Nicholas Espíritu (SBN 237665)
NATIONAL IMMIGRATION LAW CENTER
3450 Wilshire Boulevard, #108-62
Los Angeles, CA 90010
Tel.: (213) 639-3900
Fax: (213) 639-3911
espiritu@nilc.org

Antionette Dozier (SBN 244437)
WESTERN CENTER ON LAW & POVERTY
3701 Wilshire Boulevard, Suite 208
Los Angeles, CA 90010
Tel: (213) 487-7211
Fax: (213) 487-0242
adozier@wclp.org

Martha Jane Perkins (SBN 104784)
NATIONAL HEALTH LAW PROGRAM
1512 E. Franklin Street, Suite 110
Chapel Hill, NC 27514
Tel.: (919) 968-6308
Fax: (919) 968-8855
perkins@healthlaw.org

Attorneys for Plaintiffs La Clínica de La Raza et al.
See signature page for complete list of parties represented

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

LA CLÍNICA DE LA RAZA, ET AL., Plaintiffs, v. DONALD J. TRUMP, ET AL. Defendants.	Case No. 4:19-cv-04980-PJH **PLAINTIFFS' MOTION FOR RECONSIDERATION** Courtroom: 3 Judge: Hon. Phyllis J. Hamilton Trial Date: None set Action Filed: August 16, 2019

NOTICE OF MOTION FOR MOTION FOR RECONSIDERATION

TO THE DEFENDANTS AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that pursuant to this Court's Local Rule 7-9 and the Federal Rules of Civil Procedure, Rule 54(b), Plaintiffs[1] will and hereby do move this Court for reconsideration of the Court's August 7, 2020 Order Granting in Part, Denying in Part, and Deferring Ruling in Part on Motion to Dismiss, ECF No. 177.

Plaintiffs ask this Court to reconsider its Order with respect to Plaintiffs' Third, Fifth, and Eighth Claims concerning the legality of Mr. Kevin McAleenan's appointment, where the Court held that the President may have exercised discretion to appoint Mr. McAleenan under the Federal Vacancy Reform Act (FVRA). *Id.* at 22-26. Reconsideration is appropriate because new evidence has emerged after the Court's decision that undermines its factual premise. As discussed in further detail below, in the weeks since this Court's decision, Defendants have stated before another court and in public statements that the President did not exercise discretion under the FVRA to appoint Mr. McAleenan.

This Motion is based on this Notice, the following Memorandum of Points and Authorities, the Declaration of Nicholas Espíritu and the Exhibits attached thereto, the pleadings and records in this action, and any such further paper and arguments of counsel that the Court may consider.

Respectfully submitted,

Dated: September 10, 2020 By: */s/ Nicholas Espíritu*
NICHOLAS ESPÍRITU

[1] Plaintiffs are: La Clínica de La Raza, African Communities Together, California Primary Care Association, Central American Resource Center, Farmworker Justice, Council on American-Islamic Relations-California, Korean Resource Center, Maternal and Child Health Access, and Legal Aid Society of San Mateo County.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In dismissing Plaintiffs' claims regarding the validity of Kevin McAleenan's appointment (counts 3, 5, and 8), this Court concluded that, although the appointment did not comply with the Department of Homeland Security's own Order of Succession, Mr. McAleenan's appointment was nonetheless valid because under Executive Order 13753 "the President retains discretion to the extent permitted by the Vacancies Act, to depart from this order in designating an acting Secretary." ECF 177 at 26 (quoting 81 Fed. Reg. 90,667, 90,668).

Defendants did not advance this argument in their briefing, giving Plaintiffs no opportunity to rebut it. And since this Court's decision, it has become clear that Defendants' refusal to make this claim was intentional: Before another federal district court, Defendants have now conceded that if Mr. McAleenan was appointed pursuant to the Federal Vacancies Reform Act ("FVRA"), the current acting Secretary has necessarily been serving invalidly. What is more, even assuming this Court was correct and the President retained authority to appoint the Acting Secretary under the FVRA, Defendants have now conceded that the President did not in fact rely on that discretion to appoint Mr. McAleenan. In the time since the Court's opinion, Defendants have stated—to a federal district court, to the Government Accountability Office ("GAO"), and to the public—that Mr. McAleenan was appointed pursuant to the Order of Succession, not the FVRA.

