IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

ASISTA Immigration Assistance, Inc.,
P.O. Box 12,
Suffield, CT 06078,

Plaintiff,

v.

MATTHEW T. ALBENCE, in his official capacity as purported Acting Director, United States Immigration and Customs Enforcement,
500 12th St. SW,
Washington, DC 20536,

CHAD F. WOLF, in his official capacity as Acting Secretary of Homeland Security,
2707 Martin Luther King Jr. Ave. SE,
Washington, DC 20529,

DONALD J. TRUMP, in his official capacity as President of the United States,
1600 Pennsylvania Ave. NW,
Washington, DC 20500,

Defendants.

Civil Action No. 3:20-cv-00206

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff ASISTA Immigration Assistance, Inc., for its complaint against Matthew T. Albence, in his official capacity as purported Acting Director of U.S. Immigration and Customs Enforcement, Chad F. Wolf, in his official capacity as Acting Secretary of Homeland Security, and Donald J. Trump, in his official capacity as President of the United States, alleges as follows:

INTRODUCTION

1. The Constitution's Appointments Clause was adopted as a check on the power of the executive by our nation's Founders, who feared that giving the President the "sole disposition of offices" would result in a Cabinet "governed much more by his private inclinations and interests" than by the public good. *The Federalist No. 76*, at 457 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Indeed, the Founders viewed the British monarch's abuse of his appointment power as "the most insidious and powerful weapon of eighteenth century despotism." *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 883 (1991) (quotation marks omitted). To prevent similar abuses of executive power, the Constitution requires that high-level federal officers be confirmed by the Senate after presidential nomination, and that all other officers be appointed in the same manner unless federal law provides otherwise. U.S. Const. art. II, § 2, cl. 2.

2. Federal law does not provide otherwise with respect to the Director of U.S. Immigration and Customs Enforcement ("ICE"). To the contrary, the law unequivocally requires that the Director be nominated by the President and confirmed by the Senate. 6 U.S.C. § 113(a)(1)(G).

3. Despite the constitutional and statutory requirements that ICE be led by a Senate-confirmed Director, there has been no Senate-confirmed Director of ICE since the current presidential administration began more than three years ago.

4. In the Federal Vacancies Reform Act ("FVRA"), Congress provided a mechanism by which acting officials may *temporarily* carry out the duties of offices that must be filled through the constitutionally prescribed mechanism of presidential nomination and Senate confirmation. But to avoid abuses of that statute, Congress imposed rigid constraints on the length of time during which a vacant office may be filled by acting officials. *See* 5 U.S.C. § 3346.

5. Under the FVRA, when an office becomes vacant, an acting official may perform the functions and duties of that office for only a limited period of time. That period can be twice extended if the President makes nominations to permanently fill the office, but eventually these extensions run out: if more than 210 days have passed since a second nomination was rejected, withdrawn, or returned by the Senate, no one can legally fill that office in an acting capacity, except in certain narrow circumstances not relevant here. *Id.* § 3346(b). By imposing these time limits, Congress sought to ensure that presidents could not indefinitely circumvent the requirement of Senate confirmation.

6. Based on the FVRA's time limits, and under the circumstances here, the office of ICE Director could not be filled by an acting official after August 1, 2019.

7. Nonetheless, Defendant Matthew T. Albence, who began serving as Acting Director in April 2019, continued purporting to be the Acting Director of ICE after August 1, 2019. And he continued taking official actions under the authority of that office.

8. Among those actions, Defendant Albence purported to issue a new policy governing how and when ICE would issue stays of immigration removal to people who are applying for "U visas."

9. Because fear of deportation often prevents immigrant crime victims from going to law enforcement, Congress created the U-visa program to allow survivors of certain crimes, such as domestic violence and sexual assault, to remain in the United States if they are helping law enforcement investigate or prosecute those crimes. To prevent individuals with pending U-visa applications from being removed before their applications are processed, Congress authorized the Department of Homeland Security to grant stays of removals to individuals who have pending U-visa applications.

10. As a result of Defendant Albence's policy change, however, victims of crime who have applied for U visas with the support of law enforcement face much higher barriers to securing stays of removal and thus are at greater risk of being deported before their applications are processed, even though they may ultimately be granted U visas to remain in the United States.

11. Plaintiff ASISTA Immigration Assistance, Inc. ("ASISTA") is a nonprofit organization that, among other things, trains and provides technical assistance to attorneys and other advocates representing survivors in immigration proceedings.

12. The change in policy ordered by Defendant Albence has frustrated ASISTA's ability to accomplish its mission. Additionally, it has forced ASISTA to spend more staff time assisting with cases involving U-visa applicants and to completely revise the trainings that it conducts, diverting resources from ASISTA's other activities.

13. Plaintiff seeks a declaratory judgment that Defendant Albence's new ICE policy regarding stays for U-visa applicants has no force or effect, as well as an order enjoining ICE from implementing this new policy and enjoining Defendant Albence from continuing to perform the functions and duties of the Director of ICE.

PARTIES

14. Plaintiff ASISTA Legal Assistance, Inc., is a 501(c)(3) organization headquartered in Suffield, Connecticut, that works to advance the dignity, rights, and liberty of immigrant survivors of violence.

15. Defendant Matthew T. Albence is the purported Acting Director of ICE. As purported Acting Director, Defendant Albence exercises authority over all aspects of ICE operations, including its policies regarding applications for stays of removal by U-visa applicants.

