from that standpoint, it is relevant to whether or not the
20 policy was arbitrary and capricious.
21 THE COURT: You keep saying the "limited consultation
22 right." That word doesn't appear in the statute, does it, the
23 word "limited"?
24 MR. RAMKUMAR: So the reason the government is
25 referring to that right as a limited consultation right is again

1 just simply contrasting it to the right to counsel at
2 U.S.C. 1362, and that is because that is the point of comparison
3 that the plaintiffs have chosen primarily for their statutory
4 and regulatory claims.
5 So for example, the consultation right applies prior to the
6 credible fear interview, but it does not necessarily extend to
7 the interview itself. So just the --
8 THE COURT: Can you represent to me that the decision
9 was not based in any way on a desire to decrease the number of
10 individuals who qualify for asylum, who satisfy the credible
11 fear determination by just making it somewhat harder for them to
12 meet that burden? Can you make that representation?
13 MR. RAMKUMAR: So, Your Honor, the government would
14 submit that there is no evidence of that in the record.
15 THE COURT: But I'm asking whether you can represent
16 that to me.
17 MR. RAMKUMAR: So again, the government would just
18 point the Court to the stated reasons for the policy and would
19 submit that those stated reasons are not arbitrary and
20 capricious.
21 THE COURT: It may be that you just don't know if
22 there's anything else. That's fine. But I guess my question
23 is, if you know of something else, I would like to know if there
24 was another reason.
25 MR. RAMKUMAR: So I'm happy to confer with my clients

1 before I fully answer that question.
2 THE COURT: Okay.
3 MR. RAMKUMAR: But at this point, again, I would
4 submit that there is no evidence of that. This somewhat relates
5 to the plaintiffs' claim of animus, and again, the government
6 would submit that there is no evidence of animus underlying the
7 specific policies.
8 And so as a result --
9 THE COURT: The reason I ask the question is not so
10 much getting at the animus point, but plaintiffs' counsel has
11 said that the result of this new policy has been a decrease in
12 the people who qualify for -- who satisfy the credible fear
13 standard.
14 And it's not entirely clear to me what the rationale is
15 that the government has for having made the change. But I can
16 see that it would not be illogical to say, you know, you move
17 people through the process more quickly, and they're going to
18 get less of an opportunity to line their stories up. It may be
19 in a positive or a negative way. I can spin that either way.
20 It could be we want to deprive people of their rights, or it
21 could be that we think the more time you give people, the more
22 they have an opportunity to make up stories that are not true.
23 So I could spin that either way, and my question was just
24 whether that consideration had anything to do with the
25 determination.

1 MR. RAMKUMAR: Certainly, and again, I would just
2 reiterate my previous answers and again point to the fact that
3 with respect to the number of overall positive or negative
4 credible fear determinations, again, that goes squarely to the
5 causal link between the procedures challenge and the ultimate
6 determination. And again, that gap is critical in this case,
7 because it goes directly to the individual plaintiff's standing.
8 So at this point the government has squarely addressed the
9 arbitrary and capricious claim, as we just discussed, but one
10 component of that claim we did not discuss is the reliance
11 interest piece.
12 So plaintiffs' primary argument is that defendants did not
13 adequately account for the reliance interests of organizations
14 like RAICES. But in the government's view, plaintiffs overstate
15 the burden on the agency, which is not to necessarily explicitly
16 account for those reliance interests but, rather, provide
17 narrowly tailored reasons that account for the change in policy.
18 And in the government's view, the agency has met that burden
19 with the two components of the justification just alluded to.
20 Turning now to The Rehabilitation Act claim, the
21 government's view is that plaintiffs have fallen short on this
22 score for two reasons.
23 First, they have to show that the plaintiffs on whose
24 behalf they are seeking relief have or suffer from a disability.
25 And again, many of the declarations they submit generically talk

1 about unnamed parties before this Court having disabilities.
2 But as they note, "disability" is a legally defined term of art.
3 So the government's view is those declarations would not be
4 sufficient, for example, in terms of RAICES.
5 And in terms of the individual plaintiffs, for example,
6 they identified a plaintiff with a toothache. The government
7 has submitted that that is not enough under The Rehabilitation
8 Act.
9 THE COURT: I think it's more they're relying on PTSD
10 and things of that nature. A toothache would not qualify.
11 MR. RAMKUMAR: Certainly, Your Honor. And the
12 government's point is merely that they have not made that
13 showing with respect to PTSD and the other cognitive disorders
14 for all of the plaintiffs in this lawsuit, and it is their
15 burden to do so.
16 But more importantly, the reason that they failed to stay a
17 Rehabilitation Act claim is the fact that, as courts in this
18 district have held, The Rehabilitation Act does not apply unless
19 individuals were denied or excluded from an activity. So The
20 Rehabilitation Act does not exist to ensure adequate access or
21 to ensure equal results. It simply applies if someone was
22 denied or excluded from a benefit.
23 And critically, all the plaintiffs in this case were able
24 to consult. In the reply brief, plaintiffs say they were
25 essentially unable to consult, but that necessarily implicitly

1 implies that they were, in fact, able to consult.
2 THE COURT: Although one of them says, for example,
3 that the consultation was cut short, and there was more they
4 wanted to discuss, but the guard said, No, you're done, and sent
5 them back to the sleeping quarters.
6 MR. RAMKUMAR: Yes, Your Honor. And the government
7 would submit that that goes directly to the adequacy of the
8 consultation, but not that they were excluded from or denied the
9 benefit of.
10 And indeed, that is precisely how plaintiffs framed the
11 test under The Rehabilitation Act in their preliminary
12 injunction motion, which is whether or not individuals were
13 denied the benefit of or excluded from a particular process.
14 Now, they rely, for example, on the *Franco-Gonzales* case,
15 but critically in that case, the alien was denied access to an
16 attorney, and that was the fact that the Court seized on. Here,
17 by contrast, as noted, there was no denial of access. They're
18 simply attacking the adequacy of the consultation.
19 And so for those reasons, there can be no Rehabilitation
20 Act in this case.
21 Turning next to irreparable harm, as Your Honor noted, this
22 inquiry overlaps some with questions of Article III standing,
23 but the irreparable harm injury is more exacting. Specifically,
24 the plaintiffs have to demonstrate that the conduct that they
25 seek to enjoin is directly tied to the harm being asserted.

1 Now, at the outset, opposing counsel represented that the
2 only conduct they are seeking to enjoin is the removal of the
3 individual plaintiffs. But the preliminary injunction motion
4 appears to make a much broader claim for relief, namely
5 enjoining the directives wherever they are applied nationwide.
6 So from that standpoint, the government would submit that
7 the link between irreparable harm and asserted injury was not
8 met here, for largely the same reasons with respect to the
9 individual plaintiffs.
10 And as to plaintiff RAICES, this also ties into RAICES's
11 organization standing. The government would submit that mere
12 diversion of resources is not enough and would also point to the
13 Meza declaration, I believe paragraph 13, where they note that
14 there were other intervening causes in the decrease of the
15 number of clients they were able to represent, and those
16 intervening causes are outside the scope of this lawsuit.
17 So my understanding is, for example, there were changes to
18 the visitation procedures at the applicable detention center,
19 and those changes contributed to a decrease. And then the
20 argument is that the policies being challenged in this case
21 exacerbate or exacerbated their alleged injuries.
22 But because of that, they cannot show the core impairment
23 of their mission, as required, in order for the organization to
24 be found to have irreparable harm.
25 And just very briefly, the assertion that they had to

1 restructure their resources, which they repeat repeatedly, and
2 that they suffered economic loss are not sufficient to show that
3 they would suffer irreparable harm in the absence of preliminary
4 relief.
5 I would like to close with the scope of relief. And the
6 government largely agrees with everything Your Honor said, which
7 is, at this preliminary stage, if an injunction should issue, it
8 should be limited at most to the individual plaintiffs whose
9 claims are not moot.
10 And I believe Your Honor's opinion in the *United States*
11 *Association of Reptiles v. Jewel* case controls here.
12 Specifically, the logic of *National Mining Association* has no
13 applicability. Whereas, here, this Court is not finding
14 ultimately that the policies are unlawful, but merely that the
15 plaintiffs are likely to succeed on the merits.
16 So if any relief should issue, it should be sharply
17 limited.
18 So for those reasons and the reasons articulated in our
19 papers, the government would ask this Court to deny the
20 preliminary injunction motion. And my colleague will now speak
21 to the Appointments Clause issue.
22 THE COURT: Just before you get to that, let me ask
23 you what your views are with respect to the Court's suggestion
24 that I might consolidate the preliminary injunction with the
25 merits and just resolve the matter on summary judgment.

