UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

PATSY WIDAKUSWARA, JESSICA JERREAT, KATHRYN NEEPER, JOHN DOES 1-4, REPORTERS SANS FRONTIÈRES, REPORTERS WITHOUT BORDERS, INC., AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME), AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES (AFGE), AMERICAN FOREIGN SERVICE ASSOCIATION (AFSA), and THE NEWSGUILD-CWA,

Plaintiffs,

-against-

KARI LAKE, in her official capacity as Senior Advisor to the Acting CEO of the U.S. Agency for Global Media; VICTOR MORALES, in his official capacity as Acting CEO of the U.S. Agency for Global Media; and U.S. AGENCY FOR GLOBAL MEDIA,

Defendants.

Case No. 1:25-cv-01015-RCL

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT

Oral Argument Requested

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INTRODUCTION

Pursuant to Fed. R. Civ. P. 56, Plaintiffs request that this Court enter partial summary judgment for Plaintiffs on their Appointments Clause and Federal Vacancies Reform Act (FVRA) claims that Defendant Kari Lake, the Deputy CEO/Acting CEO of the U.S. Agency for Global Media (USAGM), lacked constitutional and statutory authority to perform any function or duty of the office of USAGM CEO including, but not limited to directing and approving a widescale reduction in force (RIF) announced by Defendants on August 29, 2025. On September 29, 2025, this Court temporarily suspended the RIF, which otherwise would have gone into effect on September 30, pending further proceedings on Defendants' compliance with the operative preliminary injunction in this case. Order at 2-3, ECF No. 164. Through this motion, Plaintiffs ask this Court to vacate entirely the August RIF because it was promulgated without authority, rather than leaving the fate of these employees hanging in the balance as is the case currently. Plaintiffs therefore respectfully request expedited consideration of this motion, so that this dramatic and *ultra vires* action cannot take effect and agency employees can be assured that major decisions about their employment, and indeed the operation of the entire agency they have dedicated their lives to as public servants, rests in the hands of an individual with lawful authority.

President Trump appointed Defendant Kari Lake to serve as Deputy CEO in July 2025 and, days later, Lake became Acting CEO. Because the Deputy CEO exercises significant authority and is an "Officer of the United States" within the meaning of the Appointments Clause, the Deputy CEO must be properly appointed. However, Lake has not been confirmed by the Senate, which is the exclusive method of appointment for principal officers. Even if she were an inferior officer, Congress vested the authority to appoint USAGM personnel in the CEO, not the President; but the

USAGM CEO never appointed Defendant Lake as Deputy CEO, rather the President did—at Lake's request. Thus, her appointment violates the Appointments Clause.

Lake's appointment also violates the FVRA. Because her appointment as Deputy CEO is constitutionally infirm, she is not the "first assistant" to the CEO. *See* 5 U.S.C. § 3345(a)(1). Furthermore, she was not an "assistant" because, as her testimony reveals, Defendant Lake has never been subordinate to the CEO during her time at USAGM, including in particular her few short days as Deputy CEO (while the Acting CEO was on vacation). Since shortly after joining the agency, she has exercised virtually all of the CEO's power (except writing reports), orchestrated her promotion to Deputy CEO while the previous Acting CEO was on vacation, and, within days, sidelined him and became Acting CEO herself. Finally, the FVRA is best interpreted as requiring the individual serving as first assistant to have been in place at the time the principal office became vacant in order for the first assistant to serve in an acting capacity as the principal officer. Otherwise, allowing the President to freely appoint post-vacancy first assistants to run agencies without Senate confirmation creates an end-run around the Appointments Clause; the President can simply fire or demote the principal officer or acting official (as happened here) immediately and elevate the brand new "first assistant" to the top job without Senate consent. Lake was not Deputy CEO when the last Senate-confirmed CEO resigned, and therefore she is not eligible to serve as Acting CEO now.

Because Lake's appointment as Deputy CEO and Acting CEO is invalid, her actions are also invalid and must be vacated.

