UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ASISTA IMMIGRATION ASSISTANCE, INC., et al.,

Plaintiffs,

v.

MATTHEW T. ALBENCE, et al.,

Defendants.

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

Judge: Hon. Jeffrey A. Meyer

CORRECTED MEMORANDUM OF LAW IN SUPPORT OF

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution

Statutes

Rules

Regulations

Legislative Materials

INTRODUCTION

The Department of Homeland Security has the discretion to grant stays of final orders of removal to individuals awaiting decisions on their applications for a U visa, a special category of visa available to victims of certain crimes who help law enforcement to investigate or prosecute those crimes. This case concerns a recent Directive providing guidance to U.S. Immigration and Customs Enforcement Officers who adjudicate applications for stays of removal from U visa petitioners, instructing them to consider all relevant factors and the totality of the circumstances. Plaintiffs, two nonprofit organizations whose missions involve assisting U visa petitioners or their attorneys, allege that the new guidance has made it substantially more difficult for applicants to secure stays of removal while they wait for their U visa petitions to be approved, and that they have diverted resources away from their other activities to deal with the additional workload they say the Directive has caused.

But Plaintiffs raise no challenge to the substance of the Directive's new guidance, or to the process that produced it. Instead, their sole objection is that the official who issued the Directive allegedly lacked the power to do so, because, Plaintiffs allege, the Federal Vacancies Reform Act barred him—or anyone else—from serving as Acting Director of ICE at the time of its issuance. And because the Department of Homeland Security's enabling statute requires the ICE Director to be Senate-confirmed, Plaintiffs allege violations of that statute and the Constitution's Appointments Clause too, as well of the Administrative Procedure Act's requirement that agency action be taken in accordance with law.

The problem for Plaintiffs is that the Directive provides them a wholly inadequate vehicle for the case they want to bring. On the merits, their claims cannot withstand scrutiny because the

Directive was comfortably within the authority of ICE's Deputy Director to issue, even assuming that Plaintiffs are correct about his eligibility to serve as Acting Director—so Plaintiffs' constitutional and statutory claims amount to little more than complaints that, at worst, the Directive contained the wrong signature block.

In any event, though, this Court should not reach the merits, because Plaintiffs' challenges are mired in a tangle of insuperable threshold problems. The Directive allegedly affects the availability of stays of removal, but such stays are purely discretionary, and no one can assert a judicially cognizable entitlement to one. Plaintiffs thus cannot show that the guidance has caused them or the clients they serve any concrete harm. All Plaintiffs can point to is their voluntary diversion of resources away from other activities to assist U visa applicants and their attorneys in seeking stays of removal. But that additional expenditure cannot be a judicially cognizable injury because neither Plaintiffs nor their clients have any underlying entitlement to a less resource-intensive process for seeking a stay. Plaintiffs therefore lack standing, and this Court lacks subject matter jurisdiction.

Two additional threshold issues afflict Plaintiffs' case. As persons claiming to be aggrieved by the actions of an agency, Plaintiffs are dependent on the Administrative Procedure Act for their cause of action. But that statute precludes review of agency actions that are not final, or that are committed to the agency's discretion by law. In each case, the glove fits: the Directive has no impact on the legal rights or obligations of any party, and so does not amount to final agency action; even if it did, there is no basis in law for a reviewing court to evaluate ICE's exercise of discretion, either in granting or denying stays of removal or in providing guidance to the officers who make that decision in individual cases.

To properly tee up the issues that Plaintiffs attempt to raise, they would have needed to find (i) a final agency action, (ii) subject to meaningful standards of judicial review, (iii) which could only have been taken by the Director of ICE and (iv) which caused (or imminently threatened) concrete injury to Plaintiffs or the clients they serve. The Directive falls short four times over. This Court should enter judgment for Defendants on each of Plaintiffs' claims.

FACTUAL AND LEGAL BACKGROUND

A. The U Visa Program

As part of the Victims of Trafficking and Violence Protection Act, Pub. L. No. 106-386, 114 Stat. 1464 (2000), Congress created a "new nonimmigrant visa classification," known as "U Nonimmigrant Status" or "U visas," intended 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," by granting legal status to victims of crime who cooperate with law enforcement in the investigation and prosecution of those crimes. 114 Stat. § 1513.

The U visa program allows victims of several specified crimes, including "rape; torture; trafficking; incest; domestic violence; [and] sexual assault" who have "suffered substantial physical or mental abuse as a result of having been a victim of [such] criminal activity" and are helpful, or likely to be helpful, to "authorities investigating or prosecuting [that] criminal activity" to secure legal status in the United States. 8 U.S.C. § 1101(a)(15)(U). To apply for a U visa, the applicant must submit a certification from a law enforcement official stating that the applicant "has been helpful, is being helpful, or is likely to be helpful" in the investigation or prosecution of criminal activity. *Id.* § 1184(p)(1). After at least three years of continuous physical presence in the

United States, a U visa holder may apply for legal permanent residence status. *See* 8 U.S.C. § 1255(m).

Congress has limited the number of U visas that may be issued in any fiscal year to 10,000 (not including spouses or children securing legal status derivatively of the principal petitioner). *See id.*, § 1184(p)(2)(A). Applicants who have been approved but have not yet received visas "due solely to the cap" are placed on a "waiting list." 8 C.F.R. § 214.14(d)(2). While on the waiting list, applicants receive "deferred action or parole," protecting them from removal, and the applicant and qualifying family members may receive work authorization. *Id.*

Congress also authorized the Secretary of Homeland Security to grant "an administrative stay of a final order of removal" to allow U-visa applicants to remain in the United States pending approval of their application, if the Secretary determines that it "sets forth a prima facie case for approval." 8 U.S.C. § 1227(d)(1). This case concerns a challenge to intra-agency guidance on the exercise of that discretion.