1 MR. RAMKUMAR: So the government's view would be that,
2 as opposing counsel alluded to, not all of the claims in the
3 complaint were raised in the preliminary injunction motion. And
4 the reason I bring that up is, that would affect the timing of
5 any briefing schedule.
6 And so with the caveat that an appropriate briefing
7 schedule was worked out with adequate opportunity for the
8 government to respond, the government would not oppose
9 consolidation in the manner that Your Honor suggests.
10 THE COURT: Okay. And what else would you want to do?
11 I suppose the plaintiffs would have to submit a statement of
12 material fact, and you would get an opportunity to submit an
13 opposition to that and any additional evidence that you wanted
14 to submit to contest any material facts they were placing at
15 issue.
16 MR. RAMKUMAR: Yes, Your Honor. And then that would
17 also potentially affect the scope of relief, but we have already
18 largely touched on that.
19 THE COURT: Okay. And I understand from plaintiffs'
20 counsel that there is an agreement among the parties that none
21 of the seven individual plaintiffs in the case will actually be
22 removed, at least pending my decision. Is that right?
23 MR. RAMKUMAR: Yes, with respect to the five
24 individual plaintiffs, and the two plaintiffs whose credible
25 fear determinations were positive have transitioned into full

1 removal proceedings.
2 THE COURT: Okay. All right. The only thing I would
3 come back to is the question that I asked about the rationale,
4 and if it turns out that there was a further rationale which is
5 not reflected in the memorandum itself, I would appreciate that,
6 in consultation, if you could bring that to the Court's
7 attention.
8 MR. RAMKUMAR: Yes, Your Honor, certainly.
9 THE COURT: Thank you.
10 Mr. Burnham?
11 MR. BURNHAM: Good morning, Your Honor.
12 THE COURT: Good morning.
13 MR. BURNHAM: James Burnham here to talk about the
14 Vacancies Act.
15 I brought a copy of 3345 if Your Honor doesn't have one
16 handy, but you probably have it memorized by now.
17 THE COURT: I have it right here.
18 MR. BURNHAM: There you go.
19 So in a nutshell, the Federal Vacancies Act does not
20 require that the first assistant, the person who is the first
21 assistant have been in place when the vacancy arose. And the
22 restrictive rule that plaintiffs advance would both materially
23 alter the statute's text, and it would also upend the
24 established practice of the executive branch across the last
25 three presidencies.

1 THE COURT: Let me ask you, on the text, I suppose I'm
2 in the same place with you as I was with plaintiffs' counsel.
3 It doesn't strike me that the text compels an answer to this
4 question one way or the other. And I could make arguments under
5 the text both ways. And I have read your brief, and I'm
6 familiar with the 2001 OLC opinion, I think, and the reasoning
7 in that and then the way in which the Supreme Court's decision
8 in *Southwest*, I think it was, perhaps undercut at least a
9 portion of the reasoning there.
10 But why don't you start with -- why don't you give me your
11 best textual argument, and then we can go from there.
12 MR. BURNHAM: Sure.
13 So I think it's actually pretty simple. So (a)(1) says
14 "the first assistant to the office of such officer."
15 THE COURT: Right.
16 MR. BURNHAM: If plaintiffs are right, that
17 phrase, "the office of," would not be in the statute. Right?
18 Because what the statute is saying is that the first assistant
19 to the office ascends to acting status if the office is vacant.
20 It does not say "the first assistant to such officer," which is
21 the rule the plaintiffs have proposed.
22 THE COURT: Right. But the -- that was addressed by
23 Senator Thompson, in which he indicated that the change was not
24 intended to be a material change to the statute and that -- the
25 truth of the matter is, we don't live in a country in which

1 people serve in government as assistants to other individuals.
2 It's just not the way our government works. You're not
3 appointed to be -- your appointment papers don't say that you
4 are Bill Barr's assistant for purposes of the Federal Programs
5 Branch.
6 MR. BURNHAM: Not as far as I know, Your Honor.
7 THE COURT: The nature is, people do serve in offices,
8 and there's an Office of First Assistant, and the Office of
9 First Assistant is an office which serves another office, which
10 is the higher-ranking office.
11 MR. BURNHAM: Right. So a few points on that, I
12 think, Your Honor.
13 The first one is, as far as Senator Thompson is concerned,
14 with all respect to the late Senator Thompson, I think what
15 matters, obviously, is what the statute says, not what he said
16 about it.
17 THE COURT: Right, but he was the sponsor, and he was
18 explaining the reason for the change.
19 MR. BURNHAM: He was, and I think my second point on
20 that, to just take on what he said, he did explain that this was
21 an intentional change. And as my friend on the other side and
22 Your Honor had a colloquy about, I don't think the history tells
23 us anything about this temporal point.
24 THE COURT: It would have been sort of a remarkable
25 proposition to everyone in the Congress at the time to say, you

1 know, We're adopting the Vacancies Reform Act here in a way that
2 is making it easier to appoint acting officials here, and we're
3 not even going to explain anything other than what Senator
4 Thompson did about this change, but the prior statute said "to
5 the officer," and we're going to change that now and loosen
6 things up, because the purpose of the Vacancies Reform Act was
7 to try and loosen things up and make it easier for the executive
8 branch to appoint people to act in a position.
9 I mean, the purpose of the Act was just the opposite of
10 that.
11 MR. BURNHAM: I don't think there is any basis to
12 conclude that this is looser than what was happening prior to
13 the enactment of the statute. I don't think there's any
14 historical evidence that before the FVRA was enacted, the first
15 assistant had to be in place prior to the vacancy arising in
16 order to be eligible for acting status, even though the statute
17 said "to the officer."
18 My only point is, there's certainly no textual indication
19 that they meant to tighten it up on this dimension, that they
20 meant to exclude post vacancy appointed first assistants, and in
21 fact, the textual evidence is quite to the opposite because they
22 add in "to the office."
23 THE COURT: It's not just "to the office." It's "to
24 the office of such officer."
25 MR. BURNHAM: Well, yes, of course, Your Honor,

1 because they're making clear which office we're talking about,
2 which is the office that the officer has vacated.
3 THE COURT: So you touched on this, but what was the
4 practice prior to adoption of the Vacancies Reform Act with
5 respect to using the Vacancies Act for purposes of filling
6 positions where the first assistant position was vacant at the
7 time that the principal vacancy occurred.
8 MR. BURNHAM: Right. So I would need to -- I can go
9 check again, of course. My recollection is that it is somewhat
10 inconclusive. If you look at the 2001 OLC opinion, which is a
11 short opinion, what they say is the history was just that "first
12 assistant" meant "principal deputy," which doesn't really answer
13 the question before Your Honor today. And then they kind of go
14 off and come up with the analysis that Your Honor is familiar
15 with.
16 So I don't think there was any rule -- I'm not aware of a
17 rule pre-FVRA that was equivalent to what the plaintiffs have
18 proposed, which is that you can't have a new first assistant
19 subsequent to the vacancy. And of course, as Your Honor knows,
20 I'm sure, quite well, that is totally contrary to how the
21 executive branch has functioned since the FVRA was enacted. The
22 last three presidencies, the current one, President Obama, and
23 President Bush, all had post vacancy first assistants who became
24 acting.
25 THE COURT: So how many times did that occur?

