

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT**

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

Plaintiffs,

v.

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

Defendants.

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

Judge: Hon. Jeffrey A. Meyer

**REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

Immigration and Customs Enforcement (ICE) is empowered to make critical decisions that can mean life or death for the people they affect—including whether to deport crime victims who are assisting law enforcement and have applied for “U visas” that would allow them to remain in this country. To promote accountability and ensure that ICE wields its powers responsibly, Congress required the agency to be led by a Director who must be nominated by the President, confirmed by the Senate, and possess key professional qualifications. Congress further specified that this Director “shall establish the policies” for ICE’s performance of its functions.

Despite these requirements, ICE has operated without a Senate-confirmed Director for the entire Trump administration. Other personnel have carried out the Director’s responsibility for establishing ICE’s policies. And Defendants claim that neither the Federal Vacancies Reform Act (FVRA) nor ICE’s enabling legislation imposes any limit on that practice. So when the Director’s office is vacant and the FVRA’s time limits on acting service have expired, an Acting Director may simply switch titles to “Senior Official Performing the Duties of the Director” and continue exercising the Director’s powers without presidential nomination or Senate confirmation.

Defendants also insist that even though Matthew Albence was not ICE’s Director or a valid Acting Director when he established the agency’s new stay-of-removal policy, he could establish the policy by virtue of his position as Deputy Director. That defense has two insuperable flaws.

First, under the FVRA, establishing the policies for performing ICE’s functions is a duty “required by statute” to be performed by the ICE Director “and only that officer.” 5 U.S.C. § 3348(a)(2)(A)(ii). If it is performed by “any person” who is neither the Director nor a validly serving Acting Director, the resulting policy “shall have no force or effect.” *Id.* § 3348(d)(1). None of Defendants’ objections to that straightforward conclusion withstands scrutiny. And their

interpretation would mean that no action taken by anyone in the Department of Homeland Security, or any comparable department, could *ever* be void under the FVRA. That view, which they nowhere disavow, would write § 3348 out of existence.

Second, even if the new policy were not void under the FVRA, it must still be set aside under the Administrative Procedure Act (APA). When a person's tenure as an acting officer exceeds the FVRA's time limits, as here, agency actions taken by that person are "not in accordance with law." 5 U.S.C. § 706(2)(A). Defendants concede this point in principle, but they maintain that it does not apply here because Albence's status as Deputy Director independently empowered him to establish the new policy. Their initial filings, however, failed to establish that Albence's appointment as Deputy was lawful—or even identify who appointed him. And after Plaintiffs showed that the person who likely made the appointment lacked authority to do so, Defendants incredibly *still* refuse to reveal who appointed Albence as Deputy Director, or to mount a defense of his appointment. Because Defendants have not substantiated their only defense to Plaintiffs' claims, Albence's action must be set aside as unlawful under the APA.

To avoid these outcomes, Defendants continue to press various threshold arguments against Plaintiffs' right to bring this suit. All are meritless. This Court should grant Plaintiffs' motion and vacate the harmful new stay policy adopted by an illegally serving head of ICE.

ARGUMENT

I. Plaintiffs Have Standing to Challenge the Albence Policy.

As Plaintiffs have shown, Supreme Court and Second Circuit precedent clearly supports standing here. Defendants' response largely restates their initial arguments: the policy cannot inflict a cognizable harm because no U-visa applicant has a "legally protected right to a stay," and the diversion of Plaintiffs' resources in response to the new policy is not an injury in fact because

these costs were “voluntarily incurred.” Def. Reply 3. Defendants are mistaken on both points.

Plaintiffs need not demonstrate that U-visa applicants have a legal entitlement to a stay of removal. *See* Pls. Mem. 43-44. Because Plaintiffs have alleged “organizational” standing, not associational or representational standing, whether their clients have suffered a cognizable harm is irrelevant. *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 294 (2d Cir. 2012). Likewise, alleging “an invasion of a legally protected interest,” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562-63 (1992)), does not, as Defendants would have it, require the deprivation of a “legally protected *right*.” Def. Reply 3 (emphasis added). To give but one example, the “desire to . . . observe an animal species . . . for purely esthetic purposes” is not a legally protected *right*, but it “is undeniably a cognizable *interest* for purpose of standing.” *Lujan*, 504 U.S. at 562-63 (emphasis added). Such an interest simply requires “a personal stake in the outcome of the controversy,” *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (quotation marks omitted), and a plaintiff has an adequate personal stake when he alleges “that the challenged action has caused him injury in fact, economic or otherwise,” *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152 (1970).