BACKGROUND

I. Defendant Kari Lake's dismantling of USAGM

The Court is familiar with the procedural history of this case and the factual universe surrounding it. Plaintiffs set forth only the pertinent facts in this motion and in the accompanying statement of undisputed material facts (SUMF).

In December 2024, President Trump announced Defendant Lake as his pick to head Voice of America. SUMF ¶ 1. But in January 2025, he fired all but one of the members of the USAGM Advisory Board, leaving it without a quorum and unable to replace the VOA head. *Id.* ¶ 2. *See* 22 U.S.C. § 6205(e)(1); *Abramowitz v. Lake*, 2025 WL 2480354, at *1-2 (D.D.C. Aug. 28, 2025).

Unable to be VOA Director, Lake joined USAGM on March 3, 2025 as the White House-appointed "Senior Advisor" to USAGM. SUMF ¶ 4. After she arrived, Lake announced that USAGM employee Victor Morales would serve as Acting CEO. *Id.* ¶ 5. Although Lake was nominally Morales's advisor, she was in fact in charge of the agency. Within her first two weeks at the agency, "95 percent" of the CEO's power was delegated to Lake. *Id.* ¶ 6. When asked in her deposition what 5 percent of authority Morales retained, Lake cited only "[w]riting reports . . . you know, annual reports, quarterly reports." *Id.*

On March 14, 2025, President Trump issued Executive Order 14238, which demanded that "the non-statutory components and functions of [USAGM] shall be eliminated to the maximum extent consistent with applicable law." *Id.* ¶ 7; 90 Fed. Reg. 13043 (Mar. 14, 2025). Lake, not Morales, took the lead for the agency in its misguided effort to comply with the EO. SUMF ¶ 8. For instance, on March 15, Lake cancelled USAGM's lease to occupy a new building. *Id.* ¶ 9. In the days after the EO was issued, *Lake* asked *Morales* and other senior career leaders at the agency to recommend a plan for compliance, even though Morales was supposedly Lake's supervisor. *Id.*

¶ 11. Lake (not Morales) then transmitted this plan to Congress on June 13. *Id.* Also in June, Lake authorized a widescale reduction in force, which would have terminated 639 USAGM employees, personally signing the notices after Morales "refused to do his job *Id.* ¶ 12.[1]

In July 2025, while Morales was on vacation, Lake told the White House that she was interested in becoming Deputy CEO, telling the White House she had "lost some confidence" in Morales. *Id.* ¶ 16. Within days, the White House then appointed her as Deputy, *Id.* ¶ 17, and Lake began serving as Deputy sometime on or after July 18, *see Id.* ¶¶ 15, 17. Morales was then put on administrative leave and reverted to his prior, senior policy advisor position, where he remains today. *Id.* ¶¶ 17, 19. By virtue of Morales's sidelining, Lake became Acting CEO on July 22, within four days of becoming Deputy. *See Id.*

On August 29, 2025, Lake authorized a widescale reduction in force which resulted in the termination of 532 USAGM employees, the majority of whom were VOA employees. *Id.* ¶ 21. The August 29 RIF notices, which were issued in Lake's name, indicate an effective date of September 30—giving employees only 30 days' notice of their impending termination. *Id.* ¶ 22.

II. Procedural history

Plaintiffs sued on March 21, 2025. Compl. (ECF No. 1). The Complaint comprised nine claims alleging that Defendants' actions violate numerous constitutional and statutory provisions. *Id.* ¶¶ 102-160. Count Nine alleged that Lake's appointment as Special Advisor to USAGM violated the Appointments Clause. *Id.* ¶¶ 154-160.

On March 24, 2025, Plaintiffs filed a motion for preliminary injunction but did not include Count Nine as a basis for relief at that time. The Court issued a three-pronged preliminary

[1] The June RIF notices were later rescinded after the unions pointed out errors in the retention register. *Id.* ¶ 13. The RIF was then "rerun," resulting in the August 29 RIF notices. *See id.*

injunction on April 22, 2025, finding Defendants likely violated the Administrative Procedure Act. ECF No. 98 at 36. The government appealed prongs (1) and (2) of the preliminary injunction. Those parts are currently stayed pending appeal. *Widakuswara v. Lake*, No. 25-5144, 2025 WL 1288817, at *2 (D.C. Cir. May 3, 2025). Meanwhile, the district court proceedings continue. As part of efforts to enforce prong (3) of the preliminary injunction, Plaintiffs sought, and the Court granted, leave to depose Defendant Lake and two other witnesses: acting director of programming for VOA Leili Soltani and senior advisor Frank Wuco. ECF No. 137 at 2.

