IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

ASISTA IMMIGRATION ASSISTANCE, Inc., SANCTUARY FOR FAMILIES, Inc.,

Plaintiffs,

v.

MATTHEW T. ALBENCE, in his official capacity, *et al.*,

Defendants.

Case No. 3:20-cv-00206-JAM

Judge: Hon. Jeffrey A. Meyer

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Brittany Williams (phv10516)
THE PROTECT DEMOCRACY PROJECT
1900 Market Street, 8th Floor
Philadelphia, PA 19103
(202) 236-7396
brittany.williams@protectdemocracy.org

Benjamin L. Berwick (phv04462)
THE PROTECT DEMOCRACY PROJECT
15 Main Street, Suite 312
Watertown, MA 02472
(202) 856-9191
ben.berwick@protectdemocracy.org

Rachel E. Goodman (phv10513)
THE PROTECT DEMOCRACY PROJECT
115 Broadway, 5th Floor
New York, NY 10006
(202) 997-0599
rachel.goodman@protectdemocracy.org

Elizabeth B. Wydra (phv10541)
Brianne J. Gorod (phv10524)
Brian R. Frazelle (phv10535)
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, DC 20036
(202) 296-6889
elizabeth@theusconstitution.org
brianne@theusconstitution.org
brian@theusconstitution.org

Marisol Orihuela (ct30543)
JEROME N. FRANK LEGAL SERVICES ORGANIZATION
P.O. Box 209090
New Haven, CT 06520
(202) 432-4800
marisol.orihuela@yale.edu

TABLE OF CONTENTS

Page

TABLE OF CONTENTS – cont'd

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES – cont'd

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

TABLE OF AUTHORITIES – cont'd

Page(s)

CONSTITUTIONAL PROVISIONS

STATUTES, REGULATIONS, AND LEGISLATIVE MATERIALS

TABLE OF AUTHORITIES – cont'd

TABLE OF AUTHORITIES – cont'd

Page(s)

BOOKS, ARTICLES, AND OTHER AUTHORITIES

TABLE OF AUTHORITIES – cont'd

Page(s)

INTRODUCTION

Recognizing that crime victims who lack citizenship may be reluctant to contact law enforcement for fear of deportation, Congress created a special form of protection, the "U nonimmigrant visa" or "U visa," in order 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" while offering "protection to victims of such offenses in keeping with the humanitarian interests of the United States." Pub. L. No. 106-386, § 1513(a)(2)(A), 114 Stat. 1464, 1533 (2000). Noncitizen crime victims who aid law enforcement may remain in the United States with legal status by obtaining a U visa. 8 U.S.C. § 1101(a)(15)(U). And to prevent eligible victims from being deported while their visa applications are pending, Congress authorized the Department of Homeland Security (DHS) to stay the deportation of such applicants. 8 U.S.C. § 1227(d)(1).

For more than a decade, U.S. Immigration and Customs Enforcement (ICE) has followed a policy of presumptively staying the deportation of crime victims who file proper U-visa applications and whose cases present no serious "adverse" factors. Statement of Undisputed Material Facts (SUMF) ¶¶ 22-23. Last year, however, an official who was illegally purporting to be the Acting Director of ICE established a new policy that withdraws this protection, making it more likely that crime victims who are entitled to U visas will be deported before their applications are even processed. *Id.* ¶¶ 24-26.

In addition to harming crime victims and hindering law enforcement efforts, ICE's new policy has taxed the resources and impaired the missions of legal organizations, like Plaintiffs here, that defend such victims against deportation, assist them in obtaining lawful immigration status, and provide training and technical assistance to other attorneys who represent them in immigration

proceedings. By making it harder to protect survivors of violence from deportation, ICE's new policy has forced Plaintiffs to spend additional time and resources helping U-visa applicants pursue stays of removal and otherwise avoid deportation, as well as training other attorneys on how to do so. These changes have diverted significant resources away from Plaintiffs' other work and frustrated their ability to accomplish their missions. SUMF ¶¶ 30-31.

The establishment of ICE's new policy, moreover, violated federal law and flouted the separation of powers that is central to our constitutional structure. Article II of the Constitution requires the President to obtain "the Advice and Consent of the Senate" before appointing "Officers of the United States." U.S. Const. art. II, § 2, cl. 2. The Framers adopted this requirement to promote liberty by tempering the President's power to select the individuals who "exercis[e] significant authority pursuant to the laws of the United States." *Buckley v. Valeo*, 424 U.S. 1, 126 (1976). Throughout the nation's history, "Congress has given the President limited authority to appoint acting officials to temporarily perform the functions of a vacant . . . office without first obtaining Senate approval," *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 935 (2017), but Congress has consistently placed time limits on that authority to prevent the executive from indefinitely circumventing the requirement of Senate confirmation. The Federal Vacancies Reform Act of 1998 (FVRA or "the Act") is "the latest version of that authorization," *id*. at 934, and is "the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency . . . for which appointment is required to be made by the President, by and with the advice and consent of the Senate," 5 U.S.C. § 3347(a).

The adoption of ICE's new stay policy violated the FVRA. There has been no Senate-confirmed Director of ICE since the Trump administration began more than three years ago. And as Defendants concede, the period of time during which the office of the Director could be filled

by acting officials expired on August 1, 2019. SUMF ¶ 13; Def. Mem. 5. After that date, the express terms of the FVRA prohibited anyone from exercising the powers of the Director, 5 U.S.C. § 3346(b)(2)(B), and required that office to "remain vacant," *id*. § 3348(b)(1). Nevertheless, Defendant Matthew Albence continued performing the functions of that office and taking official actions in that capacity. Among those actions, he invoked his authority as ICE's "Acting Director" to establish ICE's new stay policy for U-visa applicants. SUMF ¶ 19; *see* Dkt. No. 34-1, at 7.

Because Albence's approval of the stay policy violated the FVRA, it is void under that Act and must be set aside under the Administrative Procedure Act (APA). Federal statutes assign the Director of ICE the exclusive authority to "establish the policies" for ICE's performance of its functions. 6 U.S.C. § 252(a)(3)(A). Deciding whether to grant stays of removal to U-visa applicants is one of ICE's functions. *See infra*. The Director of ICE therefore has the exclusive authority to establish ICE's policies for granting stays of removal to U-visa applicants. And because Defendant Albence unlawfully performed a "function or duty" of the vacant office of ICE Director when he established ICE's new stay policy, this policy has "no force or effect" under the FVRA and "may not be ratified" by other officials. 5 U.S.C. § 3348(d). Moreover, because Albence's adoption of the new policy violated the FVRA, his action was "not in accordance with law" and was "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(A), (C). The policy must therefore be set aside under the APA. *Id.*

Remarkably, Defendants concede that Albence had no authority to serve as ICE's Acting Director when he established the agency's new stay policy. *See* Def. Mem. 5 (acknowledging that Albence's lawful service as Acting Director ended on August 1, 2019). Shrugging off this statutory violation, they claim that Albence nevertheless had the power to adopt the policy because, they say, he was ICE's Deputy Director. *Id.* at 1-2. But this argument—apparently Defendants'

only argument for the legality of the stay policy—is flat wrong. As shown below, the responsibility for establishing ICE's policies concerning stays of removal is a "function or duty" that by statute is assigned exclusively to the ICE Director and is required to be performed only by the Director. 5 U.S.C. § 3348(a)(2)(A). As a result, the FVRA commands that when the Director's office is vacant and there is no validly serving Acting Director, no one at ICE, including its Deputy Director, may establish such policies. *Id.* § 3348(b)(2). If anyone purports to do so, the action "shall have no force or effect." *Id.* § 3348(d)(1).

Because Albence had no statutory authority to exercise the powers of the ICE Director, and because he was never confirmed by the Senate to that office, his adoption of ICE's new stay policy also violated the Appointments Clause. Constitutional text and historical practice establish that presidents have no inherent authority to direct that the functions of vacant offices be performed on a temporary basis without Senate consent. Thus, when a person exercises the powers of an office that requires Senate confirmation without having received that confirmation and without authorization from any legislative source, this unauthorized exercise of the federal government's power violates the Appointments Clause. That is what Defendant Albence did here by establishing ICE's new policy with no legal authority to do so.

For similar reasons, Albence's establishment of the new policy also violated 6 U.S.C. § 113, which reinforces the constitutional requirement of Senate confirmation by independently requiring the Director of ICE to be "appointed by the President, by and with the advice and consent of the Senate." 6 U.S.C. § 113(a)(1)(G). That illegality provides further reason that Albence's policy must be set aside under the APA. 5 U.S.C. § 706(2). And finally, apart from their statutory claims, Plaintiffs are entitled to seek prospective equitable relief from ongoing injuries caused by officials who exceed their lawful authority. Because Defendant Albence had no constitutional or

statutory authority to establish ICE's new stay policy for U-visa applicants, his adoption of that policy was *ultra vires* and may be enjoined by this Court.

LEGAL BACKGROUND

I. The Appointments Clause and the FVRA

"Article II of the Constitution requires that the President obtain 'the Advice and Consent of the Senate' before appointing 'Officers of the United States.'" *SW Gen.*, 137 S. Ct. at 934 (quoting U.S. Const. art. II, § 2, cl. 2). The Framers imposed that requirement as a necessary check on the power of the President, recognizing that giving him 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 power of appointment to offices was deemed the most insidious and powerful weapon of eighteenth century despotism," and "[t]he manipulation of official appointments had long been one of the American revolutionary generation's greatest grievances against executive power." *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 883 (1991) (quotation marks omitted).

Because the Framers "thought it would tend to secure the liberties of the people, if they prohibited the President from the sole appointment of all officers," 3 *The Records of the Federal Convention of 1787*, at 357 (Max Farrand ed., 1911), they empowered the Senate to "check the action of the executive by rejecting the officers he selects," *Myers v. United States*, 272 U.S. 52, 119 (1926). Thus, "[t]he Senate's advice and consent power is a critical 'structural safeguard [ ] of the constitutional scheme.'" *SW Gen.*, 137 S. Ct. at 935 (quoting *Edmond v. United States*, 520 U.S. 651, 659 (1997)). And the Appointments Clause, "like all of the Constitution's structural provisions, is designed first and foremost not to look after the interests of the respective branches, but to protect individual liberty." *Id*. at 949 (Thomas, J., concurring) (quotation marks omitted).

"Over the years, Congress has established a legislative scheme to protect the Senate's constitutional role in the confirmation process." Morton Rosenberg, Cong. Research Serv., No. 98-892, *The New Vacancies Act: Congress Acts to Protect the Senate's Confirmation Prerogative*, at 5 (1998). Indeed, "[t]he origins of the modern Vacancies Act go back to the beginning of the nation." *Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 209 (D.C. Cir. 1998). "Since President Washington's first term, Congress has given the President limited authority to appoint acting officials to temporarily perform the functions of a vacant . . . office without first obtaining Senate approval." *SW Gen.*, 137 S. Ct. at 935; *see Doolin*, 139 F.3d at 209-11. These measures represent "an attempt to reconcile the requirements of Article II with the need to keep the executive branch functioning in the face of vacancies." Brannon P. Denning, *Article II, the Vacancies Act and the Appointment of "Acting" Executive Branch Officials*, 76 Wash. U. L. Q. 1039, 1043 (1998).