B. United States Immigration and Customs Enforcement Leadership

Within the Department of Homeland Security, U.S. Citizenship and Immigration Services ("USCIS") has "sole jurisdiction over all petitions for U nonimmigrant status," 8 C.F.R. § 214.14(c), but United States Immigration and Customs Enforcement ("ICE") is responsible for granting administrative stays of removal to U-visa applicants subject to final orders of removal, *id.* § 241.6. ICE is led by a single Director, appointed by the President with the advice and consent of the Senate. *See* 6 U.S.C. § 113(a)(1)(G).

However, ICE last had a senate-confirmed Director on January 20, 2017. On November 14, 2017, President Trump nominated Thomas Homan to serve as ICE director. His nomination was withdrawn on May 15, 2018. Subsequently, President Trump nominated Ronald Vitiello to

serve as ICE Director on August 16, 2018. When the Senate adjourned on January 3, 2019, Vitiello's nomination was automatically returned. The President withdrew his nomination on April 4, 2019.

Pursuant to DHS Delegation Number 00106, issued by then-DHS Secretary Jeh Johnson on December 15, 2016, the Deputy Director of ICE is first in the order of succession in the event of a vacancy in the position of Director of ICE, and is authorized to "exercise the powers and perform the functions and duties" of that office until the vacancy is filled. Ex. 2.

Matthew T. Albence was selected as Deputy Director of ICE on April 27, 2019. Pailliotet Decl., Ex. 1. He is currently the Deputy Director and Senior Official Performing the Duties of the Director of ICE, in which position he has served since August 2, 2019. From July 7, 2019, to August 1, 2019, he served as Acting Director of ICE. Compl. ¶ 44.[1]

C. Guidance on the Issuance of Administrative Stays of Removal for U-Visa Applicants

Before the events at issue in this case, then-Acting Director of ICE David J. Venturella issued a memorandum to ICE Field Office Directors ("FOD"s) setting out guidance for the adjudication of stay requests filed by U-visa applicants subject to final orders of removal. *See* Ex. 5. That guidance provided that upon receiving a stay request, a local Detention and Removal Operations office "must . . . request a *prima facie* determination from USCIS[]." *Id.* at 2. If USCIS determined that the applicant had established prima facie eligibility for a U visa, the guidance provided that "[t]he FOD should view a Stay request favorably, unless serious adverse factors

[1] *Accord Federal Vacancies Reform Act*, U.S. Government Accountability Office, https://www.gao.gov/legal/other-legal-work/federal-vacancies-reform-act?vacancyTitle=&vacancyActing=&vacancyNominee=&agency=Department+of+Homeland+Security&subagency=Department+of+Homeland+Security+%3A+United+States+Immigration+and+Customs+Enforcement&status=all&rpp=10&o=0&searched=1&order_by=date&Submit=Search (last visited May 20, 2020).

exist." *Id.* Adverse factors could include "national security concerns," "evidence [of] significant criminal history," and "any significant public safety concerns." *Id.* Favorable factors could include humanitarian concerns. *Id.* The guidance also instructed "the FOD [to] use his or her discretion in making any determination about whether to remove an alien who has a pending U-visa petition and has exhibited no adverse factors." *Id.* If the FOD found that serious adverse factors existed and was inclined to deny the stay request, the guidance required the FOD to provide a summary of the case to Detention and Removal Operations headquarters for further review. *Id.*

Defendant Albence issued ICE Directive 11005.2: Stay of Removal Requests and Removal Proceedings Involving U Nonimmigrant Status (U Visa) Petitioners (the "Directive") on August 2, 2019, superseding the guidance in the Venturella memorandum. *See* Directive, ECF 34-1 at 1. He signed the Directive as "Acting Director." *Id.* at 8.

The Directive determined that "ICE will no longer request *prima facie* determinations nor expedited adjudications from USCIS," and instructs FODs to "consider the totality of the circumstances, any favorable or adverse factors (including the extend and nature of any criminal history), and any federal interest(s) implicated" in determining whether to grant a stay. *Id.* § 5.2.2, ECF 34-1 at 5. It also clarifies that "[c]onvictions for crimes related to a petitioner's victimization will generally not be considered an adverse factor," and that "[t]he fact that a petitioner can continue to pursue a U visa adjudication from outside the United States is not alone a reason for ICE to deny a Stay of Removal Request." *Id.* The Directive goes on to list the same specific adverse factors, such as national security and public safety concerns, as were specified in the Venturella memo. *Id.* Finally, the Directive reiterates that the FOD must determine, "in his or her unreviewable discretion" based on "the totality of the circumstances" whether to grant a stay of removal. *Id.*

D. This Litigation

Plaintiffs are two nonprofit organizations whose activities include assisting U-visa applicants either directly or by providing training and assistance to attorney representing survivors of violence in immigration proceedings. Compl. ¶ 11, ECF 34 at 4. They filed this lawsuit on February 13, 2020, ECF 1, and filed an amended complaint on April 10, 2020, ECF 34. In their amended complaint, Plaintiffs allege that at the time he issued the challenged Directive, Defendant Albence was improperly serving as Acting Director of ICE, in violation of the Federal Vacancies Reform Act, 5 U.S.C. §§ 3345 *et seq.* ("FVRA"), the Constitution's Appointments Clause, U.S. Const. art II, § 2, cl. 2, and the DHS enabling statute, 6 U.S.C. § 113. Compl. ¶ 21, ECF 34 at 6. Specifically, Plaintiffs allege that the FVRA's time limits on service by acting officials prevented anyone from filling the office of ICE Director in an acting capacity when more than 210 days had passed since the second permanent nomination was rejected, withdrawn, or returned by the Senate—which is to say, after August 1, 2019. Compl. ¶¶ 6, 21, ECF 34 at 3, 6. They also allege that the issuance of the Directive was *ultra vires* and in violation of the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, because of Defendant Albence's alleged improper service as Acting Director. *Id.*

This Court granted the parties' joint motion for a scheduling order, ECF 38, and Defendants now move for summary judgment.

ARGUMENT

Defendants move for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Summary judgment is appropriate if "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). For APA claims, "the district judge sits as an appellate tribunal" to resolve issues at summary judgment. *Am.*

Bioscience, Inc. v. Thompson, 269 F.3d 1077, 1083 (D.C. Cir. 2001).