1 MR. BURNHAM: I could go tally it. I don't know. I
2 know a lot about our administration because I was there. And we
3 had lots of people. I mean, Curtis Gannon was the acting head
4 of OLC, even though the office had been vacant since Jack
5 Goldsmith left. Chad Readler was the acting head of the Civil
6 Division, even though Mr. Delery had left some time before. In
7 fact, the FVRA, as Your Honor may recall, actually contemplates
8 precisely that.
9 So in Section 3349(a), the statute actually resets the
10 clock for a new president. So it provides that a new president
11 gets a fresh 210 days, plus an additional 90, that's keyed to
12 the date of the vacancy or inauguration date.
13 And what's interesting about that provision, I think, is
14 that both it shows that while it may be that the FVRA was meant
15 to set some ground rules, the ground rules are not nearly as
16 strict as the plaintiffs would suggest. And in fact, with the
17 new president, it's very clear that -- it clearly contemplates
18 preexisting vacancies being filled by new actings.
19 So I think the way that provision is set up, it would be a
20 little weird if (a)(1) was just categorically off the table for
21 a new president, because as Your Honor, I'm sure, knows,
22 typically when a new administration comes in, particularly when
23 it's changing parties, everything's -- they're all vacant.
24 Right? Everybody's left.
25 THE COURT: Yes, but sort of in the old days and maybe

1 even in the current days with respect to the most senior people
2 in government, you know, what happens is that somebody actually
3 stays on from the prior administration until the Senate can
4 confirm new agency heads, so that -- I can't remember who it
5 was, but I'm sure there was somebody --
6 MR. BURNHAM: It was Deputy Attorney General Yates,
7 Your Honor, somewhat famous.
8 THE COURT: Okay. Well, fair enough. But it does
9 show that it can function that way and has functioned that way
10 with respect to the most senior officials in government.
11 MR. BURNHAM: Right. But I think that's really being
12 driven by the Appointments Clause, not the Vacancies Act.
13 THE COURT: Why is that?
14 MR. BURNHAM: Well, it makes sense to me, I think,
15 that a president would want the most senior positions, the
16 indisputable principal officer positions, Attorney General,
17 et cetera, to be filled by a Senate-confirmed person. The only
18 Senate-confirmed people available are from the prior
19 administration, generally speaking, which is why --
20 THE COURT: But that's not true. I mean, we had an
21 acting Attorney General in this administration who was not
22 Senate-confirmed.
23 MR. BURNHAM: I am aware of that, as I know Your Honor
24 is as well. I don't mean to suggest that is not permitted. I
25 think that is a convention that is not driven by the Vacancies

1 Act. I think that's just driven by --
2 THE COURT: It may or may not. I never got to whether
3 it was permitted or not.
4 MR. BURNHAM: Yes. Sorry about that.
5 THE COURT: Fair enough.
6 MR. BURNHAM: I think that's sort of a prudential
7 rule, which is why when Ms. Yates departed the administration --
8 THE COURT: I don't think that is a prudential rule,
9 because --
10 MR. BURNHAM: And by the way, not to interrupt Your
11 Honor, she ascended by operation of law, of course, because she
12 was the Deputy Attorney General. So she was a statutorily
13 designated first assistant.
14 THE COURT: That's my point, though. I think with the
15 most senior positions, where there is a deputy position that is
16 established by law, by statute, then that is -- whoever occupies
17 that position has to be the person who occupies the position.
18 And there's a rule against double acting. And so you can't be
19 the acting Deputy Attorney General and then be the acting
20 Attorney General, because -- while you're the acting Deputy
21 Attorney General.
22 MR. BURNHAM: No, that's exactly right. And I think
23 that's an important restriction that deals with sort of the
24 parade of horribles that the plaintiffs talk about, this being
25 endlessly manipulatable and all of that.

1 For the most important positions, there tends to be a
2 statutorily designated deputy, Attorney General being a good
3 example; DHS secretary being a good example, where the DHS
4 organic statute provides Secretary, Deputy Secretary,
5 Undersecretary for Management, I believe, and then there's a
6 succession after that. And so that prevents the manipulation
7 that plaintiffs are concerned about. And of course, the FVRA
8 would allow this.
9 But replacing Ms. Yates with Mr. Rosenstein, even if the AG
10 position remained vacant, the FVRA would allow Mr. Rosenstein as
11 a Senate-confirmed deputy to ascend to acting. That's because
12 there's a different provision that says Senate-confirmed
13 deputies can always ascend.
14 But it would be a little odd, I think, to think that even
15 in that circumstance, (a)(1) wouldn't allow the ascension just
16 because the vacancy preexisted the deputy -- or the first
17 assistant, excuse me.
18 And so I guess I would just say that, you know, there's
19 really no textual basis to support their rule.
20 Please.
21 THE COURT: But what about their other argument,
22 though? Here, there was a first assistant.
23 MR. BURNHAM: Right.
24 THE COURT: And that first assistant assumed the
25 position. So I guess question 1 is whether there was, in fact,

1 even a vacancy, because the position was already filled by the
2 first assistant before Mr. Cuccinelli came to the agency.
3 MR. BURNHAM: Right. So from the perspective of the
4 FVRA, I just -- I don't think it matters how the first assistant
5 came to be the first assistant. What the -- the vacancy that
6 the FVRA is worried about is the officer's vacancy. And so all
7 the FVRA says is that the first assistant to the office shall --
8 I'm paraphrasing, but shall become the acting. That's (a)(1).
9 And so here, it's true that Mr. Koumans for 10 days, I
10 believe, was the acting director by virtue of the fact that he
11 had held the position and still holds the position that had
12 previously been the first assistant position.
13 But I don't know why it wouldn't be different -- put
14 another way, I don't know why the FVRA would require that you
15 replace Koumans with Cuccinelli to get to the same outcome when,
16 instead, you've created a principal deputy position that is now
17 the first assistant by regulation.
18 THE COURT: Well, because -- I think the argument is
19 because it eviscerates the Vacancies Reform Act. And so why
20 doesn't it eviscerate the Vacancies Reform Act if an agency can
21 at any time create a new position of super first assistant and,
22 by doing so, supplant the person who was first assistant who, by
23 virtue of the automatic provisions of the Vacancies Reform Act,
24 filled the position?
25 The President says, I want someone different. Okay, fine,

1 you want someone different. What we will do is we will create a
2 position of super first assistant, and we will put that person
3 in that position, which will then -- that person will then be
4 the first assistant, and then they can --
5 MR. BURNHAM: Sure.
6 THE COURT: If you can do that, then it seems like the
7 Vacancies Reform Act was a waste of an effort.
8 MR. BURNHAM: Well, I think there's a couple answers
9 to that.
10 So first, I don't think any disputes -- if I'm right that
11 the first assistant didn't need to be in place when the vacancy
12 arose, then the President can get to the same place Your Honor
13 has just identified by firing the current --
14 THE COURT: I'm not sure he can fire him.
15 MR. BURNHAM: Well, the Vacancies Act imposes no
16 restriction --
17 THE COURT: No, I'm talking about the Civil Service
18 rules.
19 MR. BURNHAM: So that's -- that is a unique feature of
20 this particular vacancy, which is that Mr. Koumans is a career
21 SES official. But as Your Honor, I'm sure, knows from your time
22 at DOJ, there's all sorts of rules about SES officials. You can
23 transfer them. You can move them. You can reassign them.
24 And so I don't know -- I'm not an expert on those rules,
25 probably not as much as Your Honor, but there's no reason to

1 think they couldn't have created a vacancy in the deputy slot in
2 order to put in --
3 THE COURT: But your answer to me is a little bit
4 difficult for your position, because your answer is, Judge,
5 don't worry about that argument about eviscerating the statute,
6 because if I'm right, we've already eviscerated the statute
7 based on my interpretation to start with, and therefore, the
8 fact that this may even eviscerate it further doesn't really
9 matter, because we could have eviscerated it in some other way.
10 MR. BURNHAM: No, I don't think -- I certainly don't
11 think of my argument as being that. I guess what I would say,
12 Your Honor, is that it's not that it's been eviscerated some
13 other way. It's that Congress wanted -- the Act is not meant to
14 just be a set of handcuffs for the executive branch. It's meant
15 to carefully balance --
16 THE COURT: But (2) and (3) become meaningless, then.
17 Congress very carefully said if it's not the first assistant,
18 then it's got to be the President. I don't want the Secretary
19 doing it. I don't want anyone else in the agency doing it. I
20 want the President doing it and taking responsibility for it if
21 it's not the first assistant, and it's got to be somebody who is
22 PAS, who I think is a very senior person who the Senate has
23 already signed off on, or based on the negotiations that took
24 place, we're willing to give you a little bit of a break, and
25 you can appoint somebody who is a GS-15, but they have to have

1 served in the agency for at least 90 days before the vacancy
2 occurred.
3 Congress sort of carefully calibrated all of that, but that
4 all is meaningless if the agency can simply say, Well, we'll
5 just create a new first assistant position and put someone in
6 place there who wasn't in the agency, who is not PAS, who was
7 not in a GS-15 who served in the agency for 90 days beforehand.
8 You would never have any reason to use (2) or (3) ever.
9 MR. BURNHAM: Well, no, I don't think that's right,
10 Your Honor, because most of the -- many offices will have
11 statutory restrictions or statutorily -- statutory
12 specifications for who is the first assistant. And so for the
13 offices that Congress cares about the most, the Attorney
14 General, for the Attorney General -- I forget the provision.
15 It's 28 U.S.C. 508 specifies that the Deputy Attorney General is
16 the first assistant. And so for those sorts of offices, you
17 can't -- you wouldn't be able to do this.
18 The place where this comes into play, I think, is much more
19 at the sub-Cabinet level where which offices are the first
20 assistants to which other offices is purely a creature --
21 THE COURT: That would have mention Bill Lann Lee,
22 which is what the whole impetus for adopting the statute was.
23 MR. BURNHAM: Well, I think it would depend. I don't
24 actually know -- to be candid, I don't know regulatorily how the
25 principal deputy slots are assigned at DOJ.

