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

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Defendants' opening brief explained that Plaintiffs have settled on a singularly inapt vehicle for their claims under the Federal Vacancies Reform Act. The Directive at issue in this case concerns a purely discretionary agency function and does not harm Plaintiffs in any way. As a result, they cannot satisfy Article III's standing requirement. And even if Plaintiffs could overcome those hurdles, their challenge plainly fails on the merits of the Federal Vacancies Reform Act, because no statute or regulation requires the Director of ICE, and *only* the Director, to make policies like the Directive. For the same reason, Plaintiffs' attempt to raise an *ultra vires* challenge falls flat.

As discussed below, Plaintiffs' arguments to the contrary are meritless. This Court should grant summary judgment to Defendants.

ARGUMENT

I. THIS COURT LACKS JURISDICTION OVER PLAINTIFFS' CLAIMS

Defendants demonstrated in their opening brief, and Plaintiffs do not dispute, that organizations that sue on their own behalf (rather than raising claims derivatively on behalf of their members, which Plaintiffs disclaim any attempt to do, *see* Pls.' Mem. at 39) are subject to precisely the same requirements of Article III standing as individuals. An organization like Asista or Sanctuary for Families "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). As such, it 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 & 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)).

The "irreducible constitutional minimum of standing contains three elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) 'actual or imminent, not conjectural or hypothetical.'" *Id.* (internal citations and quotation marks omitted). "Second, there must be a causal connection between the injury and the conduct complained of," meaning that the injury must be "'fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court.'" *Id.* (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976) (cleaned up)). "Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressable by a favorable decision." *Id.* at 561 (quoting *Simon*, 426 U.S. at 38, 43).

Remarkably, Plaintiffs contend that this boilerplate recitation of the elements of standing "attempts to revive a long-discarded relic from standing doctrine of decades past." Pls.' Mem. at 44. Plaintiffs accuse Defendants of seeking to impose a "legal right" test that "the Supreme Court long ago rejected," when all they need to show is "injury in fact." *Id.* at 45 (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152 (1970)). But as the Second Circuit confirmed as recently as April, "injury in fact" *means* "an invasion of a *legally protected interest* that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Sonterra Capital Master Fund Ltd. v. UBS AG*, 954 F.3d 529, 534 (2d Cir. 2020) (emphasis added) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016)).

The problem for Plaintiffs is that they cannot show any such "invasion of a legally protected interest." In Plaintiffs' own words, their "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." Pls.' Mem. at 44. According to Plaintiffs, "ICE's new standards therefore hinder Plaintiffs' efforts by forcing them to divert resources in response to those new standards," which they claim is a "cognizable injury." *Id.* In other words, Plaintiffs claim standing because they are diverting resources away from other purposes to avoid the harm of having a client's stay application denied under the Directive: They are "forced" to divert resources from other uses because the allegedly "heightened standards" make the denial of a stay more likely, and their clients "need to seek stays."

That theory of standing produces two problems for Plaintiffs, as Defendants set out in their opening brief. First, denial of a discretionary stay of removal is not itself "an invasion of a legally protected interest" of Plaintiffs or of their clients, because no one has any legally protected right to a stay. Defs.' Mem. at 8. Plaintiffs do not argue to the contrary. Second, Plaintiffs "cannot manufacture standing by incurring costs in anticipation of non-imminent harm." *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 422 (2013). In *Clapper* itself, that included organizational plaintiffs. *Id.* at 406.

Plaintiffs attempt to dismiss *Clapper* by asserting, in a footnote, that their claims are not based on "incurring costs in anticipation of . . . harm." Pls.' Mem. at 43 n.4. But Plaintiffs miss the point of *Clapper*, which is that voluntarily incurred costs are not an injury in fact unless they are incurred in response to a harm that is itself an injury in fact. *Id.* at 416. That is because "[i]f the law were otherwise, an enterprising plaintiff would be able to secure a lower standard for Article III standing simply by making an expenditure." 568 U.S. at 416. In *Clapper*, the harm that the plaintiffs incurred expenses to avoid was not imminent, but it was at least the kind of harm that would satisfy Article III if and when it occurred or became imminent. *Id.* at 410. Here, however,

the harm that Plaintiffs seek to avoid—denial of a stay—*never* amounts to an injury in fact, imminent or not. Of course, that harm is not "imminent," because it is entirely speculative whether any given stay application will be denied. *Id.* at 414 ("We decline to abandon our usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors."). It follows *a fortiori* that Plaintiffs cannot bootstrap their way into Article III standing by voluntarily incurring expenses to avoid that harm.

Plaintiffs make no effort to engage with the Supreme Court's reasoning in *Clapper*. Instead, they rely entirely on *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), and Second Circuit cases quoting that decision. Pls.' Mem. at 39, 45–47. As Defendants explained in their opening brief, however, that decision is perfectly compatible with the Supreme Court's subsequent standing jurisprudence. Defs.' Mem. at 12. *Havens* held that a "concrete and demonstrable injury to [an] organization's activities—with the consequent drain on the organization's resources" that "perceptibly impair[s]" the organization's activities—can establish Article III standing. 455 U.S. at 379. Plaintiffs read that language to create a special form of "injury in fact" unique to organizations that entitles them to create standing at will by voluntarily incurring expenses. Pls.' Mem. at 39, 42. But *Havens* and the cases that follow it are all consistent with *Clapper*'s logic that a voluntarily incurred expense does not count as an injury in fact unless it seeks to avoid a harm that is itself an injury in fact.

As Defendants have already explained, Plaintiffs' version of organizational standing is entirely unmoored from the text of Article III (which makes no special provision for organizations), the express holdings of the Supreme Court's subsequent standing decisions, and the logic underpinning the doctrine. Defs.' Mem. at 8–19. Plaintiffs do not contest any of that reasoning, except to quote cases stating that the diversion of organizational resources and the

impairment of an organization's mission suffice for standing. Pls.' Mem. at 39–43, 45–47. The clearest illustration of Plaintiffs' disregard for any concern with the logic or internal coherence of standing doctrine comes in their insistence—without any analysis—that "litigation expenses" are, by themselves, "sufficient to confer standing." Pls.' Mem. at 42. On that logic, all organizations necessarily have standing in *every* case they bring as plaintiffs; needless to say, such aggressive bootstrapping is plainly irreconcilable with *Clapper*, not to mention *Lujan*, *Warth*, *Simon*, *Sierra Club*, and every other decision holding that an organization lacked standing. *See* Defs.' Mem. at 10–14. If applied equally to individuals as to organizations—as principles of standing must be, *see N.Y. Civil Liberties Union*, 684 F.3d at 294—it would eviscerate the standing requirement entirely, since every litigant can point to some opportunity cost of litigating.