As a result, Plaintiffs' claims are not defeated by any possible—but concededly unexercised—reservation of FVRA power by the President. Instead, those claims rise or fall based solely on whether Mr. McAleenan was next in line in the DHS Order of Succession. And this Court found correctly that he was not.

Plaintiffs thus respectfully request that the Court reconsider its dismissal of Counts 3, 5, and 8, and deny Defendants' motion to dismiss these counts.

II. BACKGROUND AND NEW EVIDENCE

Plaintiffs brought suit alleging that the Department of Homeland Security's Public Charge Rule must be vacated because, *inter alia*, it was promulgated by Kevin McAleenan while he was invalidly serving as the Acting Secretary of the Department of Homeland Security ("DHS"). *See*

ECF No. 177, at 22-23. Plaintiffs contend that Mr. McAleenan assumed the role improperly because he was not next in line to assume that office pursuant to the binding Order of Succession applicable to secretarial resignations. Rather, Secretary Nielsen amended the Order of Succession to elevate Mr. McAleenan to next-in-line only in cases where the Secretary became "unavailable to act during a disaster or catastrophic emergency." *Id.* at 23. In other cases, including resignation by the Secretary, Executive Order 13573 continued to govern the Order of Succession and provided for a different individual to assume the office of acting secretary.

In their motion to dismiss, Defendants did not dispute that Mr. McAleenan was not next-in-line to assume the office of acting secretary under Executive Order 13573, or that Executive Order 13573 dictated the Order of Succession upon Secretary Nielsen's resignation in the absence of a change to the Order of Succession by Secretary Nielsen. *See* ECF No. 166, at 17-18. Defendants did not argue that the same Executive Order's reservation of authority under the FVRA provided a backstop if the Order of Succession controlled. *See id.* at 17-18; ECF No. 172 at 13-15. Defendants likewise did not claim that the President exercised that authority, even if it had been retained. Rather, Defendants' only argument was that Secretary Nielsen's order, which expressly changed the Order of Succession only in the event of disasters and catastrophes, *sub silentio* also changed the Order of Succession applicable to resignations. *See* ECF No. 166, at 18.

This Court agreed with Plaintiffs that Mr. McAleenan was not properly appointed pursuant to the Order of Succession. ECF No. 177, at 26. The Court then determined *sua sponte*, however, that the Executive Order reserved the President's power to instead use the FVRA to appoint a successor. Thus, the Court held that because Plaintiffs did not allege that McAleenan could not serve under the FVRA's requirements, Plaintiffs' claims failed. The Court held that Mr. McAleenan's service was permitted as an FVRA appointment despite his otherwise invalid service under the Order of Succession. *Id.*[2]

[2] Plaintiffs respectfully disagree with the Court's holding that the President continued to possess the power to appoint Mr. McAleenan under the FVRA notwithstanding the Homeland Security Act and DHS' Order of Succession. Plaintiffs did not brief the issue during the motion to dismiss stage because Defendants did not advance that argument. Nonetheless, on the posture of this

Since this Court issued its opinion, several statements from Defendants, and an opinion from the GAO, have revealed that the FVRA was not, in fact, the basis for Mr. McAleenan's appointment.

A. The District of Maryland Preliminary Injunction Hearing

On August 14, 2020, Defendants DHS and Chad Wolf appeared before the District of Maryland on a motion for preliminary injunction challenging certain asylum-related rules. *See generally* Espíritu Decl., Ex. A, Transcript, *Casa de Maryland v. Wolf*, No. 8:20-cv-2118-PX (D. Md. Aug. 14, 2020). The hearing primarily concerned whether Chad Wolf validly serves as the current Acting Secretary of Homeland Security. In its argument before the Maryland district court, Defendants repeatedly disavowed any argument that the President appointed Mr. McAleenan (as well as Mr. Wolf) pursuant to the FVRA, instead affirming that both served under the Order of Succession. *See id.* at 40:5-9 ("So, again, before we even get to Secretary Wolf's service as Acting, we have to look necessarily at Acting Secretary McAleenan who, according to the Department of Homeland Security, was appointed through Section 113 and not the Federal Vacancies Reform Act."); *see also id.* at 19:3-7 ("The argument and the reason why we believe that Secretary Wolf's appointment is legal is because Secretary McAleenan and Secretary Wolf were appointed pursuant to Section 113 of the Homeland Security Act, which does not contain the 210-day limitation [applicable to FVRA appointments]."); *id.* at 22:11-17, 22:22, 22:24-25, 23:1-2 (agreeing with the court that there was "no evidence" that "the President installed Acting Secretary McAleenan" under the FVRA, and that the court could *not* take judicial notice thereof); *accord id.* at 55:2-3 (Court noting that Defendants' time limit argument says the court "can read the H[omeland Security Act] as basically being the exclusive statute"). Indeed, Defendants admitted that, if the District of Maryland "adopted the reasoning by [this Court][3] that McAleenan