Defendants are entitled to summary judgment here for several reasons. To begin with, Plaintiffs lack standing to bring this suit: The Directive causes no concrete or imminent injury to any judicially cognizable right of Plaintiffs' or the clients they serve, and Plaintiffs' voluntary diversion of resources and expenditure of funds in response to the Directive does not create the necessary injury. This case also falls under the APA's provisions precluding challenges to non-final agency actions and to decisions committed to agency discretion by law, each of which applies to the Directive; without the APA, Plaintiffs have no cause of action. Finally, Plaintiffs' claims fail on the merits because the power to issue guidance on the adjudication of applications for discretionary stays of removal is not reserved exclusively to the Director of ICE. Defendant Albence was validly serving as Deputy Director when he issued the Directive, as Plaintiffs do not contest; he thus had ample authority to act regardless of whether he could validly serve as Acting Director.

I. THIS COURT LACKS JURISDICTION OVER PLAINTIFFS' CLAIMS

As an initial matter, this Court lacks subject matter jurisdiction over this case. Plaintiffs cannot show that the Directive has caused or imminently will cause any concrete injury to them or their clients, notwithstanding their voluntary resource allocation decisions in the wake of the Directive. As a result, this "court has no subject matter jurisdiction to hear their claim." *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, LLC*, 433 F.3d 181, 198 (2d Cir. 2005).

The basic problem for Plaintiffs is this: the decision to grant or deny an administrative stay of a final order of removal under 8 U.S.C. § 1227(d)(1) is purely discretionary, and so is the process for arriving at that decision. That is why Plaintiffs do not, and cannot, challenge the substance of the Directive itself. Because the stay decision is discretionary, Plaintiffs' clients have no legally

enforceable right to receive a stay, or to have their application for a stay adjudicated in any particular manner; in other words, they do not suffer a judicially cognizable injury-in-fact from the denial of a stay. Likewise, Plaintiffs' clients suffer no concrete injury if the process of preparing a stay application is more onerous than before as a result of the Directive, because they have no legal entitlement to a more streamlined process.

By the same token, Plaintiffs themselves also suffer no concrete injury from the additional procedural hurdles they allege that their clients now face; like their clients, Plaintiffs too lack any legally protected right to have stay applications adjudicated in their preferred manner. Plaintiffs attempt to plead around this defect by pointing to the expenses they have chosen to incur in response to the Directive, and the toll those expenses have taken on their other activities. But that merely restates the problem: Plaintiffs are only injured by a more expensive process if they are entitled to one that is less expensive.

That is just as true for organizations as it is for individuals: Article III contains no carve-out from its case-or-controversy requirement for organizational plaintiffs, and the principles of standing apply equally to organizations as to individuals. Although courts sometimes use the shorthand that an impairment to an organization's mission gives it standing to challenge the cause of that impairment, that formulation is not strictly accurate. To take one example, it is well settled that no one has standing to challenge the government's exercise of prosecutorial discretion against a third party. Thus, if an antitrust enforcement decision were to cause Asista to face higher prices for office supplies, it would not have standing to challenge that decision even if the additional expense were enough to impair its mission. The Supreme Court and the Second Circuit have consistently held that organizational plaintiffs have standing to challenge policies that cause them to divert resources away from other priorities and thereby impair their mission in cases where those

organizations have a legally protected interest in avoiding the additional expense—but not otherwise. This Court should follow those precedents and hold that Plaintiffs lack standing to challenge the Directive.

A. Organizations are subject to the same principles of standing as individuals

Constitution limits the jurisdiction of federal courts to actual "Cases" and "Controversies." U.S. Const., art. III, § 2. "The doctrine of standing gives meaning to these constitutional limits," *Susan B. Anthony List v. Driehaus,* 573 U.S. 149, 157 (2014), by requiring a plaintiff to "allege[] such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf," *Warth v. Seldin,* 422 U.S. 490, 498–99 (1975) (internal quotation marks omitted). To establish standing, a plaintiff must show "(1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'likel[ihood]' that the injury 'will be redressed by a favorable decision.' " *Susan B. Anthony List,* 573 U.S. at 157–58 (alteration in original) (quoting *Lujan v. Defs. of Wildlife,* 504 U.S. 555, 560–61, (1992)). To support standing, an "injury in fact" must be "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) 'actual or imminent, not conjectural or hypothetical.'" *Lujan*, 504 U.S. at 560. "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending." *Lujan*, 504 U.S. at 565, n. 2 (internal quotation marks omitted). The Supreme Court has thus "repeatedly reiterated that 'threatened injury must be *certainly impending* to constitute injury in fact,' and that '[a]llegations of *possible* future injury' are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). Plaintiffs may not circumvent this requirement by

"incur[ing] certain costs as a reasonable reaction to a risk of harm." *Id.* at 416. "In other words, [plaintiffs] cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending"—any such "ongoing injuries" that a plaintiff suffers "are not fairly traceable" to the potential future harm. *Id.* "If the law were otherwise, an enterprising plaintiff would be able to secure a lower standard for Article III standing simply by making an expenditure based on a nonparanoid fear." *Id.*

An injury that deprives a plaintiff of a procedural right can be sufficient to sustain standing, "[b]ut deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009). A general allegation of harm to "every citizen's interest in proper application of the Constitution and laws" does not supply the necessary "concrete interest." *Lujan*, 504 U.S. at 573–74. Thus, "absent the ability to demonstrate a 'discrete injury' flowing from the alleged violation" of a procedural right, a plaintiff "cannot establish standing merely by asserting that the [government] failed to process its complaint in accordance with law." *Common Cause v. Fed. Election Comm'n*, 108 F.3d 413, 419 (D.C. Cir. 1997); *accord*, *e.g.*, *Evans v. Lynn*, 537 F.2d 571, 598 (2d Cir. 1975) (en banc) ("In this action, appellants are invoking the Court's jurisdiction solely to impose upon the appellees [budgetary] priorities which the appellants favor. Sincere as their views may be, they are not properly addressed to the courts.").