If Second Circuit law truly required such a holding, Plaintiffs' failure to engage with the reasoning behind all standing decisions might not matter. But the cases Plaintiffs cite do not at all require such a sharp departure from basic logic of standing doctrine. *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 895 (2d Cir. 1993), held that an organization had standing when its staff "devoted substantial blocks of time to investigating and attempting to remedy the defendants' [racially discriminatory housing] advertisements." *Ragin*, 6 F.3d at 905. The court held that the fact that "some of the [organization's] staff's time was spent exclusively on litigating this action does not deprive the organization of standing to sue in federal court." *Id.* That holding is a far cry from Plaintiffs' position that standing in a federal lawsuit may be based *solely* on litigation expenses in that very case. *Nnebe v. Daus*, 644 F.3d 147 (2d Cir. 2011) did not hold anything to that effect either; in that case, the court held that the New York Taxi Workers Alliance had standing as a result of its efforts litigating before the New York City Taxi and Limousine Commission. *Nnebe*, 644 F.3d at 157. Even *Mental Disability Law Clinic, Touro Law Center v. Hogan*, 519 Fed.

App'x 714 (2d Cir. 2013), the non-precedential opinion that Plaintiffs cite, did not go so far. That case held that an organizational plaintiff had standing based on its litigation efforts against the New York State Office of Mental Health's practice of automatically filing counter-claims for outstanding charges against patients who sued the Office, and cited *Ragin* to hold that the organization was "not deprived of standing solely because some of the expenses that provide a basis for standing were dedicated to litigating" that very action. *Mental Disability Law Clinic*, 519 Fed. App'x at 717.

Plaintiffs' insistence that any "drain on its resources or perceptible impairment of its missions is sufficient to establish standing," Pls.' Mem. at 45, is similarly incompatible with the basic structure of standing doctrine. If Plaintiffs were correct, organizations would have the unique right, not afforded to individual plaintiffs, to bootstrap their way into standing merely by expending funds in response to a policy they seek to challenge. But the organizations in *Clapper* did not have that right, *see Clapper*, 568 U.S. at 415–16, and nor did the organizational plaintiff in *Havens* itself. As Defendants explained in their opening brief, the organization in that case had a statutory right to truthful information about housing availability. *See* 42 U.S.C. § 3602(d). Because the racially discriminatory housing provider in that case did not provide such truthful information, the organization "had to devote significant resources to identify and counteract the defendant's racially discriminatory steering practices," by hiring "tester plaintiffs." *Havens*, 455 U.S. at 379. Contrary to Plaintiffs' supposition, Defendants do not argue that the Supreme Court expressly relied on that statutory right in holding that the organization had established standing. *See* Pls.' Br. at 45–46. Rather, the point is *Havens* does not require Plaintiffs' version of

organizational standing, in which organizations can spend their way into standing, and that Plaintiffs' position is untenable in light of subsequent Supreme Court precedent.

The same is true for the Second Circuit cases Plaintiffs cite. For example, *Nnebe* expressly held that the Taxi Workers Alliance had standing to raise *its own* due-process rights under 42 U.S.C. § 1983. *Nnebe*, 644 F.3d at 157. Indeed, it could not have raised the due-process rights of its members, because Second Circuit precedent prohibits organizations from doing so. *Id.* at 156. The right the organization sought to vindicate, as the Second Circuit expressly held, was its right to ensure that when it spent resources representing its members "it can spend those resources on hearings that represent bona fide process." *Id.*

So too for the New York Civil Liberties Union, which raised its own First Amendment right, as part of the public, to access hearings before the New York City Transit Adjudication Bureau, which allowed it to prepare to represent clients in such hearings. *NYCLU*, 684 F.3d at 289 (NYCLU brought suit under 42 U.S.C. § 1983 . . . claiming, inter alia, that the policy violated the NYCLU's First Amendment right of access to government proceedings."). Similarly, a non-profit dedicated to organizing day laborers had standing under Section 1983—and thus necessarily in its own right as an organization—to raise a First Amendment challenge to a town ordinance that impaired its ability to reach day laborers. *Centro de la Communidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 107–08 (2d Cir. 2017). Plaintiffs simply mischaracterize those decisions when they claim that they "did not rest on any alleged 'First Amendment rights' of the plaintiff organizations." Pls.' Mem. at 46. As Plaintiffs do not dispute, those cases involved

organizational plaintiffs raising First Amendment claims under Section 1983, which can only be brought in the organization's own right under Second Circuit law.

Defendants' reading of Second Circuit precedent, moreover, makes sense of *Knife Rights, Inc. v. Vance*, 802 F.3d 377 (2d Cir. 2015), a case Plaintiffs all but ignore in which the Second Circuit held that an organization did not have standing to challenge a state policy merely because of its expenditures in opposition to that policy. *Knife Rights*, 802 F.3d at 389.

In sum, Plaintiffs cannot establish standing here because the only harms they have suffered as a result of the Directive are self-incurred. The denial of a stay of removal does not cognizably injury either the Plaintiffs or their clients, and expenses incurred to avoid that harm cannot bootstrap Plaintiffs into Article III standing.

II. PLAINTIFFS LACK A CAUSE OF ACTION

As Defendants explained in their opening brief, the Administrative Procedure Act ("APA") provides the only possible statutory cause of action for Plaintiffs' claims. Defs.' Mem. at 19–20. And here, Plaintiffs can make no valid claim under the APA because there is no final agency action. Plaintiffs object in a footnote, but they conspicuously fail to cite any other statutory basis for this case. Pls.' Mem. at 47 n.5. The only other cause of action Plaintiffs cite is their non-statutory *ultra vires* claim. Neither option gives Plaintiffs basis for this suit.