16. Defendant Chad F. Wolf is Acting Secretary of Homeland Security. On

information and belief, Defendant Wolf has permitted Defendant Albence to continue serving in the role of Acting Director of ICE even after the time limit prescribed by the FVRA expired.

17. Defendant Donald J. Trump is the President of the United States. On information and belief, Defendant Trump has permitted Defendant Albence to continue serving in the role of Acting Director of ICE even after the time limit prescribed by the FVRA expired.

JURISDICTION AND VENUE

18. This Court has subject-matter jurisdiction under 28 U.S.C. §§ 1331 & 2201.

19. Venue is proper in this district pursuant to 28 U.S.C. § 1391. The District of Connecticut is a judicial district in which "a substantial part of the events or omissions giving rise to the claim occurred," *id.* § 1391(e)(1), because ASISTA is headquartered here and manages its programs here.

20. There is an actual controversy between Plaintiff and Defendants. Pursuant to his authority as Acting Director of ICE, Defendant Albence issued a new ICE policy on granting stays of removal to U-visa applicants, injuring ASISTA by forcing it to spend significantly more staff time assisting with cases involving U-visa applicants as well as preparing and conducting trainings for attorneys who handle such cases—diverting resources away from ASISTA's other mission-critical activities and frustrating its ability to achieve its mission. Plaintiff alleges that Defendant Albence issued this policy without legal authority to do so because he has not been nominated by the President and confirmed by the Senate to serve as ICE Director and he issued the policy after the time period during which he could lawfully serve as Acting Director under the FVRA had expired. Plaintiff alleges that Defendant Albence's action—taken without legal authority—directly injures Plaintiff and violates the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, the

FVRA, 5 U.S.C. §§ 3345 *et seq.*, the Administrative Procedure Act, 5 U.S.C. § 706(2), and the Department of Homeland Security's enabling statute, 6 U.S.C. § 113(a)(1)(G).

LEGAL BACKGROUND

A. The Appointments Clause and the FVRA

21. The Appointments Clause provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the 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.

22. The Director of ICE is an "Officer of the United States" because the Director exercises significant authority pursuant to the laws of the United States. *See Freytag*, 501 U.S. at 881-82; *Buckley v. Valeo*, 424 U.S. 1, 126 (1976). Thus, the Constitution requires the ICE Director to be appointed by the President "with the Advice and Consent of the Senate," unless Congress has "by Law vest[ed] the Appointment . . . in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2.

23. Congress has not done so. Instead, federal statutory law explicitly requires the Director of ICE to be nominated by the President and confirmed by the Senate. *See* 6 U.S.C. § 113(a)(1)(G) (providing that within the Department of Homeland Security there shall be a "Director of U.S. Immigration and Customs Enforcement" who must be "appointed by the President, by and with the advice and consent of the Senate").

24. Against the backdrop of the constitutional requirement that officers be appointed

by the President with the advice and consent of the Senate, Congress enacted the FVRA in 1998 to respond to perceived violations of the Appointments Clause by the executive branch. *See, e.g.*, S. Rep. No. 105-250, at 5 (1998). Among other things, Congress wanted to prevent presidents from circumventing the Senate's advice-and-consent role by relying indefinitely on acting officials in positions that should be filled by Senate-confirmed nominees. *See id.* at 13-14.

25. The FVRA therefore includes rigid limits on the length of time during which an acting official may fill a vacant office. 5 U.S.C. § 3346. Except in certain narrow circumstances not present here, acting officials may occupy vacant offices for no more than 210 days beginning on the day the vacancy occurs. *Id.* § 3346(a)(1). If the President nominates someone to the office, this time period is extended, and acting officials may serve as long as the nomination is pending in the Senate. *Id.* § 3346(a)(2). Once that nomination is rejected, withdrawn, or returned by the Senate, however, acting officials may serve for no more than an additional 210 days. *Id.* § 3346(b)(1). If the President makes a second nomination, acting officials may continue to serve until the second nominee is confirmed, or, if the nominee is not confirmed, "for no more than 210 days after the second nomination is rejected, withdrawn, or returned." *Id.* § 3346(b)(2)(B).

26. The FVRA does not authorize any further extension of the period during which acting officials may fill a vacancy, even if the President makes additional nominations.

27. Once the time periods during which an office may be filled by an acting official have elapsed, if the Senate has not confirmed a nominee to the office in question, the FVRA commands that "the office shall remain vacant." *Id.* § 3348(b)(1).

28. The FVRA specifies that its procedures, including the time limits set forth above, "are the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any officer," unless—as is not the case here—another statute expressly provides

otherwise or the President makes a valid recess appointment. *Id.* § 3347(a).

29. To help give teeth to these mandates, the FVRA provides that an agency action "shall have no force or effect" if it was taken by a person performing the functions and duties of a vacant office without authorization by the FVRA. *Id.* § 3348(d)(1). These void actions "may not be ratified" by other officials. *Id.* § 3348(d)(2).

B. U Visas and Stays of Removal

30. Congress created the U nonimmigrant visa, or "U visa," as part of the bipartisan Victims of Trafficking and Violence Protection Act, Pub. L. No. 106-386, 114 Stat. 1464 (2000). This new nonimmigrant visa classification was established both to "strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes . . . committed against aliens" and to "offer[] protection to victims of such offenses in keeping with the humanitarian interests of the United States." *Id.* § 1513(a)(2)(A), 114 Stat. at 1533. Congress created the U visa because it recognized that noncitizen victims are often reluctant to contact law enforcement for fear that doing so may result in their deportation. *See* New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53,014, 53,014 (Sept. 17, 2007).