motion for reconsideration, Plaintiffs address only the subsequent undermining of the premise of the Court's decision, and not its legal assessment of the FVRA's applicability.

[3] Defendants appear to have mistakenly referred to this Court as "the Washington court" when not referring to it by name.

was appointed through the FVRA instead, Wolf's appointment would not be proper." *Id.* at 18:4-6.[4]

B. The GAO Opinion

The same day as the District of Maryland hearing, the GAO issued an opinion concluding, *inter alia*, that "Mr. McAleenan was not the proper Acting Secretary" upon Secretary Nielsen's resignation. *See* Espíritu Decl., Ex. B, Matter of: Department of Homeland Security—Legality of Service of Acting Secretary of Homeland Security and Service of Senior Official Performing the Duties of Deputy Secretary of Homeland Security, B-331650, at 10 (GAO Aug. 14, 2020). That opinion came in response to a November 2019 request from the House Committee on Homeland Security and Committee on Oversight & Reform regarding the legality of the appointment of Mr. Wolf as acting secretary and Kenneth Cuccinelli as Senior Official Performing the Duties of Deputy Secretary. *See id.* at 2. The GAO determined those two individuals had not been validly appointed because the person who appointed them, Mr. McAleenan, did not lawfully assume the office of Acting Secretary. *See id.* at 2, 6-9. As the GAO concluded, upon Secretary Nielsen's resignation, "Mr. McAleenan was not the designated Acting Secretary because, at the time, the Director of CISA was designated the Acting Secretary under the April Delegation." *Id.* at 9.[5]

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[4] Although Defendants at one point in the hearing purported to take no position on this Court's holding concerning McAleenan's appointment under the FVRA, *id.* 21:18-22:2, that statement was belied by Defendants' repeated assertions to the district judge in Maryland that Mr. McAleenan was *not* appointed pursuant to the FVRA and not subject to its time limitations, and that Mr. Wolf's appointment would be invalid if this Court's reasoning were correct. The enormous ramifications of this Court's ruling are due to FVRA-established time limits. In the Maryland case, DHS has argued that the FVRA's time limits, which have unquestionably lapsed, do not apply to acting secretaries serving pursuant to the Order of Succession. DHS concedes, however, that the time limits certainly apply if the FVRA is the basis for an acting official's appointment. Because the 210-day limit lapsed before Mr. McAleenan purported to elevate Mr. Wolf, and because the time limits do not reset for a new acting appointee, Acting Secretary Wolf can only be valid appointee if, *inter alia*, Mr. McAleenan served pursuant to the Order of Succession and not the FVRA. *See* Ex. A, 18:8-16 (noting that, if Mr. McAleenan was appointed under FVRA, he exceeded the statutory time limit). This Court's ruling would thus serve as the basis to find dozens of administrative actions taken by DHS under Acting Secretary Wolf unlawful under the FVRA or APA.

[5] The GAO noted that that it was not "not review[ing] the consequences of Mr. McAleenan's service as Acting Secretary, other than the consequences of the November delegation" purporting

The GAO reached its opinion after weighing and rejecting the same argument that DHS advanced in this case regarding the legality of Mr. McAleenan's appointment. *See id.* at 3 (noting, consistent with GAO practice, that DHS submitted a letter regarding its views on the matter on December 20, 2019). According to GAO, DHS "stated that it referred to the April Delegation" that Nielsen signed; the same delegation that this Court found unambiguously left the order for *resignation-related* vacancies unchanged. *Id.* at 7.[6] The GAO rejected DHS's arguments, noting that "the plain language of the delegation controls, and it speaks for itself." *Id.* at 9. The GAO likewise found unpersuasive DHS's post-amendment factual arguments, most of which DHS chose not to raise in this case. *Id.*