A. Plaintiffs May Not Assert an *Ultra Vires* Claim

Plaintiffs attempt to invoke this Court's general equitable power to enjoin unlawful action by federal officials. Pls.' Mem. at 36–38. As Defendants explained in their opening brief, *ultra vires* review depends on showing a patent, rather than merely arguable, violation of statutory authority. Defs.' Mem. at 20. Plaintiffs contend that that "heightened standard" applies only "when a statute affirmatively *precludes* judicial review." Pls.' Mem. at 37–38. That is incorrect. Congress

controls the jurisdiction of the lower federal courts, and the effect of a statute that "affirmatively *precludes* judicial review" is to *preclude judicial review*, rather than to permit it subject to a higher standard. *See* U.S. Const. art. III, § 1; *accord, e.g.*, *United States v. Hudson*, 7 Cranch 32, 33 (1812) ("the power which congress possesses to create Courts of inferior jurisdiction, necessarily implies the power to limit the jurisdiction of those Courts to particular objects."); *Patchak v. Zinke*, 138 S. Ct. 897, 906–07 (2018) (unless it violates another Constitutional provision or impermissibly attempts to direct the result of a specific case, "Congress generally does not violate Article III when it strips federal jurisdiction over a class of cases."). The Supreme Court has thus held that *ultra vires* review was not available in the face of "clear and convincing evidence that Congress intended to deny the District Court jurisdiction" over the challenged agency action. *Board of Govs. of Fed. Reserve Sys. v. McCorp Financial, Inc.*, 502 U.S. 32, 44 (1991).

The availability of *ultra vires* review of agency action in the face of an apparently applicable preclusion statute, recognized in *Leedom v. Kyne*, 358 U.S. 184 (1958), turned on the Supreme Court's recognition that it "cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers," particularly when precluding review would leave "no other means . . . to protect and enforce that right." *Leedom*, 358 U.S. at 185. In other words, absent a clear statement to the contrary, courts must presume that Congress intended to allow judicial review of unauthorized government actions. But as the Court has since confirmed, that narrow basis for jurisdiction does not amount to a wholesale authorization of "judicial review of any agency action that is alleged to have exceeded

the agency's statutory authority," regardless of Congress's efforts to preclude review. *McCorp*, 502 U.S. at 44.

Contrary to Plaintiffs' assumption, a necessary condition of *ultra vires* review is thus that no statutory barrier affirmatively precludes review. Courts have consistently considered *ultra vires* claims after expressly holding that no statute bars review. *See, e.g.*, *Am. Clinical Lab. Ass'n v. Azar*, 931 F.3d 1195, 1208 (D.C. Cir. 2019) ("Although we hold that the statute itself does not bar review, we nonetheless consider ACLA's *ultra vires* argument . . ."). Indeed, many of the cases Plaintiffs cite are explicit that no statutory barrier to review applied. *See, e.g.*, *Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1173 (D.C. Cir. 2003) (holding that the APA "does not repeal the review of *ultra vires* actions" (internal citation and quotation marks omitted); *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) (same). The point of *ultra vires* review is that it provides a non-statutory cause of action even in the absence of an affirmative authorization, not that it overrides a sufficiently clear statutory preclusion of review. *See, e.g.*, *Reich*, 74 F.3d at 1327.

But that non-statutory cause of action "is intended to be of extremely limited scope." *Griffith v. Federal Labor Relations Authority*, 842 F.2d 487, 493 (D.C. Cir. 1988). For an *ultra vires* claim to succeed, the agency "must have stepped so plainly beyond the bounds of the [relevant statute], or acted so clearly in defiance of it, as to warrant the immediate intervention of an equity court." *Local 130, IUERMW v. McCulloch*, 345 F.2s 90, 95 (D.C. Cir. 1965). In other words, a plaintiff raising such a claim "must show a 'patent violation of agency authority.'" *Am.*

Clinicl Lab. Ass'n, 931 F.3d at 1208 (quoting *Indep. Cosmetic Mfrs. & Distribs., Inc. v. U.S. Dep't of Health, Educ. & Welfare*, 574 F.2d 553, 555 (D.C. Cir. 1978)).

None of the cases Plaintiffs cite are to the contrary. *Armstrong v. Exceptional Child Center*, 575 U.S. 320, 327 (2015), for example, recognized the general "power of federal courts of equity to enjoin unlawful executive action," but held that Congress had precluded such equitable review under the statute at issue in that case. 575 U.S. at 328. Likewise, *Harmon v. Brucker*, 355 U.S. 579 (1958), exercised that equitable power to overturn an agency action that the Solicitor General conceded was "not sustainable" on the merits. 355 U.S. at 582. And *Federal Defenders of N.Y., Inc. v. Federal Bureau of Prisons*, 954 F.3d 118, 132–134 (2d Cir. 2020), merely recognized that "the precise scope and contours of the court's equitable powers of this nature are ill-defined," including the question of "whether the APA in any way displaces suits in equity," and did not attempt to exercise that power or provide any specific guidance for the district court on remand. 954 F.3d at 134.

However ill-defined the contours of this Court's equitable powers may be, the relevant precedents are perfectly clear that an *ultra vires* cause of action requires a showing that the agency action was patently, not just arguably, illegal. Plaintiffs have pointed to no authority applying a lower standard to an *ultra vires* claim, and they do not even attempt to argue that their FVRA claims demonstrate the requisite "patent" violation. Plaintiffs thus may not rely on non-statutory review.

B. The Directive Is Not Final Agency Action

The APA provides a cause of action to challenge final agency actions. *See* 5 U.S.C. § 704. The Directive, as Defendants explained in their opening brief, is not a final agency action within the meaning of the APA, because it has no direct legal effects, determines no rights or obligations,

and produces no legal consequences. Defs.' Mem. at 20–21 (quoting *Salazar v. King*, 822 F.3d 61, 82 (2d Cir. 2016).[1]

Plaintiffs start off on the wrong foot by arguing that the Directive is an agency "action" for APA purposes, which Defendants have never denied. Pls.' Mem. at 47 (citing 5 U.S.C. § 551(4)). They likewise misfire when they attack "the novel proposition," which Defendants have never asserted, that only "'the final decision on any particular [individual's] application' for relief from a government agency" qualifies as final agency action. *Id.* at 48 (quoting Defs' Mem. at 21). Defendants' argument, instead, is that the particular Directive at issue in this case produces no legal consequences for anyone, does not directly affect any parties, and does not determine any rights or obligations. Defs.' Mem. at 21. Moreover, this particular Directive does not grant any petitioner the right to remain in the United States, or finally determine any petitioner's obligation to comply with a final order of removal. Those "rights or obligations" are instead determined for each individual petitioner in the decision on their individual stay application.