31. Under 8 U.S.C. § 1101(a)(15)(U), people who are the victims of certain crimes—including sexual assault, domestic violence, and stalking—can apply for a U visa if they have experienced resultant mental or physical abuse and have aided law enforcement in the investigation or prosecution of the crime. Securing a U visa permits these individuals to remain in the United States with legal status.

32. A person seeking a U visa must submit an application to U.S. Citizenship and Immigration Services ("USCIS"). *See* 8 C.F.R. § 214.14(c)(1). Along with a petition form, the

applicant must submit a certification from a law enforcement agency indicating that, among other things, the applicant is a victim of a qualifying crime and has been or is likely to be helpful in the investigation or prosecution of the relevant criminal activity. *Id.* § 214.14(c)(2)(i). The applicant must also submit biometric data and a personal statement, and may include additional supporting evidence. *Id.* § 214.14(c)(2)(ii)-(iii), (c)(3).

33. Because of a statutory cap, USCIS can grant only 10,000 U visas annually to principal applicants. *See* 8 U.S.C. § 1184(p)(2)(A). As a result, there is currently a backlog of pending U-visa applications for principal applicants that have been approved but have not yet resulted in visas.[1] By regulation, "[a]ll eligible petitioners who, due solely to the cap, are not granted [a U-visa] must be placed on a waiting list," 8 C.F.R. § 214.14(d)(2), and once applicants are on the U-visa waiting list, USCIS is required to grant them deferred action or parole protecting them from deportation, *id*.

34. Currently, a U-visa applicant must wait more than four years before her case is considered for the waiting list.[2] To prevent people from being deported before their U-visa applications are processed, Congress authorized the Secretary of Homeland Security to grant U-visa applicants "an administrative stay of a final order of removal" until an application is either approved or conclusively denied, if the Secretary determines that the application "sets forth a prima facie case for approval." 8 U.S.C. § 1227(d)(1). In accordance with this provision, individuals who are subject to a final order of removal but who have applied for a U visa may request a stay

[1] U.S. Citizenship and Immigration Services, Form I-918, Petition for U Nonimmigrant Status, by Fiscal Year, Quarter, and Case Status: Fiscal Years 2009-2019, https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I918u_visastatistics_fy2019_qtr4.pdf.

[2] Gustavo Solis, *Fewer Immigrants Apply For Special Visa Reserved For Crime Victims*, San Diego Union Tribune (Sept. 1, 2019), https://www.sandiegouniontribune.com/news/immigration/story/2019-08-31/u-visa-decline-story.

of removal to protect themselves from deportation during the time between the filing of their application and the point at which USCIS adjudicates it. *See* 8 C.F.R. § 214.14(c)(1)(ii); *see also id.* §§ 241.6(a), 1241.6(a).

FACTUAL ALLEGATIONS

A. The Vacancy in the Office of ICE Director

35. ICE has not had a Senate-confirmed Director in more than three years.

36. Sarah Saldaña, the last Senate-confirmed Director of ICE, "retired days before [President] Trump's inauguration."[3]

37. Thomas Homan, a career ICE official, was named that same month to serve as Acting ICE Director, and nearly ten months later, on November 14, 2017, was nominated by President Trump to serve as ICE Director.[4] Homan's nomination to fill the office on a permanent basis "stalled" in the face of "intense opposition" from some Senators.[5] His nomination was withdrawn on May 15, 2018.[6]

38. Three months later, on August 16, 2018, President Trump made a second nomination to fill the office, nominating Ronald Vitiello to be ICE Director.[7] Although the Senate

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[3] Nicole Hensley, *New Acting Director of ICE Tapped By President Trump Was Once Honored For Deportations Under Obama*, N.Y. Daily News (Jan. 31, 2017), https://www.nydailynews.com/news/national/new-acting-director-ice-honored-deportations-article-1.2960171.

[4] Brett Samuels, *Trump Taps Thomas Homan as ICE Director*, The Hill (Nov. 14, 2017), https://thehill.com/homenews/administration/360316-trump-taps-acting-ice-director-to-take-role-permanently.

[5] Brent D. Griffiths, *New Acting ICE Head Named as Agency Continues To Be Criticized*, Politico.com (June 30, 2018), https://www.politico.com/story/2018/06/30/new-ice-director-ronald-vitiello-689504.

[6] 164 Cong. Rec. S2685 (daily ed. May 18, 2018).

[7] Tal Kopan, *Trump Nominates New ICE Director*, CNN (Aug. 6, 2018), https://www.cnn.com/2018/08/06/politics/ice-trump-vitiello/index.html.

held a confirmation hearing for Vitiello,[8] he was not confirmed. His nomination was returned under Senate rules when the Senate adjourned on January 3, 2019.[9]

39. Under the time limits imposed by the FVRA, the position of ICE Director could be filled by acting officials for no more than 210 days after this nomination was returned on January 3, 2019—that is, until August 1, 2019. After August 1, 2019, the express terms of the FVRA prohibited any individual from performing the functions and duties of the ICE Director.