"[F]rom the beginning," however, "Congress limited how long the President's designee could serve." *Doolin*, 139 F.3d at 210; *see, e.g.*, Act of Feb. 13, 1795, ch. 21, 1 Stat. 415, 415 (empowering the President to authorize persons "to perform the duties" of vacant offices, but providing that "no one vacancy shall be supplied, in manner aforesaid, for a longer term than six months"). In the 1860s, "Congress repealed the existing statutes on the subject of vacancies and enacted in their stead a single statute," the Vacancies Act, which has been in force since then, with modifications. *Doolin*, 139 F.3d at 210. "The Federal Vacancies Reform Act of 1998 . . . is the latest version of that authorization." *SW Gen.*, 137 S. Ct. at 934.

Congress enacted the FVRA in response to the executive branch's increasing non-compliance with the Vacancies Act and circumvention of the Appointments Clause. Beginning in the 1970s, the Justice Department adopted the position that "any executive

department or agency whose authorizing legislation vests all powers and functions of the agency in its head and allows the head to delegate such powers and functions to subordinates in her discretion, d[id] not have to comply with th[e] [Vacancies] Act." Rosenberg, *supra*, at 1; *see The Vacancies Act*, 22 Op. O.L.C. 44, 44 (1998) (arguing that "statutes vesting an agency's powers in the agency head and allowing delegation to subordinate officials may be used to assign, on an interim basis, the powers of certain vacant Senate-confirmed offices"). Virtually *all* federal departments are governed by such legislation, however. "As a result, those who were ineligible for appointment as acting officers under the terms of the Vacancies Act were frequently 'delegated' the title and duties of precisely the same office, meaning the act's restrictions had become largely toothless." Thomas A. Berry, *S.W. General: The Court Reins in Unilateral Appointments*, 2017 Cato Sup. Ct. Rev. 151, 155.

Dismayed that "acting service beyond the time limitations in the act was widespread," *id.* at 154, Congress enacted the FVRA "to create a clear and exclusive process to govern the performance of duties of offices in the Executive Branch that are filled through presidential appointment by and with the consent of the Senate." S. Rep. No. 105-250, at 1 (1998). The FVRA "repudiated the contention of the Department of Justice that the head of a department may temporarily fill a position under a law authorizing that head to delegate or reassign duties among other officers in the department." Rosenberg, *supra*, at 7. It did so by providing that the Act is "the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency . . . for which appointment is required to be made by the President, by and with the advice and consent of the Senate," unless a statutory provision "expressly" provides otherwise. 5 U.S.C. § 3347(a)(1). In direct response to the Justice Department's longstanding position, the Act explicitly provides that statutes which merely

"provid[e] general authority to the head of an Executive agency . . . to delegate duties statutorily vested in that agency head" do not satisfy this lone exception. *Id.* § 3347(b); *see* S. Rep. No. 105-250, at 17 (this provision "forecloses" the Justice Department's position); *id.* at 3 (objecting that the Justice Department's position "allow[ed] for designation of acting officials for an indefinite period"); *id.* at 4 ("If the Vacancies Act is to function as it is designed . . . the Justice Department's interpretation of the existing statute must be ended.").

To prevent acting officials from filling vacant offices for "constitutionally unacceptable" periods of time, *id.* at 8, the FVRA sets rigid limits on the length of time during which acting officials may perform the duties of vacant offices. Except in certain narrow circumstances not present here, acting officials may perform the functions and duties of a vacant office for no more than 210 days from when the vacancy begins. 5 U.S.C. § 3346(a)(1). That period can be twice extended if the President makes nominations to fill the office, but once 210 days have passed following the rejection, withdrawal, or return by the Senate of a second nomination, no one may legally continue to serve in an acting capacity. *Id.* § 3346(b). Instead, the FVRA commands that "the office shall remain vacant." *Id*. § 3348(b)(1).

To encourage compliance with these mandates, the FVRA further provides that an agency action "shall have no force or effect" if it was taken by a person performing a function or duty 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).

By imposing these time limits, Congress sought to ensure that presidents could not indefinitely circumvent the requirement of Senate confirmation, which is "among the significant structural safeguards of the constitutional scheme." S. Rep. No. 105-250, at 4 (quoting *Edmond*, 520 U.S. at 659).

II. The U-Visa Program and Its Protections from Deportation

Nearly twenty years ago, Congress recognized that noncitizen victims of crime 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). Congress therefore created the U visa as part of the bipartisan Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 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. 1533.

That law allows people to apply for U visas when they have survived certain crimes, including sexual assault, domestic violence, and stalking; have experienced mental or physical abuse as a result of those crimes; and have aided law enforcement in the investigation or prosecution of the relevant crime. Securing a U visa permits these individuals to remain in the United States with legal status. 8 U.S.C. § 1101(a)(15)(U).

An applicant for a U visa submits a petition form to U.S. Citizenship and Immigration Services (USCIS). *See* 8 C.F.R. § 214.14(c)(1). Along with this 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 she may include additional supporting evidence. *Id.* § 214.14(c)(2)(ii)-(iii), (c)(3).

The statute allows USCIS to grant a maximum of ten thousand U visas each year to

"principal" applicants, in addition to the U visas that may be granted to each principal applicant's qualifying family members. *See* 8 U.S.C. § 1184(p)(2)(A); 8 C.F.R. § 214.14(a)(10). As a result of this statutory cap, there is currently a backlog of applications that have been approved but have not yet resulted in visas. SUMF ¶ 3. 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). Once applicants are on that waiting list, USCIS is required to grant them deferred action or parole, which protects them from deportation. *Id*.

A U-visa applicant must currently wait more than four years before her application is processed so that she can be added to the waiting list. To prevent people from being deported before their U-visa applications are processed, Congress authorized the granting of administrative stays of final orders of removal to individuals whose applications "set[] 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 of removal to protect themselves from deportation during the time between the filing of their application and the point at which USCIS evaluates it—that is, the period of time before they could be placed on the waiting list. *See* 8 C.F.R. § 214.14(c)(1)(ii); *see also id.* §§ 241.6(a), 1241.6(a).

III. The ICE Director's Responsibility for Establishing ICE Policy Concerning Stays of Removal

Under federal legislation, the Director of ICE has the exclusive authority to establish and oversee ICE's policies for performing the functions that are vested in the agency. Those functions include deciding whether to grant stays of removal to U-visa applicants.

ICE and the office of its Director were established in the legislation that created the Department of Homeland Security (DHS) in 2002. That legislation established within DHS a "Bureau of Border Security," and it provided that the Bureau would be led by an Assistant

Secretary (later renamed the Director), who "shall establish the policies for performing such functions" as are delegated to the Bureau or "otherwise vested in the Assistant Secretary by law." 6 U.S.C. § 252(a)(3)(A). The legislation also provided that the Assistant Secretary "shall oversee the administration of such policies." *Id.* § 252(a)(3)(B).

The following year, a statutorily authorized reorganization plan for DHS renamed this entity the "Bureau of Immigration and Customs Enforcement." *See Reorganization Plan Modification for the Department of Homeland Security*, H.R. Doc. No. 108-32 (Jan. 30, 2003) (codified at 6 U.S.C. § 542 Note). The DHS reorganization plan provided that the Assistant Secretary "will . . . [e]stablish and oversee the administration of the policies for performing the detention and removal . . . functions" that are vested in the Assistant Secretary by law. *Id.*

In 2007, the Bureau was renamed "U.S. Immigration and Customs Enforcement," and in 2010, its Assistant Secretary was renamed the "Director" of ICE. *See* U.S. Immigration and Customs Enforcement, *Celebrating the History of ICE*, https://www.ice.gov/features/history.

Among the functions that have been assigned to ICE and its Director is the authority to grant administrative stays of removal to U-visa applicants. That authority was first lodged in the Secretary of Homeland Security, *see* 8 U.S.C. § 1227(d)(1), and was later delegated to the ICE Director, *see* DHS Delegation No. 7030.2, *Delegation of Authority to the Assistant Secretary for U.S. Immigration and Customs Enforcement* (Nov. 13, 2004); 8 C.F.R. § 241.6 ("Administrative Stay of Removal"). Thus, ICE's functions now include "grant[ing] stays of removal under 8 C.F.R. 241.6" and "mak[ing] determinations in matters within the jurisdiction of the ICE" regarding U-visa holders. DHS Delegation No. 7030.2, *supra*, §§ 2.W, 2.BB.

Under federal law, therefore, ICE's Director has the exclusive authority to establish ICE's policies concerning stays of removal for U-visa applicants. The Director "shall establish the

policies for performing such functions" as are vested in ICE, 6 U.S.C. § 252(a)(3)(A); *accord* 6 U.S.C. § 542 Note, and those functions include granting stays of removal and making determinations concerning U-visa holders, *see* DHS Delegation No. 7030.2, *supra*, §§ 2.W, 2.BB. Moreover, the law unambiguously provides that the ICE Director himself "shall perform the functions specified by law for the [Director]'s office." 6 U.S.C. § 113(f).

FACTUAL BACKGROUND

I. Expiration of the FVRA's Time Limit for an Acting Director of ICE

One week before President Trump's inauguration, the Senate-confirmed Director of ICE retired. SUMF ¶ 6. In the more than three years since, ICE has not had a Senate-confirmed Director. *Id.* ¶ 5. Instead, the position has been filled by acting officials.

In January 2017, President Trump named an Acting ICE Director. Nearly ten months later, he nominated the Acting Director to serve permanently in that role. *Id.* ¶ 7. This nomination "stalled" in the face of "intense opposition" from some Senators, *see* Brent D. Griffiths, *New Acting ICE Head Named as Agency Continues to be Criticized*, Politico (June 30, 2018), https://www.politico.com/story/2018/06/30/new-ice-director-ronald-vitiello-689504, and it was withdrawn in May 2018, *see* 164 Cong. Rec. S2685 (daily ed. May 15, 2018); SUMF ¶ 8.

Three months later, President Trump made a second nomination. *Id.* ¶ 9. This nominee was sharply questioned during his confirmation hearing about "his role in the Trump administration's 'zero tolerance' immigration policy that led to the separation of migrant children from their parents and a 2015 Twitter post in which [he] referred to the Democratic Party as the 'liberalcratic party or NeoKlanist Party.'" 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. When the Senate adjourned on

January 3, 2019, this second nomination was returned. *See PN2397 — Ronald D. Vitiello — Department of Homeland Security*, Congress.gov, https://www.congress.gov/nomination/115th-congress/2397; SUMF ¶ 10.

Under the time limits imposed by the FVRA, the position of ICE Director could be filled by an acting official for no more than 210 days after this nomination was returned on January 3, 2019. In other words, after August 1, 2019, the express terms of the FVRA required that the office of ICE Director "remain vacant," 5 U.S.C. § 3348(b)(1), and prohibited anyone (except the Secretary of Homeland Security) from "perform[ing] any function or duty of such office," *id.* § 3346(b)(2)(B).

This requirement is confirmed by the records of 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. SUMF ¶ 12. GAO's public-vacancies database indicates that Defendant Albence served as the Acting Director of ICE in 2019 but that his tenure was supposed to end on August 1 of that year. *Id.* ¶ 13. Likewise, the Department of Homeland Security submitted FVRA paperwork on August 5, 2019, claiming that the "discontinuation of service in an acting role" for Albence had occurred on August 1. *Id.* ¶ 14. And indeed, Defendants have acknowledged in this litigation that after August 1, Albence was not lawfully the Acting Director of ICE. *See* Def. Mem. 5.

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

Although no one could lawfully serve as the Acting Director of ICE after August 1, 2019, Defendant Albence continued to represent himself as the Acting Director after that date and continued taking official actions in that capacity.