Nor does the Directive change the criteria for granting or denying a stay. As Defendants explained in their opening brief, under both the Directive and the previous guidance it replaced, the decision to grant a stay of removal is discretionary and requires consideration of the favorable as well as adverse factors present in a given application. *See* Defs.' Mem. at 21–22. Neither policy

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[1] In light of the Supreme Court's decision in *Department of Homeland Security v. Regents of Univ. of Cal.*, --- S. Ct. ---, 2020 WL 3271746 (June 18, 2020), at *8–9, Defendants withdraw their argument that this case falls under the APA's exemption for actions committed to agency discretion by law or 8 U.S.C. § 1252(g)'s jurisdictional bar.

ever created any right for any individual to receive a stay or offered any basis for an applicant to "depend upon" receiving one. *Id.* Plaintiffs notably fail to contest that the texts of the two policies provide materially indistinguishable substantive standards for determining stay requests. In particular, nothing in the previous guidance guaranteed a stay to an applicant who presented no adverse factors or prevented a Field Office Director from exercising her discretion to deny a stay to such an applicant. Plaintiffs point to nothing in the text of the previous guidance that "virtually guaranteed" a stay to an applicant with "no serious adverse factors." Pls.' Mem. at 48.

The cases Plaintiffs cite as examples of finality, in contrast, all involved agency actions that had direct legal consequences for the plaintiffs challenging them. In *Salazar v. King*, 822 F.3d 61, 82 (2d Cir. 2016), for example, the Second Circuit considered a decision by the Department of Education not to suspend the collection of student loan payments from a putative class of borrowers; the agency did not contest that its decision on the matter was final. *Salazar*, 822 F.3d at 82. The court concluded that "legal consequences flow" from that decision, for the obvious reason that the plaintiffs in that case were obliged to make payments that they would not have had to make if the decision had been otherwise. *Id.* In this case, in contrast, an individual applying for a stay of removal is in precisely the same legal position after the Directive as before; any change in the applicant's rights or obligations occurs only when there is a decision on that individual's particular application.

Likewise, in *Sharkey v. Quarantillo*, 541 F.3d 75, 89 (2d Cir. 2008), the plaintiff alleged that the Immigration and Naturalization Service crossed out a stamp in her passport that provided "Temporary Evidence of Lawful Admission for Permanent Residence" and wrote "cancelled with prejudice" over the seal. *Sharkey*, 541 F.3d at 79–80. That decision "clearly constituted final

agency action" because it revoked the plaintiff's status as a lawful permanent resident. *Id.* at 89. The Directive, in contrast, has no direct effect on any individual's immigration status.

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), meanwhile, involved a Food and Drug Administration final rule governing prescription drug labeling. *Abbott Labs.*, 387 U.S. at 138. That case stands for the uncontroversial proposition that an individual whose legal rights or obligations are determined by an agency regulation may seek judicial review without needing to wait for an enforcement action under the regulation. *Id.* at 152–153. And *Sackett v. EPA*, 566 U.S. 120, 126 (2012), involved a "compliance order" that imposed a "legal obligation to 'restore' their property" on the plaintiffs, required them to "give EPA access to their property," exposed them to "double penalties in a future enforcement proceeding," and "severely limited [their] ability to obtain a permit." *Sackett*, 566 U.S. at 126.

Plaintiffs point to no precedent holding that a change in internal agency procedures from one articulation of an all-things-considered discretionary standard to another determines "rights or obligations" or produces "legal consequences." All that remains of their argument is thus their apparent contention that the Directive *in practice* changed the substantive standard for stay applications from "virtually guaranteed" in the absence of "serious adverse factors" to "a totality-of-the-circumstances standard." *See* Pls.' Mem. at 48. But Plaintiffs do not cite *any* evidence for that contention, instead providing only speculation that "some people who would have received a stay under the old policy will be denied one under the new policy." *Id.* In the more than nine months between the issuance of the Directive and Plaintiffs' brief in this case, Plaintiffs have identified a single case in which they claim the Directive has made a difference, which they discuss in a declaration and do not mention in their brief. *See* Dkt. 44-3 at 9–10, Pendleton Decl. ¶¶ 30–32. In that case, the U-visa applicant "had no criminal history and no history of immigration fraud,"

and Asista claims that in its "expert experience," "USCIS would have swiftly and easily found her *prima facie* eligible." *Id.* at 9, ¶ 30. According to Asista's declarant, ICE denied the stay application, determining that there was "no compelling reason to warrant a favorable exercise of discretion" in light of "ICE's mission, current ICE policies and enforcement priorities." *Id.*, ¶ 31.

That anecdote, however, is far from sufficient to establish Plaintiffs' factual claims about the effect of the Directive. To begin with, the declaration does not attempt to claim that the *stay application* would have been granted under the previous guidance; it claims only that USCIS would have returned a favorable "*prima facie* determination." But as Plaintiffs themselves point out in their Statement of Facts, ICE has described the *prima facie* determination under the previous guidance as "a simple confirmation that the petition was filed correctly and . . . not a substantive review of the petition." Dkt. 44-1 at 5, ¶ 21. And a positive *prima facie* determination did not necessarily entail a successful stay application; the previous guidance provided that a FOD should "view a Stay request favorably" if USCIS determined that the applicant had established *prima facie* eligibility and there were no adverse factors present. Venturella Memo, Dkt. 40-7. Even then, the previous guidance expressly instructed the FOD to "use his or her discretion in making a determination" of whether to grant a stay of removal. *Id.* Nor, in light of the Complaint's concession that "habeas and mandamus petitions" were "occasionally necessary in the years before" the Directive for applicants who were denied a stay, Dkt. 34 at 18–19, Compl. ¶ 63, can Plaintiffs show that that particular applicant would have received a stay under the previous guidance. Given the discretionary nature of the stay decision both before and since the Directive, it is doubtful that *any* individual case could demonstrate the change in substantive standards that Plaintiffs assert. But Plaintiffs do not offer any facts about any other cases to help bolster their claim, or to attempt to show that approval rates for stay applications have changed since the

Directive. Plaintiffs instead provide facts showing only that they have put in more work preparing applications, and preparing for the possible consequences of a denial, but in the absence of any evidence from the text of the Directive or its actual application in practice, they cannot show that it has changed the substantive standards for granting a stay of removal. The Directive thus has no impact on the rights or obligations of any party, produces no direct effects on anyone, and produces no legal consequences. It is not a final agency action, and this Court lacks statutory jurisdiction over Plaintiffs' challenge.

