UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTRAL AMERICAN RESOURCE CENTER, *et al.*, Plaintiffs, v. KENNETH T. CUCCINELLI, *et al.*, Defendants.	)	Civil Action No. 20-2363 (RBW)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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Pursuant to Federal Rules of Civil Procedure ("Rule") 12(b)(1) and 12(b)(6), Defendants, the U. S. Department of Homeland Security ("DHS"), Chad Wolf, in his official capacity as Secretary of DHS, U. S. Citizenship and Immigration Services ("USCIS"), Kenneth Cuccinelli, in his official capacity as the Senior Official Performing the Duties of the Director of USCIS (collectively, "Defendants"), by and through undersigned counsel, respectfully submit this Memorandum in support of their Motion to Dismiss the Complaint filed by Plaintiffs, Central American Resource Center ("CARECEN"), Blanca Mirna Romero del Cid, Jose Oscar Velasco Garcia, Vilma Haydee Hernandez, Heroldine Bazile, Juan Francisco Medina, Maria Floriselda Alvarez Gomez, and Yolanda Maritza Ramirez Martinez (the "Individual Plaintiffs" and together with CARECEN, "Plaintiffs") (ECF No. 1, "Complaint").[1]

INTRODUCTION

The Complaint purports to challenge Defendant USCIS's operational guidance, taking issue with its alleged effect on beneficiaries of Temporary Protected Status ("TPS") traveling abroad with permission of USCIS, who file for adjustment of status.[2] In multiple counts, Plaintiffs challenge USCIS's operational guidance including: APA challenges to USCIS's operational guidance (Counts I-III, Compl. ¶¶ 199-214); challenges to the authority of Defendant Cuccinelli's appointment under the Federal Vacancies Reform Act ("FVRA") and the Appointments Clause and his alleged exercise of *ultra vires* authority in issuing the guidance (Counts IV-VI, Compl. ¶¶ 215-29); and, a Fifth Amendment challenge to the guidance (Count VII, Compl. ¶¶ 230-34).

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[1] In considering Defendants' Motion, a court may take judicial notice of undisputed facts in the public record, such as court orders. *See Covad Commc'ns Co. v. Bell Atl. Corp.*, 407 F.3d 1220, 1222 (D.C. Cir. 2005). Moreover, where the plaintiff has chosen not to attach a document that has been incorporated by reference into the complaint, "the defendant may submit an authentic copy to the court to be considered on a motion to dismiss, and the court's consideration of the document does not require conversion of the motion to one for summary judgment." *Strumsky v. Wash. Post Co.*, 842 F. Supp. 2d 215, 217–18 (D.D.C. 2012).

[2] *See* ECF No. 21-1 for the USCIS operational guidance.

This Court should dismiss this case in its entirety because it lacks subject-matter jurisdiction over Plaintiffs' claims, USCIS's operational guidance comports with the law, and Plaintiffs fail to adequately state their claims for relief. First, some of the Individual Plaintiffs do not have claims which are ripe for review. Second, the remaining Individual Plaintiffs and CARECEN lack standing. Third, even assuming that Individual Plaintiffs' claims are ripe for review or have standing to bring their claims, this Court lacks jurisdiction because Plaintiffs have failed to exhaust their administrative remedies. Fourth, the Immigration and Nationality Act ("INA") strips the Court of jurisdiction over the Individual Plaintiffs' claims and they improperly seek to collaterally attack their removal orders.

Fifth, and in line with the INA's jurisdiction stripping provisions, the Individual Plaintiffs fail to state a claim for relief because they are not "arriving aliens" and, as a result, USCIS lacks jurisdiction over their claims. Specifically, Plaintiffs seek to improperly involve this Court in matters over which the Department of Justice, Executive Office for Immigration Review ("EOIR") has exclusive administrative jurisdiction. The Individual Plaintiffs have filed applications with USCIS seeking to adjust their status to that of lawful permanent residents but, due to the pending removal proceedings against them, USCIS lacks jurisdiction over their applications. Instead, EOIR has exclusive jurisdiction over these applications because Plaintiffs have outstanding orders of removal issued by EOIR.[3] By law, the appropriate court to review a removal decision of EOIR, after administrative appeal to the Board of Immigration Appeals ("BIA") has been exhausted, is a United States Circuit Court of Appeals upon a petition for review, and not a federal District Court.