The Second Circuit has “repeatedly held that only a ‘perceptible impairment’ of an organization’s activities is necessary for there to be an injury in fact,” *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 110 (2d Cir. 2017) (citing cases) (quotation marks omitted), and that such impairment occurs “where an organization diverts its resources away from [those] activities,” *id.* at 111 (citing cases). In short, “an organization shows injury-in-fact where, as here, a policy has impeded . . . the organization’s ability to carry out [its] responsibilit[ies].” *Id.* at 110 (quotation marks omitted); *see NYCLU*, 684 F.3d at 295 (standing where plaintiff “alleged an interest in open access to . . . hearings as a matter of professional

responsibility to clients” and where “the access policy has impeded . . . the organization’s ability to carry out this aforementioned responsibility”); *Nnebe v. Daus*, 644 F.3d 147, 157 (2d Cir. 2011) (standing where plaintiff “expended resources to assist its members who face summary suspension”). Despite Defendants’ wishful thinking, the Circuit has recognized standing in each of these cases based solely on diversion of resources and impairment of mission.

As these cases illustrate, moreover, the question is not whether an organization’s spending was “voluntarily incurred.” Def. Reply 3. Every expenditure of resources by an organization in service of its mission could be characterized that way, and so Defendants’ broad rule is incompatible with organizational standing. Such standing does not “depend on the voluntariness or involuntariness of the plaintiffs’ expenditures,” but rather “on whether they undertook the expenditures in response to, and to counteract, the effects of the defendants’ [action].” *Equal Rights Ctr. v. Post Properties, Inc.*, 633 F.3d 1136, 1140 (D.C. Cir. 2011). Nor is there any support for Defendants’ variation on this argument—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.” Def. Reply 4. Defendants do not cite a single decision from any court adopting that rule, and none exists.

Of course, a plaintiff “cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 402 (2013) (emphasis added). But that is not what Plaintiffs are doing: Sanctuary provides direct legal assistance to U-visa applicants, while ASISTA provides trainings and legal assistance to individuals representing U-visa applicants. Asnani Decl. ¶¶ 4-6, 11; Pendleton Decl. ¶¶ 4-7. Because ICE has changed its standards for granting stays of removal, Plaintiffs must divert resources to meet these new standards, which require a more fulsome showing from applicants than what previously sufficed to obtain a stay. Asnani Decl. ¶¶ 12-21; Pendleton Decl. ¶¶ 19-47.

Plaintiffs are not diverting these additional resources in anticipation of some event that might occur in the future—some “future injury they purportedly fear.” *Clapper*, 568 U.S. at 422. Because they serve individuals who must satisfy ICE’s new standard to obtain stays of removal, professional responsibility to their clients requires them to take these measures now.¹

As Defendants are ultimately forced to concede, precedent confirms that “the diversion of organizational resources and the impairment of an organization’s mission suffice for standing.” Def. Reply 4-5. Defendants simply disagree with that precedent. But this Court is bound by it.

II. Plaintiffs May Challenge the Albence Policy Under the APA.

Defendants continue to argue that the Albence Policy is not reviewable under the APA because it is not final agency action. But the policy meets the “two conditions [that] must be satisfied for agency action to be ‘final.’” *Bennett v. Spear*, 520 U.S. 154, 177 (1997). First, as Defendants do not seriously contest, the policy provides ICE field offices with definitive, not “tentative or interlocutory,” rules for processing stay requests, and is therefore the “consummation of the agency’s decisionmaking process.” *Id.* at 178 (quotation marks omitted). Second, “legal consequences will flow” from the policy, *id.* (quotation marks omitted), because it changed the standards for adjudicating stay requests.

Remarkably, Defendants claim that the Albence Policy does not “change the criteria for granting or denying a stay.” Def. Reply 12. A simple comparison of the policy with its predecessor

¹ For that reason, *Knife Rights, Inc. v. Vance*, 802 F.3d 377 (2d Cir. 2015), does not help Defendants. There, organizations alleged that they incurred expenses opposing the threatened enforcement of a new criminal law. The Second Circuit *agreed* that this might demonstrate past injury supporting a damages action—but found that it was “not an injury that can be redressed through the prospective declaratory and injunctive relief sought.” *Id.* at 388. The organizations also argued that “injunctive relief would redress future injury by precluding defendants from applying [the new law] in a way that will prompt the[] organizations to incur opposition expenses.” *Id.* But the organizations did “not even attempt[]” to show that these “anticipated expenditures” were “‘certainly impending.’” *Id.* at 389 (quoting *Clapper*, 568 U.S. at 409).

shows otherwise. The old policy dictated that when ICE field offices received a stay application, they “must” initiate contact with U.S. Citizenship and Immigration Services (USCIS) “to request a *prima facie* determination.” Dkt. No. 40-7, at 2. And if USCIS found the applicant *prima facie* eligible for a U visa, and no serious adverse factors were present, the field office “should favorably view [the] alien’s request” and “should generally grant the alien a Stay of Removal.” *Id.* Field offices were also *required* to “consider favorably any humanitarian factors related to the alien or the alien’s close relatives who rely on the alien for support.” *Id.* And even if a field office found that serious adverse factors existed and was therefore “inclined to deny the Stay request despite the USCIS *prima facie* eligibility finding,” the office was required to “provide a summary of the case to [enforcement and removal] Headquarters for further review.” *Id.* at 3.