An organization, like an individual, "may 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." *Warth*, 422 U.S. at 511. (An association may also have standing "solely as a representative of its members," *id.*, but Plaintiffs do not claim standing on that basis here). "Under this theory of 'organizational' standing, the organization is just another person—albeit a legal

person—seeking to vindicate a right." *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 294 (2d Cir. 2012). The organization thus must "meet[] the same standing test that applies to individuals . . . [by] show[ing] actual or threatened injury in fact that is fairly traceable to the alleged illegal action and likely to be redressed by a favorable court decision." *Irish Lesbian and Gay Org. v. Giuliani*, 143 F.3d 638, 649 (2d Cir. 1998) (quoting *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990)).

As with individuals, an organization's "mere 'interest in a problem'" is not enough to confer standing, "no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem." *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972). But a "concrete and demonstrable injury to [an] organization's activities—with the consequent drain on the organization's resources"—may confer standing, because such an injury that "perceptibly impair[s]" the organization's activities "constitutes far more than simply a setback to the organization's abstract social interests." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). Thus, in *Havens*, an organization dedicated to providing "counseling and referral services for low- and moderate-income homeseekers" had standing in its own right to challenge the racially discriminatory housing practices of an apartment complex owner. *Id.* Because the owner violated the organization's statutory right under the Fair Housing Act to truthful information about the availability of apartments in the complex, the organization "had to devote significant resources to identify and counteract" the defendants' "racially discriminatory steering practices" by hiring "tester plaintiffs." *Id.*

In contrast, several organizations "dedicated to promoting access of the poor to health services" lacked standing to challenge an Internal Revenue Service Revenue Ruling which they alleged encouraged nonprofit hospitals to refuse treatment on the basis of indigency by allowing

them to claim tax exemptions as "charitable" hospitals without offering any services other than emergency-room care to anyone unable to pay. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 39–40 (1976). The Supreme Court held that the organizational plaintiffs "could not in the context of this suit" allege any "injury to themselves as organizations." *Id.* And the individual plaintiffs could not establish standing because "[i]t is purely speculative whether the denials of service specified in the complaint fairly can be traced to [the IRS's] 'encouragement' or instead result from decisions made by the hospitals without regard to the tax implications." *Id.* at 42–43.

Likewise, a mother seeking to compel the district attorney to enforce a criminal child support statute against the father of her child could not establish standing because "[t]he prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative." *Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973).

And plaintiffs challenging a town's zoning ordinance could not demonstrate that their personal "inability to locate suitable housing in [the town] reasonably can be said to have resulted, in any concretely demonstrable way, from respondent's alleged constitutional and statutory infractions," even assuming that "[the town]'s zoning ordinance and the pattern of enforcement by respondent officials have had the purpose and effect of excluding persons of low and moderate income, many of whom are members of racial or ethnic minority groups" and that such practices, "if proved in a proper case, would be adjudged violative of the constitutional and statutory rights of the persons excluded." *Warth*, 422 U.S. at 502.

The same reasoning applied to the organizational plaintiffs in that case, suing in their capacity as taxpayers in an adjacent metro area. *Id.* at 512. Nor did those organizations have standing based on the injury to their interest in "living in a racially and ethnically integrated community" caused by the zoning ordinance, despite precedent finding standing for individuals

asserting that the race-based denials of housing to others had deprived them of the benefits of living in a racially integrated community. *Id.* at 512–13 (citing *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972)). The "critical distinction" with that case was that the organizations, unlike the individuals in the earlier case, could not assert any statutory right of action, either in their own right or on behalf of their members: Although in certain cases, "Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of the statute," there was "[n]o such statute . . . applicable" there. *Id.* at 513–14.

The Second Circuit has thus consistently found standing for organizations suing to vindicate their own rights under 42 U.S.C. § 1983, requiring "only a 'perceptible impairment' of an organization's activities" to demonstrate the requisite injury in fact. *See, e.g.*, *Nnebe v. Daus*, 644 F.3d 147, 157 (2d Cir. 2011). Thus, the New York Taxi Workers Alliance had standing to raise a due-process challenge to the New York City Taxi and Limousine Commission's procedures for suspending licenses when drivers were arrested on criminal charges. *Id.* Although Second Circuit precedent prevents organizations from litigating § 1983 claims on behalf of their members, the court held that the resources the Taxi Workers Alliance had expended in assisting its members facing the challenged suspension procedures gave it standing in its own right to raise a due process claim: "The Alliance brings this suit so that when it expends resources to assist drivers who face suspension, it can expend those resources on hearing that represent bona fide process." *Id.* at 158.

Similarly, the New York Civil Liberties Union had standing to raise a First Amendment challenge to a New York City Transit Authority rule that excluded observers from hearings of the Transit Adjudication Bureau ("TAB") when the respondent objected to their presence. *See NYCLU*, 684 F.3d at 289 (2d Cir. 2012). Although the NYCLU was not itself the subject of the

citations for violations of the Rules of Conduct for users of New York's public transportation system adjudicated in the TAB hearings, the exclusionary policy allegedly violated its independent First Amendment right of access to the hearings and thereby impaired its ability to represent clients in such hearings: "In order to represent clients before the TAB, NYCLU must prepare, in part, by observing TAB hearings." *NYCLU*, 684 F.3d at 295.

Likewise, the Workplace Project, an organization dedicated to community organizing to support "Latino immigrant workers on Long Island" had standing to challenge a Town ordinance regulating "the road-side solicitation of employment" as a violation of the organization's own First Amendment rights. *Centro de la Communidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 107 (2d Cir. 2017). The ordinance, if enforced, would disperse day laborers from the areas where they ordinarily congregated, making it "more costly to reach them." *Centro de la Communidad*, 868 F.3d at 110. The organization also demonstrated that it had "divert[ed] resources away from its current activities in response to the Ordinance," which constituted an injury-in-fact sufficient to confer standing. *Id.* at 110–11.