1 I think it's a zero point reg. I'm not sure --
2 THE COURT: It is.
3 MR. BURNHAM: Of course, it would be changeable by the
4 Attorney General.
5 THE COURT: It is, and it was. My recollection of the
6 record in this case, and I think it's in the amicus brief --
7 MR. BURNHAM: You were probably there.
8 THE COURT: I was there. It is also in the amicus
9 brief that was filed by Mr. Rosenberg and also in the law review
10 article that he cites to and relies upon in his piece. It says
11 there -- and this is not based on any memory of my own. This is
12 based on what those documents in the case say, is that the
13 Attorney General actually created a new position that Bill Lann
14 Lee then filled, first assistant.
15 MR. BURNHAM: Right.
16 THE COURT: So it would be exactly the circumstance
17 that Congress was -- adopted the Vacancies Reform Act to
18 address.
19 MR. BURNHAM: So I guess I would just say that that is
20 the same outcome if Mr. Lee was hired as the principal deputy
21 assistant AG in the Civil Rights Division and ascended by
22 operation of regulation in (a)(1). So I don't know what the new
23 position really adds to the analysis. And I think to say that
24 post vacancy first assistants are ineligible would be a rather
25 revolutionary decision.

1 THE COURT: It wouldn't be so revolutionary. You can
2 tell me how many times it's occurred.
3 MR. BURNHAM: We can check.
4 THE COURT: But you're talking about three
5 administrations. We're not talking about going back to the
6 Washington administration and changing --
7 MR. BURNHAM: But I think it would be -- of course
8 not. But I think it would be a fairly extraordinary thing,
9 given the text of the provision. There's nothing in the text
10 that suggests in any way this temporal requirement. There are
11 other provisions that talk about when people were serving.
12 I didn't mean to -- go ahead.
13 THE COURT: Well, I mean, the concept of -- the
14 structure and concept of being a first assistant is that you are
15 serving subordinate to somebody else; correct?
16 MR. BURNHAM: Yes.
17 THE COURT: Okay. So who did Mr. Cuccinelli ever
18 serve subordinate to? I think it's he never did.
19 MR. BURNHAM: I'm sorry?
20 THE COURT: He never did. You're filling the position
21 with somebody who was never a first assistant to anybody.
22 You're calling the job the first assistant, but he's not the
23 first assistant. He's the director.
24 MR. BURNHAM: Well, he's the first assistant to the
25 vacant directorship.

1 THE COURT: But he was never first assistant to
2 anybody or any office. He never served as a first assistant to
3 anybody or any office.
4 MR. BURNHAM: Right. But his position is first
5 assistant to the office right now.
6 THE COURT: Well, that depends on what the term "first
7 assistant" means. If the term "first assistant" means that you
8 actually served as somebody's assistant, then it's not -- I
9 mean, he never ever served as anybody's assistant.
10 MR. BURNHAM: Right. But I guess I would say, in
11 other parts of even 3345 itself, it talks about the person;
12 right? So there's places where it says, you know, the person
13 had to be there for 90 days or 365 days, et cetera. Nothing
14 about (a)(1) talks about the person who would ascend to acting
15 status via operation of law as first assistant. There's nothing
16 in there to suggest that what Congress was trying to do was
17 impose an additional restriction on when this individual was in
18 the agency.
19 And so I don't think -- I think it would do -- it would put
20 too much weight by far on the term "first assistant."
21 THE COURT: But what was Congress achieving, at least
22 with respect to anybody where there was not a statutory first
23 assistant? If you're right, what did Congress achieve in
24 any way?
25 MR. BURNHAM: Well, I think they importantly created a

1 very important default rule, and they imposed a very important
2 restriction on the most important offices where there are
3 statutory restrictions.
4 THE COURT: But the whole focus was on somebody who
5 wasn't such an important officer.
6 MR. BURNHAM: Your Honor said that. I don't --
7 THE COURT: That's what the legislative history says.
8 MR. BURNHAM: Well, but there's nothing in the text of
9 the statute that says this statute prohibits Mr. Lee or --
10 THE COURT: The Court doesn't have to blind itself to
11 the fact that what precipitated the adoption of this statute was
12 Congress's frustration with what happened with respect to Bill
13 Lann Lee.
14 MR. BURNHAM: I don't actually know -- I thought that
15 what happened with Mr. Lee is they created a new position, and
16 the Attorney General designated him as the acting Attorney
17 General sort of directly. I don't believe they did it the way
18 we've discussed here, which is they created a new first
19 assistant position, but I don't know, Your Honor.
20 THE COURT: That's what I think Mr. Rosenberg's amicus
21 brief says and the article he cites in it says.
22 MR. BURNHAM: I read the brief. I don't recall that.
23 Regardless, I guess I just -- I don't understand why --
24 THE COURT: Regardless one way or the other --
25 MR. BURNHAM: But I think that cuts in my favor;

1 right? If the idea is that that was what was animating the
2 statute, then I think the Court would need to see, Well, gee,
3 did Congress put something in the statute to preclude that
4 situation that is clear? Because of course, the statute has to
5 be passed by the House and the Senate and signed by the
6 President. I don't think this was passed over a veto.
7 And so the fact that there's nothing in here -- it's a
8 little odd to me that if that is the central problem the statute
9 is trying to solve, there would be absolutely nothing in the
10 text that directly addresses it.
11 THE COURT: I think plaintiffs' argument is that's
12 what (a)(1) does.
13 MR. BURNHAM: Right. And I think that argument is not
14 plausible based upon what the text says, because nothing in the
15 text says anything about the first assistant needing to postdate
16 or predate the vacancy, the first assistant needing to have
17 been an officer --
18 THE COURT: Unless the concept of first assistant
19 means that you were actually somebody's assistant.
20 MR. BURNHAM: But there's nothing in the statute that
21 says that.
22 THE COURT: But that's plain language. To be a first
23 assistant -- it may be a possible use of language to say that
24 somebody who never assisted anybody is the first assistant to
25 the office, because that's what you call the position. But they

1 never -- as a matter of just plain language, they were never
2 anybody's first assistant. They weren't the second assistant,
3 third assistant, or fifth assistant. They weren't anybody's
4 assistant.
5 MR. BURNHAM: Right. But I think that's why it's so
6 important that the statute says "the first assistant to the
7 office."
8 THE COURT: Well, fine. First assistant to the office
9 of such officer. So at what point in time did Mr. Cuccinelli
10 come in and serve as the assistant to someone else who was
11 occupying that office?
12 MR. BURNHAM: But Your Honor is changing -- I think
13 that question changes the text. It doesn't say -- if I could
14 just --
15 THE COURT: Go ahead.
16 MR. BURNHAM: It doesn't say the first assistant to
17 the office of such officer during that officer's service or
18 something else that makes clear they had to be the first
19 assistant to the office while the office was occupied.
20 That, I think, is the key.
21 THE COURT: I started off here by saying I don't think
22 the language is clear one way or the other on this, and I think
23 you're sort of saying, Well, if Congress wants to do this, they
24 better be darn clear about it, and because they weren't
25 sufficiently clear about it, we win.