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

As Defendants explained in their opening brief, the Federal Vacancies Reform Act ("FVRA") limits the ability of invalidly serving acting officials to perform certain "functions and duties" of offices requiring Presidential appointment and Senate confirmation (commonly known as "PAS" offices). 5 U.S.C. §§ 3345 *et seq.*; Pls.' Mem. at 26–29. Those limits, however, apply only to "any function or duty of the applicable office" that is "required by statute" or regulation "to be performed by the applicable officer (and *only* that officer)." 5 U.S.C. § 3348(a) (emphasis added). Setting policy for granting stays of removal to U-visa petitioners does not fit that description, because there is no statute or regulation requiring the Director of ICE, and *only* the Director, to set such policies. Instead, as the validly serving Deputy Director, Albence had full authority to issue the Directive, both as an exercise of the Secretary of Homeland Security's delegated rulemaking power and as an exercise of the ICE Director's policymaking power. Because of those delegations, the only potential defect in the Directive was the use of the wrong signature block, which Plaintiffs do not dispute was harmless error at worst. *See* Defs.' Mem. at 29.

A. Setting Policy Is Not An Exclusive "Function Or Duty" Of The ICE Director Under 5 U.S.C. § 3348

Plaintiffs argue that setting policy for ICE is an exclusive function of the Director that no one else can perform, because the DHS organic statute provides that the Director "shall establish the policies for performing" ICE's functions, and does not expressly "authorize any other official" to do so. Pls.' Mem. at 22. That argument is astonishingly broad, and, if generally accepted, would eviscerate the operations of the federal government. It is also wrong. Assigning a role to a given office by statute, without any further restriction, has never been understood to mean that only that officer and no one else may carry out that role. And with good reason: Requiring express authorization to delegate functions to subordinates would fly in the face of decades of consistent agency practice across the government, in which major and minor policymaking responsibilities are delegated to senior officials and the thousands of employees required to maintain operations.

1.The Director's policymaking authority is not exclusive

The statute establishing the office of ICE Director provides that the Director "shall establish the policies for performing such functions" as are "vested in the [Director] by law." 6 U.S.C. § 252(a)(3). It does not say that *only* the Director may set policy. And as Plaintiffs concede, it does not say anything at all about granting stays of removal; that power, instead, comes from a delegation of authority from the Secretary of Homeland Security. *See* Dkt. 40-6, DHS Delegation No. 7030.2. Nothing in the DHS enabling statute makes setting policy for granting stays of removal an exclusive power of the Director, or prohibits any other official from setting policy. The FVRA thus poses no barrier to Albence's exercise of that authority, because it is not "required by statute" or regulation "to be performed by the applicable officer (and only that officer)." 5 U.S.C. § 3348(a). Plaintiffs attempt to sidestep this difficulty by interpreting Section 3348 to apply

broadly to any "function or duty" that "is assigned to one particular office." Pls.' Mem. at 22 (quoting *L.M.-M. v. Cuccinelli*, --- F. Supp. 3d ---, 2020 WL 985376, at *21 (D.D.C. March 1, 2020)). On Plaintiffs' reading of Section 3348, it is enough that the relevant statute or regulation does not expressly "authorize any other official" to carry out the function or duty at issue—regardless of whether the statute or regulation *forbids* any other official from doing so.

To begin with, that interpretation is contrary to the plain language of Section 3348. The relevant question, as Plaintiffs appear to agree, is whether "only the Director" may carry out the function or duty at issue. Pls.' Mem. at 20. In other words, if another official could carry out the function or duty without violating the statute or regulation, it is not a "function or duty" within the meaning of Section 3348. So, Plaintiffs' theory would make sense only if assigning a function or duty to one particular office necessarily implied that no other office could carry it out. In fact, however, the opposite is the case: "When a statute delegates authority to a federal officer or agency, subdelegation to a subordinate federal officer or agency is presumptively permissible absent affirmative evidence of contrary congressional intent." *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004); *see also, e.g.*, *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 121 (1947) ("rule-making power may itself be an adequate source of authority to delegate a particular function"—including issuing subpoenas—"unless by express provision of the Act or by implication it has been withheld."). The circuit courts "that have spoken on this issue are unanimous in permitting subdelegation to subordinates, even where the enabling statute is silent, so long as the enabling statute and its legislative history do not indicate a prohibition on subdelegation." *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1190 (10th Cir. 2014) (collecting cases). If any doubt remained, moreover, the DHS enabling statute expressly provides that "[u]nless otherwise provided in the delegation or by law, any function delegated under this

chapter"—which includes the provision establishing the duties of the ICE Director—"may be redelegated to any subordinate." 6 U.S.C. § 455(c).

That reading of the DHS enabling statute also fits with consistent agency practice of policymaking by officials below the level of Director, both under the old Immigration and Naturalization Service ("INS") before the creation of DHS in 2002, and under ICE since then. For example, the INS's Executive Associate Commissioner for the Office of Field Operations issued memoranda setting policy for the level of parole authorization required for detained aliens, as well as for the release from detention of an alien on an order of recognizance. *See* Exs. 1, 2. Since the creation of DHS, both the Acting Director of ICE and the Director of the Office of Detention and Removal have issued updates, carrying equal weight, to the "Detention and Deportation Officer's Field Manual." *See* Exs. 3, 4. And the Acting Director of the Office of Detention and Removal Operations has issued a policy memorandum superseding, in part, an early memo from the Acting Director of ICE. *See* Ex. 5. The "policies and procedures" section of the "FOIA Library" on ICE's website contains at least twenty six documents issued by officials other than the Director.[2] In light of that consistent agency practice, it is implausible that Congress intended—without ever saying so directly—to restrict policymaking authority solely to the Director of ICE.

Moreover, if Plaintiffs were correct that Congress makes a given function exclusive merely by specifying one particular office that may carry out that function, without more, then their case would fall apart for a different reason. Congress provided that "the Secretary of Homeland Security" may grant "an administrative stay of a final order of removal" to a U-visa petitioner who

[2] *See* https://www.ice.gov/foia/library (last visited June 22, 2020).