In contrast, where an organizational plaintiff demonstrates a "drain on the organization's resources" in response to a challenged policy *without* showing that a "concrete and demonstrable injury to the organization's activities" caused the diversion, *Havens*, 455 U.S. at 379, the Second Circuit has held that such an organization lacks standing. Thus, Knife Rights, "a membership advocacy organization" supporting "people's ability to carry and use knives and tools," and the related Knife Rights Foundation, lacked standing to seek declaratory and injunctive relief to prevent New York authorities from applying an allegedly over-broad and vague criminal prohibition on the possession of "gravity knives." *Knife Rights, Inc. v. Vance*, 802 F.3d 377, 388 (2d Cir. 2015). The organizations pointed to expenses they had incurred in opposing the

application of the "gravity knives" statute, and argued that "injunctive relief would redress future injury by precluding defendants from applying [the statute] in a way that will prompt [them] to incur opposition expenses." *Id.* But the Second Circuit, noting *Clapper*'s holding that plaintiffs "'cannot manufacture standing by incurring costs in anticipation of non-imminent harm,'" held that the "absence of any credible threat that *they* will be prosecuted" meant that the organizations "must show that both anticipated expenditures and ensuing harm to their organization's activities are 'certainly impending.'" *Id.* at 389 (quoting *Clapper*, 586 U.S. at 416).

B. Plaintiffs' expenditures in response to the Directive do not create standing

The problem for Plaintiffs here is that the challenged Directive causes no actual or imminent judicially cognizable harm to *anyone*, and they have not alleged to the contrary. As a result, their claims to have diverted resources away from other priorities as a result of the Directive cannot establish an injury in fact that is fairly traceable to the Directive.

To begin with, Plaintiffs cannot show that the Directive has caused or will cause any judicially cognizable harm to their clients. To be sure, the imminent execution of an order of removal is an injury in fact that affords the subject of that order standing to challenge it, and such challenges may be raised in federal court subject to the terms of 8 U.S.C. § 1252 and related statutory provisions. But Plaintiffs do not allege that an individual subject to a final order of removal has any judicially cognizable liberty or property interest in the discretionary grant of an administrative stay of removal under 8 U.S.C. § 1227(d)(1). It follows that they also lack any cognizable interest in the procedures used to determine whether to grant such a stay—any such interest would be the kind of "procedural right *in vacuo*" that is "insufficient to create Article III standing." *Summers*, 555 U.S. at 496. And neither Plaintiffs nor their clients could supply the missing "concrete interest affected by the [procedural] deprivation," *id.*, by claiming an interest in

seeing that the procedures for granting administrative stays of removal not be tainted by alleged Appointments Clause or FVRA violations—that is just the kind of harm to "every citizen's interest in proper application of the Constitution and laws" that *Lujan* teaches cannot provide standing to bring suit in federal court, *Lujan*, 504 U.S. at 573–74.

Even if Plaintiffs' clients had a cognizable interest in the grant of an administrative stay, moreover, it is entirely speculative whether the Directive caused or will cause the denial of any particular stay application. In that respect, Plaintiffs' clients are in the same position for purposes of standing analysis as the individual plaintiffs in *Simon*, *Warth*, and *Linda R.S.*: It is impossible to say in any particular case that the challenged policy produced any particular outcome, whether it be denial of treatment, loss of housing opportunities or child-support payments, or the denial of a discretionary stay of removal. As a result, even if any of Plaintiffs' clients could claim a concrete injury-in-fact from the denial of a stay, it would not be possible to trace that injury to the Directive.

Of course, Plaintiffs bring this case to assert their own rights as organizations, rather than as representatives of their clients. But because the Directive causes no cognizable harm to any concrete interest that even Plaintiffs' clients might assert, it is impossible for Plaintiffs to demonstrate that they themselves have suffered any concrete injury. As a result, decisions such as *Havens*, *Nnebe*, *NYCLU*, and *Centro de la Communidad* cannot avail Plaintiffs. In each of those cases, the organizational plaintiffs had standing to challenge policies that injured statutory or constitutional interests *of their own* as organizations. In *Havens*, Housing Opportunities Made Equal had a statutory entitlement in its own right as an organization to "truthful information about housing." *Havens*, 455 U.S. at 373; *see also* 42 U.S.C. § 3602(d). In *Nnebe*, the Taxi Workers Alliance had standing to assert its own due process rights, rather than those of its members, under 42 U.S.C. § 1983. *Nnebe*, 644 F.3d at 156, 158. And both the NYCLU and the Workplace Project

had standing to assert First Amendment rights of their own under 42 U.S.C. § 1983, to access to government proceedings, *NYCLU*, 684 F.3d at 295, and to communicate with day laborers, *see Centro de la Communidad*, 868 F.3d at 110–11, respectively.

The "critical distinction," here as in *Warth*, is that Plaintiffs have no statutory or constitutional interest of their own to assert. *Warth*, 422 U.S. at 513–14. Plaintiffs are instead in the same position as the organizational plaintiffs in *Simon* and *Knife Rights*, unable to show that they face any concrete or imminent harm in their own capacities. *Knife Rights* left open the possibility that the organizational plaintiffs in that case might have been able to demonstrate the requisite harm if they had "attempted to make such a showing," perhaps by asserting that, like the Taxi Workers Alliance representing members subject to an allegedly invalid suspension policy, they had a due-process interest in reduced representational expenses for members subject to imminent prosecution under the gravity-knives law. *Knife Rights*, 802 F.3d at 389.

But even if that were a viable option in *Knife Rights*, it is not available to Plaintiffs here—the Directive does not implicate any due process interests that Plaintiffs could assert, even derivatively through their clients. Instead, just as the organizational plaintiffs in *Simon* could not have asserted any "injury to themselves as organizations" from the effects of a discretionary decision by the IRS on the discretionary decisions by nonprofit hospitals to deny treatment to their members, *Simon*, 426 U.S. at 40, so too here: Plaintiffs cannot show any injury to themselves as organizations from the discretionary decision to issue the challenged Directive, or from any effect the Directive may have on the discretionary decision to grant an administrative stay in any particular case.