Under the Albence Policy, however, ICE “no longer routinely request[s] *prima facie* determinations.” Dkt. No. 34-1, at 2. Instead, each field office is given unguided discretion to “consider the totality of the circumstances,” including “*any* favorable or adverse factors . . . and *any* federal interest(s) implicated.” *Id.* at 4 (emphasis added). There is no longer any requirement that field offices present denials to Headquarters for further review.

These are not “materially indistinguishable” standards. Def. Reply 13. ICE itself certainly recognizes that. Describing the abandonment of the *prima facie* process, the agency has explained: “Now, under the ICE Directive 11005.2, ICE officers and attorneys *will review* the totality of the circumstances . . . and decide whether a Stay of Removal or terminating proceedings is appropriate. . . . ICE *no longer* exempts classes or categories of removable aliens from potential enforcement.” ICE, *Fact Sheet: Revision of Stay of Removal Request Reviews for U Visa Petitioners* (Aug. 2, 2019), <https://www.ice.gov/factsheets/revision-stay-removal-request-reviews-u-visa-petitioners> (emphasis added).

Apart from misconstruing the new policy, Defendants continue to belabor the idea that “any change in [an] applicant’s rights or obligations occurs only when there is a decision on that individual’s particular application.” Def. Reply 13. “This confuses the question whether the [agency]’s action is final with the separate question whether” the denial of any particular application “is fairly traceable to [that] action.” *Bennett*, 520 U.S. at 177 (quotation marks omitted). Regardless of whether any individual applicant could make that showing, legal consequences will flow from the policy because it “alter[s] the legal regime to which the [applicant] is subject.” *Id.* at 178. Under longstanding precedent, final action does not require a “direct effect on any individual’s . . . status.” Def. Reply 14.² And the new policy’s heightened standards are no less final simply because they do not categorically foreclose any particular application. *See Sackett v. EPA*, 566 U.S. 120, 126 (2012) (an action that “limits . . . the ability to obtain a permit” was final, though a permit could still be obtained if deemed “clearly appropriate”); *Hawkes*, 136 S. Ct. at 1814 (legal consequences can flow from the denial of a “safe harbor”).

By adopting new standards, ICE “has completed its decisionmaking process,” and the new standards “directly affect” stay applicants and those who assist them. *Sharkey v. Quarantillo*, 541 F.3d 75, 88 (2d Cir. 2008) (quotation marks omitted).³ The Albence Policy is final agency action.

² See, e.g., *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016) (describing final action where an agency’s order “specif[ied] which commodities [the agency] believed were exempt by statute from regulation [a]lthough the order . . . would have effect only if and when a particular action was brought against a particular carrier” (quotation marks omitted)); *Abbott Labs. v. Gardner*, 387 U.S. 136, 150 (1967) (describing final action where an agency’s licensing regulation “could properly be characterized as a statement only of its intentions” and “no license had in fact been denied or revoked”).

³ The effects of the new policy are reflected in how Plaintiffs have adjusted their work. Before, Plaintiffs’ work on stay applications was typically limited to filling out the application and attaching a receipt showing that USCIS had received the client’s U-visa petition. Asnani Decl. ¶ 12. “No other documentation or work was required because the USCIS staff trained and assigned to make U-visas application determinations would also make the *prima facie* decision.” Pendleton

III. Plaintiffs May Challenge the Albence Policy as *Ultra Vires*.

Even if APA review were not available, Plaintiffs could challenge the Albence Policy as *ultra vires*, under the “well-drawn line of precedent establishing that a plaintiff may invoke the court’s equitable powers to enjoin a defendant” who exceeds lawful authority. *Fed. Defs. of N.Y., Inc. v. Fed. Bureau of Prisons*, 954 F.3d 118, 133 (2d Cir. 2020); accord *Sierra Club v. Trump*, 2020 WL 3478900, at *11 (9th Cir. June 26, 2020) (permitting *ultra vires* review).

Defendants concede that “*ultra vires* review . . . provides a non-statutory cause of action even in the absence of an affirmative authorization.” Def. Reply 10. But they continue insisting that “an *ultra vires* cause of action requires a showing that the agency action was patently, not just arguably, illegal.” *Id.* at 11. As the cases plainly show, however, that standard applies only where Congress has “precluded review.” *Griffith v. Fed. Labor Relations Auth.*, 842 F.2d 487, 492 (D.C. Cir. 1988) (citing *Leedom v. Kyne*, 358 U.S. 184 (1958)). While this “*Leedom v. Kyne* exception” requires “patently” illegal action, *id.* at 493, that heightened standard is not applied in any other context. And Defendants identify no “statutory preclusion of review” here. Def. Reply 10.