C. Defendants' August 17 Letter to the GAO

On August 17, 2020, Defendant DHS submitted a letter to the GAO demanding that the GAO withdraw its opinion. *See generally* Espíritu Decl., Ex. C, Letter from Chad Mizelle, Senior Official Performing the Duties of the General Counsel, Department of Homeland Security, to Thomas Anderson, General Counsel, Government Accountability Office (Aug. 17, 2020). One of the central arguments advanced by the letter was that the GAO had no authority to issue its report because the issues in the Report "did not concern an appointment under the FVRA . . . . Instead, the Report concerned an appointment under § 103 of the [Homeland Security Act]." *Id.* at 2. Despite post-dating this Court's opinion, Defendants made no argument that Mr. McAleenan could have been or was appointed by the President pursuant to the FVRA. On the contrary, they expressly *disavowed* that theory as a means of denying the GAO's authority to issue its decision. The GAO has since declined to withdraw its opinion. *See* Espíritu Decl., Ex. D, Matter of: Department of Homeland Security—Legality of Service of Acting Secretary of Homeland Security and Service of Senior Official Performing the Duties of Deputy Secretary of Homeland Security—Reconsideration, B-331650 (GAO Aug. 21, 2020).

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to make Mr. Wolf and Mr. Cuccinelli eligible for their positions, but was referring such questions to the DHS Office of Inspector General for its review. *See id.* at 11; *see also id.* at 2 n.1.

[6] The GAO opinion does not indicate that Defendants attempted to persuade the GAO that the President could or did appoint Mr. McAleenan pursuant to the FVRA.

D. Defendants' Public Statements

Defendants likewise have rejected this Court's reasoning regarding the use of the FVRA in public statements since this Court's decision. For example, on August 23, 2020, Mr. Wolf stated during an interview:

> [A]s you can tell, we disagree with what the GAO said. [T]hey have no authority in this area. They have authority to look at the Federal Vacancy Act. That's not how we use—*that's not the authority that we use when we appoint our successors at the Department; the Homeland Security Act is.*

Espíritu Decl., Ex. E, Transcript, *Interview with Acting U.S. Secretary of Homeland Security Chad Wolf*, CNN (Aug. 23, 2020), *available at* http://transcripts.cnn.com/TRANSCRIPTS/2008/23/sotu.01.html (emphasis added) (last visited Aug. 23, 2020).

III. ARGUMENT

Pursuant to Federal Rule of Civil Procedure 54(b), this court may "revise [its determinations as to some claims] at any time before the entry of a judgment adjudicating all claims and all the parties' rights and liabilities." Among the bases for which this Court's local rules permit such reconsiderations are that "a material difference in fact or law exists from that which was presented to the Court before entry of the interlocutory order for which reconsideration is sought." N.D. Cal. Civ. L. R. 7-9(b)(1).

Here, Defendants' post-dismissal position before a different district court, the GAO's opinion, Defendants' letter responding to the GAO, and Mr. Wolf's public statements are all material changes that postdate this Court's opinion, and were therefore unavailable to Plaintiffs prior to the Court's adjudication.

As a matter of fact, these three events clarify, in a manner and to an extent not previously available to Plaintiffs, that, even if the President *could* have used the FVRA to appoint Mr. McAleenan, as this Court held, he did not use that authority in this case. Indeed, Defendants have argued before another court and a federal agency that this Court's decision that Mr. McAleenan was appointed via the FVRA is wrong as a matter of fact. *See supra*, sect. II.A.-C. The order dismissing Plaintiffs' claims is thus unwarranted because its legal conclusion relies on a factual premise that Defendants did not advance in this Court and have now admitted was incorrect. *Cf.,*

e.g., *DHS v. Regents of the Univ. of Calif.*, 140 S. Ct. 1891, 1905 (2020) ("The dispute before the Court is not whether DHS may rescind DACA. All parties agree that it may. The dispute is instead primarily about the procedure the agency followed in doing so."); *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2576 (2019) (setting aside Census citizenship question despite not holding that agency decision was substantively invalid).