[3] An alien is considered to be "in proceedings" from the point in time when the charging document is filed with EOIR until such time as their removal order is executed pursuant to 8 C.F.R. § 1245.1(c)(8) and thus any application for adjustment of status where the alien is not an "arriving alien" in proceedings is subject solely to the jurisdiction of the immigration judge.

Consequently, Plaintiffs' claims before this Court represent a collateral attack on removal orders; a challenge which may only be brought through a petition for review with a federal appeals court.

Sixth, because Plaintiffs fail to plausibly allege that Defendant Cuccinelli was unlawfully appointed as Acting Director of USCIS and fail to allege a colorable Constitutional violation, Counts IV through VII must likewise be dismissed. Finally, though Plaintiffs attempt to posture their claims as direct attacks on the operational guidance, as opposed to challenges to denials of the Individual Plaintiffs' petitions for adjustment of status, if these claims are divorced from any cognizable injury (i.e. denial of attempts to adjust status), they are merely seeking an advisory opinion regarding the legality of the operational guidance—which this Court has no jurisdiction to provide under Article III of the U.S. Constitution. For these reasons, and as more fully articulated below, the Court should dismiss the Complaint for lack of subject-matter jurisdiction under Rule 12(b)(1) or failure to state a claim upon which relief may be granted under Rule 12(b)(6).

FACTUAL AND PROCEDURAL BACKGROUND

Each of the Individual Plaintiffs is subject to a final order of removal or a deportation order.[4] Plaintiffs have not alleged, nor have they provided any evidence, that any of the Individual Plaintiffs has pursued a motion to reopen his or her immigration proceedings with EOIR. Subsequent to being ordered removed by an immigration judge, each of the Individual Plaintiffs was granted TPS. TPS does not provide beneficiaries with a separate path to lawful permanent residence, but protects them from deportation and grants them the ability to work. *See* 8 U.S.C. §

[4] Under the law there is no difference between removal orders and deportation orders. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") eliminated the distinction between deportation and exclusion proceedings by merging them into "removal" proceedings for "all aliens who were (1) in the United States without an inspection, (2) inspected and not admitted, or (3) previously admitted but now subject to removal." Division C of Pub. L. No. 104-208, 110 Stat. 3009-546, (enacted September 30, 1996); *see Succar v. Ashcroft*, 394 F.3d 8, 13 (1st Cir. 2005) (citing 8 U.S.C. §§ 1225(b)(2), 1227(a)).

1254a(a)(1). Subsequent to being ordered removed and after being accorded TPS, several of the Individual Plaintiffs have filed applications for "adjustment of status" or applications to become lawful permanent residents which, if approved, would alter their status in the United States. Pursuant to 8 U.S.C. § 1255(a) an alien may seek discretionary adjustment of status where the alien is the eligible to receive an immigrant visa because an eligible employer or family member has filed a petition on their behalf.

Plaintiff Blanca Mirna Romero Del Cid ("Romero"), a national of El Salvador, entered the United States without inspection in 1994. Compl. ¶ 27. She was placed in removal proceedings after an attempt to apply for asylum through her husband. *Id.* On October 15, 1998, an Immigration Judge ("IJ") granted Romero voluntary departure with an alternate order of removal in the event Romero failed to timely depart; after failing to leave the United States, she was ordered removed pursuant to the terms of the IJ's order.[5] *Id.* Subsequently, Romero was granted TPS in 2002. *Id.* ¶ 26. In 2013, Romero applied for and obtained a travel document. *Id.* ¶ 28. Romero then left the United States and returned on July 12, 2013, utilizing the USCIS issued travel document. *Id.* On July 27, 2018, Romero filed an I-485, Application to Register Permanent Residence or Adjust Status ("I-485 Application"), with USCIS. *Id.* ¶ 29. On January 15, 2020, USCIS denied Romero's I-485 Application for lack of jurisdiction; USCIS determined that it lacked jurisdiction over her application because of her outstanding removal order. *Id.*