IV. The Albence Policy Is Void Under the FVRA.

As Plaintiffs have explained, DHS’s enabling statute demands that the ICE Director “shall establish the policies” for performing the functions vested in ICE. 6 U.S.C. § 252(a)(3)(A). Those functions include deciding whether to grant stays of removal to U-visa applicants. Pls. Mem. 10. And the Albence Policy “sets forth [ICE] policy” for deciding whether to grant such stays. Dkt. No. 34-1, at 1. By establishing this policy, therefore, Albence performed “a function or duty” that

Decl. ¶ 21. Now, however, stay applications require “a detailed packet of information, which may include . . . a client affidavit; a legal brief; letters and affidavits by friends, family, and community members; and other evidence such as school diplomas or professional certificates, children’s birth certificates, medical records, and criminal certificates of disposition.” Asnani Decl. ¶ 14.

is required by statute to be performed “only” by the ICE Director. 5 U.S.C. § 3348(a)(2)(A)(ii). The policy therefore has no “force or effect” under the FVRA. *Id.* § 3348(d)(1).

On Defendants’ view of the law, however, no action taken by any ICE official can ever be void under the FVRA. Indeed, no action taken by anyone across the entire Department of Homeland Security can suffer that penalty. As Defendants see it, the Secretary’s vesting-and-delegation statute, 6 U.S.C. § 112, makes every function of the Department “delegable,” which in turn means that no function is assigned by statute to a single officer “and only that officer.” 5 U.S.C. § 3348(a)(2)(A)(ii). If Defendants’ understanding were correct, there would be little incentive for the Department to comply with the FVRA’s careful limits on acting service during vacancies—or to obey the Appointments Clause by submitting acceptable nominees to the Senate. Instead, the Department could be run indefinitely by a series of acting officers, senior officials “performing the duties of” vacant offices, and lower-level deputies.

The implications do not stop there. “[E]very cabinet-level department has some version of [the Department’s] vesting and delegation statutes.” *L.M.-M. v. Cuccinelli*, 2020 WL 985376, at *20 (D.D.C. Mar. 1, 2020) (quotation marks omitted); *see id.* n.11 (listing statutes). And so “the logic of this position would cover all (or almost all) departments subject to the FVRA.” *Id.* Across the federal government, the FVRA—and the Appointments Clause—would become a nullity, because “statutes vesting an agency’s powers in the agency head and allowing delegation to subordinate officials” could be used in their place. *The Vacancies Act: Statement Before the Committee on Governmental Affairs, United States Senate*, 22 Op. O.L.C. 44, 44 (1998). And that is precisely what Congress enacted the FVRA to prevent. *See* Pls. Mem. 6-8, 25-26.

All this indicates that something has gone deeply wrong with Defendants’ interpretation of the FVRA. Closer inspection bears that out. Defendants’ understanding of both the FVRA and

DHS’s enabling legislation is belied by the text, structure, and purpose of those statutes. Background presumptions of administrative law, on which Defendants heavily rely, do not suggest otherwise. And despite Defendants’ hyperbolic claims, Plaintiffs’ straightforward interpretation of these statutes poses no threat to the routine functioning of government.

A. Defendants deny that establishing the policies for performing ICE’s functions is a duty “required by statute” to be performed “only” by the ICE Director. 5 U.S.C. § 3348(a)(2)(A)(ii). According to Defendants, “nothing in the relevant statutes . . . prevents the delegation of the Director’s policymaking authority.” Def. Reply 23. But that is wrong.

To start, the statutes plainly state 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)(A) (emphasis added); *id.* § 542 Note. While “every use of the term ‘shall’ in the United States Code” does not, standing alone, create “an exclusive mandate to the officer in question,” Def. Reply 21, statutory context here supports the normal meaning of “shall,” which “usually connotes a requirement,” *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016), and a “mandatory . . . obligation impervious to . . . discretion,” *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (citing *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947)).

First, the text of § 252 contrasts the Director’s exclusive responsibility for establishing ICE policies with other responsibilities that different ICE personnel may perform. Immediately after instructing that the Director “shall establish the policies for performing [the] functions” vested in ICE, the statute provides that the Director also “shall oversee the administration of such policies.” 6 U.S.C. § 252(a)(3)(A), (B). By requiring the Director to “oversee the administration” of ICE’s policies, the statute signals that people besides the Director may implement those policies—otherwise, there would be nothing for the Director to “oversee.” The statute, in other words,

distinguishes between duties that the Director must personally perform (establishing the agency's policies and overseeing their administration) and duties that the Director need not personally perform (implementing those policies). *See United States v. Mango*, 199 F.3d 85, 91 (2d Cir. 1999) ("specific authority to subdelegate one power within a given piece of legislation may indicate that Congress did not intend to allow subdelegation of other powers").