Plaintiffs learned from Defendant Lake's September 9, 2025, deposition testimony that, not only is USAGM still failing to fulfill its statutory mandate, but Defendant Lake's appointment as Deputy CEO and Acting CEO in July 2025 violated the Appointments Clause and the FVRA. Simultaneous with this motion, Plaintiffs are filing a motion for leave to supplement the Complaint to add allegations concerning Lake's role as Senior Advisor, her July 2025 appointment as Deputy CEO and Acting CEO, and her actions after the original Complaint was filed. The proposed supplemental pleading adds claims challenging Defendant Lake's appointment as Deputy CEO and Acting CEO under the Appointments Clause and FVRA. In the instant motion, Plaintiffs request that the Court grant summary judgment to Plaintiffs on the Appointments Clause and FVRA claims since there are no material disputes of fact, and they have established as a matter of law that Defendants violated the Appointments Clause and FVRA by installing Lake as Deputy CEO and Acting CEO without Senate approval.

LEGAL STANDARD

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Under Federal Rule of Civil Procedure 56, summary judgment is appropriate when

the motion papers, affidavits, and other submitted evidence demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law." *Leadership Conf. on Civ. Rts. v. Gonzales*, 404 F. Supp. 2d 246, 252 (D.D.C. 2005).

ARGUMENT

I. Defendant Lake's appointments as Senior Advisor, Deputy CEO, and Acting CEO violated the Appointments Clause.

The White House's appointment of Defendant Lake first as Senior Advisor, Deputy CEO, and Acting CEO were each invalid under the Appointments Clause. For Appointments Clause purposes, federal workers fall into three categories: principal officers, inferior officers, and employees. *See Lucia v. SEC*, 585 U.S. 237, 244 & n.3 (2018). "An officer exercises significant authority pursuant to the laws of the United States"; an employee does not. *Kennedy v. Braidwood Mgmt., Inc.*, 145 S. Ct. 2427, 2442 (2025) (citation omitted). Principal officers include heads of departments who report directly to the President. *Id.* at 2442-43. Generally, "[i]nferior officers are those 'whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.'" *Id.* at 2443 (quoting *Edmond v. United States*, 520 U.S. 651, 663 (1997)). A "subordinate officer" can perform the duties of a superior officer "for a limited time, and under special and temporary conditions," without being "transformed into the superior and permanent official." *United States v. Eaton*, 169 U.S. 331, 343 (1898).

Unlike employees, officers must be appointed in particular ways. Principal officers must be nominated by the President and confirmed by the Senate. This is also the default method for the appointment of inferior officers, but alternatively, Congress "may by Law vest the Appointment of

such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const., art. II, § 2, cl. 2; *Edmond*, 520 U.S. at 660.

In the USAGM statute, Congress chose to vest the CEO (not the President) with the power to "appoint . . . personnel for the Chief Executive Officer." 22 U.S.C. § 6204(a)(11). That means that only the CEO could validly appoint his subordinates, including Senior Advisor and Deputy CEO.

Defendant Lake has been acting as an officer and not a mere employee since shortly after she joined USAGM, when she began exercising "95 percent" of the CEO's authority, except writing reports. SUMF ¶ 6. The CEO's authorities include, among other things: "supervis[ing] all broadcasting activities conducted pursuant to [22 U.S.C. ch. 71]," "mak[ing] and supervis[ing] grants and cooperative agreements for broadcasting and related activities," "allocat[ing] funds appropriated for international broadcasting activities," "determin[ing] . . . the addition or deletion of language services." 22 U.S.C. § 6204(a). In other words, Lake had virtually all of CEO's authority to run USAGM.