1 I think the other way to think about it is, there's
2 actually a constitutional norm here, which is the appointments
3 process, and Congress was trying to protect its rights under the
4 Appointments Clause of the Constitution.
5 The default is that Mr. Cuccinelli or anyone who holds that
6 position needs to actually be Senate-confirmed. And the
7 question is, are we going to except -- or recognize an exception
8 to that constitutional norm. And so maybe the tie goes to the
9 plaintiffs, then, in that case, because that is what actually
10 furthers the constitutional arm.
11 MR. BURNHAM: Right. So I want to be clear. I don't
12 mean to suggest that they have to be darn clear or especially
13 clear in order to restrict it. I think they just have to say
14 it, and I just don't think the statute here says it. In fact, I
15 think the natural reading of the statute is the opposite of
16 plaintiffs' rule, which is that the person serving as first
17 assistant to the office of such officer shall be the acting.
18 THE COURT: But the problem is, the term "first
19 assistant" is not defined, and Congress says we didn't define
20 "first assistant."
21 MR. BURNHAM: Right.
22 THE COURT: And you can't point to me any history that
23 says, Well, first assistant was understood to mean somebody who
24 filled a position after a vacancy occurred in which they never
25 were subordinate to anybody else.

1 MR. BURNHAM: So to be clear, I think the history
2 makes -- says that the first assistant is just the top deputy to
3 the Senate-confirmed position, and that's --
4 THE COURT: Where does it say that?
5 MR. BURNHAM: Well, that's from the OLC opinion. "We
6 believe, however, that the phrase" --
7 THE COURT: That's the OLC opinion after the fact.
8 MR. BURNHAM: Well, the first one was --
9 THE COURT: After Congress enacted it. If it was
10 before, it might influence what we're doing.
11 MR. BURNHAM: I guess my only point, Your Honor, is if
12 the history is inconclusive and the word is just "first
13 assistant," I don't think there's any basis to import an
14 additional requirement that the person have to have served
15 beneath a Senate-confirmed officer in order to qualify as the
16 first assistant.
17 THE COURT: But one might reasonably conclude that
18 that's what the term "first assistant" means.
19 MR. BURNHAM: Right. I just don't think there's any
20 basis for that conclusion, because Congress didn't define it
21 that way. The history didn't --
22 THE COURT: Congress didn't define it one way or the
23 other.
24 MR. BURNHAM: No, I know, and that's why I think the
25 important -- the way to interpret it is the office it's

1 referring to.

2 THE COURT: That's why I asked you about the history.

3 I mean, if you can point me to a half a dozen occasions prior to

4 enactment of the Vacancies Reform Act where, under the Vacancies

5 Act, with Congress's knowledge, people were -- succeeded to the

6 position of principal office as first assistants where there was

7 a vacancy at the time they assumed the position of first

8 assistant, that would be informative to me. But so far, no

9 one's pointed me to any evidence like that.

10 MR. BURNHAM: Right. So I would have to check. I

11 don't know exactly what happened with Mr. Lee, although the

12 discussion suggested --

13 THE COURT: Well, Mr. Lee, though, is what prompted

14 Congress's -- I can tell you, and I think the record reflects,

15 that Mr. Lee was not appointed pursuant to the Vacancies Act.

16 MR. BURNHAM: Right. It was the other, yeah.

17 THE COURT: And one might actually assume from that

18 that the reason that -- and I don't know this, but the reason

19 that he was placed in the position pursuant to the Attorney

20 General's organic authority is maybe there was some problem with

21 the Vacancies Act in doing it.

22 MR. BURNHAM: It might have been timed out as well.

23 That is another, of course, important restriction on all of

24 this, is the timing rules with nominees.

25 THE COURT: But if there were some examples of

1 beforehand with your interpretation that would have informed
2 what Congress understood, I get that.
3 But plaintiffs are right that the legislative history and
4 the Senate report certainly suggest that Congress was of the
5 view that if the position of first assistant was vacant, that
6 didn't mean that you would then fill the position of first
7 assistant, but rather, you would drop back to (2) or (3).
8 MR. BURNHAM: So actually, I don't agree with that.
9 The passages they quote in their brief, Your Honor, just talk
10 about if there is no first assistant, which I took to mean if
11 there is no first assistant position, so if you have the Office
12 of Legal Counsel with no principal deputy, you just have the
13 four DAGs.
14 I don't know -- I'm not familiar with something that is
15 very definitive one way or the other on the question before Your
16 Honor right now, of the person being in the agency as the first
17 assistant when the vacancy arose.
18 So if I could, Your Honor, unless you want to -- please.
19 THE COURT: If you do want to bring to my attention
20 any examples pre-1998 of individuals being assigned the duties
21 of the principal office pursuant to the Vacancies Act --
22 MR. BURNHAM: Right.
23 THE COURT: -- where the principal office was vacant
24 at the time that they assumed the position of the subordinate
25 official --

1 MR. BURNHAM: Sure.
2 THE COURT: -- that would be helpful.
3 MR. BURNHAM: Yes. And we can talk to OLC and get
4 that to Your Honor.
5 And of course, not to belabor the point, it is beyond -- it
6 has been very common, subsequent to the Vacancies Act,
7 particularly with new administrations -- and I just know well
8 from this administration that we had acting officials throughout
9 the agencies, maybe not the Cabinet Secretary level but the
10 sub-Cabinet level.
11 THE COURT: Right, although you also have a President
12 who said that he prefers filling people in positions on an
13 acting basis because it is easier to do that, which is exactly
14 what Congress was trying to get at.
15 MR. BURNHAM: David Barron was the acting head of OLC
16 at the beginning of the Obama administration, even though the AG
17 slot had been vacant since Jack Goldsmith left.
18 THE COURT: My question really, though -- and I take
19 your point, and I am aware that starting with the Sheldon
20 Bradshaw opinion this became the view in the executive branch,
21 and I can tell you that once it's the view in the executive
22 branch, why not fill people in positions in this way, because
23 one, you get people who are political appointees or people who
24 share the vision of the administration in the senior positions,
25 and you are able to fill them in that way, and I get that.

1 My suspicion is that this is one of these circumstances in
2 which the curve is ever-increasing, and it happens more and
3 more, which is in part, I think, what Congress may have been
4 trying to get at and trying to cabin with the Vacancies Reform
5 Act. And I do take it that it's been the position of the
6 executive branch since 2001, but the D.C. Circuit has also said
7 that OLC gets no deference.
8 MR. BURNHAM: I was hoping in this courtroom at least.
9 THE COURT: I follow the D.C. Circuit now.
10 MR. BURNHAM: Yes, of course, Your Honor.
11 The one other textual clue I want to emphasize again,
12 though, is the restarting of the clock for a new president. I
13 think it's a little strange to have this restarting of the clock
14 that expressly contemplates preexisting vacancies and think that
15 they did that in conjunction with (a)(1) taking off the table
16 any -- all new first assistants that a President or a Cabinet --
17 I guess it would be a Cabinet head for most of them, might
18 appoint. It's just a little weird to think that Congress would
19 have been so solicitous of a new President but yet so
20 restrictive in (a)(1), particularly given that most PASs are
21 going to be, obviously, from the last President and, thus, not
22 desirable actings in a long-term basis for the new President.
23 THE COURT: Do you agree that the directive that
24 Mr. Cuccinelli issued setting the timelines was a function or
25 duty of the office of the director?

1 MR. BURNHAM: I'm actually really glad you asked that.
2 That leads me to my next point. If you will allow me to just
3 frame this a little more broadly.
4 THE COURT: Please.
5 MR. BURNHAM: There's a serious question about
6 ratification and what the Vacancies Act means if you conclude
7 that Mr. Cuccinelli is not serving as the proper director.
8 I think the first point I would make is, if you actually
9 read the ratification provision, it only prohibits ratification
10 if it is a duty that is assigned to, quote, only that officer,
11 meaning -- and that's from Section 3348(a)(2)(A) and (a)(2)(B),
12 meaning a function or duty assigned solely to the director of
13 USCIS.
14 I think that's very important for a couple of reasons, and
15 the first one --
16 THE COURT: I'm sorry. What provision were you
17 pointing to?
18 MR. BURNHAM: Sorry. Mr. Rosenberg, at some length,
19 in --
20 THE COURT: 3348(d)(1)? Is that what you're referring
21 to?
22 MR. BURNHAM: I'm saying that it talks about when it
23 cannot be ratified.
24 THE COURT: Right. Bu you just cited me a provision a
25 second ago. I just wanted to take a look at that one. Was it

1 at 1348(d)?