That conclusion is buttressed by surrounding context. The Director is "[t]he head" of the agency, 6 U.S.C. § 252(a)(2), and is the only ICE official who must be presidentially nominated and Senate confirmed, *id.* § 113(a)(1)(G). Congress further required the Director to "have a minimum of 5 years professional experience in law enforcement, and a minimum of 5 years of management experience." *Id.* § 252(a)(2)(B). It would have made no sense for Congress to impose these specific requirements of professional experience and Senate confirmation if the Director's leadership duties could simply be reassigned to someone else who does not meet those requirements. *See Shook v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 132 F.3d 775, 784 (D.C. Cir. 1998) ("The specific qualifications set forth . . . for Control Board membership and the mechanism of Presidential appointment of the Control Board . . . indicate that Congress wanted the Control Board itself to exercise the powers of governance over the District."). Reinforcing this connection between the leadership duties of the ICE Director and the qualifications for holding that office, the very same statutory provision that requires Senate confirmation for the Director, 6 U.S.C. § 113(a)(1)(G), explicitly requires that the Director "shall perform the functions specified by law for the [Director]'s office," *id.* § 113(f).

Other portions of DHS's enabling statute indicate that when Congress wanted to allow the delegation of leadership responsibilities to subordinates, Congress made that intention clear. *E.g.*, 6 U.S.C. § 350(a) ("The Under Secretary for Management shall be responsible for workforce-

focused health and medical activities of the Department. *The Under Secretary for Management may further delegate responsibility for those activities, as appropriate.*” (emphasis added)); 6 U.S.C. § 112(b)(1) (subject to certain limits, the Secretary “may delegate any of the Secretary’s functions to any officer, employee, or organizational unit of the Department”).

As these provisions illustrate, statutes directing that an officer “shall” perform particular functions are often coupled with express authorizations to delegate those functions—providing an exemption from the mandatory nature of the duty. This structure is common for department heads. *See, e.g., United States v. Giordano*, 416 U.S. 505, 513 (1974) (“Congress characteristically assigns newly created duties to the Attorney General rather than to the Department of Justice, thus making essential the provision for delegation appearing in 28 U.S.C. s 510[.]”). Critically, however, the ICE Director’s duty to establish ICE policies departs from this pattern: there is no exception, implicit or explicit, from the mandatory nature of that duty. Plaintiffs’ position, therefore, is not at all in tension with the practice of using the word “shall” to confer rulemaking and other authorities on department secretaries while also allowing delegation of that authority to subordinates. *E.g., Estate of Landers v. Leavitt*, 545 F.3d 98, 105 (2d Cir. 2008).

Finally, the chief rationale that has prompted courts to recognize *implicit* delegation authority in other contexts does not apply here. “Congress regularly gives heads of agencies more tasks than a single person could ever accomplish, necessarily assuming that the head of the agency will delegate the task to a subordinate officer.” *Ethicon Endo-Surgery, Inc. v. Covidien LP*, 812 F.3d 1023, 1031 (Fed. Cir. 2016). Traditionally, therefore, “[s]tatutory allocations of decisional authority were not read literally where the action by the named officer was impracticable.” Jerry L. Mashaw & Avi Perry, *Administrative Statutory Interpretation in the Antebellum Republic*, 2009 Mich. St. L. Rev. 7, 27 (2009); *see, e.g., Parish v. United States*, 100 U.S. 500, 504 (1879) (finding

it “impossible” for an officer “to perform in person all the duties imposed on him”). Thus, when it is clear that an officer cannot perform a statutory duty without relying on subordinates—or that Congress did not intend the officer to carry out the duty personally—courts have found delegation authority to be implied.⁴ That rationale, however, is absent here. While it may be impractical for the ICE Director to adjudicate every U-visa applicant’s request for a stay of removal, Defendants have offered no reason to believe that it is impractical for the Director to “establish the policies” for performing those adjudications—or that Congress would have thought so.

In sum, context confirms what the plain text states: the ICE Director is the person who “shall establish the policies” for performing ICE’s adjudication of stay requests. 6 U.S.C. § 252(a)(3)(A); *see Kingdomware Techs.*, 136 S. Ct. at 1977 (“The surrounding subsections . . . confirm that Congress used the word ‘shall’ . . . as a command.”).

B. Nothing in the DHS enabling statute undermines this conclusion. Plaintiffs have already explained why the Secretary’s general delegation authority, found in 6 U.S.C. § 112(b)(1), does not override the assignment of specific policymaking authority to the ICE Director. *See* Pls. Mem. 23-26. Precedent firmly supports that reasoning. In *United States v. Giordano*, for instance, the Supreme Court “held that [a statute] did not allow the Attorney General to delegate the power to authorize [wiretap] applications . . . even though the Attorney General was authorized by a different statute to delegate any of her functions to ‘any other officer, employee, or agency of the

⁴ *See, e.g., Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 122-23 (1947) (not every function granted to a price-control administrator need “be performed personally by him or under his personal direction,” because “he could hardly be expected, in view of the magnitude of the task, to exercise his personal discretion in determining whether a particular investigation should be launched”); *Mango*, 199 F.3d at 91 (“Clearly, Congress did not intend the Chief, a lieutenant general, personally to maintain spoil disposal facilities or to spread sand on the beaches.”); *Inland Empire Pub. Lands Council v. Glickman*, 88 F.3d 697, 702 (9th Cir. 1996) (“Requiring Secretary Glickman to personally authorize every salvage timber sale would contradict the purpose of the Rescissions Act, which is to expedite such sales.”).