B. Defendant Albence's Unlawful Tenure as Acting Director of ICE

40. In April 2019, President Donald Trump engaged in a "near-systematic purge" of the Department of Homeland Security, starting with the removal of Homeland Security Secretary Kirstjen Nielsen.[10]

41. On April 11, 2019, the Acting Director of ICE, Ronald Vitiello, sent an email to ICE employees informing them that "[b]eginning tomorrow I will be out of the office, during which time Acting Deputy Director Matt Albence will be leading the agency."[11]

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[8] Ron Nixon, *Democrats Grill ICE Nominee About Child Detentions and a Derogatory Tweet*, N.Y. Times (Nov. 15, 2018), https://www.nytimes.com/2018/11/15/us/politics/ronald-vitello-immigration-agency.html.

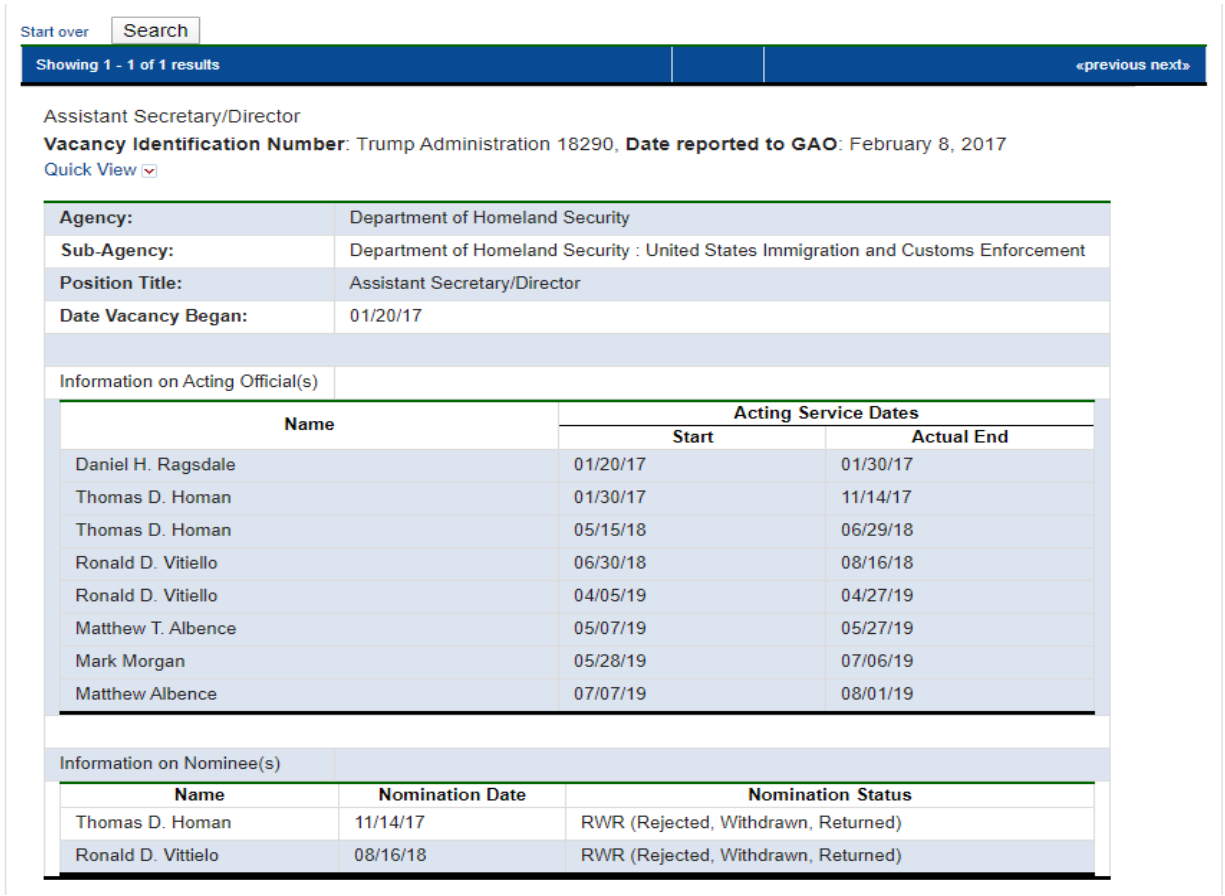
[9] *PN2397 – Ronald D. Vitiello – Department of Homeland Security*, Congress.gov (last visited Feb. 12, 2020), https://www.congress.gov/nomination/115th-congress/2397.

[10] *See* Priscilla Alvarez et al., *Trump Overseeing 'Near-Systemic Purge' at Department of Homeland Security*, CNN Politics (Apr. 8, 2019), https://www.cnn.com/2019/04/08/politics/miller-nielsen-trump-immigration-homeland-security/index.html; Matthew Yglesias, *Trump's Flailing Shake-up of the Department of Homeland Security, Explained*, Vox (Apr. 8, 2019), https://www.vox.com/policy-and-politics/2019/4/8/18300319/trump-dhs-kirstjen-nielsen-kevin-mcaleenan.

[11] Priscilla Alvarez, *ICE Acting Deputy Director Tapped To Lead Agency*, CNN Politics (Apr. 11, 2019), https://www.cnn.com/2019/04/11/politics/matt-albence-lead-ice/index.html.

42. Neither Defendant Albence nor anyone else could serve as Acting Director of ICE after August 1, 2019, in light of the expiration of the explicit time limits set out in the FVRA. The Act instead required that the office "remain vacant." 5 U.S.C. § 3348(b)(1).