To exercise significant authority, Defendant Lake had to be properly appointed as an officer. Because she was exercising significant authority without supervision while she was Senior Advisor and Deputy CEO, she has been a principal officer since March. Thus, the only constitutionally valid way for her to exercise the authority she has exercised since March was upon appointment by the President and confirmation by the Senate. That has not happened.

Even if Lake were an inferior officer as Senior Advisor or Deputy CEO, Lake was still acting *ultra vires* because, in order to validly serve as such an inferior officer at USAGM, she must be appointed by the CEO. The Appointments Clause gives Congress (not the President) the authority to choose where to vest the power to appoint such inferior officers and, at USAGM,

Congress vested it in the CEO.[2] But Lake was appointed as Senior Advisor and then Deputy CEO by the White House, to which she also reported. SUMF ¶¶ 4, 15-17.

Lake's service as Acting CEO also violates the Appointments Clause. The President does not have free-floating constitutional power to appoint acting officials. *Aviel v. Gor*, No. CV 25-778 (LLA), 2025 WL 2374618, at *10 (D.D.C. Aug. 14, 2025) ("The notion that the President always possesses 'inherent' Article II power to appoint acting officials is both novel and wrong."). Those temporarily serving as acting heads of agencies are generally considered inferior officers. *See Nw. Immigrant Rts. Project v. USCIS*, 496 F. Supp. 3d 31, 64 (D.D.C. 2020); *Guedes v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 356 F. Supp. 3d 109, 147 (D.D.C. 2019). Thus, like other inferior officers, they must be appointed either through Presidential appointment and Senate confirmation, or, if Congress has vested the appointment power in the President alone, in a department head, or in the courts of law, then through the method Congress has chosen. Congress has set forth three ways that individuals can temporarily serve in a vacant Presidential appointment and Senate confirmation (PAS) office in the Federal Vacancies Reform Act and, for the reasons discussed below, Lake does not qualify under any of them.

Accordingly, Lake has been acting *ultra vires* from the beginning of her time at USAGM.

[2] *See Ex parte Siebold*, 100 U.S. 371, 397-98 (1879) ("[A]s the Constitution stands, the selection of the appointing power, as between the functionaries named, is a matter resting in the discretion of Congress."); *Aviel v. Gor*, No. CV 25-778 (LLA), 2025 WL 2374618, at *12-13 (D.D.C. Aug. 14, 2025) (where Congress gave the Inter-American Foundation's board the power to appoint the Foundation's president, the board had the power to hire and fire, not President Trump); *cf. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 493 (2010) (where Congress vests the power to appoint inferior officers in a department head, "it is ordinarily the department head, rather than the President, who enjoys the power of removal").

II. Defendant Lake's service as Acting CEO violates the FVRA.

Defendant Lake's service as Acting CEO violates the FVRA. The FVRA provides the President with limited authority to appoint acting officials while preserving the Senate's advice and consent power—a power which serves as "a critical 'structural safeguard [] of the constitutional scheme.'" *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 293 (2017) (quoting *Edmond*, 520 U.S. at 659). As the Supreme Court recognized, "[t]he Framers envisioned" the Senate's role in the nomination process "as 'an excellent check upon a spirit of favoritism in the President' and a guard against 'the appointment of unfit characters . . . from family connection, from personal attachment, or from a view to popularity.'" *Id.* (quoting The Federalist No. 76 at 457 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). Because the confirmation process may take time, throughout history Congress has enacted statutes permitting the President to appoint acting officials under limited and explicitly articulated circumstances. *Id.* at 294. Congress enacted the FVRA in 1998 after the Executive Branch's repeated abuses of the previous Vacancies Act became intolerable.[3] The statute "was framed as a reclamation of the Congress's Appointments Clause power." *SW Gen., Inc. v. NLRB*, 796 F.3d 67, 70 (D.C. Cir. 2015), *aff'd,* 580 U.S. 288 (2017).