Department of Justice.” *In re United States*, 10 F.3d 931, 937 (2d Cir. 1993) (quoting *Giordano*, 416 U.S. at 513); *see also Halverson v. Slater*, 129 F.3d 180, 186 (D.C. Cir. 1997) (a provision limiting the Transportation Secretary’s delegation of a particular authority took precedence over another provision allowing the Secretary to delegate any of his powers: “the former as the more specific provision controls, . . . according to the traditional tools of statutory construction”).

Defendants suggest that § 112 and § 252 do not conflict, but the whole point of their interpretation is that the Secretary, by virtue of § 112, may decide at any time that the ICE Director shall *not* establish the policies for performing ICE’s functions, as § 252 requires. Plaintiffs agree that the two provisions are not actually in conflict, but only because of an explicit carve-out in § 112(b)(1)—“except as otherwise provided by this chapter”—which requires the Secretary’s delegation authority to yield to more specific contrary provisions like § 252.⁵

Moreover, the mere existence of a vesting-and-delegation statute cannot mean that no functions of the relevant department are exclusive to one officer within the meaning of 5 U.S.C. § 3348. As explained, that would eviscerate the FVRA’s most basic purpose, which was to prevent the use of vesting-and-delegation statutes to avoid the restrictions of vacancies legislation. “In construing a statute,” courts “must . . . never adopt an interpretation that will defeat its own purpose, if it will admit of any other reasonable construction.” *The Emily*, 22 U.S. 381, 388 (1824). And even without reference to statutory purpose, Defendants’ reading is untenable. Section 3348 contemplates that it will sometimes apply to officers whose duties are also vested in their

⁵ To explain away this carve-out, Defendants claim that it merely preserves *explicit* prohibitions on delegation in DHS’s enabling statute, citing 6 U.S.C. § 624(c)(2). Tellingly, however, that provision is the only explicit prohibition that Defendants can identify in the nearly 700 sections of DHS’s enabling statute (Plaintiffs are not aware of others), making this an implausible account of the carve-out. And regardless, Defendants’ premise is wrong: explicit prohibitions are not needed for a duty to be reserved exclusively to one official. *See infra* at 16-17.

department head: in that situation, “only the head of such Executive agency may perform any function or duty of such office.” 5 U.S.C. § 3348(b)(2). “Significantly, this fallback provision presupposes that the head of the department will have authority to discharge the functions and duties of the vacant, subcabinet office.” *L.M.-M.*, 2020 WL 985376, at *21.

Defendants also point to a separate authorization for delegations in DHS’s enabling statute. *See* 6 U.S.C. § 455(c) (“Unless otherwise provided in the delegation or by law, any function delegated under this chapter may be redelegated to any subordinate.”). This provision, though, refers to functions that are “*delegated* under this chapter,” which it allows to be “*redelegated*.” *Id.* (emphasis added). Rather than expanding the pool of delegable functions, therefore, this provision appears to clarify that when a function *is* delegable under the DHS enabling statute, further subdelegation is also presumptively allowed. *See id.* (contrasting “the delegation” with “law”). In any event, this authorization to redelegate—located in a section called “Miscellaneous authorities,” *id.* § 455—is no more specific than the Secretary’s vesting-and-delegation statute. And because it includes the same type of carve-out—“[u]nless otherwise provided . . . by law,” *id.* § 455(c)—it simply begs the same question: Do the provisions that address the powers of the ICE Director “otherwise provide[]”? For the reasons explained above, they do.

C. Notwithstanding the statutory text, Defendants invoke “consistent agency practice,” citing memoranda that have notified ICE personnel of policy changes and that were “issued by officials other than the Director.” Def. Reply 19. Setting aside the question of how these memoranda should affect a court’s statutory analysis, there is an obvious problem here. The fact that a lower-level official signs and issues such a memorandum does not mean that he or she established the new policy unilaterally, without the approval of a validly serving Director or Acting Director. And if such a thing *has* become standard practice at ICE, that is all the more reason to

begin enforcing the limits of the agency’s enabling statute and the FVRA.

D. Defendants also rely heavily on “the general presumption of delegability.” Def. Reply 20. That principle, however, comes into play only “absent evidence of contrary congressional intent.” *U.S. Telecom Ass’n v. FCC*, 359 F.3d 554, 566 (D.C. Cir. 2004); accord *Kobach v. U.S. Election Assistance Comm’n*, 772 F.3d 1183, 1190 (10th Cir. 2014) (“Absent some indication in an agency’s enabling statute that subdelegation is forbidden, subdelegation to subordinate personnel within the agency is generally permitted.” (emphasis added)). It does not, therefore, help answer the antecedent question—whether the enabling statute indicates an intent that only the ICE Director may establish the agency’s policies for performing its functions.