Plaintiff Jose Oscar Velasco Garcia ("Velasco"), a national of El Salvador, entered the United States without inspection. *Id.* ¶ 32. Velasco was ordered removed on August 28, 1995.[6] *Id.* ¶ 33. Subsequently, Velasco was granted TPS in 2001. *Id.* ¶ 32. In 2016, Velasco applied for and

[5] That removal order remained in effect at the time the complaint was filed. Compl. ¶ 31.
[6] That order remained in effect at the time the complaint was filed. Compl. ¶ 37.

obtained a USCIS issued Travel Document. *Id.* ¶ 34. Velasco then left the United States and returned on August 8, 2016 utilizing the Travel Document. *Id.* On May 29, 2018, Velasco filed an I-485 Application, with USCIS. *Id.* ¶ 35. On May 22, 2020, USCIS denied Velasco's I-485 application for lack of jurisdiction; USCIS determined that his 1995 removal order was not executed when he temporarily left the United States in 2016. *Id.*

Plaintiff Vilma Haydee Hernandez ("Hernandez"), a national of El Salvador, entered the United States without inspection in October 2000. *Id.* ¶ 38-39. Hernandez was ordered removed in February 2001.[7] *Id.* 39. Subsequently, Hernandez was granted TPS in 2001. *Id.* In 2014, Hernandez applied for an obtained a Travel Document. *Id.* ¶ 40. Hernandez then left the United States and returned on August 22, 2014. *Id.* On March 18, 2019, Hernandez filed an I-485 Application, with USCIS. *Id.* ¶ 41. On March 4, 2020, USCIS denied Hernandez's I-485 Application for lack of jurisdiction; USCIS determined that her removal order was not executed when she temporarily left the United States in 2014. *Id.*

Plaintiff Heroldine Bazile ("Bazile"), a national of Haiti, purportedly entered the United States without inspection. *Id.* ¶ 44-45. Bazile was ordered removed, by an IJ, after her family applied for and was denied asylum. *Id.* ¶ 45.[8] Bazile was granted TPS in 2011. *Id.* ¶ 44. Bazile applied for and obtained a USCIS issued Travel Document in 2013. *Id.* ¶ 46. Bazile then left the United States and returned, utilizing the travel document, on December 24, 2013. *Id.* On March 28, 2014, Bazile submitted an I-485 Application. *Id.* Bazile filed another I-485 on September 29, 2017. *Id.* ¶ 48. On August 3, 2020 USCIS denied Bazile's I-485 Application for lack of jurisdiction; USCIS determined that her removal order was not executed when she temporarily left the United

[7] That order remained in effect at the time the complaint was filed. Compl. ¶ 43.
[8] That removal order remained in effect at the time the Complaint was filed. Compl. ¶ 48.

States in 2013. *Id.*

Plaintiff Juan Francisco Medina ("Medina"), a national of El Salvador, entered the United States without inspection in 1990. *Id.* ¶¶ 51-52. Medina was ordered removed, by an IJ, on February 19, 1991, after attempting to apply for asylum. *Id.* ¶ 52. Subsequently, Medina was granted TPS in 2001. *Id.* ¶ 51. Medina purportedly applied for and obtained travel documents from USCIS, leaving from and returning to the United States on multiple occasions. *Id.* ¶ 53. Medina's last return to the United States was on September 15, 2019. *Id.* ¶ 53. On December 6, 2019, Medina filed an I-485 application, with USCIS. *Id.* ¶ 54. At the time the Complaint was filed, his application remained pending with USCIS. *Id.* ¶ 54.