The FVRA provides three ways that an individual can temporarily perform the functions of a vacant PAS office in an acting capacity. First, the default method is for the "first assistant" of the vacant office to automatically become the acting principal. 5 U.S.C. § 3345(a)(1). Second, "the President (and only the President) may direct a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the vacant office." *Id.* § 3345(a)(2). Third, "'the

[3] "By 1998, approximately 20 percent of PAS offices in executive agencies were occupied by temporary designees, most of whom had served beyond the 120-day limitation period . . . without presidential submissions of nominations." *SW Gen., Inc.*, 580 U.S. at 295 (cleaned up).

President (and only the President) may direct an officer or employee of' the agency experiencing the vacancy 'to perform the functions and duties of the vacant office,' but only if that individual served in a senior position in that agency for at least 90 days 'during the 365-day period preceding' the occurrence of the vacancy." *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 24 (D.D.C. 2020) (quoting 5 U.S.C. § 3345(a)(3)).

Defendant Lake is not eligible to serve as Acting CEO under subsections (a)(2) and (3) because she has not been Senate-confirmed to any position and she did not serve at USAGM in any capacity in the 365-day period before the last Senate-confirmed CEO, Amanda Bennett, vacated the office on January 20, 2025. Defendant Lake is also ineligible to serve as Acting CEO under subsection (a)(1) for multiple reasons, explained below.

A. The President lacked constitutional authority to appoint Defendant Lake as first assistant.

First, even assuming that the Deputy CEO is (and that Lake ever actually served as) the "first assistant" to the CEO, and that the Deputy CEO could therefore automatically become acting principal under 5 U.S.C. § 3345(a)(1), Defendant Lake never validly served as Deputy CEO. As discussed above, her purported appointment to the Deputy CEO position was constitutionally invalid because she was appointed by President Trump rather than the CEO, even though the International Broadcasting Act vests that appointment authority in the CEO. *See supra* Section III.

B. Defendant Lake has never been subordinate to the CEO, including as Deputy CEO.

Second, even if Defendant Lake were validly appointed Deputy CEO, during her tenure, the office of Deputy CEO has not been subordinate to the CEO's office and thus cannot qualify as the first "assistant" to the CEO's office.

The FVRA does not provide a statutory definition of the phrase "first assistant," so it is construed "in accordance with its ordinary or natural meaning." *Cuccinelli*, 442 F. Supp. 3d at 25-26; *see* Federal Vacancies Reform Act of 1998, S. Rep. No. 105-250 at 12 (July 15, 1998) (hereinafter "Senate Report"). An "assistant" is "one who acts as a subordinate to another or as an official in a subordinate capacity." *Cucinelli*, 442 F. Supp. 3d at 25-26 (quoting *Assistant*, Webster's Third New International Dictionary at 132 (1993)). The mere fact that "deputy" is in the title is not dispositive. Rather, courts will look beyond the "labels" to the "substance" of whether the deputy's office is truly subordinate. *See Cuccinelli*, 442 F. Supp. 3d at 26; *cf. United States v. Giraud*, No. 1:24-CR-00768, 2025 WL 2416737, at *23 (D.N.J. Aug. 21, 2025) (rejecting government's attempt to install Alina Habba as U.S. Attorney in the District of New Jersey by naming her "Special Attorney" and "First Assistant United States Attorney" and delegating her all of the U.S. Attorney's powers).

Here, Defendant Lake has never been in a subordinate role at USAGM, including as Deputy CEO. President Trump appointed Lake as Senior Advisor at USAGM. Although she was nominally an advisor, she was the CEO in all but name. Defendant Lake admitted she was delegated "95 percent" of the CEO's power. SUMF ¶ 6. When asked what was in the 5 percent not delegated to her, the only concrete task she could identify was writing reports. *Id.* Soon after she arrived, Defendant Lake cancelled newswire contracts at the agency, personally decided to play a loop of the VOA charter on otherwise dark USAGM TV broadcasts, requested that senior staff (including Morales, who was purportedly the principal, not Lake) come up with a plan for slimming the agency to its statutory minimum, brought on Frank Wuco as a Senior Advisor, elevated Leili Soltani to acting director of programming for VOA, and brought back programming to Iran in June, among other things. *See id.* ¶¶ 10-12.