43. Indeed, the U.S. Government Accountability Office ("GAO"), which "receives and records the information" that the FVRA requires agencies to report to the Comptroller General about vacancies, confirms in its public-vacancies database that Defendant Albence's tenure as Acting Director was required to end on August 1, 2019:[12]



Start over Search

Showing 1 - 1 of 1 results «previous next»

Assistant Secretary/Director

Vacancy Identification Number: Trump Administration 18290, **Date reported to GAO**: February 8, 2017

Quick View

Agency:	Department of Homeland Security
Sub-Agency:	Department of Homeland Security : United States Immigration and Customs Enforcement
Position Title:	Assistant Secretary/Director
Date Vacancy Began:	01/20/17

Information on Acting Official(s)

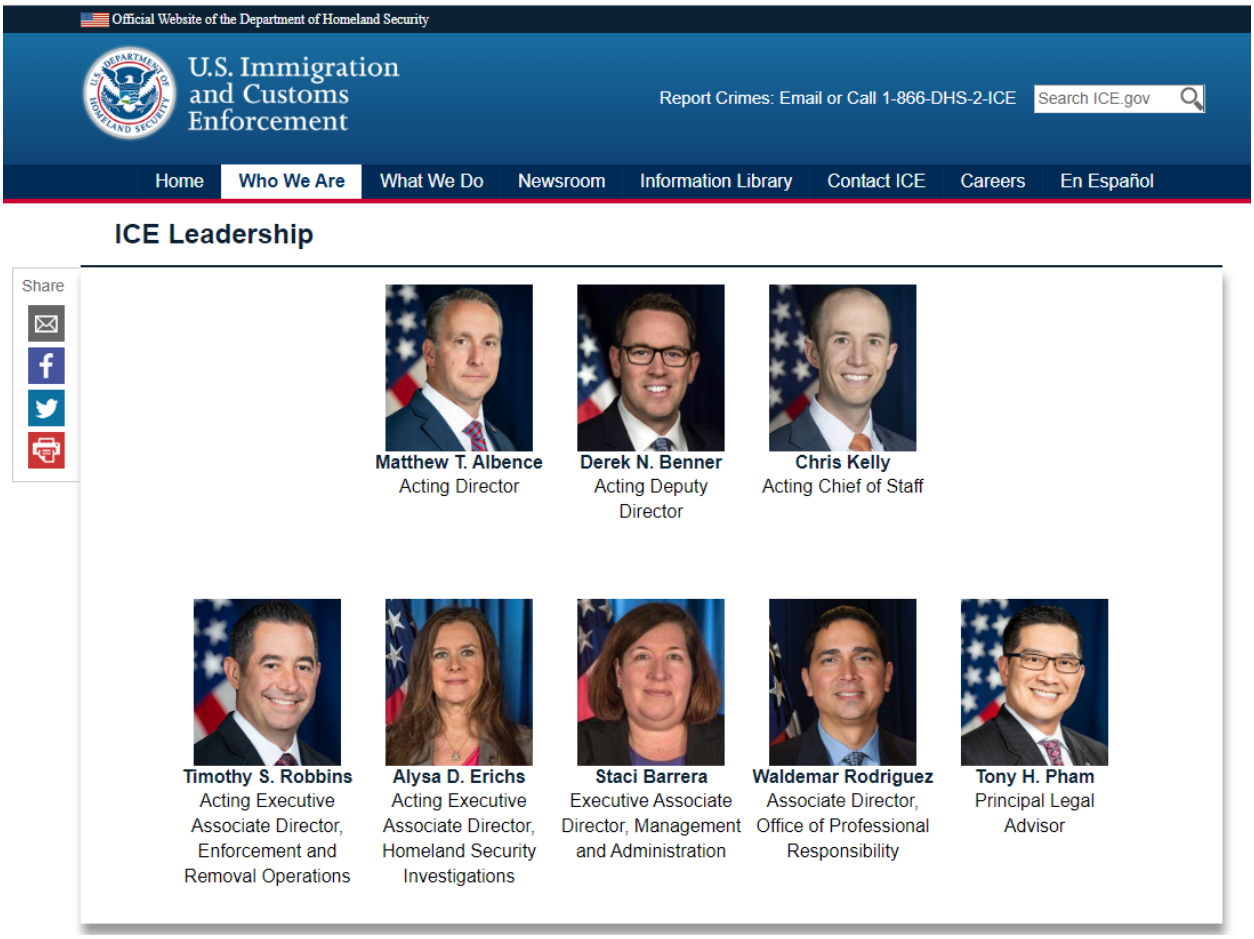
Name	Acting Service Dates	
	Start	Actual End
Daniel H. Ragsdale	01/20/17	01/30/17
Thomas D. Homan	01/30/17	11/14/17
Thomas D. Homan	05/15/18	06/29/18
Ronald D. Vitiello	06/30/18	08/16/18
Ronald D. Vitiello	04/05/19	04/27/19
Matthew T. Albence	05/07/19	05/27/19
Mark Morgan	05/28/19	07/06/19
Matthew Albence	07/07/19	08/01/19

Information on Nominee(s)

Name	Nomination Date	Nomination Status
Thomas D. Homan	11/14/17	RWR (Rejected, Withdrawn, Returned)
Ronald D. Vittielo	08/16/18	RWR (Rejected, Withdrawn, Returned)

[12] *Federal Vacancies Reform Act*, U.S. Government Accountability Office, https://www.gao.gov/legal/other-legal-work/federal-vacancies-reform-act (last visited February 12, 2020). The GAO's website, from which this screenshot was taken, allows for searches of vacant offices within the executive branch.