"sets forth a prima facie case for approval." 8 U.S.C. § 1227(d)(1). The statute says nothing about any other official granting such stays. On Plaintiffs' apparent logic, therefore, only the Secretary of Homeland Security *personally* may grant stays of removal to their clients. In which case, an internal ICE policy setting out the procedure for an action that no one at ICE has the power to take could have no possible relevance to any concrete interest of Plaintiffs or their clients.

Plaintiffs do not discuss the general presumption of delegability, but they do argue that when a statute provides that an officer "shall" perform a certain function or duty, that "mandatory language" means that the officer "may not delegate to lower officials his responsibility" to carry out that function or duty. Pls.' Mem. at 24, 27. But that distinction is to no avail. To begin with, Section 252 on its face does not treat the word "shall" as creating a mandatory and exclusive duty. In the provision immediately following the grant of policymaking authority, it provides that the Director "shall oversee the administration of such policies." 6 U.S.C. § 252(a)(3)(B). On Plaintiffs' logic, that provision would require the Director—and no one else—to exercise all managerial responsibility over all of ICE's functions. Of course, that would be absurd: "it is impossible for a single individual to perform in person all the duties imposed on him by office." *Parish v. United States*, 100 U.S. 500, 504 (1879). It is thus hardly surprising that Section 252 expressly contemplates that ICE "employees" other than the Director will have "supervisory and managerial responsibility." 6 U.S.C. § 252(a)(5).

Indeed, the only authority Plaintiffs cite for that contention—that the word "shall" makes a duty exclusive—holds the opposite. In *Schaghticoke Tribal Nation v. Kempthorne*, this Court held that a regulation providing that the Assistant Secretary–Indian Affairs within the Department of the Interior "shall" make acknowledgement determinations for Indian tribes did *not* mean that that function was exclusive to the Assistant Secretary for purposes of Section 3348. 587 F. Supp.

2d 389, 420–21 (D. Conn. 2008). That is hardly surprising, because reading the word "shall" to prevent subdelegation within an agency would wreak havoc throughout the federal government. For example, the Medicare statute provides that the Secretary of Health and Human Services "shall promulgate regulations" on a range of topics. *See*, *e.g.*, 42 U.S.C. §§ 1395ff(a)(1), 1395hh(a)(1). The Secretary "in turn has delegated that authority to" the Centers for Medicare and Medicaid Services ("CMS"), which the Second Circuit has held "clearly" authorizes CMS to make regulations carrying the force of law. *Estate of Landers v. Leavitt*, 545 F.3d 98, 105 (2d Cir. 2008). Likewise, Congress has provided that the Director of the Patent and Trademark Office "shall" perform various functions, such as issuing patents, notifying the applicant of the rejection of a patent application, and reissuing amended patents, 35 U.S.C. §§ 131, 132(a), 251(a), but "Congress obviously assumed that the Director would delegate" those duties to subordinates. *Ethicon Endo-Surgery, Inc. v. Covidien LP*, 812 F.3d 1023, 1032 (Fed. Cir. 2016). Treating every use of the term "shall" in the United States Code as an exclusive mandate to the officer in question would risk grinding the government to a halt.

Plaintiffs' argument that "[u]nder 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" is thus plainly wrong. Pls.' Mem. at 20 (emphasis added). The Director's authority to issue stays of removal for U-visa petitioners comes from a delegation order that, as Plaintiffs concede, Pls.' Mem. at 26–27, expressly permits redelegation. *See* Dkt. 40-6, DHS Delegation No. 7030.2. Likewise, the Director's authority to "establish the policies for performing" ICE's functions is also delegable, because nothing in the statute—including the word "shall"—overcomes the presumption of delegability and the express statutory authorization for redelegation. Indeed, as Defendants established in their opening brief, *see* Defs.' Mem. at 28, and as Plaintiffs

do not contest, that authority has been delegated to the Deputy Director during vacancies in the office of Director. *See* Dkt. 40-4, DHS Orders of Succession and Delegations of Authorities for Named Positions, Delegation No. 00106. Plaintiffs' only answer is to point out that the delegation order also designates the Deputy Director as "First Assistant" for FVRA purposes, and that the First Assistant may not carry out any "function or duty" of the vacant office under Section 3348 after the Act's time limits have expired. Pls.' Mem. at 27. That argument is beside the point, however, because policymaking is not an exclusive "function or duty" within the meaning of Section 3348. Nor does the delegation order purport to delegate only "functions or duties" that fall under Section 3348; to the contrary, it expressly delegates "all the powers, duties, authorities, rights, and functions" *as well as* "any function or duty required by law to be performed exclusively by the office holder," except to acting officials who are not "First Assistants," who may not carry out exclusive functions or duties. Dkt. 40-4, Delegation No. 00106, § 2(e) & Annex M.

Plaintiffs insist, citing *L.M.-M.*, that Section 3348 does not include "only 'non-delegable duties,'" or in other words, that it *does* include delegable duties. Pls.' Mem. at 23 (quoting *L.M.-M.*, 2020 WL 985376, at *20). That case, however, turned on anti-circumvention reasoning that does not apply here. As the court in *L.M.-M.* understood it, the purported acting official in that case could not qualify as a "first assistant" because "[h]e never did and never will serve in a subordinate role," and the office he occupied "never has served and never will serve 'in a subordinate capacity' to any other official." *L.M.-M.*, 2020 WL 985376, at *15, *16. The office of "Principal Deputy Director" was created after the vacancy in the office of Director arose, and it "displaced" the serving Deputy Director in USCIS's order of succession. *Id.* at *4. Here, in contrast, the office of Deputy Director has always been subordinate to the office of Director, and the order of succession delegating power to that office during a vacancy in the office of Director

predates the current vacancy (and, indeed, the current administration). *See* Dkt. 40-4, DHS Orders of Succession, Delegation No. 00106. This case thus does not present the concerns with potential abuse of the Secretary's vesting-and-delegation authority that concerned the court in *L.M.-M.*

In sum, nothing in the relevant statutes or regulations prevents the delegation of the Director's policymaking authority over issuing stays of removal to U-visa applicants. There is thus no requirement that "only that officer" may perform that policymaking function, and therefore no barrier to the Deputy Director doing so when the office of Director is vacant. 5 U.S.C. § 3348(a).