2 MR. BURNHAM: 1348(a)(2)(A) and (a)(2)(B),

3 particularly (ii) for both. That's telling us when it is a

4 function or duty that later in the statute cannot be ratified.

5 So if you look at (a)(2)(A)(ii), my apologies, it refers to

6 something that's required by statute to be performed by the

7 applicable officer, quote, and only that officer, end quote.

8 And then the next provision is the same thing, but for

9 regulatorily assigned duties.

10 THE COURT: Okay.

11 MR. BURNHAM: So the point I'm trying to make is, the

12 no ratification rule only applies if this condition is met,

13 which is that it is something that only that person can do.

14 Like the Attorney General signing a FISA -- actually, that's not

15 just assigned to the Attorney General, but you take the point.

16 THE COURT: Right.

17 MR. BURNHAM: So that matters here for two, I think,

18 pretty important reasons.

19 The first is that the Secretary of DHS has the authority to

20 do anything the director of USCIS can do. And I apologize, Your

21 Honor, because this is not in our briefs. So we would be happy

22 to submit something in writing if you want. But 6 U.S.C.

23 112(a)(3), that's the DHS Secretary statute. You may have it up

24 there.

25 THE COURT: I actually have the one for the director

1 up here but not the DHS Secretary.
2 MR. BURNHAM: Don't worry. I can give you the quote.
3 It's pretty straightforward. It just says, "All functions of
4 all officers, employees, and organizational units of the
5 department are vested in the Secretary."
6 THE COURT: So that's a very -- you're again getting
7 to a point at which if that's what the Vacancies Reform Act
8 means, then it's meaningless, because every agency has that
9 provision. It's -- there's also a generic version of that. I
10 think it's section 501. There's a provision of that at the
11 Justice Department, and it was actually that provision that the
12 Attorney General exercised to assign to Bill Lann Lee the duties
13 and functions of the Assistant Attorney General for the Civil
14 Rights Division. As I've indicated, I think, it is one of the
15 things that prompted Congress to act.
16 And so if this means that the vesting and delegation
17 authority that, I think, virtually every agency head has means
18 that there are no functions that are assigned solely to
19 particular individuals in the agencies, then this provision is
20 meaningless.
21 MR. BURNHAM: Well, actually, I don't agree with that,
22 because I think what Congress was getting at here probably is
23 the most senior officers.
24 THE COURT: But even the Deputy Attorney General or
25 the Deputy Secretary of State, the Deputy Director of Homeland

1 Security, those individuals, everyone except for the agency
2 head. And in fact, I believe that there's a statute that says
3 that all the authorities vested in the agency heads are vested
4 in the President. And so the President could trump any agency
5 head as to at least most functions, maybe not everything.
6 MR. BURNHAM: Well, I'm not sure. Is the President an
7 officer?
8 THE COURT: I don't think the President is an officer.
9 MR. BURNHAM: I haven't thought about that until just
10 now.
11 But I mean, Your Honor, this text couldn't be more clear
12 when it says "only that officer." I mean, that is beyond clear
13 that Congress -- and the new ratification rule, of course, is a
14 very tough rule. Not allowing ratification is incredibly
15 disruptive to the operations of the government. I don't think
16 it's at all hard to imagine that Congress wanted that to be a
17 narrow prohibition.
18 And the D.C. Circuit has told us in the *U.S. Telecom*
19 *Association v. FCC* case, 359 F.3d 554, "When the statute
20 delegates authority to a federal officer or agency,
21 sub-delegation to a subordinate fellow officer or agency is
22 presumptively permissible absent affirmative evidence of a
23 contrary congressional intent."
24 So here, not only do we have the vesting that I mentioned
25 to Your Honor before, the Secretary has an expressed authority

1 that the Congress gave the Secretary after the Vacancies Act was
2 passed, because Congress created the Homeland Security
3 department later, to, quote, delegate any of the Secretary's
4 functions to any officer, employee, or organizational unit of
5 the department. That's at 112(b)(1).
6 And here's where I finally get to the answer to the
7 question Your Honor asked me a little while ago.
8 THE COURT: Yes.
9 MR. BURNHAM: Even if Your Honor concludes that
10 Mr. Cuccinelli's not eligible under (a)(1) for one of the
11 different reasons we've talked about, I think you have to at
12 least read the redesignation of first assistant as a delegation
13 to Mr. Cuccinelli from the acting secretary of the functions and
14 duties of the directorship of the USCIS.
15 THE COURT: It seems like that completely guts the
16 Vacancies Reform Act. That's exactly what Congress is trying to
17 stop.
18 MR. BURNHAM: Your Honor, I think that's just the
19 ineluctable conclusion from what the statute says and what the
20 DHS statutes say.
21 Forget the Vacancies Reform Act for a moment. The DHS
22 Secretary provisions that I quoted Your Honor are very clear
23 that the Secretary has the authority of all subordinate
24 officials of the agency and expressly allows the Secretary to
25 delegate that authority.

1 THE COURT: That's true in virtually every agency in
2 government.
3 MR. BURNHAM: That's the statute Congress passed.
4 Nothing in the FVRA countermands the explicit authority Congress
5 gave the Secretary in the DHS statute.
6 And so if you look at the redesignation document, which is
7 the succession document, the document that says the principal
8 deputy at USCIS takes over -- that's the Blackwell declaration,
9 Exhibit 2. It says that it does so by changing -- by altering
10 DHS delegation number 01-06. And then you go to DHS delegation
11 01-06, which is Johnson declaration, Exhibit 1, I believe it's
12 Exhibit B to the opposition, and you go to the annex for the
13 USCIS director, it's titled "DHS Orders of Succession, Orders
14 For Delegations of Authorities." Right?
15 And so I think, you know, even if the Court concludes that
16 Mr. Cuccinelli can't be the acting because he's not eligible
17 under (a)(1), I think then it's just as clear that he has the
18 authorities -- I forget the exact phrase. The functions or
19 duties have been delegated to him by the Secretary through the
20 same designation order. And so he has the authority either way.
21 And we would be happy to brief that if Your Honor would
22 like, because I know this is a lot for me to just --
23 THE COURT: No, no, no, I get the point. I just think
24 that if that's right, then the Vacancies Reform Act is a
25 nullity.

1 MR. BURNHAM: I don't think it's a nullity. I think
2 it just recognizes that Congress wanted to balance the desire to
3 have Senate confirmation for senior --
4 THE COURT: Give me an example of something it does,
5 and I will give you the way around it.
6 MR. BURNHAM: I don't think you could get around the
7 Attorney General. I actually --
8 THE COURT: The Attorney General. So Cabinet
9 officials only, it only applies to Cabinet-level officials then.
10 MR. BURNHAM: If Congress created coterminous
11 investments of authority in multiple levels of the agency. But
12 Your Honor, that --
13 THE COURT: As I said, I believe there's a general
14 statute that vests in Secretaries the authorities of everyone --
15 MR. BURNHAM: For all Secretaries?
16 THE COURT: I believe that's the case. Let me see if
17 I have it here. Hold on a second.
18 But in any event, I know that it's the case that in
19 general, that most agencies have that in their organic statutes
20 that says -- let's see here.
21 So there is 5 U.S.C. Section 301, which applies to all
22 agencies, that says the head of an executive department may
23 prescribe regulations for the governing of his department, the
24 conduct of its employees, the distribution and performance of
25 its business, the custody, use, and preservation of records and

1 property.

2 And then there is 5 U.S.C. Section 302 that says in
3 addition to the authority to delegate conferred by other law,
4 the head of an agency may delegate to subordinate officials the
5 authority vested in him by law to take final action on matters
6 pertaining to the employment, direction, and general
7 administration of personnel, and by Section 3702, to authorize
8 the publication or advertisement of notices of proposals.

9 MR. BURNHAM: I think that's a delegation provision.

10 THE COURT: That is, but there's a vesting provision
11 as well, I'm pretty sure.

12 So I take it maybe there's some agencies where this isn't
13 the case, but I think in general, agency heads have the
14 authority vested in the agency head of all the authorities in
15 that agency and the delegation authority then to redelegate that
16 authority, and that's what Congress was getting at in the
17 Vacancies Reform Act, saying, Stop using that to get around the
18 nomination process.

19 MR. BURNHAM: Your Honor, again, fair enough. I guess
20 I would just point to the text of 3348 where Congress is really
21 clear that it is -- the prohibition on ratification is limited
22 to things that are statutorily assigned to the, quote,
23 applicable officer and only that officer.