Among other things, an August 19 filing with the U.S. Supreme Court identified Albence

as the "Acting Director of ICE." *Id.* ¶ 15. Likewise, the agency directive challenged in this litigation was signed and approved by Albence as the "Acting Director" of ICE. *Id.* ¶ 19; *see* Dkt. No. 34-1, at 7. Indeed, the ICE website continued to identify Albence as the agency's Acting Director until at least the filing of the complaint in this action on February 13, 2020. SUMF ¶ 16. Sometime thereafter, the ICE website was changed to identify Albence as "Deputy Director and Senior Official Performing the Duties of the Director." *Id.* ¶ 17.

III. Albence's Establishment of ICE's New Stay Policy

On August 2, 2019, Defendant Albence invoked his authority as ICE's "Acting Director" to issue ICE Directive 11005.2, which established a new stay policy for U-visa applicants. SUMF ¶ 19. Prior to Albence's action, ICE followed a 2009 policy with respect to stays of removal. *Id.* ¶ 20. Under the 2009 policy, 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. *Id.* ICE has described the *prima facie* determination as having been "a simple confirmation that the petition was filed correctly and . . . not a substantive review of the petition." *Id.* ¶ 21.

Under the prior policy, if USCIS reported that an individual had established *prima facie* eligibility for a U visa, then ICE's detention and removal operations field office director was required to "favorably view" the request for a stay as long as certain "serious adverse factors" were not present. *Id.* ¶ 22. 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." *Id.*

According to the prior policy, 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.* ¶ 23. The field office director was also required to "consider favorably any humanitarian factors related to the 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 [detention and removal] Headquarters for further review." *Id.*

Under ICE Directive 11005.2 (the "Albence Policy"), ICE no longer routinely requests *prima facie* determinations from USCIS. *Id.* ¶ 24. Indeed, ICE no longer employs the *prima facie* standard at all. *Id.* Instead, 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.* ¶ 25.

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. *Id.* ¶ 26.

Significantly, deportation creates serious harms for U-visa applicants. *Id.* ¶ 27. Deported U-visa applicants will need to await adjudication of their applications abroad, which may take nearly a decade. *Id.* Applicants are often separated from their families during this time. *Id.* Moreover, even successful applicants may be unable 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). Thus, avoiding deportation is extremely important to U-visa applicants, SUMF ¶ 28, which is why it is so critical that legal services providers work hard to prevent the deportation of their clients. Indeed,

Congress's desire to avert the threat of deportation for noncitizen crime victims—and thereby "facilitate the reporting of crimes to law enforcement officials by trafficked, exploited, victimized, and abused aliens who are not in lawful immigration status," Pub. L. No. 106-386, § 1513(a)(2)(B), 114 Stat. 1533—is why Congress created the U-visa system in the first place. *Id.*

Under the Albence Policy, however, protecting a U-visa applicant who is not yet on the waiting list from deportation is a much more time-intensive process than it was under the prior policy. *Id.* ¶ 29. Whereas attorneys could previously assume that a person who had demonstrated *prima facie* eligibility for a U visa could secure a stay of removal in the absence of serious adverse factors, they now must argue that the client should prevail under a much more demanding totality-of-the-circumstances analysis. *Id.* ¶ 28. Moreover, the significantly increased risk that ICE will deny a stay of removal to a U-visa applicant means that attorneys must also prepare to initiate federal litigation to protect their clients from deportation, demanding additional time and resources. *Id.* ¶ 29.

As a result, the Albence Policy has forced Plaintiffs ASISTA and Sanctuary for Families to divert significant resources away from other work in order to adequately protect U-visa applicants from deportation. *Id.* ¶ 30. By making it harder to protect immigrant survivors of violence from deportation, the Albence Policy has also impaired the missions of each Plaintiff organization. *Id.* ¶ 31.

STANDARD OF REVIEW

A court may grant summary judgment when "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). "[C]onclusory statements or mere allegations [are] not sufficient to defeat a summary judgment motion," *Davis v. New York*, 316 F.3d 93, 100 (2d Cir. 2002); *Anderson v. Liberty Lobby, Inc.*,

477 U.S. 242, 247-48 (1986), and summary judgment is appropriate where no *material* factual issues are in dispute, *R.F.M. v. Nielsen*, 365 F. Supp. 3d 350, 360 (S.D.N.Y. 2019); *id.* (summary judgment is appropriate in review of agency action because the "questions . . . are purely legal"); *Parillo v. Sura*, 652 F. Supp. 1517, 1519 (D. Conn. 1987).

ARGUMENT

I. The Albence Policy Violates the FVRA.

A. Albence Could Not Adopt the Stay Policy as ICE's Acting Director.

Because the ICE Director exercises significant authority pursuant to the laws of the United States, he or she is an "Officer of the United States." *Freytag*, 501 U.S. at 881 (citing *Buckley*, 424 U.S. at 126); *see Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018). The Director must therefore be appointed by the President and confirmed by the Senate, unless federal law provides otherwise. U.S. Const. art. II, § 2, cl. 2. Instead of providing otherwise, federal law independently requires the Director to be presidentially nominated and Senate confirmed. 6 U.S.C. § 113(a)(1)(G).

Despite the constitutional and statutory requirements of a Senate-confirmed appointee, the ICE Director's office has been vacant since the Trump administration began. And while the FVRA authorizes other officials to carry out the functions and duties of the Director's office under certain conditions, 5 U.S.C. § 3345, the Act places time limits on that authorization, *id.* § 3346(a)(1). Those time limits are extended if the President nominates someone to be the Director, and if that nomination is unsuccessful they are extended again if the President makes a second nomination. *Id.* § 3346(a)(2), (b)(1). But if the President's second nominee is not confirmed, acting officials may perform the Director's functions and duties "for no more than 210 days after the second nomination is rejected, withdrawn, or returned" by the Senate. *Id.* § 3346(b)(2)(B).

Thus, under the FVRA, the office of the ICE Director could be filled by acting officials for no more than 210 days after the second nomination to fill that office was returned on January 3,

2019—that is, no longer than August 1, 2019. *See* SUMF ¶ 13 (GAO database confirms that Defendant Albence's tenure as Acting Director was required to end on August 1, 2019); Def. Mem. 5 (conceding this point).

After August 1, 2019, the plain terms of the FVRA prohibited any individual—except the Secretary of Homeland Security—from performing the functions and duties of the ICE Director. Section 3346 limits the time during which a "person serving as an acting officer as described under section 3345 may serve in the office." 5 U.S.C. § 3346(a). And Section 3345, in turn, establishes that to "serve as an acting officer" under the FVRA means to "perform the functions and duties of the vacant office." *Id.* § 3345(a)(2), (a)(3), (b)(1). Section 3347 confirms that "Sections 3345 and 3346 are the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office" covered by the FVRA. *Id.* § 3347(a). And under Section 3348, if an office is vacant and no one is properly serving as an acting officer pursuant to the FVRA, "the office shall remain vacant" and "only the head of such Executive agency [here, the Secretary of Homeland Security] may perform any function or duty of such office." *Id.* § 3348(b). It therefore violated the plain language of the FVRA for Defendant Albence to perform the functions and duties of the Director after August 1, 2019.

Although Albence's lawful tenure as Acting ICE Director ended on August 1, 2019, he continued taking official actions under the purported authority of that office after that date. Indeed, the very next day, Albence issued the policy challenged here, "ICE Directive 11005.2," which he approved as the "Acting Director" of ICE. Dkt. No. 34-1, at 7. This Directive "sets forth U.S. Immigration and Customs Enforcement (ICE) policy." *Id.* at 1. It supersedes previous agency policies, *see id.*, and it prescribes new standards and procedures to be followed by ICE's field office directors and attorneys regarding stays of removal for U-visa applicants, *see id.* at 1-7.

In establishing this new ICE policy, Defendant Albence performed one of the functions and duties of the ICE Director, in violation of the FVRA. As a result, ICE Directive 11005.2 "shall have no force or effect" under the Act. 5 U.S.C. § 3348(d)(1).

B. Albence Could Not Adopt the Stay Policy as ICE's Deputy Director.

Remarkably, Defendants concede that Albence was not lawfully serving as the Acting Director of ICE at the time he established ICE's new stay policy. *See* Def. Mem. 5 (acknowledging that Albence's lawful service as Acting Director ended on August 1, 2019). And they do not deny that Albence approved the policy in the exercise of his ostensible authority as the agency's "Acting Director." Dkt. No. 34-1, at 7. This is no problem, they say, because Albence's action would have been lawful if he had used a different signature block when signing the Directive. Def. Mem. 2.

More specifically, Defendants assert that when the office of ICE Director is vacant, and when there is no lawful Acting Director, the agency's Deputy Director can simply perform the functions and duties of the Director's office—indefinitely. *Id*. at 26-29. But Defendants' interpretation of the FVRA is wrong. Establishing ICE's policies concerning stays of removal is a "function or duty" of the ICE Director under 5 U.S.C. § 3348(a)(2). Accordingly, it may be performed only when there is a Senate-confirmed Director or a properly serving Acting Director. *Id.* § 3348(b)(2). In the absence of either, only the Secretary of Homeland Security may approve such policies. And because that did not happen here, the stay policy is void. *Id.* § 3348(d)(1).

1. Establishing ICE's Policies Concerning Stays of Removal Is a Function Assigned by Statute Exclusively to the ICE Director.

To encourage compliance with its limits, the FVRA imposes a severe penalty on certain actions that violate those limits. If "any person" who is not validly filling a vacant office under the FVRA performs any "function or duty" of that office, the person's action "shall have no force or effect." 5 U.S.C. § 3348(d)(1). For purposes of this penalty, the FVRA defines a "function or

duty" as including "any function or duty of the applicable office that is established by statute and is required by statute to be performed by the applicable officer (and only that officer)." *Id.* § 3348(a)(2)(A) (punctuation and headings omitted).

Under DHS's organic statutes, the establishment of ICE policies governing stays of removal is a function that the ICE Director, and only the Director, may perform. The Albence policy, set forth in ICE Directive 11005.2, is an ICE policy governing stays of removal. The policy, therefore, is void under the FVRA because Albence could not validly serve as the Acting Director when he established it. 5 U.S.C. § 3348(d)(1).

Defendants dispute that only the ICE Director can establish ICE's policies governing stays of removal. *See* Def. Mem. 27-28. But in a telling omission, they do not mention, anywhere, the statutes that establish the office of ICE Director and define its duties. Among the duties assigned exclusively to the ICE Director by statute is the power to establish ICE's policies governing the performance of its detention and removal functions—including stays of removal. Thus, the ICE Director "shall establish the policies for performing such functions" as are delegated to ICE or otherwise vested in him by law. 6 U.S.C. § 252(a)(3)(A). The Director also "shall oversee the administration of such policies." *Id.* § 252(a)(3)(B). Similarly, the DHS reorganization plan of 2003, which has the force of law under 6 U.S.C. § 542(d)(1), provides that ICE will conduct the "interior enforcement functions, including the detention and removal program," of the former Immigration Naturalization Service, and that the ICE Director "will . . . [e]stablish and oversee the administration of the policies for performing the detention and removal program . . . functions" that are delegated to him or otherwise vested in him by law. *Reorganization Plan Modification for the Department of Homeland Security*, H.R. Doc. No. 108-32 (Jan. 30, 2003) (codified at 6

U.S.C. § 542 Note).[1]

In short, these statutes impose a mandatory and exclusive duty on the ICE Director to "establish" the policies for performing whatever functions are delegated to ICE or otherwise vested in the agency by law, as well as to "oversee" the administration of those policies. Moreover, the "functions" of ICE, for which the Director is required to establish and oversee ICE's policies, include carrying out removals and deciding when to grant stays of removal to U-visa applicants. Consistent with the provisions cited above, the DHS Secretary has vested ICE with several functions that encompass the power to stay the removal of U-visa applicants. Among other things, the ICE Director has been vested with "all authority" over ICE's detention and removal program, as well as the authority "to enforce and administer the immigration laws . . . with respect to matters within the jurisdiction of ICE," including the specific authority "to grant stays of removal" and "to make determinations in matters within the jurisdiction of the ICE" regarding U-visa holders. DHS Delegation No. 7030.2, *supra*, §§ 2.C, 2.H, 2.W, 2.BB.