44. Defendant Albence, however, continued purporting to be Acting Director after August 1, 2019, and he continued taking official actions in that capacity. Indeed, as of the filing of this complaint, the ICE website continues to identify Defendant Albence as the agency's Acting Director:[13]



[13] *ICE Leadership*, U.S. Immigration and Customs Enforcement, https://www.ice.gov/leadership (last visited Feb. 12, 2020). The Department of Homeland Security's website identifies Defendant Albence both as "Deputy Director" and as "Senior Official Performing the Duties of the Director," *see Leadership*, Department of Homeland Security, https://www.dhs.gov/leadership (last visited Feb. 12, 2020), although that website too continued to identify Defendant Albence as Acting Director through August 5, 2019, *see* https://web.archive.org/web/20190805122137/https://www.dhs.gov/leadership. In addition, although the Department of Homeland Security website currently identifies Defendant Albence as ICE's "Deputy Director," ICE's own website currently identifies a different person—Derek N. Benner—as its "Acting Deputy Director" (see above).

C. The New U-Visa Stay Policy

45. On August 2, 2019, acting pursuant to his authority as the purported Acting Director of ICE, Defendant Albence issued a directive that made significant changes to ICE's policies regarding applications for stays of removal by U-visa applicants.

46. Prior to the change in policy ordered by Defendant Albence, when a person who had applied for a U visa requested a stay of removal, ICE was required to contact USCIS to request a *prima facie* determination regarding that person's application. Memorandum from David J. Venturella, Acting Director, USCIS, to Field Officer Directors 2 (Sept. 24, 2009) [hereinafter "Venturella Memo"]. ICE recently described the *prima facie* determination as "a simple confirmation that the petition was filed correctly and . . . not a substantive review of the petition." *Fact Sheet: Revision of Stay Removal Request Reviews for U Visa Petitioners*, U.S. Immigration and Customs Enforcement (Aug. 2, 2019), https://www.ice.gov/factsheets/revision-stay-removal-request-reviews-u-visa-petitioners (last updated Nov. 12, 2019).

47. Under the prior policy, if USCIS reported that an individual had established *prima facie* eligibility for a U visa, and as long as certain "serious adverse factors" were not present, then ICE's detention and removal operations field office director was required to "favorably view" the request for a stay. Venturella Memo at 2.[14] That is, the prior policy required that in the absence of these serious adverse factors, the field office director "should generally grant the alien a Stay of Removal when USCIS has found the alien to be *prima facie* eligible for a U-visa." *Id*. The field office director was also required to "consider favorably any humanitarian factors related to the

[14] The "serious adverse factors" that weighed against granting a stay were "(1) national security concerns; (2) evidence that the alien is a human rights violator; (3) evidence that the alien has engaged in significant immigration fraud; (4) evidence that the alien has a significant criminal history; and (5) any significant public safety concerns." Venturella Memo at 2.

alien or the alien's close relatives who rely on the alien for support." *Id*. If the field office director found that serious adverse factors existed and was therefore "inclined to deny the Stay request despite the USCIS *prima facie* eligibility finding," the field office director was required to "provide a summary of the case to [enforcement and removal] Headquarters for further review." *Id.* at 3.

48. The new policy dictated by ICE Directive 11005.2—which Defendant Albence signed as the "Acting Director" of ICE—represents a reversal of course on ICE's treatment of U-visa applicants seeking stays of removal. Under this new directive, ICE no longer routinely requests *prima facie* determinations from USCIS. *ICE Directive 11005.2: Stay of Removal Requests and Removal Proceedings Involving U Nonimmigrant Status (U Visa) Petitioners* § 5.2.2, at 4 (Aug. 2, 2019) ("the Albence Policy") (attached hereto as Exhibit 1). Indeed, ICE no longer employs the *prima facie* standard at all.

49. Instead, under the Albence Policy, each ICE field office director is given broad discretion to "consider the totality of the circumstances," including "any favorable or adverse factors . . . and any federal interest(s) implicated," in deciding whether to grant a stay. *Id*.; *see Fact Sheet*, *supra*.

50. This process is a sharp break from the previous policy, under which ICE granted a U-visa applicant a stay of removal as a matter of course if she made a *prima facie* showing of eligibility and no adverse conditions existed.

51. As a result of this change, U-visa applicants who have properly filed a petition that raises no serious adverse factors can no longer depend upon ICE's prior policy to protect them from deportation as they await adjudication of their petitions.

52. Deportation creates serious harms for U-visa applicants. Deported U-visa applicants will need to await adjudication of their applications abroad, which may take nearly a

decade. Applicants are often separated from their families during this time. Moreover, even successful applicants may not be able to reenter the United States, as deportation could trigger additional grounds of inadmissibility for which they would have to separately secure waivers in order to return to the United States. *See* 8 U.S.C. § 1182(a)(9)(A), (B)(i)(II).

D. Plaintiff and Its Injuries

53. Defendant Albence's illegal issuance of ICE Directive 11005.2 has caused, and will continue to cause, multiple harms to Plaintiff.

54. Plaintiff ASISTA's mission is to advance the rights and liberty of immigrant survivors of violence. An important aspect of this mission is providing assistance and resources to advocates who are aiding noncitizen survivors of violence with immigration matters.

55. ICE Directive 11005.2 has frustrated Plaintiff's ability to achieve its mission and forced it to divert its limited resources away from other activities on an ongoing basis to respond to the new policy.