2. The Deputy Director was also authorized to exercise the Secretary's delegated rulemaking power in issuing the Directive

As Defendants established in their opening brief, Albence has full authority as Deputy Director and "highest ranking official" to manage ICE during a vacancy in the office of Director, under a 2004 delegation order from the Secretary of Homeland Security. Defs.' Mem. at 28. The Secretary, as "the head of the Department," has full "direction, authority, and control over it." 6 U.S.C. § 112(a)(2). That power necessarily includes policymaking authority. The Secretary has delegated portions of that authority—including the power to publish regulations—to the "highest ranking official" in each "organizational element" in DHS, including ICE. Dkt. 40-5, Delegation to Department of Homeland Security Organizational Elements, Delegation No. 0160.1 (March 3, 2004). As Deputy Director, Albence was and remains the "highest ranking official" in ICE. *See* Dkt. 40-4, DHS Order of Succession. In that capacity, he had full power to issue the Directive as an exercise of the Secretary's—rather than the Director's—delegated rulemaking authority.

Nothing in the FVRA or any other statute divests the Deputy Director of this longstanding authority.

Plaintiffs nevertheless argue that Defendants may not rely on the Secretary's delegated rulemaking authority under Section 112, rather than the Director's authority to set policy under Section 252. Plaintiffs offer two reasons for their position, neither of which is persuasive. First, they claim that the specific policymaking authorization in Section 252 takes precedence over the vesting and delegation clauses in Section 112, on the principle that "the specific governs the general." *Id.* at 23–24 (quoting *NLRB v. SW General, Inc.*, 137 S. Ct. 929, 941 (2017)). That argument presumes that the only source of the Secretary's rulemaking authority over ICE is the provision vesting "[a]ll function of all officers," including the Director's policymaking function under Section 252, in the Secretary. *See* 6 U.S.C. § 112(a)(3). But Plaintiffs ignore the Secretary's own independent authority as "head of the Department" with "direction, authority, and control over it," irrespective of the vesting clause. *Id.* § 112(a)(2) In any case, the principle that the specific governs the general only applies when the provisions in question are in conflict. *See Nitro-Lift Technologies, LLC v. Howard*, 568 U.S. 17, 21–22 (2012). There is no facial conflict in vesting policymaking authority in both the Secretary and the Director, and thus no need for either provision to yield to the other. Plaintiffs' position, however, would create a conflict, because their "specific governs the general" logic would remove *all* functions described with more specificity than the bare term "function" from the scope of the vesting and delegation clauses. In other words, contrary to the statutory language vesting "all" functions in the Secretary, there would be *no* functions to which that clause would apply. Plaintiffs attempt to bolster their argument by pointing to out that the Secretary's delegation authority is limited when "otherwise provided by this chapter." 6 U.S.C. § 112(b)(1). The most natural reading of that restriction, however, is that it applies to provisions

such as 6 U.S.C. § 624(c)(2), which provides that "[t]he Secretary may not delegate" certain authority to make emergency orders "to any official other than the Director of Cybersecurity and Infrastructure Security." Indeed, reading Section 252 to implicitly limit the Secretary's power to delegate under Section 112 would create a "specific-governs-the-general" problem of its own: Section 112(b)(1) specifically permits delegation, whereas Section 252 is silent on the matter. Plaintiffs are thus plainly wrong that anything in the DHS enabling statute divests the Secretary of rulemaking authority over the Department or any of its components, including ICE, or of the right to delegate that authority, as Secretary Ridge did in 2004, to the "highest ranking official" in ICE, namely, Deputy Director Albence. *See* Dkt. 40-5, Delegation No. 0160.1.

Second, Plaintiffs invoke general concerns about the statutory purpose of the FVRA, which they claim is "to prevent agencies from using their vesting-and-delegation provisions to circumvent the requirements of the Vacancies Act and Appointments Clause." Pls.' Mem. at 24. Whatever the merits of that anti-circumvention rationale may be in a case that presents the issue, it plainly has no application here. Plaintiffs cannot possibly argue that a delegation made in 2004 constitutes an attempt to end-run a restriction that did not arise until more than fifteen years after the delegation was made. Plaintiffs claim that Section 3347 "forecloses" the possibility of the Deputy Director exercising the Secretary's delegated authority during a vacancy in the office of Director, because it provides that vesting-and-delegation provisions like the one in Section 112 do not provide an alternative to the FVRA to authorize service in an acting capacity. *Id.* at 25. But that argument merely begs the question. Defendants do not argue that the Secretary somehow

authorized Albence to serve as Acting Director, but rather that Albence had the authority to issue the Directive *as Deputy Director*.

In any case, Plaintiffs' argument gets the text of the FVRA exactly backwards. Section 3348 applies to sub-cabinet officials *only if* there is no "statutory provision [that] expressly prohibits the head of the Executive agency from performing the functions and duties of such office," 5 U.S.C. § 3348(e)(5), and it expressly contemplates "the head of such Executive agency" performing "any function or duty of such office" while the office is vacant, *id.* § 3348(b)(2). In other words, if Plaintiffs were correct that Section 252 prohibited the Secretary of DHS from making policy for ICE, then Section 3348 would not apply to this case on its own terms.

3. Albence is validly serving as Deputy Director

According to Plaintiffs, Albence *might* not be validly serving as Deputy Director because it is "far from clear" that Ronald Vitiello validly served as Acting Director before him. Pls.' Mem. at 28. That argument, however, appears nowhere in the Amended Complaint, *see generally* Dkt. 34, Am. Compl., and is thus not properly before this Court, *see, e.g.*, *Redd v. Wright*, 597 F.3d 532, 539 (2d Cir. 2010) (claim "was not properly before the district court" when it appeared "[n]owhere in the complaint"). Plaintiffs cannot raise it for the first time in their summary judgment briefing. *See, e.g. Wright v. Ernst & Young LLP*, 152 F.3d 169, 178 (2d Cir. 1998) ("a party is not entitled to amend its complaint through statements made in motion papers"). Even if Plaintiffs *could* raise that argument at this stage in the litigation, moreover, they have chosen not to do so. By consciously failing to argue that Vitiello's service *was* unauthorized by Section 3345(a)(1), and instead claiming only that it "*appears* unauthorized," Pls. Mem. at 29 (emphasis added), Plaintiffs have waived that argument. *See Corporacion Mexicana De Mantenimiento Integral v. Pemex-Exploracion y Produccion*, 832 F. 3d 92, 101 n.2 (2d Cir. 2016) ("The term

'waiver'" applies to "a litigant's intentional relinquishment of a known right." (internal citation and quotation marks omitted)).