Most notably, in June 2025, Lake issued RIF notices to 639 employees under her own name after Acting CEO Victor Morales "refused to do his job and do that." *Id.* ¶ 12.[4] This is not the work of a subordinate, it is the work of a boss.

The circumstances surrounding Lake's appointment as Deputy CEO further demonstrate that she continued to run the agency after she became the Deputy CEO. In July, while Morales was on vacation, she expressed to the White House that she was interested in becoming Deputy CEO. *Id.* ¶ 16. President Trump appointed her as Deputy CEO while Morales was on vacation. *See id.* ¶ 17. She continued to have 95 percent of the CEO's power, other than report writing. *Id.* Lake also expressed to the White House that she had "lost some confidence" in Victor Morales. *Id.* ¶ 16. On July 22—within days after Lake became Deputy CEO[5]—Morales was placed on administrative leave and Deputy CEO Lake became Acting CEO. *Id.* ¶¶ 17-19. In her August declaration, she described herself as President Trump's "politically appointed representative to ***run*** USAGM." *Id.* ¶ 18.

The facts of this case amply show that Lake has never been subordinate to the CEO during her entire time at USAGM, including during her less-than-five-day tenure as Deputy. As she acquired each of her titles, the "delegated" powers of that role were crafted to allow her to control (or "run," to use her own word) the agency, to the point where she could terminate over 600

[4] In her deposition, Defendant Lake claimed only President Trump and God as her bosses when she served as senior advisor, only later remembering to throw in the Acting CEO. SUMF ¶ 15. At various points, she tried to emphasize that she "consulted with" or "worked with" senior career leaders in USAGM, including Morales. *Id.* But at other points, she also said that she "rel[ied]" on the senior career leaders to "help" her. *Id.* Given the many times Lake has personally taken credit for her actions to dismantle USAGM, her efforts to downplay her role are unconvincing. *Id.*

[5] Lake likely began serving as Deputy sometime on or after July 18, as she described herself as the Senior Advisor in her July 18, 2025 declaration to the Court, without mentioning anything about being Deputy CEO. SUMF ¶ 15.

employees after Acting CEO Morales refused to do so, could get herself appointed as Deputy CEO while he was on vacation, and could eventually sideline him altogether. Because the Deputy CEO position is not the first "assistant" to the CEO, Lake cannot serve as Acting CEO based on § 3345(a)(1).

C. Defendant Lake was not the first assistant at the time the CEO office became vacant.

Third, even if a Deputy CEO who has virtually all of the CEO's power can be considered an "assistant," the individual must have been serving as the first assistant at the time the PAS office vacancy arises in order to serve in an acting capacity under § 3345(a)(1). Here, the CEO vacancy arose on January 20, 2025, when CEO Amanda Bennett resigned. SUMF ¶ 2. Defendant Lake was not the Deputy CEO of USAGM at that time. Thus, she is not eligible to serve as Acting CEO under § 3345(a)(1).

As another district court recently held, the FVRA's "statutory framework convincingly indicates that a 'first assistant' who may take office in an 'acting capacity' must be the first assistant at the time the vacancy occurs." *United States v. Giraud*, No. 1:24-CR-00768, 2025 WL 2416737, at *14 (D.N.J. Aug. 21, 2025), *appeal filed* (No. 25-2635, 3d Cir. Aug. 28, 2025). Section 3345(a)(1) mandates that, "[i]f" a PAS officer "dies, resigns, or is otherwise unable to perform the functions and duties of the office[,] . . . the first assistant . . . *shall* perform" those duties. 5 U.S.C. § 3345(a)(1) (emphasis added). The if-then structure of the provision and the use of the present tense ("dies, resigns, or is otherwise unable to perform") indicates that the first assistant immediately and automatically becomes the acting principal at the moment the office becomes

vacant.[6] "There is no textual indication that the President has any choice in invoking the first assistant provision, nor that it is meant to trigger at any time other than the moment that the vacancy occurs." *Giraud*, 2025 WL 2416737, at *14. Thus, the person must be serving as first assistant at the time the vacancy occurs.