24 So Congress -- I mean, that is not -- whatever ambiguity
25 Your Honor may see in (a)(1), I don't think there's any

1 ambiguity in that where Congress has actually added a
2 parenthetical confirming they mean things that are assigned to
3 only that officer.
4 And so I haven't gone through the entire U.S. Code, but I'm
5 sure there are offices where only that office has a particular
6 function or duty. And the DHS statute, which Congress also
7 enacted, couldn't be more clear that, quote, all functions --
8 the same term they use in the Vacancies Reform Act, all
9 functions of all officers are vested in the Secretary, and the
10 Secretary may delegate, quote, any of the Secretary's functions.
11 So these are all congressional enactments. It may be that
12 in creating the Homeland Security department, Congress gave the
13 Secretary more authority to delegate functions than the 1998
14 Congress had in mind when it passed the Vacancies Act, but
15 there's no denying that they did it.
16 And if you look at the designation documents here, I think
17 it's quite clear that they function in both ways. They both
18 make this -- you understand.
19 THE COURT: So even if the sort of Draconian no
20 ratification provision doesn't apply, if the Court were to
21 conclude that Mr. Cuccinelli was not properly appointed, sort of
22 just under independent law before you even get to that
23 provision, his actions at least would not apply with respect to
24 the plaintiffs in the case.
25 MR. BURNHAM: No. I don't think the plaintiffs even

1 dispute that he was properly appointed principal deputy director
2 of USCIS.
3 THE COURT: Then you get back -- see, I think that's
4 where you're conflating things here. So I get your argument
5 with respect to the Draconian remedy of no ratification, for
6 example, and that that's limited to the solely assigned
7 functions. But that doesn't mean, though, that someone could be
8 nonetheless lawfully appointed to serve in an acting position.
9 MR. BURNHAM: He wouldn't be the acting --
10 THE COURT: Cannot be lawfully assigned the duties of
11 an office.
12 MR. BURNHAM: Right. But that's a question -- so
13 let's table for a second whether he's properly the acting
14 director under the FVRA.
15 THE COURT: I'm sorry. Just give me a second.
16 I don't want to extend beyond the capacity of the court
17 reporter. Why don't I give you five more minutes, and then I
18 will give the plaintiffs five minutes to respond.
19 MR. BURNHAM: I will be very brief.
20 The question Your Honor is asking now I think is not an
21 FVRA question. So in a role in which the Court thinks
22 Mr. Cuccinelli can't be the acting director, we have a second
23 question, which is, under the DHS statutes, can the Secretary
24 assign him, delegate to him the duties and functions of the
25 director?

1 There's no dispute that he is properly serving as principal
2 deputy director at USCIS, that he is lawfully employed by the
3 agency. The only dispute is whether he can be the acting
4 director under the FVRA.
5 THE COURT: So that's just a question of whether he
6 needs the title or not?
7 MR. BURNHAM: I mean, essentially, because the DHS
8 statute gives the Secretary such broad delegation authority, and
9 the appointment order -- I'm sorry, the succession order the
10 Secretary issued.
11 THE COURT: I can tell you with certainty that was
12 true of the Justice Department as well. That's what the
13 Attorney General relied upon in assigning the duties to Bill
14 Lann Lee, and that's what Congress said no, we're not going to
15 allow.
16 MR. BURNHAM: But it's what they said yes to when they
17 passed 6 U.S.C. 112(b)(1) for the Department of Homeland
18 Security.
19 THE COURT: No, they passed that years before they
20 passed --
21 MR. BURNHAM: No, no, after. The Homeland Security
22 department postdates the FVRA.
23 THE COURT: One way or the other, but there's an
24 organic statute that existed throughout government for decades.
25 MR. BURNHAM: Sure enough. But I'm just saying that

1 here, you don't need to wrestle with all of that, because here
2 we have a very clear provision for the Secretary at 6 U.S.C.
3 112(a)(3) and a very clear delegation provision for the
4 Secretary at 112(b)(1).
5 So the point of all of this is that even if Mr. Cuccinelli
6 is out as director, he still has the authority through
7 delegation. And so either way, he had the authority to do what
8 he did. And I just don't think there's any reason to think that
9 the Vacancies Act would require the removal of Mr. Koumans in
10 order to install Cuccinelli -- Mr. Cuccinelli lawfully.
11 THE COURT: Okay. Thank you.
12 MR. BURNHAM: Thank you, your Honor.
13 MR. LEWIS: So I will just make a few brief points on
14 the merits and close a few jurisdictional issues at the end.
15 Starting in reverse order with the FVRA claim and
16 specifically with the FVRA's enforcement provision, as I
17 understand my friend's argument, it's that because the DHS
18 Secretary statute specifically delegates all functions of the
19 department and the Secretary, there's nothing for the rest of
20 DHS that is vested in any officer in particular.
21 I think there's some reasons why that argument is legally
22 untenable, but I think the implication of it is pretty
23 startling. It would mean the FVRA's enforcement provisions have
24 no application to any sub-Secretary official in DHS. And I
25 think the same would be true of any other agency statute that

1 vests all functions of the department in the Secretary, which I
2 think is fairly common.
3 THE COURT: But what do you do with the language in
4 the statute that says "and only that officer"?
5 MR. LEWIS: So I think the problem is that 5 U.S.C.
6 3348 itself recognizes that the Secretary will perform all the
7 functions of the department. It says if there's nobody lawfully
8 in a position, then the Secretary is the only one who can
9 discharge those functions.
10 So I think Congress was recognizing that to avoid the harsh
11 impact of the FVRA, you still have to have somebody that will
12 discharge those authorities. And then I think it's recognizing
13 that the other statutes --
14 THE COURT: Do you want to point me to that language
15 which says only the Secretary can perform the functions?
16 MR. LEWIS: It's in 5 U.S.C. 3348. I don't have it in
17 front of me.
18 But I think the idea is that Congress recognizes that the
19 Secretary would perform those functions. And so if the idea is
20 that by vesting everything back in the Secretary, that reads the
21 FVRA out of the picture, I just don't see how that can be
22 squared with the language of that provision.
23 I think a more reasonable reading is that if something is
24 vested in the official in the first instance, if it's an
25 authority that that official is supposed to discharge, then

1 that's all that's required for the FVRA's enforcement provision.
2 And that's the case here. 6 U.S.C. 271 gives the USCIS
3 director authority to promulgate policies about asylum seekers,
4 and then 6 U.S.C. 113 says that all authorities vested in a
5 specific person will be discharged by that person, of course
6 subject to the limitation that the Secretary can discharge the
7 powers.
8 So I don't think this argument was in their papers, and I
9 think that's because it just doesn't make sense in terms of the
10 statute and its purpose.
11 So to go back to the merits of the FVRA argument, I think
12 what Your Honor has seized on is that the FVRA is imperfectly
13 drafted. It's 20 years old, and now there are a lot of things
14 happening that Congress maybe can't have foreseen.
15 But I think the Court has to give effect to the structure
16 of the FVRA and what it's trying to do. I think my friend's
17 argument hinges in large part on the idea there are a lot of
18 statutes which specifically designate first assistants and so
19 impose additional limitations.
20 I don't think that's true. I think there are only five
21 statutes in the Federal Code that specifically say this person
22 is the first assistant to this position. It's things like the
23 DOJ Deputy Attorney General, the DHS Deputy Secretary, I think a
24 Deputy Secretary of Agriculture. There just isn't much there if
25 the FVRA doesn't do something about this on its own force.