Considering Plaintiffs' gesture toward a challenge to Vitiello's service would be particularly inappropriate because it would require this Court to resolve a question of first impression without proper briefing. Specifically, Plaintiffs attempt to shoehorn Vitiello's service into the entirely different fact-pattern in *L.M.-M.*, claiming that he could not serve as "First Assistant" because his service began after the vacancy arose. Pls.' Mem. at 29. But as *L.M.-M.* noted, whether "the first-assistant default rule applies only to individuals serving as first assistants at the time the vacancy arises" is "a difficult question that the Office of Legal Counsel has answered differently at different times . . . and that the courts have not had the occasion to resolve." *L.M.-M.*, 2020 WL 985376, at *15; *see also SW General, Inc. v. NLRB*, 796 F.3d 67, 76 (D.C. Cir. 2015) (noting that "subsection (a)(1) may refer to the person who is serving as first assistant *when the vacancy occurs*" but "we do not decide its meaning today."). In *L.M.-M.*, the court had no need to resolve that question because it held that the *office* of "Principal Deputy Director," which came into existence only after the vacancy in the office of Director of U.S. Citizenship and Immigration Services and would cease to be the First Assistant as soon as a new Director was appointed, had never been and never would be subordinate to the *office* of Director. *Id.* at *15–16. (citing 5 U.S.C. § 3345(a)). That arrangement has no analogue here: the office of Deputy Director was subordinate to the office of Director before the vacancy arose, and nothing in the current regulations stands to change that at any point in the future. *See* Delegation No. 00106 (Dec. 15, 2016). This case thus would present the issue left unresolved in *SW General* and *L.M.-M.* of whether a First Assistant

appointed post-vacancy may validly serve under Section 3345(a)(1)—if Plaintiffs had chosen to make that argument. But they did not.

B. No Other Provision Of The FVRA Invalidates The Directive

Plaintiffs maintain that even if policymaking is not a "function or duty" of the ICE Director for purposes of Section 3348, they are still entitled to relief because, they claim, the Directive violates Sections 3345, 3346, and 3347 of the FVRA, making it subject to invalidation under the APA. Pls.' Mem. at 31–32. That argument is meritless.

Plaintiffs point out that the Section 3348's definition of "function or duty" by its own terms applies only to that section. *See* 5 U.S.C. § 3348(a). They therefore surmise that "the action can be illegal . . . even if it is not an action that is exclusively assigned to the vacant office." Pls.' Mem. at 31. But Plaintiffs conspicuously fail to offer any reason to believe that the Directive actually *is* illegal under any other provision of the FVRA, or to provide any definition of "function or duty" that would bring the Directive within the scope of Section 3345, 3346, or 3347 but *not* 3348. The only possible such definition, however, is "actions that are not exclusively assigned to the vacant office"—in other words, actions that a validly serving Director or Acting Director could take, but that other officials can also take. Treating such actions as "voidable" under the APA may make sense in a case in which the official's *only* basis for taking the action in question is service in an acting capacity. *Cf, e.g.*, *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 12 (D.C. Cir. 2019) (noting that the Senate-confirmed Attorney General validly ratified a challenged action of the Acting Attorney General who served before his confirmation). But as explained above, Albence had full authority to issue the Directive as Acting Director. So Plaintiffs must intend their definition of "function or duty" for purposes of Sections 3345, 3346, and 3347 to cover actions which the official in question had the power to take, but that the Director could

also take. Even a moment's reflection reveals that such a definition would create chaos: *every* action taken by any ICE officer or employee (except, perhaps, the Chief of Policy and Strategy and the Principal Legal Advisor, some of whose functions are provided by statute, *see* 6 U.S.C. §§ 252(b), (c)) would become subject to invalidation under the APA. Likewise, any vacancy at the head of a department would render *every* action taken by *every* officer or employee of that department illegal, given, as Plaintiffs insist, *see* Pls.' Mem. at 24, that *every* cabinet-level department has a vesting-and-delegation statute that empowers the department head to carry out all of the department's functions.

The authorities Plaintiffs cite do not remotely support such an extravagant overreach. In *SW General*, the D.C. Circuit considered an action that all parties agreed was a "function or duty" of the General Counsel of the National Labor Relations Board; the *only* reason the court considered that Section 3348 did not apply was that provision's express exemption for the NLRB's General Counsel. 796 F.3d 67, 78 (D.C. Cir. 2015) (quoting 5 U.S.C. § 3348(e)(1)); *see also Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 564 (9th Cir. 2016). Because the NLRB did not argue that Section 3348's exemption "could be understood more broadly to wholly insulate the Acting General Counsel's actions even in the event of an FVRA violation," the court "assume[d]" that "the actions of an improperly serving Acting General Counsel [are] *voidable*, not void." *SW General*, 796 F.3d at 79. The court thus had no occasion to consider whether the term "function or duty" could plausibly have a different meaning in the rest of the FVRA than its definition in Section 3348. Likewise, *L.M.-M.* did not consider any argument that issuing the policy in question

in that case was not a "function or duty" of the vacant office under *any* provision of the FVRA, not just Section 3348. *See L.M.-M.*, 2020 WL 985376, at *23–24.

In any case, even if issuing the Directive did qualify as a "function or duty" under Sections 3345, 3346, and 3347, and was "voidable" under the APA, the doctrine of harmless error would apply. *See* 5 U.S.C. § 706 (in reviewing agency action, "due account shall be taken of the role of harmless error"); *S.W. General*, 796 F.3d at 79 (analyzing "voidable, not void" action under the FVRA for harmless error). To prevail on this argument, Plaintiffs thus would still need to show that Albence could not have issued the Directive in his capacity as Deputy Director. For the reasons discussed above, they cannot do so.

There is thus no question that Albence is validly serving as Deputy Director. Although the FVRA's time limits prevented Albence from serving as Acting Director after August 1, 2019, nothing in the FVRA limits his authority as Deputy Director. Because the Deputy Director has the authority to make policies such as the Directive at issue in this case, there is no basis under the FVRA to invalidate the Directive.

CONCLUSION

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

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CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2020, the foregoing brief 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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