Notably, the immigration laws specifically allow the DHS Secretary to grant "an administrative stay of a final order of removal" to U-visa applicants until their applications are approved or conclusively denied. 8 U.S.C. § 1227(d)(1). And the Secretary has delegated this power to ICE. *See* DHS Delegation No. 7030.2, *supra*, §§ 2.W, 2.BB (empowering the ICE Director "to grant stays of removal" and "to make determinations in matters within the jurisdiction of the ICE" regarding U-visa holders). The power to stay the removal of U-visa applicants, therefore, is one of the functions that has been "vested" in ICE "by law." 6 U.S.C. § 252(a)(3)(A); *Reorganization Plan Modification*, 6 U.S.C. § 542 Note.

[1] Because the ICE Director's statutory functions stem from the legislation that originally created DHS, some of these statutes continue to refer to the Director and to ICE by their original names. *See supra* at 10-12 (describing the establishment of ICE and the office of its Director).

As noted, ICE's organic statute requires that its Director "shall" establish ICE's policies for performing *all* functions that have been conferred on the agency. 6 U.S.C. § 252(a)(3)(A) (the Director "shall establish the policies for performing such functions"). The statute also provides that the Director "shall oversee the administration of such policies." *Id.* § 252(a)(3)(B); *accord Reorganization Plan Modification*, 6 U.S.C. § 542 Note (the ICE Director "will . . . [e]stablish and oversee the administration of the policies for performing the detention and removal program"). Setting ICE's policy with respect to stays of removal for U-visa applicants, therefore, is a "function or duty" of the ICE Director that "is established by statute." 5 U.S.C. § 3348(a)(2)(A)(i).

This function or duty is also "required by statute to be performed by the [ICE Director] (and only that officer)." *Id.* § 3348(a)(2)(A)(ii). The statutes discussed above instruct that the Director, and no one else, "shall establish the policies" that govern ICE and "shall oversee the administration of such policies." 6 U.S.C. § 252(a)(3)(A), (a)(3)(B); *accord Reorganization Plan Modification*, 6 U.S.C. § 542 Note. A third statute confirms that the ICE Director "shall perform the functions specified by law for the official's office." *Id.* § 113(f). Nowhere do these statutes authorize any other official to establish or oversee ICE policies on any matter, including stays of removal. Notably, the Deputy Director of ICE is not a statutorily created position, *see id.* §§ 113, 252, and the Director is the only official in ICE whom Congress required to be presidentially appointed and Senate confirmed, *see id.* § 113(a)(1)(G).

Thus, the ICE Director, "and only that officer," 5 U.S.C. § 3348(a)(2)(A)(ii), is required to establish ICE's policy on stays of removal for U-visa applicants. *See L.M.-M. v. Cuccinelli*, No. 19-2676, 2020 WL 985376, at *21 (D.D.C. Mar. 1, 2020) (interpreting § 3348 as requiring only that a statute or regulation "provide that the function or duty at issue is assigned to one particular office"); *id*. (finding this requirement satisfied where "the function of establishing

policies for performing the functions of USCIS and establishing 'national immigration services and polices' is assigned only to the office of the USCIS Director" (quoting 6 U.S.C. § 271(a)(3))); *cf. Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp. 2d 389, 420 (D. Conn. 2008) (holding that a particular function "is not assigned by statute exclusively to the [vacant office]" because the statutes "do not even mention" that function); *id.* (recognizing that when a regulation uses the term "shall" in assigning a responsibility to an official, this "arguably suggest[s] a mandatory instruction limited to [that official]," but holding that the regulation in dispute "contemplates that the [official]'s responsibilities may be delegated to other agency officials").

2. *The Secretary of Homeland Security's Vesting-and-Delegation Statute Does Not Change the Analysis.*

In arguing to the contrary, Defendants ignore the statutes that define the responsibilities of the ICE Director. Indeed, they cite only one statute at all—a provision vesting the Secretary of Homeland Security with the functions of all DHS officials and permitting the Secretary to delegate some of these functions to other officers or employees. 6 U.S.C. § 112(a)(3), (b)(1).

Citing this provision, the government has elsewhere argued (unsuccessfully) that the term "function or duty" under 5 U.S.C. § 3348 "includes only 'non-delegable duties'—that is, only those duties . . . that may not be reassigned." *L.M.-M.*, 2020 WL 985376, at *20 (quoting brief). Under that interpretation, if the Secretary of Homeland Security is vested with all of the ICE Director's powers—including the authority to establish ICE's stay policies—and if the Secretary may re-delegate that authority at will, then that authority cannot be an exclusive "function or duty" of the ICE Director under § 3348. Notwithstanding the Secretary's vesting-and-delegation provision, however, establishing ICE policies concerning stays of removal is "required by statute to be performed by the [ICE Director] (and only that officer)." 5 U.S.C. § 3348(a)(2)(A)(ii).

To start, "[i]t is a commonplace of statutory construction that the specific governs the

general." *SW Gen.*, 137 S. Ct. at 941 (quoting *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012)). The interplay between 6 U.S.C. § 112 (containing the Secretary's vesting-and-delegation provision) and 6 U.S.C. § 252 (providing that the ICE Director "shall establish the policies for performing [ICE's] functions") is a perfect example. The former supplies a general rule affecting the entire Department of Homeland Security, while the latter specifically governs the ICE Director and uses the mandatory language of "shall" to confer particular responsibilities on that officer. *See Bloate v. United States*, 559 U.S. 196, 207 (2010) ("[g]eneral language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment" (quoting *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932))).

Confirming the relevance of that interpretive canon here, the provision allowing the Secretary to redelegate Department functions expressly states that it applies "except as otherwise provided by this chapter." 6 U.S.C. § 112(b)(1). And permitting the general language of 6 U.S.C. § 112 to trump the specific language of 6 U.S.C. § 252 would lead to untenable results: even while a Senate-confirmed officer is properly serving as ICE Director, the Secretary could withdraw the Director's statutory authority to establish ICE policies and instead reassign that authority to "any officer, employee, or organizational unit of the Department." *Id.* § 112(b)(1).

Even if it were textually plausible, allowing the Secretary's vesting-and-delegation statute to render § 3348 inapplicable would be "at odds with the statutory purpose of the FVRA." *L.M.-M.*, 2020 WL 985376, at *23. Given the ubiquity of vesting-and-delegation provisions across the executive branch—indeed, "[e]very cabinet-level department has some version of [a] vesting and delegation statute," *id.* (quotation marks omitted)—the "logic of this position would cover all (or almost all) departments subject to the FVRA," *id.* at *20, and would exempt each of those

departments and their officers from § 3348's penalty. That would be a quintessentially "absurd result[] that the provision cannot have been meant to produce." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2462 (2019).

This conclusion is especially obvious because "[i]t was the pervasive use of those vesting-and-delegation statutes, along with 'the lack of an effective enforcement process,' that convinced Congress of the need to enact the FVRA" in the first place. *L.M.-M.*, 2020 WL 985376, at *23 (quoting S. Rep. No. 105-250, at 7); *see supra* at 6-8. In 1998, "the Department of Justice maintain[ed] that where a department's organic act vests the powers and functions of the department in its head and authorizes that officer to delegate such powers and functions to subordinate officials or employees as she sees fit, such authority supersedes the Vacancies Act's restrictions on temporarily filling vacant advice and consent positions, allowing for designation of acting officials for an indefinite period." S. Rep. No. 105-250, at 3. The language of the FVRA "forecloses" that position, *id.* at 17, unambiguously providing that vesting-and-delegation statutes do not provide an alternative to the Act's restrictions. *See* 5 U.S.C. § 3347(b).[2]

Thus, "the mere fact that a department head is also vested with all functions specifically vested in other department officers and employees cannot, standing alone, defeat the enforcement mechanisms found in the FVRA's vacant-office provision." *L.M.-M.*, 2020 WL 985376, at *21; *see id.* at *20 (noting that, under Defendants' reasoning, "no function or duty assigned to *any* Department of Homeland Security official other than the Secretary constitutes a 'function or duty'

[2] Indeed, as Defendants see it, Congress failed to address the very controversy that incited the FVRA's passage—the designation of Bill Lann Lee to serve as the acting head of the Justice Department's Civil Rights Division after the Senate declined to confirm him to that position. *See* Rosenberg, *supra*, at 1; Denning, *supra*, at 1039-40. Because the Attorney General, like the Secretary of Homeland Security, is generally vested with all the powers of his or her Department, *see* 28 U.S.C. § 509, no actions taken by an improperly serving head of the Civil Rights Division could ever be deemed void under § 3348(d), under Defendants' interpretation.

within the meaning of the vacant-office provision of the FVRA"). Congress enacted the FVRA to prevent agencies from using their vesting-and-delegation provisions to circumvent the requirements of the Vacancies Act and the Appointments Clause. Construing § 3348 to exempt most of the executive branch from its penalties, based on that very type of vesting-and-delegation provision, would subvert congressional intent by flouting the FVRA's basic purpose.

3. *The Department of Homeland Security's Delegation Orders Do Not Change the Analysis.*

In addition to citing the DHS Secretary's vesting-and-delegation statute, Defendants also cite three delegation orders issued by the Secretary since 2003 that confer various powers on ICE and its personnel. Def. Mem. 27-28. These delegations are irrelevant to Plaintiffs' challenge. Plaintiffs do not maintain that establishing ICE's stay policies is a function or duty established by *regulation* and required by such *regulation* to be performed only by the Director. 5 U.S.C. § 3348(a)(2)(B). Rather, they maintain that this is a function or duty established by *statute* and required by *statute* to be performed only by the Director. *Id.* § 3348(a)(2)(A). As shown above, the authority to establish these policies is assigned exclusively to the Director by statute—*see* 6 U.S.C. § 252(a)(3); *id*. § 542 Note; *id.* § 113(f)—regardless of what additional powers are assigned to the Director by regulation. The only relevance of the delegations cited by Defendants is that they assign certain government functions to ICE. Whatever those functions are at any given moment, however, it remains the exclusive duty of ICE's Director to "establish the policies for performing such functions." 6 U.S.C. § 252(a)(3)(A).

Because of that, it is beside the point that two of the delegation orders cited by Defendants permit the ICE Director to re-delegate the additional powers that those orders confer on him. *See* DHS Delegation No. 7030.2, *supra*, § 4; DHS Delegation No. 0160.1, § III (Mar. 3, 2004). That delegation authority, by its own terms, affects only the powers conferred on the Director by those

orders themselves. *See id.* Nothing in those orders purports to authorize the Director to delegate the separate *statutory* duties conferred on him by 6 U.S.C. § 252 and § 542. So while the Director may re-delegate to lower officials his power "to grant stays of removal," which is a power conferred on him by the delegation orders, *see* DHS Delegation No. 7030.2, *supra*, § 2.W, he may not delegate to lower officials his responsibility to *establish ICE's policies* for granting stays of removal—a power conferred on him by statute, *see* 6 U.S.C. § 252(a)(3)(A). Instead, the Director "shall" perform that responsibility himself. *Id.*; *accord id.* § 113(f).