Plaintiffs attempt to sidestep this difficulty by detailing the expenses they have chosen to incur in response to the Directive, and the ensuing impairment to their other activities. *See* Compl.

¶¶ 54–86, ECF 34 at 17–24. But Plaintiffs "cannot manufacture standing by incurring costs in anticipation of non-imminent harm." *Knife Rights*, 802 F.3d at 389 (quoting *Clapper*, 568 U.S. at 416). Thus, the plaintiffs in *Clapper* could not establish standing to challenge a surveillance program that they could not show had intercepted their communications or was imminently likely to do so merely by incurring expenses to protect themselves from that possibility—even accepting that the decision to incur those expenses was a "reasonable reaction to a risk of harm." *Clapper*, 568 U.S. at 416.

Here, the discretionary denial of an administrative stay is not a judicially cognizable harm to begin with. Nor is it imminent in any particular case as a result of the Directive: as Plaintiffs admit, for example, the "habeas and mandamus petitions" they now help to prepare even in advance of a decision on a stay application were also "occasionally necessary in the years before" the Directive. Compl. ¶ 63, ECF 34 at 18–19. Plaintiffs thus cannot bootstrap their way into standing "by making an expenditure based on a nonparanoid fear," however reasonable the decision to make that expenditure may be in light of their organizational missions. *Clapper*, 568 U.S. at 416.

II. THE ADMINISTRATIVE PROCEDURE ACT PRECLUDES REVIEW OF PLAINTIFFS' CLAIMS

Plaintiffs do not, and could not, assert any freestanding injury, independent of the challenged Directive, as a result of the alleged violations of the Appointments Clause, the DHS enabling statute, or the FVRA. Instead, in each case Plaintiffs allege that the asserted violations render the Directive "invalid and void." Compl. ¶¶ 92, 99, 102, 104; ECF 34 at 24–26. Although Plaintiffs do not specifically identify any statute that supplies their cause of action, the only possibility is the Administrative Procedure Act's "[r]ight of review" for any "person suffering

legal wrong because of agency action . . . seeking relief other than money damages." 5 U.S.C. § 702. Plaintiffs attempt to make an *ultra vires* claim, but that nonstatutory avenue for judicial review applies only when an agency action "patently"—rather than merely arguably—"misconstrues a statute, disregards a specific and unambiguous statutory directive, or violates a specific command of a statute." *Yale New Haven Hosp. v. Azar*, 409 F. Supp. 3d 3, 15–16 (D. Conn. 2019) (internal citation omitted). For that kind of challenge, "the determination of whether the court has jurisdiction is intertwined with the question of whether the agency has authority for the challenged action." *Id.* (quoting *Amgen, Inc. v. Smith*, 357 F.3d 103, 133 (D.C. Cir. 2004)). As part III, *infra*, demonstrates, the *ultra vires* label does not give Plaintiffs any right of action beyond what Congress provided. That leaves the APA as the only possible source of Plaintiffs' right to sue.

But that cause of action is limited in two ways relevant to this case: First, it applies only to "final agency action." 5 U.S.C. § 704. And second, it does not apply to "agency action [that] is committed to agency discretion by law." *Id.* § 701(a)(2). Each of those limitations independently bars this suit, and this Court is free to resolve this case on either of those "threshold bases for dismissal without deciding whether it has subject matter jurisdiction." *In re Facebook, Inc.*, 797 F.3d 148, 155 (2d Cir. 2015) (citing *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 588 (1999)).

A. The Directive Is Not Final Agency Action

For an agency action to count as "final," it must meet two conditions: "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights of obligations have been determined, or from which legal consequences will flow." *Salazar v. King*, 822 F.3d 61, 82 (2d Cir. 2016) (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)). "For the second prong,

the 'core question' is whether the result of [the agency's decisionmaking] process is one that will directly affect the parties." *Id.* (quoting *Sharkey v. Quarantillo*, 541 F.3d 75, 88 (2d Cir. 2008)).

The Directive is plainly not final action: It does not constitute the final decision on any particular stay application; it does not alter any person's eligibility to seek a stay; and it does not change the criteria for granting a stay, which has always been a discretionary decision that requires case-by-case consideration of the applicant's particular circumstances. Rather than marking the consummation of a decisionmaking process, the Directive provides guidance on how that process should work. It instructs the decision maker to "consider the totality of the circumstances," including "any favorable or adverse factors" and "any federal interest(s) implicated" in making the final decision on an application for a stay of removal. Directive § 5.2.2, ECF 34-1 at 5. The closest the Directive comes to making anything like a final decision in its own right is its determination that "ICE will no longer *routinely* request *prima facie* determinations nor expedited adjudications from USCIS." *Id.* (emphasis added). But even that statement does not amount to any final decision about the role of USCIS in adjudicating stay requests; it is instead the kind of "tentative" decision that does not mark the end of the agency's consideration of an issue.

The same reasoning applies to the second prong—rather than determining the rights or obligations of any party, the Directive merely sets out guidance for how rights and obligations will be determined at a later point. The Directive does not change the legal status of any person or alter any person's rights or obligations; it does not grant or deny any stay of removal or affect any individual's eligibility to apply for a stay, nor does it have any legal effect on the applicant's U visa petition. Likewise, the Directive does not alter the substantive criteria for granting a stay of removal: The previous guidance directed the FOD to "use his or her discretion in making any determination about whether to remove an alien who has a pending U-visa petition and has

exhibited no adverse factors," and offered non-exhaustive examples of favorable and adverse factors that should inform that discretionary decision, Venturella Memo at 2, Ex. 5; the Directive likewise instructs the FOD to determine, after "careful consideration" and "in his or her unreviewable discretion," whether "the totality of the circumstances merit a Stay of Removal," and provides a non-exhaustive list of favorable and adverse factors that should inform that discretionary decision, Directive §§ 5.2.2, 5.2.3, ECF 34-1 at 5. Contrary to Plaintiffs' suggestion, the previous guidance offered no basis for an applicant to "depend upon" receiving a stay of removal, Compl. ¶ 52, ECF 34 at 16; under both the old and the new guidance, the grant of a stay is a discretionary decision, and the applicant has no legal entitlement to receive a stay.