What the passages just quoted do illustrate, however, is that Congress may prohibit delegation without utilizing an express prohibition: all that is needed is “some indication,” *Kobach*, 772 F.3d at 1190, or “evidence,” *U.S. Telecom Ass’n*, 359 F.3d at 566, that this was Congress’s intent. See *Halverson*, 129 F.3d at 187 (courts should not “*presume* a delegation of power absent an express *withholding* of such power”). The question, therefore, is simply whether a statute, “fairly read, was intended to limit the power,” even if “precise language forbidding delegation was not employed.” *Giordano*, 416 U.S. at 514; see *Fleming*, 331 U.S. at 121-22 (finding an authority delegable because no contrary intent could be “fairly inferred from the history and content of the Act”). Consideration of a statute’s purpose is part of that fair reading. See *In re United States*, 10 F.3d at 937 (“The *Giordano* Court based its holding on the purpose and the legislative history of Title III, fairly read.”); *id.* (applying “[t]he same approach” and finding delegation foreclosed); *Inland Empire*, 88 F.3d at 702 (“Without express congressional authorization for a subdelegation, we must look to the purpose of the statute to set its parameters.”). Also relevant is whether the claimed power to delegate is of a “limited nature” or would permit “a subdelegation of the entirety

of the superior’s power,” *Kobach*, 772 F.3d at 1191, as here. *See Cudahy Packing Co. v. Holland*, 315 U.S. 357, 361 (1942) (“A construction . . . which would thus permit the Administrator to delegate all his duties, including those involving administrative judgment and discretion which the Act has in terms given only to him, can hardly be accepted unless plainly required by its words.”).

In short, the principles Defendants invoke only undermine their position. The statutes governing the ICE Director supply abundant evidence that Congress wanted this Senate-confirmed Director, not someone else, to “establish the polices” for performing ICE’s functions.

E. Defendants fare no better in grappling with relevant FVRA precedent. Attempting to distinguish *L.M.-M. v. Cuccinelli*, Defendants argue that it “turned on anti-circumvention reasoning that does not apply here.” Def. Reply 22. The reasoning to which they refer, however, had nothing to do with § 3348. It was, instead, part of the court’s rationale for concluding that the defendant was not a valid acting officer—a matter that Defendants concede here. *See L.M.-M.*, 2020 WL 985376, at *15-19. After reaching that conclusion, the court in *L.M.-M.* then turned to “the question of remedy,” *id.* at *19, and its detailed analysis of § 3348 fully applies here.

Defendants offer an equally misleading account of *Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp. 2d 389 (D. Conn. 2008). That decision, to be sure, “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.” Def. Reply 20. But Defendants omit the basis for that holding: “the regulation contemplate[d] that the AS–IA’s responsibilities may be delegated to other agency officials” because “it define[d] the term Assistant Secretary to include the AS–IA ‘or that officer’s authorized representative.’” *Schaghticoke Tribal Nation*, 587 F. Supp. 2d at 420-21 (quoting regulation); *see Schaghticoke*

Tribal Nation v. Kempthorne, 587 F.3d 132, 135 (2d Cir. 2009) (“The . . . argument fails because Indian acknowledgment decisions may be made *either* by the ‘Assistant Secretary–Indian Affairs’ *or* by his or her ‘authorized representative.’”). This only highlights the lack of comparable statutory authority for the ICE Director to delegate away his policymaking responsibilities.

V. The Albence Policy Must Be Set Aside Under the APA.

Even if the Albence Policy were not void under 5 U.S.C. § 3348(d), it must be set aside under the APA. As Plaintiffs have explained, when a person’s tenure as an acting officer violates the FVRA, agency actions taken by that person are “not in accordance with law” and therefore must be “set aside.” 5 U.S.C. § 706(2)(A). *See* Pls. Mem. 30-32.

Defendants offer no real rebuttal. Far from identifying any flaw in Plaintiffs’ analysis, they acknowledge that it “may make sense,” Def. Reply 28—just not in this case. The reason, they say, is that Albence could have established the new policy as ICE’s Deputy Director, even though he was not the agency’s Acting Director, so any violation of the FVRA was harmless error. *Id.* at 30.

That argument, however, simply raises the question: *was* Albence lawfully the Deputy Director? And stunningly, Defendants still refuse to tell this Court how Albence obtained that position, even though their entire defense rests on it. Defendants’ initial memorandum offered only the vague, passive-voice statement that Albence “was selected” as Deputy in April 2019. Def. Mem. 5. Nothing that Defendants submitted explained *who* appointed Albence to that position. Plaintiffs thus examined the public record and inferred that ICE’s outgoing Acting Director, Ronald Vitiello, may have been responsible. Plaintiffs then described why Vitiello’s own tenure “appears to have violated the FVRA, because it satisfied none of the three exclusive options for authorizing acting service under 5 U.S.C. § 3345.” Pls. Mem. 28-29. If Vitiello was leading the agency unlawfully, Plaintiffs explained, his appointment of Albence as Deputy Director would

itself “have no force or effect” under the FVRA. 5 U.S.C. § 3348(d)(1).