As for the third order cited by Defendants, it only confirms the unlawfulness of Defendant Albence's action. That document expressly incorporates the FVRA by designating ICE's Deputy Director "as the Director's 'First Assistant' for purposes of the FVRA." Def. Mem. 28 (citing DHS Delegation No. 00106, § 2(d) & Annex M (Dec. 15, 2016)). But under the FVRA, neither the first assistant nor anyone else (except the Secretary) may perform any function or duty of the ICE Director after the Act's time limits have expired. 5 U.S.C. §§ 3346, 3347(a), 3348(b).

In sum, statutes mandate that the ICE Director "shall" establish ICE's policies like the one challenged here, without authorizing anyone else to carry out that function. Establishing ICE's policy for granting stays of removal to U-visa applicants, therefore, is a "function or duty of the applicable office" that is "required by statute to be performed by the applicable officer (and only that officer)." 5 U.S.C. § 3348(a)(2)(A)(ii). As a result, the Albence Policy, which was adopted in violation of the FVRA's time limits, has "no force or effect." *Id*. § 3348(d)(1).

4. *Defendants Have Not Established that Albence Was Lawfully Appointed as Deputy Director.*

Although the foregoing sufficiently establishes that it was unlawful for Albence to approve ICE's new stay policy, whatever title he used, there is an additional problem with the assertion that he could have done so as ICE's Deputy Director. Defendants have not even established that

Albence was validly appointed as Deputy Director.

Defendants offer only a cryptic account of how Albence became the Deputy Director. They simply state that he "was selected as Deputy Director" (by whom, we are not told) in April 2019. Def. Mem. 5; *see* Pailliotet Decl., Ex. 1, Dkt. No. 40-3, ¶¶ 4-5 ("Matthew Albence began his career in federal service on December 11, 1994. He became Deputy Director of ICE on April 27, 2019."); *see also* 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 ("The acting deputy director of Immigration and Customs Enforcement has been tapped to lead the agency . . . . Before Albence can take over the agency in an acting capacity, he must first be permanently appointed to his current position as deputy director, a senior administration official told CNN.").

The previous Acting Director of ICE was Ronald Vitiello. SUMF ¶ 11. And according to the GAO database, Vitiello's last day in that role was April 27, 2019—the same day that, according to Defendants, Albence "was selected" as Deputy Director. Def. Mem. 5; *see* Exhibit D to Declaration of Brittany Williams. Because the next Acting Director was Albence himself, the most likely inference is that Vitiello named Albence the Deputy Director before leaving office. But the legality of Vitiello's own service as Acting Director is far from clear. And if Vitiello was leading the agency unlawfully, his appointment of Albence as Deputy Director would itself "have no force or effect" under the FVRA. 5 U.S.C. § 3348(d)(1).

Vitiello was purportedly named Acting Director by former DHS Secretary Kirstjen M. Nielsen on June 30, 2018.[3] That designation, however, appears to have violated the FVRA,

[3] *DHS Press Release: Secretary Nielsen Announces Ronald D. Vitiello to Serve as Acting Director of U.S. Immigration and Customs Enforcement* (June 30, 2018),

because it satisfied none of the three exclusive options for authorizing acting service under 5 U.S.C. § 3345. Vitiello had not been confirmed by the Senate to another position, nor had he worked for ICE during the previous year—so neither § 3345(a)(2) nor (a)(3) were available. The only remaining possibility is that Vitiello became the Acting Director under § 3345(a)(1) by being named the new "first assistant" to the office of the Director. By the time of his designation, however, the office of the Director had long been vacant—Vitiello was not the first assistant when the vacancy began. And "subsection (a)(1) may refer to the person who is serving as first assistant *when the vacancy occurs*." *SW Gen., Inc. v. NLRB*, 796 F.3d 67, 76 (D.C. Cir. 2015) (citing 23 Op. O.L.C. 60, 64 (1999)) (emphasis in original). If nothing else, a "first assistant" must at least be an "assistant," which "under any plausible construction comprehends a role that is, in some manner and at some time, subordinate to the principal." *L.M.-M.*, 2020 WL 985376, at *16. But because Vitiello "was assigned the role of principal on day-one," and because he retained that role until he left ICE, he "never did and never will serve in a subordinate role—that is, as an 'assistant'—to any other [ICE] official." *Id.* at *15-16. His appointment as Acting Director, therefore, appears unauthorized by § 3345(a)(1).

In short, the lone "fact" that Defendants proffer in their statement of undisputed facts, *see* Dkt. No. 40-2—a claim on which their entire defense of the Albence Policy rests—is a legal proposition that Defendants have thus far failed to substantiate. And indeed, the foregoing also suggests that Albence's designation as *Acting* Director of ICE may never have been valid to begin with, even setting aside the expiration of the FVRA's time limits on acting service in August 2019.

---

https://www.dhs.gov/news/2018/06/30/secretary-nielsen-announces-ronald-d-vitiello-serve-acting-director-us-immigration.

II. The Albence Policy Violates the APA.

Even if the FVRA's unique penalties, set forth in 5 U.S.C. § 3348(d), did not apply here, Defendant Albence's adoption of the stay policy still violated the substantive restrictions set forth in the previous sections of the Act. His action must therefore be held unlawful and set aside under the APA as "not in accordance with law" and "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(A), (C); *see L.M.-M.*, 2020 WL 985376, at *23 ("The Court . . . is also persuaded by Plaintiffs' alternative theory—that, because Cuccinelli was exercising the authority of the USCIS Director in violation of the FVRA, the directives were not issued 'in accordance with law,' and must, accordingly, be set aside under the APA.").

The FVRA is the "exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office," apart from two exceptions not relevant here. 5 U.S.C. § 3347(a). And under the FVRA, Defendant Albence was not authorized to perform the functions and duties of the ICE Director after August 1, 2019. Nevertheless, Albence approved and signed ICE Directive 11005.2 as the Acting Director of ICE after he was no longer authorized to perform the "functions and duties" of that office. *Id.* Because that action violated the FVRA, it exceeded statutory authority and limits and was not in accordance with law. 5 U.S.C. § 706(2). Importantly, therefore, Albence's action must be set aside under the APA even if this Court were to conclude that the function of establishing ICE's stay policies is not exclusive to its Director.

While § 3348 provides that a "function or duty" of a vacant office is—for *purposes of that section*—limited to those "required by statute [or regulation] to be performed by the applicable officer (and only that officer)," 5 U.S.C. § 3348(a)(2), the meaning of "functions and duties" under the rest of the FVRA is broader. The text makes this clear: Section 3348 explicitly states that its narrower definition of that term applies only "[i]n this section." *Id.* § 3348(a). That definition, therefore, governs the use of this term only for purposes of whether the penalties in § 3348 apply.

It does not govern the meaning of "functions and duties" in § 3347 or in the rest of the Act.

The FVRA uses phrases like "in this section" with precision and intent, as the Supreme Court has explained:

> Now add "under this section." The language clarifies that subsection (b)(1) applies to all persons serving under § 3345. Congress often drafts statutes with hierarchical schemes—section, subsection, paragraph, and on down the line. Congress used that structure in the FVRA and relied on it to make precise cross-references. When Congress wanted to refer only to a particular subsection or paragraph, it said so.

SW Gen., 137 S. Ct. at 938-39 (citations omitted). By specifying that § 3348's limited definition of "function or duty" applies only "[i]n this section," 5 U.S.C. § 3348(a), not in this "title," "part," or "chapter," Congress "ma[d]e [a] precise cross-reference[]," *SW Gen.*, 137 S. Ct. at 939, to clarify that the same definition does not apply in the FVRA's other sections.

The upshot is that demonstrating a violation of § 3345, § 3346, or § 3347 does not require showing that the challenged action was, by statute or regulation, an action which "only that officer" could take. 5 U.S.C. § 3348(a)(2). This means that the action can be illegal, and therefore grounds for invalidation under the APA, even if it is not an action that is exclusively assigned to the vacant office. Thus, the normal remedies for unlawful agency action under the APA remain available even when the unique penalties of § 3348 do not apply.

The D.C. Circuit explained this point in *SW General*. The court concluded that an official who took a challenged action was illegally serving in violation of the FVRA, but it also concluded that § 3348 did not apply because the office in question was expressly exempt from that section. *See* 796 F.3d at 78-79; 5 U.S.C. § 3348(e). The court therefore proceeded on the assumption that, "in the event of an FVRA violation," the inapplicability of § 3348 made the challenged action "*voidable*, not void," and subject to invalidation under the APA. *SW Gen.*, 796 F.3d at 79, 80-81. The only other court of appeals to address the issue has agreed. *Hooks v. Kitsap Tenant Support*

Servs., Inc., 816 F.3d 550, 564 (9th Cir. 2016).

The same reasoning would apply here if this Court were to find that § 3348 does not apply because a different criteria of that section is not satisfied—its definition of "function or duty" in paragraph (a)(2). While that result would be incorrect, *see supra*, and while it would deprive Plaintiffs of the benefits of § 3348's unique penalties, it would still leave the standard enforcement mechanisms of the APA on the table. *See L.M.-M.*, 2020 WL 985376, at *23-24.

In short, it violates the FVRA when someone performs the functions and duties of a vacant office without complying with the Act's restrictions. Because such actions are "not in accordance with law" and "in excess of statutory jurisdiction, authority, or limitations," this Court must "hold [them] unlawful and set [them] aside" under the APA. 5 U.S.C. § 706(2)(A), (C).

III. The Albence Policy Violates the Appointments Clause.

As explained above, after August 1, 2019, Defendant Albence lacked statutory authority to exercise the ICE Director's powers, which include establishing ICE's stay policies. Because Albence had no statutory authority to exercise the powers of the Director, and because he was not confirmed by the Senate to that office, his establishment of the stay policy violated the Appointments Clause. Constitutional text and historical practice establish that presidents have no inherent authority to direct that the functions of vacant offices be performed on a temporary basis without Senate consent. Thus, when a person nevertheless performs such functions without constitutional or statutory authority, as Albence did here, the Appointments Clause is violated.

More than "a matter of etiquette or protocol," *Edmond*, 520 U.S. at 659, the constitutional requirement that presidents obtain the Senate's advice and consent for their appointments to federal office ensures that the people who exercise the powers of those offices are subject to the check of Senate confirmation. *See supra* at 5-6. In order to keep routine government functions from coming to a halt between appointments, however, "Congress has passed legislation since the Washington

Administration to provide for temporary officials to perform the functions and duties of vacant positions requiring the advice and consent of the Senate." S. Rep. No. 105-250, at 3. The First Congress, in establishing the government's three initial department secretaries, made provision for "an inferior officer" who, "in any . . . case of vacancy," would "have the charge and custody of all records, books and papers appertaining to the said department." Act of July 27, 1789, ch. 4, § 2, 1 Stat. 28, 29; *see also* Act of Aug. 7, 1789, ch. 35, § 2, 1 Stat. 49, 50; Act of Sept. 2, 1789, ch. 12, § 7, 1 Stat. 65, 67. Expanding on those measures, the Second Congress supplied a more comprehensive grant of authority allowing the duties of vacant offices to be performed:

> [I]n case of the death, absence from the seat of government, or sickness of the Secretary of State, Secretary of the Treasury, or of the Secretary of the War department, or of any officer of either of the said departments whose appointment is not in the head thereof, whereby they cannot perform the duties of their said respective offices, it shall be lawful for the President of the United States, in case he shall think it necessary, to authorize any person or persons at his discretion to perform the duties of the said respective offices until a successor be appointed, or until such absence or inability by sickness shall cease.

Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281. Congress soon revised this measure to limit the time during which acting officials could perform the duties of a vacant office, *see* Act of Feb. 13, 1795, ch. 21, 1 Stat. 415, 415, and it has followed that practice ever since, *see Doolin*, 139 F.3d at 209-11.

This longstanding tradition of furnishing statutory authority to make it "lawful" for individuals "to perform the duties of [vacant] offices," 1 Stat. 281, shows a common understanding that "the President lacks any inherent appointment authority for government officers," S. Rep. No. 105-250, at 5. That is why "legislation authorizing some non-Senate confirmed persons to perform the functions and duties of vacant offices is necessary if the government's operations are to be performed." *Id.*; *see NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014) ("established practice is a consideration of great weight in a proper interpretation of constitutional provisions

regulating the relationship between Congress and the President" (quotation marks omitted)); *Mistretta v. United States*, 488 U.S. 361, 401 (1989) ("traditional ways of conducting government . . . give meaning to the Constitution" (quotation marks omitted)). This shared understanding, validated by historical practice, also best comports with the text of the Constitution, which authorizes the President to make recess appointments, U.S. Const. art. II, § 2, cl. 3, but does not otherwise provide for the temporary filling of vacancies without Senate consent.

In keeping with this text and history, "courts have consistently rejected the proposition that the President may evade the Appointments Clause by claiming an inherent power to fill vacancies." Denning, *supra*, at 1042 (citing cases); *see also SW Gen.*, 137 S. Ct. at 935 ("Since President Washington's first term, Congress *has given* the President limited authority to appoint acting officials . . . without first obtaining Senate approval." (emphasis added)); *id.* at 935 (indicating that in the absence of vacancies legislation, "the duties of the vacant office" would "go unperformed" until the Senate confirmed a replacement). Indeed, the Supreme Court has rejected an analogous argument that Congress, under the Necessary and Proper Clause, may take actions that "the Appointments Clause by clear implication prohibits it from doing." *Buckley*, 424 U.S. at 135.

Likewise, the Justice Department has historically recognized that where legislation does not authorize the duties of a vacant office to be temporarily performed, the President lacks inherent authority to direct otherwise. *See, e.g.*, *Appointments Ad Interim.*, 16 U.S. Op. Att'y Gen. 596, 597 (1880) (concluding that because the office of the Navy Secretary was vacant and the period of acting service permitted by the Vacancies Act had expired, "there is, and can be, no person authorized by designation to sign requisitions upon the Treasury Department on account of Navy payments as Acting Secretary of the Navy"); *id.* ("This power of the President is a statutory power . . . . The statutory power being exhausted, the President is remitted to his constitutional power of

appointment."); *Vacancy in Office of Sec'y of State*, 32 U.S. Op. Att'y Gen. 139, 141 (1920) (advising that the Vacancies Act "specifically limits the period for temporary action," and that because this period had expired, "you should not take action in any case out of which legal rights might arise which would be subject to review by the courts").

Thus, when a person exercises the powers of an office that requires Senate confirmation without having received that confirmation and without authorization from any legislative source, this unauthorized exercise of the federal government's power violates the Appointments Clause. Without Senate confirmation or statutory authority, Defendant Albence is exercising the powers of the office of ICE Director. By Defendants' own admission, he is "Performing the Duties of the Director of ICE." Def. Mem. 5. Albence was likewise exercising those powers, without constitutional or statutory authority, when he established ICE's new stay policy while purporting to be the agency's "Acting Director." Dkt. No. 34-1, at 7. His adoption of that policy therefore violated not only the FVRA and the APA, but also the Appointments Clause.

IV. The Albence Policy Violates 6 U.S.C. § 113.

The constitutional requirement of presidential nomination and Senate confirmation applies to all federal officers, unless, in the case of "inferior" officers, federal law provides otherwise. U.S. Const. art. II, § 2, cl. 2. With respect to the ICE Director, federal law does not provide otherwise—instead, it "reinforces rather than diminishes the requirement of Senate confirmation," *Williams v. Phillips*, 482 F.2d 669, 670 (D.C. Cir. 1973), by independently requiring the "Director of U.S. Immigration and Customs Enforcement" to be "appointed by the President, by and with the advice and consent of the Senate," 6 U.S.C. § 113(a)(1)(G).

While the FVRA carves out a limited exception to that requirement, Defendant Albence's authority to perform the functions of the ICE Director under the FVRA expired before he established ICE's new stay policy for U-visa applicants. By exercising the powers of the ICE

Director without being confirmed by the Senate, and without possessing any statutory authority to exercise those powers as the agency's Acting or Deputy Director, *see supra*, Albence violated 6 U.S.C. § 113(a)(1)(G) when he established ICE's new stay policy. His action was therefore "not in accordance with law" and "in excess of statutory jurisdiction, authority, or limitations," and it must be set aside. 5 U.S.C. § 706(2)(A), (C).

V. The Albence Policy Is *Ultra Vires*.

Separate from their claims under the APA, Plaintiffs are entitled to seek prospective relief from harmful government action that exceeds an official's lawful authority. Because Defendant Albence had no constitutional or statutory authority to establish ICE's new stay policy for U-visa applicants, his adoption of that policy was *ultra vires* and may be enjoined by this Court.

Long before Congress enacted the APA, plaintiffs harmed by government action that exceeded an officer's authority could obtain relief by invoking "the federal courts' inherent equitable powers." *Fed. Defs. of N.Y., Inc. v. Fed. Bureau of Prisons*, 954 F.3d 118, 122 (2d Cir. 2020). Such equitable relief "is traditionally available to enforce federal law" and "reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 329, 327 (2015). The power to enjoin an officer's *ultra vires* conduct, like other traditional equitable powers, was conferred on the federal courts by the Constitution, *see* U.S. Const. art. III, § 2, cl. 1, and the Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78. As a result, "judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers." *Harmon v. Brucker*, 355 U.S. 579, 581-82 (1958). "The acts of all [government] officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief." *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902).

From the nation's earliest days, therefore, federal courts have used their equitable powers to review the actions of executive branch officials that were alleged to be "beyond their statutory and constitutional powers." *Dames & Moore v. Regan*, 453 U.S. 654, 667 (1981); *see, e.g.*, *id.*; *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 491 n.2 (2010); *Franklin v. Massachusetts*, 505 U.S. 788, 803-06 (1992); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 583-84 (1952); *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 623-24 (1838); *Marbury v. Madison*, 5 U.S. 137, 163-71 (1803).

Because the APA "do[es] not limit or repeal additional requirements imposed by statute or otherwise recognized by law," 5 U.S.C. § 559, its passage did "not repeal the review of *ultra vires* actions that was recognized long before," *Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1173 (D.C. Cir. 2003) (quoting *Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988)), or preclude such review outside of the APA framework. *See Franklin*, 505 U.S. at 801 (although the President's actions are not reviewable under the APA, they "may still be reviewed for constitutionality"); *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1326-27 (D.C. Cir. 1996) (conducting *ultra vires* review of executive action where an APA cause of action was not pled); *Fed. Defs.*, 954 F.3d at 133 ("the Supreme Court has done little to define the boundaries, if any, that might circumscribe this 'judge-made remedy'" (quoting *Armstrong*, 575 U.S. at 327)). Thus, there is a "well-drawn line of precedent establishing that a plaintiff may invoke the court's equitable powers to enjoin a defendant" from violating "provisions that do not, themselves, grant any legal rights to private plaintiffs." *Id.*

Defendants claim that *ultra vires* review is available "only when an agency action 'patently' . . . rather than merely arguably" violates the law. Def. Mem. 20 (quoting *Yale New Haven Hosp. v. Azar*, 409 F. Supp. 3d 3, 15 (D. Conn. 2019)). Defendants are confused. That

heightened standard applies when a statute affirmatively *precludes* judicial review. *Azar*, 409 F. Supp. 3d at 15; *Amgen, Inc. v. Smith*, 357 F.3d 103, 111-13 (D.C. Cir. 2004); *see Fresno Cmty. Hosp. & Med. Ctr. v. Azar*, 370 F. Supp. 3d 139, 152 (D.D.C. 2019) ("Congress . . . cannot limit judicial review to correct a patently unlawful agency action"). No statute precludes review here.

Because Albence exceeded his authority under the statutory and constitutional provisions discussed above when he adopted ICE's new stay policy, his adoption of that policy may be enjoined by this Court as *ultra vires*.

VI. Plaintiffs Have Standing to Raise These Claims.

Article III standing requires a plaintiff to have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). "The Supreme Court has held that an organization establishes an injury-in-fact if it can show that it was 'perceptibly impaired' by [the] defendant's actions." *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 110 (2d Cir. 2017) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). "Consequently," the Second Circuit has "repeatedly held that only a 'perceptible impairment' of an organization's activities is necessary for there to be an injury in fact," *id.* (citing cases) (quotation marks omitted), and that such impairment occurs "where an organization diverts its resources away from [those] activities," *id.* at 111 (citing cases).

Plaintiffs clearly meet these standards. As demonstrated in their unrebutted declarations, the unlawful implementation of the Albence Policy has forced ASISTA and Sanctuary to divert resources from various mission-critical activities and has perceptibly impaired their ability to accomplish their missions. Thus, both Plaintiffs have suffered the type of injury "that has been repeatedly held to be . . . sufficient to confer organizational standing." *Id.*

In response, Defendants advance two propositions about organizational standing that are clearly foreclosed by precedent. First, Defendants maintain that organizations like Plaintiffs can have standing to contest a policy only if the clients they serve also have standing to contest that policy. Def. Mem. 8-9. That is patently wrong. Organizations, like individuals, may sue to redress cognizable injuries they suffer in their own right; they are not limited to suing in a representational capacity to vindicate the rights of their members or clients. Second, Defendants maintain that when an organization sues over an impairment of its mission or a drain on its resources, as Plaintiffs do here, the organization must show not only a cognizable Article III injury but also something more: the deprivation of a "legally protected right." Def. Mem. 9. That notion, too, is completely wrong.

A. Plaintiffs Have Established an Injury in Fact.

An organization suffers an injury in fact when a defendant's conduct "impair[s] [its] ability to provide" services that it would otherwise be providing and when it is forced to divert resources to address this conduct, thereby draining its resources and frustrating its ability to engage in other activities. *See Havens*, 455 U.S. at 369 (defendants' practices "frustrated the organization's counseling and referral services, with a consequent drain on resources"). Therefore, as the Second Circuit has consistently recognized, an organization has standing to sue on its own behalf when it is forced to divert resources "from its other current activities to advance its established organizational interests." *Centro*, 868 F.3d at 110. So too when a defendant's action "has impeded, and will continue to impede, the organization's ability to carry out [its] responsibilit[ies]." *Id.* at 110 (citations omitted). Only "a perceptible impairment" or "opportunity cost expended" is necessary to establish injury in fact. *Nnebe v. Daus*, 644 F.3d 147, 157 (2d Cir. 2011) (quotation marks omitted).

Plaintiffs easily satisfy this standard because, as a result of the Albence Policy, they have been forced to divert resources from their other activities, their ability to accomplish their missions has been frustrated, and they have expended resources opposing the policy through this litigation.