In short, the Directive has no legal force of its own but instead merely provides guidance for subsequent decisions that will determine whether to stay removal in particular instances. It is thus exempt from judicial review under the APA.

B. The Procedures for Granting Stays of Removal to U-Visa Applicants are Committed to Agency Discretion by Law

Plaintiffs' claims fail for another reason: Immigration enforcement decisions such as whether to grant a stay of removal to a U-visa petitioner are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). That provision applies where "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion," *Heckler v. Chaney*, 470 U.S. 821, 830 (1985), leaving the court with "no law to apply," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971)). In the context of an agency decision whether to "take enforcement steps . . . the presumption is that judicial review is not available." *Heckler*, 470 U.S. at 831. The Supreme Court has thus emphasized "on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal

process, is a decision generally committed to an agency's absolute discretion." *Id.* The Second Circuit has likewise recognized that "[i]t is rare that agencies lack discretion to choose their own enforcement priorities." *Natural Res. Def. Council, Inc. v. FDA*, 760 F.3d 151, 171 (2d Cir. 2014). That discretion extends to the formulation of general policies governing the exercise of discretion in particular cases. *Heckler* itself, for example, involved the Food and Drug Administration's decision not to take enforcement actions that would interfere with the administration of State lethal injection laws. *Heckler*, 470 U.S. at 824–25. The only potential limitations the Supreme Court could perceive to an agency's right to set policies governing its exercise of discretion were situations in which an agency might decline to act based solely on its mistaken belief that it lacked jurisdiction, or where an agency "consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities." *Id.* at 833 n.4 (internal citation and quotation marks omitted).

Those principles of nonreviewability apply with particular force in the context of enforcement of the immigration laws. The Supreme Court has emphasized that "[a] principal feature of the removal system is the broad discretion exercised by immigration officials," including over the decision to "grant discretionary relief allowing" individuals subject to removal "to remain in the country." *Arizona v. United States*, 567 U.S. 387, 396 (2012). In that context, the concerns inherent in any challenge to prosecutorial discretion "are greatly magnified." *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 490 (1999) ("AADC").

Congress has demonstrated particular concern with protecting executive discretion in the immigration context. Section 1252(g) of the Immigration and Nationality Act channels "any cause of claim by or on behalf of any alien arising from the decision or action . . . to commence proceedings, adjudicate cases, or execute removal orders against any alien" into petitions for

review of final removal orders. 8 U.S.C. § 1252(g). Section 1252(b)(9) likewise provides that "all questions of law and fact . . . arising from any action taken or proceeding brought to remove an alien from the United States" is subject only to "judicial review of a final order under this section." 8 U.S.C. § 1252(b)(9). Those provisions "aimed at protecting the Executive's discretion from the courts" over the decision, among others, to "*execute* removal orders," by ensuring that the exercise of executive "discretion to abandon the endeavor" in some cases does not lead to separate litigation over the denial of discretionary relief in other cases. *AADC*, 525 U.S. at 482–86. To illustrate the concern, the Supreme Court specifically cited one of its own precedents involving "review of [a] refusal to stay deportation." *Id.* (citing *Cheng Fan Kwok v. INS*, 392 U.S. 206 (1968)). The Second Circuit has thus held that section 1252(g)'s ban on challenges to the execution of removal orders "necessarily includes the Government's denial of a[n] . . . administrative stay of removal," as well as the "early termination" of a "then-existing stay." *Ragbir v. Homan*, 923 F.3d 53, 64 n.13 (2d Cir. 2019). And it has applied section 1252(g) to bar a putative class action "challenging the *procedures* employed by the INS with respect to [putative class-members'] deportations." *Jean-Baptiste v. Reno*, 144 F.3d 212, 214, 218 (2d Cir. 1998) (emphasis added).

This action falls under section 1252(g)'s bar to review. As the Second Circuit has made clear, the denial of a stay of removal is part of the executive's discretion to "execute removal orders," and framing an action as a challenge to the executive's policy guiding the exercise of that discretion does not change the analysis. But even if the Court were to conclude that the INA does not directly preclude review here, the narrow statutory review scheme confirms the importance that Congress placed on shielding the executive branch's discretionary decisions over immigration enforcement from review, and reinforces the conclusion that such decision are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2).

The presumption of unreviewability of enforcement decisions "may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Heckler*, 470 U.S. at 833. Here, however, the statute offers no such guidance: It provides only that "[i]f the Secretary of Homeland Security determines that an application [for a U-visa] filed for an alien in the United States sets forth a prima facie case for approval, the Secretary may grant the alien an administrative stay of a final order of removal." 8 U.S.C. § 1227(d)(1). The statute offers no guidance whatsoever to determine which applications setting forth a prima facie case should receive stays. Nor does it say anything about how the Secretary should determine which applications do set forth the necessary prima facie case for approval.

The relevant regulations likewise preserve the agency's enforcement discretion. The regulations governing the U-visa program merely provide that an individual subject to a final order of removal "may file a request for a stay of removal pursuant to 8 C.F.R. 241.6(a) and 8 C.F.R. 1241.6(a)." 8 C.F.R. § 214.14(c)(1)(ii). The latter of those provisions, meanwhile, simply provides that the individual "may seek a stay of deportation or removal from the Department of Homeland Security as provided in 8 C.F.R. 241.6." 8 C.F.R. § 1241.6(a).

Section 241.6, in turn, provides that any of several listed officers "in his or her discretion and in consideration of factors listed in 8 C.F.R. § 212.5 and [8 U.S.C. § 1231], may grant a stay of removal." 8 C.F.R. § 241.6(a). The referenced regulatory provision sets out factors that may support "the exercise of discretion . . . only on a case-by-case basis." 8 C.F.R. § 212.5. And the statutory provision allows for a stay of removal if the Secretary decides that "immediate removal is not practicable or proper" or that "the alien is needed to testify" in a criminal case. 8 U.S.C. § 1231.