1 THE COURT: You're telling me there are only five
2 statutory deputies in the U.S. Code?
3 MR. LEWIS: Not deputies. That use the term "first
4 assistant," that say this person is the first assistant.
5 Otherwise, it's left open for the agency to appoint the first
6 assistant by regulation. And then there's nothing preventing
7 them from doing what they did here.
8 THE COURT: No, but there are a whole bunch of deputy
9 positions, like Deputy Attorney General, Deputy Secretary of
10 Homeland Security; right?
11 MR. LEWIS: That statutorily create those positions
12 but not that specifically say these positions are the first
13 assistant. And so there's nothing preventing the agency from
14 creating a new position of Principal Deputy Secretary or
15 something like that and saying this person will serve as the --
16 THE COURT: Oh, I think there is. Like for the Deputy
17 Attorney General, the statute says that in the absence of the
18 Attorney General, the Deputy Attorney General shall exercise the
19 authorities of the Attorney General.
20 MR. LEWIS: Fair enough. So I think there are other
21 statutes that may make similar points in slightly different
22 language. But as far as statutes that say this person is the
23 first assistant, there are only five of them. There may be
24 statutes that say this person shall serve per 3345, and I use
25 the term first assistant, but I think those statutes are

1 somewhat infrequent.
2 So the question is really what's left of the FVRA if you
3 buy either their argument on the merits or their argument on
4 ratification in the enforcement provision. And I think the
5 answer is that there really isn't anything. I think the
6 specific strategy that they did here of creating a new office
7 and designating that as the first assistant could apply anywhere
8 where the statute doesn't specifically designate a first
9 assistant.
10 And just quickly on the text, the principal textual
11 argument that I understand them to be making is the "to the
12 office" argument. I think there are two ways you can look at
13 this argument. I think one is just the plain text of what that
14 language means, and there's nothing in the phrase "to the
15 office" that says when the person has to have been serving as
16 the first assistant to the office. We know that that language
17 was just intended to depersonalize the Office of First Assistant
18 and make it about the agency's structure, and not that somebody
19 is serving Bill Barr or serving a particular official.
20 The other way you can look at it is what was Congress
21 trying to do by putting that language in, which is sort of an
22 atextual argument. And I think we know very clearly from the
23 legislative history that Congress didn't mean anything
24 substantial by this and certainly not the result that my friend
25 is arguing for. If anything, it was intended to do just what

1 the language would seem to do, which is depersonalize the Office
2 of First Assistant.
3 THE COURT: Do you want to respond to the government's
4 argument with respect to the *AILA* decision and whether this
5 court has jurisdiction?
6 MR. LEWIS: Yes, Your Honor.
7 So I don't think that the *O.A.* decision gets us 100 percent
8 of the way on RAICES, but I do think it gets us about 90 percent
9 of the way.
10 So starting from what (e)(3) says, (e)(3) encompasses both
11 determinations and implementations. The statute means the same
12 thing, regardless of the specific plaintiff that it's being
13 applied to. If the statute permits review of both those two
14 things, then that's surely true for any kind of plaintiff. And
15 so it doesn't matter purely from the language of the statute
16 whether RAICES is subject to a determination.
17 As far as *AILA* is concerned, I think Judge Jackson got it
18 right in *Make the Road*. *AILA* is concerned solely with third-
19 party standing, and the purpose of its statutory analysis was to
20 see if there was anything in the statute that expanded the scope
21 of third-party standing. And the Court said that there wasn't.
22 It wasn't definitively ruling on the scope of (e)(3). And so as
23 Judge Jackson put it, *AILA* can't propel this jurisdictional
24 argument forward.
25 I think the Court is left with the language of the statute,

1 and the language of the statute encompasses both implementation
2 and determination. So even if RAICES can't receive a
3 determination, it can still challenge the implementation of the
4 statute.
5 So like I said, I think *O.A.* gets us 95 percent of the way
6 on (e)(3). I think it gets us 100 percent of the way on the
7 zone of interest argument, because *O.A.* recognized that
8 organizations that provide services to asylum seekers further of
9 the purposes of the INA, and I think that's equally true here.
10 THE COURT: *O.A.* is just a district court decision.
11 So I am not bound by it anyway.
12 MR. LEWIS: Well, a pretty good judge wrote it.
13 I think that's it, unless you have any further questions.
14 THE COURT: All right. Thank you.
15 So should we just talk for a moment about process? I do
16 think I would like to at least consider the opportunity of
17 treating the motion as a motion for summary judgment, but I want
18 to know what the parties would like to do on the assumption that
19 I am going to proceed that way and what else you would like to
20 submit and when you would want to do it. And I think
21 expedition, obviously, is key.
22 MR. LEWIS: So from the plaintiffs' perspective, we
23 are happy to treat the motion for preliminary injunction as a
24 motion for summary judgment, a partial motion that only
25 addresses the claims in it, and then we can have a discussion

1 about whether the other claims need to be resolved, depending
2 upon the outcome of that motion.
3 We would appreciate the chance, you know -- we have to put
4 in the statement of material facts. We could do that in the
5 next week or two. If there are any other factual points that
6 the Court would appreciate clarification on, we can do that as
7 well.
8 But otherwise, we're not opposed to that proposal.
9 THE COURT: I would invite you -- you may not have the
10 resources that the government has on this, but if you have
11 examples one way or the other with respect to whether pre-1998
12 there were vacancies that were filled under the Vacancies Act by
13 a first assistant where the position, the principal position was
14 vacant at the time that the first assistant was appointed, that
15 would be helpful.
16 MR. LEWIS: We will certainly look, but as you noted,
17 we don't have quite the resources as the government on this
18 point.
19 THE COURT: All right. Mr. Ramkumar?
20 MR. RAMKUMAR: So Your Honor, the government is
21 largely in agreement, just with the caveat that if it is treated
22 as a partial motion for summary judgment, limited just to the
23 claims raised in the preliminary injunction motion, we would
24 have no objection, provided that given that there were a number
25 of new issues raised during this argument, we would request the

1 opportunity to file a supplemental brief specifically to the
2 issue you just alluded to, as well as to file the statement in
3 opposition to the material facts for purposes of assessing --
4 THE COURT: So assuming I give the plaintiffs a week
5 to file their statement of material facts not in dispute -- and
6 in that, what I would request that you do is actually cite to
7 record evidence, and if it turns out that you need to submit
8 another affidavit or declaration, you are welcome to do so at
9 this point.
10 Is a week sufficient for you to do that?
11 MR. LEWIS: Yes.
12 THE COURT: So today is December 3rd. And I will
13 direct, then, that the plaintiffs file by December 10th a
14 statement of material facts and any additional factual
15 submission that you need to submit in support of that. And this
16 will be a partial motion for summary judgment.
17 MR. LEWIS: Got it. So the only question I have is if
18 they intend to file a supplemental brief --
19 THE COURT: I will give you a chance to respond.
20 MR. LEWIS: Okay. Great.
21 THE COURT: So how much time do you want to both
22 respond to the statement of material fact and to file a
23 supplemental brief?
24 MR. RAMKUMAR: We would request an additional week,
25 Your Honor.

1 THE COURT: So that takes us to December 17th for the
2 government to file its response, and I will ask that you do the
3 same thing in that -- ideally, what you will do is reproduce
4 their statement of material fact, create a new column indicating
5 whether it's disputed, and if it's disputed, give me a cite to
6 the evidence that's disputing it. And if you need to submit any
7 additional declarations or affidavits or evidence in support of
8 that, you are welcome to do so at that point.
9 Okay?
10 MR. RAMKUMAR: Yes, Your Honor.
11 THE COURT: And then also, if you want to submit a
12 supplemental brief at that time, you can do so as well.
13 MR. RAMKUMAR: Yes, Your Honor.
14 THE COURT: How many pages would you like for that?
15 MR. RAMKUMAR: Let me briefly confer with my
16 co-counsel.
17 THE COURT: Okay.
18 MR. RAMKUMAR: We would request no more than 30 pages.
19 MR. BURNHAM: Not that we would use them all, but
20 whatever you want.
21 THE COURT: I want to get this right. But why don't I
22 give you 25 pages. Hopefully, you won't even need all that.
23 This is pushing into the holidays, but would it be asking
24 too much for the plaintiffs to respond by December 24th to that?
25 If you wanted a little additional time, I would give it to you,

1 in light of the holiday.
2 MR. LEWIS: Yes, let's say December 24th. Our hope is
3 that we won't file it on that date but will file it a bit
4 earlier, but I think December 24th is reasonable.
5 THE COURT: I will also give you up to 25 pages to
6 respond, if you would like.
7 Anything further today? Let me simply say, I thought the
8 arguments were excellent today. They were very helpful to me
9 today. So thank you.
10 (Proceedings adjourned at 12:34 p.m.)
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12 -
13
14 CERTIFICATE OF OFFICIAL COURT REPORTER
15
16 I, Sara A. Wick, certify that the foregoing is a
17 correct transcript from the record of proceedings in the
18 above-entitled matter.
19
20
21
22 /s/ Sara A. Wick December 4, 2019
23 SIGNATURE OF COURT REPORTER DATE
24
25