Diversion of Resources

56. In service of its mission, ASISTA provides technical assistance and informational resources to lawyers who are assisting noncitizen survivors of violence in immigration matters, as well as to accredited representatives who work with certain organizations to assist indigent survivors of violence, *see* 8 C.F.R. § 1292.1(a)(4).

57. Through its technical assistance program, ASISTA offers support for individual attorneys with noncitizen clients who are survivors of domestic violence, including U-visa applicants. From 2015 through 2019, ASISTA provided technical assistance in over 3,000 U-visa immigration cases.

58. Before the Albence Policy was issued, ASISTA's technical assistance to attorneys representing U-visa applicants who were in danger of deportation consisted largely of helping those attorneys navigate the administrative process for securing stays of removal under the prior ICE policy. This technical assistance involved familiarizing attorneys with best practices and the steps required to represent clients when submitting U-visa stay applications.

59. Under the prior policy, providing technical assistance to an attorney representing a U-visa applicant who was requesting a stay of removal took as little as fifteen minutes, depending upon the staff member providing the technical assistance.

60. The Albence Policy has forced ASISTA to make significant changes in its technical assistance program.

61. Because of the change in ICE's policy, in order to properly support attorneys representing U-visa applicants who are at risk of deportation, ASISTA must now provide training and technical assistance on filing federal court actions to stop such deportations. Thus, in addition to helping attorneys submit administrative applications for stays of removal, ASISTA must now guide attorneys through the process of filing mandamus, habeas, and Administrative Procedure Act civil actions on behalf of their clients in federal court. Although such federal litigation was occasionally necessary in the years before the Albence Policy, it is now vital in every case to ensure that eligible crime victims with certifications of helpfulness from law enforcement are not deported while USCIS is considering their U-visa applications. Indeed, ASISTA now helps attorneys prepare habeas and mandamus petitions even before their clients have had their stay applications denied, so that the petitions will be ready to file as soon as a stay is denied.

62. Accordingly, the Albence Policy makes ASISTA's technical assistance work more difficult and substantially increases the amount of time necessary to provide technical assistance

in each case. On average, it takes ASISTA staff between two and ten hours, depending on the case, to provide technical assistance for litigation in federal district court, in addition to the time spent on technical assistance for filing stays of removal on behalf of the same clients. This represents a dramatic increase in the amount of staff time over that which was necessary to provide technical assistance with administrative applications under the prior policy.

63. In addition to the need to guide attorneys on filing federal civil actions, ASISTA is now required to spend more time than it used to helping attorneys submit administrative applications for stays of removal, because the "totality of the circumstances" standard that ICE now employs requires significantly more support from an applicant than the prior *prima facie* standard required.

64. Largely due to the urgent need for training and technical assistance caused by ICE's change in policy, 114 new attorneys have sought ASISTA's services since August 2, 2019.

65. Because the change in policy has forced ASISTA to devote so much staff time to this technical assistance, ASISTA has significantly scaled back its work helping attorneys and their clients with immigration cases not involving U visas. It has also significantly scaled back its work on state and local capacity-building meant to increase immigrant survivors' access to legal services.

66. This diversion of resources is ongoing. Under the Albence Policy, ASISTA will continue to be forced to engage in the time-intensive work of helping attorneys bring litigation in federal district court to stop removals instead of supporting those attorneys in the resolution of their clients' U-visa applications. Were ICE to revert to its prior policy, ASISTA could once again devote significantly more time to helping attorneys and their clients obtain other forms of

immigration relief and to capacity-building aimed at increasing immigrant survivors' access to legal services.

67. Separate from the technical assistance it provides in individual cases, ASISTA conducts training sessions for attorneys and accredited representatives representing U-visa applicants, both in person and via webinar. The issuance of the Albence Policy forced ASISTA to conduct additional trainings and to spend valuable staff time and organizational resources revising and updating materials, as well as creating new materials and resources.

68. For instance, on August 29, 2019, ASISTA conducted a two-hour webinar entitled "Late-Breaking Webinar After the New ICE Memo: Now how do we stop survivor removals?" Creating this webinar took approximately two days of staff time, including time to create relevant materials for participants.

69. Additionally, on December 11, 2019, ASISTA conducted a two-hour webinar entitled "Hot Topics in U Visas: Stopping Survivor Removals," which included information about engaging in federal court litigation on behalf of U-visa applicants facing removal under the new ICE policy. Creating this webinar took approximately two days of staff time, including time to create relevant materials for participants.

70. ASISTA was also forced to revise its curricula and materials for the all-day, in-person trainings that it conducts for lawyers representing immigrant survivors of domestic violence in light of the new policy.

71. Diverting resources toward developing and conducting these new training sessions has forced ASISTA to stop providing basic- and intermediate-level training on working with immigrant crime survivors submitting U-visa applications. On an ongoing basis, ASISTA is not able to provide these U-visa application trainings, which formed the bulk of its work in the past.

72. Moreover, diverting resources toward these new training and technical assistance needs has left ASISTA with less funding and staff time to engage in other aspects of its work, including training law enforcement personnel and civil and criminal court judges on best practices for engaging with immigrant survivors of violence, as well as advocating before government officials to ensure that the panoply of laws intended to protect immigrant survivors of violence are implemented as intended.

Frustration of Mission

73. ASISTA exists to advance the rights and liberty of immigrant survivors of violence. Supporting the ability of these survivors to secure protection against deportation through the U-visa program is a crucial part of that mission.