Nothing in any of those provisions would provide a reviewing court with any meaningful basis on which to assess a discretionary decision to grant or deny a stay of removal to a U-visa petitioner. And since Plaintiffs do not offer any basis on which to fault the substance of the Directive, there is also no meaningful standard to judge the Directive's guidance on the exercise of the agency's unreviewable discretion.

To be sure, 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. But an "agency action" for purposes of the APA is defined by *what* the agency does, rather than who within the agency does it: "'agency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). The substance of the Directive is committed to agency discretion by law, and Defendant Albence's decision to sign the Directive as "Acting Director" is not a distinct agency action subject to review. The APA thus affords Plaintiffs no basis to challenge the Directive—and nor does any other cause of action.

III. THE FEDERAL VACANCIES REFORM ACT DOES NOT INVALIDATE THE DIRECTIVE

If the Court were to reach the merits, it should nevertheless enter judgment in Defendants' favor because even assuming that Albence may not serve as Acting Director, the issuance of the Directive did not violate the FVRA, for the simple reason that it was not an exercise of the "functions or duties" of the office of Director.

As Plaintiffs set out in their Complaint, the FVRA authorizes "the first assistant" to an office requiring Senate confirmation to "perform the functions and duties of the office temporarily in an acting capacity," subject to time limitations specified in the statute. 5 U.S.C. § 3345(a)(1).

Once those time limits expire, the FVRA provides that "the office shall remain vacant," and that "[a]ny action taken," with caveats that are not applicable here, "in the performance of any function or duty of a vacant office . . . shall have no force and effect," and "may not be ratified." 5 U.S.C. § 3348.

Plaintiffs allege throughout their complaint that Defendant Albence is improperly performing "the functions and duties of the Director of ICE." Compl. ¶ 13; *see also id.* ¶¶ 40, 90, 91, 92, 99, 102, Prayer for Relief b); ECF 34 at 5, 12, 24–27. But Plaintiffs fail to note that the term "function or duty" has a defined meaning in the FVRA. To qualify, "any function or duty of the applicable office" must be "established by statute" or "regulation" and "required by statute" or "regulation" to "be performed by the applicable officer (*and only that officer*)." 5 U.S.C. § 3348(a)(2) (emphasis added). In the case of a function or duty established by regulation, the applicable regulation must be "in effect at any time during the 180-day period preceding the date on which the vacancy occurs." *Id.* § 3348(a)(2)(B)(ii).

Plaintiffs can point to no statute or regulation requiring the Director of ICE—and *only* the Director—to issue guidance on the grant or denial of stays of removal to U-visa petitioners, because no such statute or regulation exists. To the contrary, the governing statutes and regulations are clear that Defendant Albence was authorized as Deputy Director to issue such guidance. To begin with, the DHS enabling statute vests the Secretary of Homeland Security with the authority to perform "all functions of all officers, employees, and organizational units of the Department." 6 U.S.C. § 112(a).

The authorities of the Director of ICE are set out in a Delegation Order issued by then-Secretary Tom Ridge in 2003. *See* Ex. 4, Delegation of Authority to the Assistant Secretary for U.S. Immigration and Customs Enforcement, Delegation No. 7030.2 (March 1, 2003). As relevant

here, that Delegation Order grants the Director the authority to "enforce and administer the immigration laws . . . with respect to matters within the jurisdiction of ICE," to "exercise prosecutorial discretion in immigration enforcement matters," to "grant stays of removal under 8 C.F.R. 241.6," and to "make determinations in matters within the jurisdiction of the ICE with respect to . . . 'U' nonimmigrants." *Id.* at § 2(H), (N), (W), (BB). It also expressly permits for re-delegation. *Id.* § 4.

Another Delegation Order, issued by then-Secretary Jeh Johnson in December, 2016, delegates authority to officials in a designated order of succession "to exercise the powers and perform the functions and duties" of the Director of ICE; the Deputy Director is first in that line of succession, and is also designated as the Director's "First Assistant" for purposes of the FVRA. Ex. 2, DHS Orders of Succession and Delegations of Authorities for Named Positions, Delegation No. 00106 (Dec. 15, 2016), § 2(d) & Annex M.

Yet another Delegation Order, issued by then-Secretary Ridge in 2004, delegates various powers to the "highest ranking official" in each "organizational element" of DHS (of which ICE is one), including filing documents directly with the Office of the Federal Register, making determinations under the Regulatory Flexibility Act, and overseeing the component agency's budget. Ex. 3, Delegation to Department of Homeland Security Organizational Elements, Delegation No. 0160.1 (March 3, 2004). That Delegation Order defines the "highest ranking official" as "[t]he senior person within each Organizational Element by position, including an official acting in that capacity." *Id.* It also expressly permits re-delegation. *Id.*

There is no question that Defendant Albence, as Deputy Director, was the highest ranking official in ICE on the date the Directive was issued. In that capacity, he had full authority to manage

the agency, including authority to issue guidance to FOD's in the exercise of their delegated authority to grant discretionary stays of removal.

At worst, granting Plaintiffs' premise that the office of Director may not be filled in an acting capacity, the only problem with the Directive was that Defendant Albence signed it as "Acting Director" rather than "Deputy Director." If that could even qualify as an error, it is a paradigmatic example of a harmless one. *See, e.g.*, *State of Conn. v. EPA*, 696 F.2d 147, 162 (2d Cir. 1982) (applying harmless error doctrine to agency action).

CONCLUSION

For the foregoing reasons, Defendants respectfully ask the Court to grant Defendants' motion for summary judgment.

Dated: May 5, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2020, the foregoing Memorandum in Support of Motion for Summary Judgment was filed electronically. Notice of this filing will be sent by e-mail to all

parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing. Parties may access this filing through the Courts system.

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