Leaving in place the Court's opinion on an argument that Defendants did not advance, and which they have repudiated before another court, a federal agency, and to the general public, also risks substantial harm to the rule of law. At minimum, the Government's post-opinion conduct confirms that it has made a strategic choice to advance claims about the appointment of Mr. McAleenan that depend on the President having appointed him pursuant to the DHS organic statute, and not the FVRA. Such strategic choices come with the corresponding risk of waiver. *See, e.g.*, *June Medical Servs. LLC v. Russo*, 140 S. Ct. 2103 (2020) (noting that Petitioner's strategic concession of prudential standing issue barred the Supreme Court from considering the waived argument).

More fundamentally, Defendants appear to contend that this Court was wrong to suggest that the President appointed Mr. McAleenan pursuant to the FVRA. To leave the opinion in place would allow Defendants to contend to federal courts elsewhere that Mr. McAleenan, and Mr. Wolf, were appointed pursuant to the Order of Succession, while allowing Defendants to dismiss this suit on grounds that it claims before other courts to be counterfactual. To do so would allow Defendants to have their cake and eat it too.

As a matter of law, the GAO's decision provides a persuasive assessment of the issues presented here, which warrant reconsideration even though the GAO's decision is not binding upon this Court. *See, e.g.*, *N.M. Health Connections v. HHS*, 340 F. Supp. 3d 1112, 1173 (D.N.M. 2018) ("The GAO Report, as an opinion letter, does not receive *Chevron* deference, but it is still entitled to respect '[as] a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)) (citation omitted). The GAO's persuasiveness is pronounced given Congress's explicit decision to task the Office with identifying and reporting violations of the FVRA. *See* 5 U.S.C. § 3349(b)

(assigning task of determining violations of FVRA to Comptroller General of the United States, the head of the GAO). Beyond the legal persuasiveness, the decision's factual revelations—that Defendants deny that the FVRA was the basis of succession—independently justify reconsideration for the reasons discussed above.

IV. CONCLUSION

Because Defendants repeatedly have disavowed the factual premise of this Court's ruling in the weeks since it was handed down, and because persuasive authority post-dating the opinion supports Plaintiffs' contentions, Plaintiffs respectfully request that this Court reconsider its dismissal of Counts Three, Five, and Eight of the First Amended Complaint.

Respectfully submitted,

Dated: September 10, 2020 By: */s/ Nicholas Espíritu*

NICHOLAS ESPÍRITU (SBN 237665)
espiritu@nilc.org
ALVARO M. HUERTA (SBN 274787)
huerta@nilc.org
MAYRA B. JOACHIN (SBN 306065)
joachin@nilc.org
NATIONAL IMMIGRATION LAW CENTER
3450 Wilshire Boulevard, #108-62
Los Angeles, CA 90010
Tel.: (213) 639-3900
Fax: (213) 639-3911

ANTIONETTE DOZIER (SBN 244437)
adozier@wclp.org
ROBERT D. NEWMAN (SBN 86534)
rnewman@wclp.org
DAVID KANE (SBN 292186)
dkane@wclp.org
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3701 Wilshire Boulevard, Suite 208
Los Angeles, CA 90010
Tel.: (213) 487-7211
Fax: (213) 487-0242

MARTHA JANE PERKINS (SBN 104784)
perkins@healthlaw.org
NATIONAL HEALTH LAW PROGRAM
1512 E. Franklin Street, Suite 110
Chapel Hill, NC 27514
Tel.: (919) 968-6308
Fax: (919) 968-8855

TANYA BRODER (SBN 136141)
broder@nilc.org
NATIONAL IMMIGRATION LAW CENTER
2030 Addison Street, Suite 420
Berkeley, CA 94704
Tel.: (510) 663-8282
Fax: (213) 639-3911

MAX S. WOLSON (*pro hac vice*)
wolson@nilc.org
NATIONAL IMMIGRATION LAW CENTER
P.O. Box 34573
Washington, D.C. 20043
Tel.: (202) 216-0261
Fax: (202) 216-0266

Attorneys for Plaintiffs LA CLÍNICA DE LA RAZA; CALIFORNIA PRIMARY CARE ASSOCIATION; MATERNAL AND CHILD HEALTH ACCESS; FARMWORKER JUSTICE; COUNCIL ON AMERICAN ISLAMIC RELATIONS-CALIFORNIA; AFRICAN COMMUNITIES TOGETHER; LEGAL AID SOCIETY OF SAN MATEO COUNTY; CENTRAL AMERICAN RESOURCE CENTER, and KOREAN RESOURCE CENTER