This reading is confirmed by the text setting forth the FVRA's two other appointment mechanisms. Subsections (a)(2) and (3) allow the President to choose someone else to serve in an acting capacity "notwithstanding" (a)(1), "*as long as* that person is either a Senate-confirmed appointee … or an employee within the same agency." *Guedes*, 920 F.3d at 11 (emphasis added). Those are the only "two ways the President may override the automatic operation of (a)(1)." *Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 557 (9th Cir. 2016). If the President (or agency head) can freely pick people off the street—with no vetting by the Senate and no experience in the agency—to serve as first assistant post-vacancy, the Senate confirmation and agency-tenure limitations in (a)(2) or (3) would be rendered superfluous in most cases. The President's power to fill many vacancies would be virtually unbounded.

The FVRA's legislative history also indicates that Congress intended for the first assistant to already be in place at the time of the vacancy. A Senate Report explained that the Act "provides for the automatic performance of the functions and duties of the vacant office by the first assistant because such person is often a career official with knowledge of the office or a Senate-confirmed individual, and the Committee believes that the routine functions of the office should be allowed to continue for a limited period of time *by that one person*." S. Rep. No. 105-250, at 12 (emphasis

[6] Courts have repeatedly described § 3345(a)(1) as the "automatic," "default" procedure for filling a vacancy. *See, e.g., SW Gen.*, 580 U.S. at 935; *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 11 (D.C. Cir. 2019); *Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 557 (9th Cir. 2016); *English v. Trump*, 279 F. Supp. 3d 307, 312 (D.D.C. 2018).

added). Congress intended "to prevent manipulation of first assistants to include persons highly unlikely to be career officials." *Id.* at 13; *see also id.* at 15 (describing the bill's time limit provision as "allow[ing] the office to be temporarily filled by 'the person' who was originally eligible to be the acting officer *at the time the vacancy arose*" (emphasis added)). "[I]f there is no first assistant, and no presidential designation, no one may serve as acting officer." *Id.* at 14.

Reading the FVRA to allow post-vacancy first assistants to serve as acting principals would conflict with Congress's fundamental purpose in enacting the FVRA and with the Appointments Clause. Congress enacted the FVRA to combat "a threat to the Senate's advice and consent power." *SW Gen.*, 580 U.S. at 295. If the President (or the head of a Department) can name whoever he wants to serve as a first assistant after the vacancy arises, then the President would have virtually unlimited power to fill PAS positions without Senate confirmation, nullifying the Senate's constitutional role.

The government may argue that the statute uses the phrase "first assistant to the *office* of such officer" and not "to the officer." But the phrase "first assistant to the office" merely clarifies that the person who shall serve as acting principal is the principal's top deputy, not the personal aide to the principal. *See Giraud*, 2025 WL 2416737, at *16 (interpreting "office of such officer" as referring to "the agency's formal hierarchical structure as opposed to an ordinary meaning interpretation which would suggest that the phrase merely refers to the person on which the outgoing officer relied most heavily").[7]

The government may also contend that Plaintiffs' reading would upend a common government practice. However, this type of argument should be given little weight given that

[7] *Cf. Cuccinelli*, 442 F. Supp. 3d at 26 n.8 ("To borrow from a long-running riff on the television show *The Office*, there may well be a difference between one who serves as 'the assistant regional manager' and 'the assistant to the regional manager.'").

Congress enacted the current "FVRA *exactly because* the Executive's practice had been to avoid application of the prior Vacancies Act by interpreting its provisions narrowly." *Giraud*, 2025 WL 2416737, at *18; *cf. SW Gen., Inc.*, 580 U.S. at 307 (rejecting government's resort to "post-enactment practice"). If it truly is common, such a practice of appointing post-vacancy first assistants would only show that the Executive Branch is again playing games with vacancies statutes to evade the FVRA and the Appointments Clause, whose "purpose . . . is precisely to grant some control over the Executive Branch to Congress, within the framework of the system of checks and balances put in place by the Constitution." *Andrade v. Lauer*, 729 F.2d 1475, 1495 (D.C. Cir. 1984); *see also NLRB v. SW Gen., Inc.*, 580 U.S. 288 (2017) ("The Senate's advice and consent power is a critical structural safeguard of the constitutional scheme.") (cleaned up); *Edmond*, 520 U.S. at 659 (noting that the Senate's role "serves both to curb Executive abuses of the appointment power . . . and to promote a judicious choice of persons for filling the offices of the union") (cleaned up).[8] The Executive Branch's self-aggrandizement at Congress's expense is particularly egregious here where it not only has bypassed the Senate in installing Defendant Lake as the head of USAGM, but Defendant Lake is also preventing USAGM and VOA—agencies created and funded by Congress—from performing their statutory mandates.