74. Defendant Albence's illegal issuance of ICE Directive 11005.2 has impaired, and continues to impair, ASISTA's ability to achieve its mission. It has placed U-visa applicants—survivors of violence who have bravely come forward to cooperate with law enforcement on the investigation and prosecution of crimes against them—at greater risk of deportation.

COUNT I

Violation of the Appointments Clause, U.S. Const. art. II, § 2, cl. 2

75. Plaintiff re-alleges and incorporates by reference the preceding paragraphs of this Complaint as if fully set forth herein.

76. The Director of ICE is an officer of the United States whose appointment requires Presidential nomination and Senate confirmation.

77. The office of ICE Director has not been filled by a Senate-confirmed nominee since the Trump Administration began more than three years ago.

78. Defendant Albence is performing the functions and duties of the ICE Director, even though he has not been confirmed by the Senate to hold that office or any other position requiring the Senate's advice and consent.

79. Because the time limit for filling the office of ICE Director with acting officials has expired under the FVRA, there is no legal basis for Defendant Albence to continue exercising the functions and duties of that office, and there has been no such legal basis since August 1, 2019.

80. Defendant Albence's exercise of those functions and duties without having been confirmed by the Senate or otherwise having the legal authority to exercise them violates the Appointments Clause. His purported change in ICE policy is therefore invalid and void.

COUNT II

Violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)

81. Plaintiff re-alleges and incorporates by reference the preceding paragraphs of this Complaint as if fully set forth herein.

82. ICE is a federal agency, the final actions of which are subject to judicial review under the Administrative Procedure Act ("APA"). 5 U.S.C. § 551(1).

83. The APA provides that a reviewing court shall "hold unlawful and set aside agency actions, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," "in excess of statutory jurisdiction, authority, or limitations," or "without observance of procedure required by law." *Id.* § 706(2)(A), (C), (D).

84. Because Defendant Albence has been unlawfully serving as Acting Director of ICE since August 1, 2019, and has had no authority to take any actions in that capacity, his purported change to the U-visa stay policy violates the APA and is invalid and void.

COUNT III

Violation of 6 U.S.C. § 113

85. Plaintiff re-alleges and incorporates by reference the preceding paragraphs of this Complaint as if fully set forth herein.

86. Section 113(a)(1)(G) of Title 6 of the U.S. Code requires that the Director of ICE be nominated by the President and confirmed by the Senate.

87. Because Defendant Albence is performing the functions and duties of the ICE Director without having been nominated by the President or confirmed by the Senate, and without any other legal authority to do so, he is currently filling that office in violation of 6 U.S.C. § 113, and he was filling it in violation of 6 U.S.C. § 113 when he issued his purported change to the U-visa stay policy. That change is therefore invalid and void.

COUNT IV

Violation of the Federal Vacancies Reform Act, 5 U.S.C. §§ 3345 *et seq.*

88. Plaintiff re-alleges and incorporates by reference the preceding paragraphs of this Complaint as if fully set forth herein.

89. The FVRA provides that no person may serve as an acting officer "more than 210 days after [a] second nomination [to fill that office] is rejected, withdrawn, or returned" by the Senate. 5 U.S.C. § 3346(b)(2)(B). The FVRA is the "exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office," unless another statute expressly provides otherwise or the President makes a valid recess appointment (neither of which is the case here). *Id.* § 3347(a). Once the time periods prescribed by the FVRA have elapsed without Senate confirmation of a permanent appointee, the office in question "shall remain vacant." *Id.* § 3348(b)(1).

90. Because, on the date Defendant Albence issued his purported change to the U-visa stay policy, more than 210 days had passed since a second nomination to fill the office of ICE Director was returned by the Senate, Defendant Albence was performing the functions and duties

of the Director in violation of the FVRA, and his purported change to the U-visa stay policy is invalid and void.

COUNT V

***Ultra Vires* Action**

91. Plaintiff re-alleges and incorporates by reference the preceding paragraphs of this Complaint as if fully set forth herein.

92. Because Defendant Albence has been unlawfully serving as Acting Director of ICE since August 1, 2019, and has had no authority to take any actions in that capacity, his purported change to the U-visa stay policy is *ultra vires* and therefore invalid and void.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court enter a judgment in Plaintiff's favor and against Defendants, consisting of:

a) A declaratory judgment stating that:

(1) Defendant Albence's service as Acting Director of ICE after August 1, 2019, violates the Appointments Clause, U.S. Const. art. II, § 2, cl. 2;

(2) Defendant Albence's purported change to the U-visa stay policy was not in accordance with law under the APA, 5 U.S.C. § 706(2)(A), (C), (D);

(3) Defendant Albence's service as Acting Director of ICE after August 1, 2019, violates 6 U.S.C. § 113(a)(1)(G);

(4) Defendant Albence's service as Acting Director of ICE after August 1, 2019, violates the Federal Vacancies Reform Act, 5 U.S.C. §§ 3345 *et. seq.*;

(5) Defendant Albence acted *ultra vires* when he purported to change the U-visa stay policy after his lawful service as Acting Director had expired; and

(6) Defendant Albence's actions as Acting Director after August 1, 2019, including his purported change to the U-visa stay policy, are invalid and void.

b) Injunctive relief, enjoining the implementation of ICE's August 2, 2019, change to its U-visa stay policy and enjoining Defendant Albence from performing the functions and duties of the office of ICE Director;

c) A grant to Plaintiff of its costs and reasonable attorneys' fees; and

d) Such other and further relief as this Court may deem just and proper.

Dated: February 13, 2020

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**Pro hac vice* motions forthcoming.