First, the Albence Policy forces Plaintiffs to divert resources from other activities to spend more staff time assisting with cases involving U-visa applicants, which are now "much more complicated." Pendleton Decl. ¶ 23; *see id.* ¶¶ 28-29; Asnani Decl. ¶¶ 12-19. For example, ASISTA staff now spend up to five hours per U-visa case providing technical assistance when, under the prior policy, providing technical assistance in such cases could take as little as fifteen minutes. Pendleton Decl. ¶¶ 21-29. As a result, ASISTA has "significantly scaled back" technical assistance for cases that do not involve U visas, as well as its state and local capacity-building efforts and its work providing basic training to domestic violence advocates, attorneys, and those unfamiliar with crime-victim relief. *Id.* ¶ 33. Likewise, Sanctuary spends "significantly more time" than it used to preparing administrative applications for stays of removal, meeting with clients, and preparing clients for the possibility of deportation in cases involving U visas, Asnani Decl. ¶ 14, and is thus "forced to spend less time" assisting clients with other proceedings, *id.* ¶ 20. *See Nnebe*, 644 F.3d at 157 ("[e]ven if only a few suspended drivers are counseled by [the organization] in a year, there is some perceptible opportunity cost expended" that otherwise "could be spent on other activities"); *De Dandrade v. DHS*, 367 F. Supp. 3d 174, 182 (S.D.N.Y. 2019) ("There is a real world injury in diverting limited staff attorneys' time to attend client interviews and expend additional efforts preparing repeated applications for N-648 waivers.").

Moreover, as a result of the Albence Policy, Plaintiffs must spend additional time preparing for federal litigation to protect U-visa applicants from deportation—which was "rarely necessary" before, but is now "vital." Pendleton Decl. ¶ 25; *see id.* ¶¶ 26-29. ASISTA's attorneys may spend

anywhere from thirty minutes to five hours helping attorneys with possible litigation to stop deportations of their U-visa clients. *Id.* ¶ 27. ASISTA has also been forced to "significantly revise" the in-person and webinar trainings it offers, develop new ones, and reduce the number of introductory-level immigration resources it can provide. *Id.* ¶ 19; *see id.* ¶¶ 36-43. For example, ASISTA's webinar training sessions prior to the Albence Policy focused on a variety of basic and introductory topics, such as "Assessing Possible Legal Remedies for Immigrant Survivors" and "Supporting Your Legal Arguments: Techniques for Researching Immigration Remedies for Survivors of Domestic Violence." *Id.* ¶ 38. However, in response to the Albence Policy, ASISTA's webinars have shifted to cover issues stemming from the lack of security against deportation. *Id.* ¶¶ 39-40.

As a result of these changes to ASISTA's programing, ASISTA has less funding and less staff time available to engage in other critical aspects of its work, *id.* ¶¶ 44-47, such as assisting attorneys with efforts to obtain lawful immigration status for their clients and mounting litigation to challenge USCIS policies that undermine the U-visa program, *id.* ¶ 46. *See Nnebe*, 644 F.3d at 156 (standing recognized where organization "has had to divert greater resources to more individualized services and away from . . . reform efforts"); *Centro*, 868 F.3d at 110 (standing recognized where new ordinance "will require [the organization] to divert resources from other of its activities to combat the effects of the Ordinance"); *Make the Rd. New York v. Cuccinelli*, 419 F. Supp. 3d 647, 658 (S.D.N.Y. 2019) (standing recognized where organization had to divert resources "to educate their clients, members, and the public" about a challenged policy, and also had to "expend additional resources helping clients prepare applications for adjustments, representing clients in removal proceedings, and conducting additional trainings"). These substantial changes to Plaintiffs' work far exceed the "perceptible impairment" that gives rise to

Article III standing. *Nnebe*, 644 F.3d at 157. Without the injunctive relief sought here, Plaintiffs will be forced to continue diverting their resources as a result of the Albence Policy. Pendleton Decl. ¶ 34; Asnani Decl. ¶ 19.

Second, by impeding Plaintiffs' ability to deliver crucial services to their clients, the Albence Policy frustrates Plaintiffs' ability to carry out their missions. *See Centro*, 868 F.3d at 110 ("enforcement of the Ordinance . . . . will adversely impact [the organization's] ability to organize day laborers"). The policy makes it "far harder" for ASISTA to achieve its mission of protecting from deportation immigrant survivors of violence who cooperate with law enforcement. Pendleton Decl. ¶ 50; *see id.* ¶¶ 48-49. And by placing U-visa applicants at greater risk of deportation, the new policy hinders Sanctuary's ability to help survivors of gender violence secure lawful immigration status. Asnani Decl. ¶¶ 22-24. It is beyond dispute that "an organization shows injury-in-fact where, as here, a 'policy has impeded, and will continue to impede, the organization's ability to carry out [its] responsibilit[ies].'" *Centro*, 868 F.3d at 110 (quoting *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 295 (2d Cir. 2012)).

Lastly, Plaintiffs have been forced to expend resources challenging the Albence Policy through this litigation, which itself is sufficient to confer standing. Pendleton Decl. ¶ 47; Asnani Decl. ¶ 21. The Second Circuit has "explicitly" held that litigation expenses are sufficient "to demonstrate an injury in fact for the purposes of Article III standing," *Mental Disability Law Clinic, Touro Law Center v. Hogan*, 519 Fed. App'x 714, 717 (2d. Cir. 2013) (citing *Nnebe*, 644 F.3d at 157), even when "some of the expenses that provide a basis for standing were dedicated to litigating the very action in which the defendant challenges the organization's standing," *id.* (citing *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 905 (2d Cir. 1993)).

In sum, each Plaintiff has "offered unrebutted testimony that it has already had to devote

attention, time, and personnel" to respond to the Albence Policy, "divert[ing] its resources away . . . . from its other current activities to advance its established organizational interests." *Centro*, 868 F.3d at 110-11. Each Plaintiff has therefore suffered—and continues to suffer—concrete and particularized injuries as a result of the Albence Policy and has standing to maintain this action.[4]

B. Defendants Mischaracterize Organizational Standing.

Defendants counter that because ICE's decision to grant a stay of removal to any particular individual is discretionary, the Albence Policy "causes no cognizable harm to any concrete interest" that U-visa applicants might assert, and therefore "it is impossible for Plaintiffs to demonstrate that they themselves have suffered any concrete injury." Def. Mem. 16-17. These arguments make two faulty assumptions: first, that Plaintiffs cannot be injured unless their clients or the clients their members serve are also injured, and second, that Plaintiffs need to demonstrate not only a cognizable Article III injury but also the deprivation of a legal entitlement.

Defendants' first assertion, that ASISTA and Sanctuary can have standing only if the Albence Policy caused a "judicially cognizable harm to their clients," Def. Mem. 16, confuses the two avenues by which an organization may demonstrate standing:

> An organization can have standing to sue in one of two ways. It may sue on behalf of its members, in which case it must show, *inter alia*, that some particular member of the organization would have had standing to bring the suit individually. . . . *In addition*, an organization can "have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy."

NYCLU, 684 F.3d at 294 (emphasis added) (quoting *Warth v. Seldin*, 422 U.S. 490, 511 (1975)).

[4] Because Plaintiffs' claims are not based on "incurring costs in anticipation of . . . harm," *Knife Rights, Inc. v. Vance*, 802 F.3d 377, 389 (2d Cir. 2015) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 422 (2013)), and do not require "[s]peculative inferences . . . to connect their injury to the challenged actions," *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 45 (1976), much of Defendants' discussion contesting their standing is entirely off point.

Because Plaintiffs have alleged "organizational" standing, as opposed to associational or representational standing, whether their clients would also have standing is irrelevant. *See id.* at 295 ("[T]he NYCLU does not bring its challenge under an associational/representational theory of standing. Rather, it sues to vindicate its own rights as an organization with goals and projects of its own. As it does not sue on behalf of injured members, it need not identify any that have standing.").

As explained above, Plaintiffs' injuries result from the fact that ICE has heightened the standards by which it grants stays of removal, and Plaintiffs represent clients (or serve attorneys representing clients) who need to seek stays of removal. ICE's new standards therefore hinder Plaintiffs' efforts by forcing them to divert resources in response to these new standards. That is a cognizable injury specific to Plaintiffs, giving them standing in their own right. *See Nnebe*, 644 F.3d at 158 (where plaintiff NYTWA "expends resources to assist drivers who face suspension," "[t]hat is an interest specific to NYTWA, independent of the interest of individual drivers in their licenses. . . . Accordingly, NYTWA has standing to bring this action on its own behalf").

Defendants eventually acknowledge that Plaintiffs are asserting their own interests as organizations, "rather than as representatives of their clients." Def. Mem. 17. But they assert that when an organization seeks redress on this basis, it must identify not only a cognizable Article III injury but also something more—the deprivation of a "statutory or constitutional interest" to which the organization is legally entitled. *Id.* at 18. This argument is a non-starter.

To begin with, the argument attempts to revive a long-discarded relic from standing doctrine of decades past. Constitutional standing analysis once required a plaintiff's injury to be the product of "a wrong which directly results in the violation of a legal right." *Alabama Power Co. v. Ickes*, 302 U.S. 464, 479 (1938); *see Tenn. Elec. Power Co. v. TVA*, 306 U.S. 118, 137

(1939) (standing is absent "unless the right invaded is a legal right . . . one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege"); 13A Charles Alan Wright et al., *Federal Practice and Procedure* § 3531.1 (3d ed. 2020). But the Supreme Court long ago rejected this "legal right" test, recognizing that constitutional standing simply requires "a personal stake in the outcome of the controversy," *Warth*, 422 U.S. at 498 (quotation marks omitted), and that a plaintiff has an adequate personal stake when he alleges "that the challenged action has caused him injury in fact, economic or otherwise," *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152 (1970); *see Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562-63 (1992).

Because of that, when an organization sues on its own behalf, a drain on its resources or perceptible impairment of its mission is sufficient to establish standing. *See supra*. No court has ever grafted onto that standard the additional requirement that the organization also possess "a legally protected interest in avoiding the additional expense." Def. Mem. 9.

Defendants nevertheless insist that "Plaintiffs are only injured by a more expensive process if they are entitled to one that is less expensive." *Id.* But when Defendants finally get around to substantiating that assertion, *id.* at 17-18, they misinterpret the decisions they cite.

The Supreme Court recognized standing in *Havens* for one reason only: "If, as broadly alleged, [the defendants'] steering practices have perceptibly impaired [the organization]'s ability to provide counseling and referral services for low-and moderate-income homeseekers, there can be no question that the organization has suffered injury in fact," because "the consequent drain on the organization's resources" constitutes "concrete and demonstrable injury to the organization's activities." 455 U.S. at 379. The Court never so much as suggested that the organization "had a statutory entitlement in its own right as an organization to 'truthful information about housing,'"

Def. Mem. 17 (quoting *Havens*, 455 U.S. at 373), much less that such an entitlement was the basis for the organization's standing. That quote comes from a separate discussion of the standing of the *individual* plaintiffs—housing "testers" who inquired about rental availability but did not actually need housing. *Havens*, 455 U.S. at 373 ("Congress has thus conferred on all 'persons' a legal right to truthful information about available housing. This congressional intention cannot be overlooked in determining whether testers have standing to sue.").

Defendants' interpretation of Second Circuit precedent is equally incorrect. In *Nnebe*, the court never determined that "the Taxi Workers Alliance had standing to assert its own due process rights." Def. Mem. 17. Rather, the Alliance had standing because it "has expended resources to assist its members who face summary suspension by providing initial counseling, explaining the suspension rules to drivers, and assisting the drivers in obtaining attorneys." 644 F.3d at 157; *see id.* (citing "the expenditure of resources that could be spent on other activities").