Despite all this, Defendants have chosen to remain mum about who appointed Albence. But if Defendants cannot, or will not, substantiate the legitimacy of Albence’s appointment as Deputy—the crux of their defense—then Plaintiffs have demonstrated “prejudicial error” under the APA. 5 U.S.C. § 706; *cf. SW Gen., Inc. v. NLRB*, 796 F.3d 67, 80 (D.C. Cir. 2015) (“a different General Counsel may have imposed different requirements and procedures during his tenure”). “[T]he harmless error rule is ‘not . . . a particularly onerous requirement,’ and the Supreme Court has cautioned courts applying the rule against ‘us[ing] mandatory presumptions and rigid rules rather than case-specific application of judgment.’” *Jicarilla Apache Nation v. U.S. Dep’t of Interior*, 613 F.3d 1112, 1121 (D.C. Cir. 2010) (quoting *Shinseki v. Sanders*, 556 U.S. 396, 407, 410 (2009)). Defendants have opted not to defend the legality of Albence’s appointment as Deputy, and this Court “cannot be confident that the [U-visa policy] would have issued under an [official] other than [Albence].” *SW Gen.*, 796 F.3d at 80. That “uncertainty is sufficient to conclude that [Plaintiffs] ha[ve] carried [the] burden of demonstrating that the FVRA violation is non-harmless under the Administrative Procedure Act.” *Id.*

Instead of substantiating their own defense, Defendants assert, ironically, that *Plaintiffs* have waived any consideration of whether Albence was validly appointed as Deputy. That assertion borders on the frivolous. Plaintiffs’ Complaint alleges that Albence’s adoption of the stay policy violated numerous laws because he was neither a Senate-confirmed Director of ICE nor a validly serving Acting Director. *See* Am. Compl. ¶¶ 1-8, 36-46, 87-104. Nothing required Plaintiffs to anticipate and attempt to counter any “argument,” Def. Reply 26, that Defendants might raise as a defense to Plaintiffs’ claims. *See* Fed. R. Civ. P. 8(a)(2) (requiring “a short and plain statement of the claim showing that the pleader is entitled to relief”). Plaintiffs have not

raised any new factual claims or theories of liability. They have simply responded to a legal argument that Defendants made in opposing their existing claims.⁶

Even beyond that, waiver is inappropriate when, as here, an argument “is raised at the first pragmatically possible time and applying it at that time would not unfairly prejudice the opposing party.” *Am. Fed. Grp., Ltd. v. Rothenberg*, 136 F.3d 897, 910 (2d Cir. 1998). Albence approved the new ICE policy under his purported authority as “Acting Director,” Dkt. No. 34-1, at 7, and when he did so, a different person was serving as the agency’s Deputy Director in an acting capacity, *see* Am. Compl. ¶ 45. The first time that Albence invoked his Deputy Director status as authority for the new policy was when Defendants filed their motion for summary judgment. Plaintiffs responded at the next available opportunity. Defendants had four weeks to respond, were granted an extension with Plaintiffs’ consent, *see* Dkt. No. 46, and ultimately used only 30 of the 40 pages available to them for their reply brief, *see* Dkt. No. 37, at 2. If the legality of Albence’s appointment has gone “without proper briefing,” Def. Reply 27, the fault lies with Defendants.

CONCLUSION

For the foregoing reasons, Plaintiffs’ motion for summary judgment should be granted.

⁶ Even more specious is the assertion that Plaintiffs waived this issue at the summary judgment stage by “failing to argue that Vitiello’s service *was* unauthorized by Section 3345(a)(1), and instead claiming only that it ‘*appears* unauthorized.’” Def. Reply 26. Plaintiffs’ cautious phrasing reflected the fact that Defendants had offered no details about Vitiello’s appointment, and indeed had not even confirmed that Vitiello was actually the person who appointed Albence. Nevertheless, an entire section of Plaintiffs’ memorandum is titled “Defendants Have Not Established that Albence Was Lawfully Appointed as Deputy Director,” Pls. Mem. 27, and that section lays out the case against Vitiello’s appointment, citing statutes and precedent. Describing this as the “intentional relinquishment of a known right,” *Hamilton v. Atlas Turner, Inc.*, 197 F.3d 58, 61 (2d Cir. 1999), does not pass the laugh test.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2020, the foregoing document was filed with the Clerk of the Court, using the CM/ECF system, causing it to be served on all counsel of record.

Dated: July 17, 2020

/s/ Brianne J. Gorod
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