* * * *

For these reasons, Plaintiffs are entitled to summary judgment on their Appointments Clause and FVRA claims.

[8] The government may argue that, without post-vacancy deputies, agencies might be left with no leadership at times. But that is not the case. The FVRA permits the President to direct a senior officer or employee who has been at the agency for at least 90 days to temporarily perform the duties of the vacant PAS office. 5 U.S.C. § 3345(a)(3). The President can also direct someone who has been Senate-confirmed for another office. *Id.* § 3345(a)(2).

III. Plaintiffs Are Entitled to Vacatur of Lake's Unauthorized Actions.

Given that Defendant Lake was acting without authority, Plaintiffs are entitled to invalidation of Defendant Lake's actions, including the August 29 RIF. "[T]the general rule [is] that actions taken in violation of the FVRA are void *ab initio*." *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 298 n.2 (2017). The FVRA provides that "[a]n action taken by any person who is not acting under section 3345, 3346, or 3347, or as provided by subsection (b), in the performance of any function or duty of a vacant office to which [section 3349c applies] shall have no force or effect," and "may not be ratified." 5 U.S.C. § 3348(d). In addition, an action taken in violation of the FVRA is "not in accordance with law" and a court must, accordingly, set it aside under the APA. 5 U.S.C. § 706(2)(A); *Cuccinelli*, 442 F. Supp. 3d at 34; *see also Asylumworks v. Mayorkas*, 590 F. Supp. 3d 11, 25 (D.D.C. 2022) ("because the Timeline Repeal Rule and EAD Bar Rule 'have no force or effect,' 5 U.S.C. § 3348(d)(1), they must also be vacated and 'set aside' as actions taken 'in excess of statutory ... authority,' 5 U.S.C. § 706(2)(C)").

Courts similarly invalidate decisions that are "tainted with an appointments violation." *Lucia*, 585 U.S. at 251. This Court has observed that "to ensure accountability is not 'lost in the nameless bureaucracy,' violations of the Appointments Clause demand 'remedies with bite.'" *Sidak v. U.S. Int'l Trade Comm'n*, 678 F. Supp. 3d 1, 10 (D.D.C. 2023) (citation omitted). In *Lucia*, for example, the ALJ's decision was undone. *See id.* at 251-52 & n.6. In *NLRB v. Noel Canning*,573 U.S. 513 (2014), where NLRB members' appointments violated the Recess Appointments Clause, the Board's order was invalidated. 573 U.S. 513, 521, 557 (2014) (affirming D.C. Circuit's judgment that the Board's order was invalid). *See also Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1334 (D.C. Cir. 2012) ("Because of the Appointments Clause violation at the time of decision, we vacate and remand the determination challenged here."); *Associated*

Mortg. Bankers, Inc. v. Carson, No. CV 17-0075 (ESH), 2019 WL 108882, at *7-8 (D.D.C. Jan. 4, 2019) (vacating decision of improperly appointed ALJ as a remedy for the Appointments Clause violation).

Because Lake's appointments at USAGM violated the Appointments Clause and the FVRA, her actions taken in these roles should be vacated. This includes the 532 RIF notices that she issued on August 29, 2025 to USAGM and VOA employees.

CONCLUSION

For these reasons, the Court should grant Plaintiffs' motion for partial summary judgment.

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Respectfully submitted,

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[9] The views expressed herein do not purport to represent the institutional views of Yale Law School, if any.