Likewise, the Second Circuit's recognition of standing in *NYCLU* and *Centro* did not rest on any alleged "First Amendment rights" of the plaintiff organizations. Def. Mem. 17; *see NYCLU*, 684 F.3d at 295 ("The NYCLU has alleged an interest in open access to TAB hearings as a matter of professional responsibility to clients. . . . The NYCLU has shown that the access policy has impeded, and will continue to impede, the organization's ability to carry out this aforementioned responsibility."); *id.* at 293 ("The NYCLU alleges that the inability to observe TAB hearing freely leaves it 'seriously hampered in its ability to advise clients' about their own hearings."); *Centro*, 868 F.3d at 110 ("Workplace will inevitably face increased difficulty in meeting with and organizing those laborers. We have held that an organization shows injury-in-fact where, as here, a policy has impeded, and will continue to impede, the organization's ability to carry out [its] responsibilit[ies]." (citation and quotation marks omitted)); *id.* at 110-11 ("the

Ordinance will force Workplace to divert money from its other current activities to advance its established organizational interests . . . . And, where an organization diverts its resources away from its current activities, it has suffered an injury that has been repeatedly held to be independently sufficient to confer organizational standing.").

In short, the standing inquiry here is not a close call: under well-established standards, Plaintiffs unquestionably have suffered—and are still suffering—a cognizable injury.

VII. The APA Does Not Preclude These Claims.

Unable to demonstrate that Defendant Albence had the authority to establish ICE's new stay policy, or that Plaintiffs lack standing to challenge the policy, Defendants seek to avert a decision by arguing that the APA precludes this suit. All of Defendants' contentions lack support, however, and many are refuted by the very authorities they cite.[5]

First, the Albence Policy is clearly a final agency action. "An 'agency action' includes any 'rule,' defined by the [APA] as 'an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.'" *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967) (quoting 5 U.S.C. § 551(4)). The Albence Policy is a final rule that meets these criteria: it "instructs [ICE] decision maker[s]," Def. Mem. 21, on what procedural steps to take, and what substantive standards to apply, when adjudicating applications for stays of removal by U-visa applicants. *See* SUMF ¶¶ 19-25. Because the Albence Policy is ICE's final and definitive "guidance on how that process should work," Def. Mem. 21, there is nothing "tentative or interlocutory" about it, *Salazar v. King*, 822 F.3d 61, 82 (2d Cir. 2016). The policy represents "the consummation of the agency's decisionmaking process," *id.*, regarding how

[5] Defendants also assert that the APA provides the only possible statutory cause of action here, Def. Mem. 19, but they provide no support for that assertion.

stay applications must be adjudicated. *See* Dkt. No. 34-1, at 1 ("This Directive sets forth U.S. Immigration and Customs Enforcement (ICE) policy regarding Stay of Removal requests . . . .").

Defendants cite no authority for the novel proposition that final agency action is limited to "the final decision on any particular [individual's] application" for relief from a government agency. Def. Mem. 21. Indeed, the sources Defendants cite say just the opposite. *See Salazar*, 822 F.3d at 83-84 ("agency action is final, and thus reviewable under the APA," although "further proceedings in the agency . . . will be required before the [agency] will discharge any individual's loan obligation" by "process[ing] applications of individuals who apply"); *accord Abbott Labs.*, 387 U.S. at 150-51 (surveying "final" agency actions where agencies adopted general policies but had not yet applied them to specific individuals).

Moreover, "legal consequences flow" from the Albence Policy. *Salazar*, 822 F.3d at 82. Under ICE's prior policy, individuals who filed proper stay applications that involved no "serious adverse factors" were virtually guaranteed to receive a stay of removal. *See* Dkt. No. 40-7 ("The [field office director] should favorably view an alien's request for a Stay of Removal if USCIS has determined that the alien has established *prima facie* eligibility for a U-visa."); SUMF ¶¶ 20-23. Because the new policy replaces this blanket rule with a totality-of-the-circumstances standard that is applied in the discretion of field office directors, *id.* ¶¶ 24-25, some people who would have received a stay under the old policy will be denied one under the new policy. "The core question for determining finality is whether the agency has completed its decisionmaking process, and whether the result of that process . . . will directly affect the parties." *Sharkey v. Quarantillo*, 541 F.3d 75, 88 (2d Cir. 2008) (quotation marks omitted). By issuing new standards for adjudicating stay applications, ICE has completed its decisionmaking process, and the result will directly affect stay applicants and legal services providers who assist them.

In short, "the agency's action is final notwithstanding '[t]he possibility of further proceedings in the agency' on related issues," because "'judicial review . . . [would not] disrupt the administrative process.'" *Id.* at 89 (quoting *Bell v. New Jersey*, 461 U.S. 773, 779-80 (1983)); *see Sackett v. EPA*, 566 U.S. 120, 126 (2012) (agency action is final where it "severely limits [individuals'] ability to obtain a permit"); *Salazar*, 822 F.3d at 83 (agency action is final where it will "have a substantial practical effect on the plaintiffs' ability to exercise their rights" because "it is likely" that some individuals will "be unaware" of their options).

Second, Plaintiffs' challenge to the Albence Policy—which is based on Albence's lack of authority to exercise the powers of the ICE Director—does not impermissibly seek review of "agency action [that] is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). As Defendants belatedly acknowledge in the final paragraph of their discussion, "Plaintiffs do not seek to challenge the Directive's substance, but rather its issuance in alleged contravention of the Appointments Clause, the DHS enabling statute, and the FVRA." Def. Mem. 26. Compliance with those laws is not committed to agency discretion. Defendants' argument therefore requires accepting a novel proposition for which no authority is offered—that § 701 bars review when a plaintiff, rather than challenging a policy's substance, maintains that the person who adopted it had no right to act on behalf of the agency.

This proposition is irreconcilable with *SW General*, which demonstrates that a discretionary agency decision may be challenged, and set aside, on the basis that the official who made it was serving in violation of the FVRA. *SW General* involved a challenge to a decision made by the purported acting general counsel of the National Labor Relations Board (NLRB). The NLRB's general counsel has the authority "to issue complaints alleging unfair labor practices," and a purported acting general counsel "issued a complaint alleging that respondent SW General

. . . had improperly failed to pay certain bonuses to long-term employees." *SW Gen.*, 137 S. Ct. at 937. In challenging the adverse ruling that followed from this complaint, the company "argued that the unfair labor practices complaint was invalid because, under . . . the FVRA, [the purported acting general counsel] could not legally perform the duties of general counsel." *Id.*

Significantly, the NLRB's general counsel "sets the enforcement priorities for the NLRB" and "essentially exercises prosecutorial discretion: he need not issue a complaint even if he believes a[n] [unfair labor practice] was committed." *SW Gen.*, 796 F.3d at 80. The decision to issue such a complaint, therefore, is plainly "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). But because the acting general counsel issued a complaint while serving in violation of the FVRA, this "unauthorized" complaint was invalid and could not be considered harmless under the APA. *SW Gen.*, 796 F.3d at 80-81. Accordingly, the court of appeals vacated the ruling that resulted from the complaint, *id.* at 83, and the Supreme Court affirmed, 137 S. Ct. at 938.

This result is unsurprising, because the text of the FVRA makes clear that challenges to unauthorized agency actions are reviewable even when the action in question involves a function committed to the agency's discretion. When an office is vacant, "[a]n action taken by any person" who is not validly filling the office under the FVRA "shall have no force or effect." 5 U.S.C. § 3348(d)(1). In defining the scope of that penalty, Congress expressly incorporated the APA: "In this section," the FVRA provides, "the term 'action' includes any agency action as defined under section 551(13)," *id.* § 3348(a)(1). And that definition, in turn, includes any "agency rule, order, license, sanction, relief, or the equivalent or denial thereof." *Id.* § 551(13). Significantly, therefore, Congress did not limit the FVRA's penalty by excluding "discretionary" agency actions; to the contrary, Congress provided that an "action" which may be held void under the FVRA

"includes *any* agency action," *id.* § 3348(a)(1) (emphasis added), and thus includes *any* "agency rule, order, . . . relief, or the equivalent or denial thereof," *id.* § 551(13).

Defendants' interpretation of the APA would carve out a broad, unwritten exception from this penalty. And that outcome is unsupported by text, precedent, or reason. While *Heckler v. Chaney*, 470 U.S. 821 (1985), found unreviewable "a decision of an administrative agency to exercise its 'discretion' not to undertake certain enforcement actions," *id.* at 823, Plaintiffs here do not challenge any such decision, and not a single consideration cited to support the *Heckler* rule applies here, *see id.* at 829-35. As for Defendants' lengthy discussion of immigration law, that discussion is both a red herring and unreliable.[6]

The APA's rule for discretionary agency decisions "is a very narrow exception," applicable only "in those rare instances" where "there is no law to apply." *Heckler*, 470 U.S. at 830 (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971)). Suffice it to say, there is no shortage of law to apply in assessing the legality of the Albence Policy. *See supra* at 5-14, 17-39. The APA does not bar these claims.

[6] For instance, Defendants extensively discuss the bar to judicial review in 5 U.S.C. § 1252(g), and although that bar obviously does not apply here, Defendants claim that it "confirms the importance that Congress placed on shielding the executive branch's discretionary decisions over immigration enforcement from review." Def. Mem. 24. Defendants further assert that "framing an action as a challenge to the executive's policy guiding the exercise of that discretion does not change the analysis." *Id.* But the very statute that Defendants cite refutes both of their assertions. The statutory bar they invoke applies only "except as provided in this section," 5 U.S.C. § 1252(g), and an earlier provision in that section authorizes judicial review of whether "a written policy directive, written policy guideline, or written procedure . . . is . . . in violation of law," *id.* § 1252(e)(3)(A)(ii).

CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment should be denied, and Plaintiffs' motion for summary judgment should be granted.

Dated: May 26, 2020

Respectfully submitted,

/s/ *Brianne J. Gorod*
Brianne J. Gorod

Brittany Williams (phv10516)
THE PROTECT DEMOCRACY PROJECT
1900 Market Street, 8th Floor
Philadelphia, PA 19103
(202) 236-7396
brittany.williams@protectdemocracy.org

Benjamin L. Berwick (phv04462)
THE PROTECT DEMOCRACY PROJECT
15 Main Street, Suite 312
Watertown, MA 02472
(202) 856-9191
ben.berwick@protectdemocracy.org

Rachel E. Goodman (phv10513)
THE PROTECT DEMOCRACY PROJECT
115 Broadway, 5th Floor
New York, NY 10006
(202) 997-0599
rachel.goodman@protectdemocracy.org

Elizabeth B. Wydra (phv10541)
Brianne J. Gorod (phv10524)
Brian R. Frazelle (phv10535)
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, DC 20036
(202) 296-6889
elizabeth@theusconstitution.org
brianne@theusconstitution.org
brian@theusconstitution.org

Marisol Orihuela (ct30543)
JEROME N. FRANK LEGAL SERVICES ORGANIZATION
P.O. Box 209090
New Haven, CT 06520
(202) 432-4800
marisol.orihuela@yale.edu

CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2020, the foregoing document was filed with the Clerk of the Court, using the CM/ECF system, causing it to be served on all counsel of record.

Dated: May 26, 2020

/s/ Brianne J. Gorod
Brianne J. Gorod