Plaintiff Maria Floriselda Alvarez Gomez ("Alvarez"), a national of El Salvador, entered the United States without inspection. *Id.* ¶¶ 57-58. She was placed in deportation proceedings, and an IJ granted her voluntary departure on April 16, 1996 with an alternate order of removal in the event Alvarez failed to timely depart. *Id.* ¶ 58. However, after failing to leave the United States, Alvarez was ordered removed. *Id.* Subsequently, Alvarez was granted TPS in 2001. *Id.* ¶ 57. In 2018, Alvarez applied for and obtained a USCIS issued Travel Document. *Id.* ¶ 59. Alvarez then left the United States and returned on September 17, 2018, utilizing the Travel Document. *Id.* At the time the Complaint was filed, Alvarez had not submitted an I-485 Application. *Id.* ¶ 60.

Plaintiff Yolanda Maritza Ramirez Martinez ("Ramirez"), a national of El Salvador, entered the United States without inspection in 1998. *Id.* ¶¶ 62-63. Ramirez was placed in removal proceedings and ordered removed by an IJ on January 5, 1999. *Id.* ¶ 63. Subsequently, Ramirez was granted TPS in 2001. *Id.* ¶ 62. In 2014, Ramirez applied for and obtained a USCIS issued Travel Document. *Id.* ¶ 65. Ramirez left the United States and returned in May 2014, utilizing the Travel Document. *Id.* At the time the Complaint was filed, Ramirez had not submitted an I-485

application. *Id.* ¶ 66.

Plaintiff CARECEN is a non-profit organization that works with the Latino community in the Washington D.C. area in part by providing legal counseling on a range of issues on a low or no cost basis. *Id.* ¶ 68. CARECEN's website notably states that it serves Latin Americans at "all stages of the long and complex migration process." *See* "About Us, Who We Serve," http://carecendc.org/about/who-we-serve/ (last visited on December 2, 2020).

STATUTORY BACKGROUND

In 1991 Congress amended the INA through the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 ("MTINA"). Among other things, MTINA provided that aliens in TPS, who traveled with the permission of the Attorney General, "shall be inspected and admitted in the same immigration status the alien had at the time of departure." *See* Pub. L. 102-232, 304(c) 105 Stat. 1733, 1749 (1991). In December 2019, USCIS added a footnote to their operational guidance simply to clarify for adjudicators the application of the aforementioned provision as applied to aliens whose applications for adjustment of status are within the sole jurisdiction of the immigration judges (in EOIR) because the aliens are in removal proceedings (and removal proceedings include those certain proceedings pending before an immigration judge and those same cases with outstanding removal or deportation orders). The Individual Plaintiffs allege that this addition to the USCIS operational guidance in its "Policy Manual" has detrimentally affected them by leading to the denial (or prospective denial) of their adjustment of status applications and the undermining of CARECEN's business. However, the operational guidance deviates in no way from the law or prior guidance but rather clarifies how the law applies in specific circumstances so that the law is applied consistently across the United States.

LEGAL STANDARDS

"'Federal courts are courts of limited jurisdiction,' possessing 'only that power authorized

by Constitution and statute.'" *Gunn v. Minton*, 568 U.S. 251, 256 (2013) (quoting *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994)). Indeed, federal courts are "forbidden . . . from acting beyond [their] authority," *NetworkIP, LLC v. FCC*, 548 F.3d 116, 120 (D.C. Cir. 2008), and, therefore, "have an affirmative obligation 'to consider whether the constitutional and statutory authority exist . . . to hear each dispute.'" *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1092 (D.C. Cir. 1996) (citations omitted). Federal courts' subject-matter jurisdiction is limited to deciding actual "Cases and Controversies" and one of the "landmarks[] setting apart the Cases and Controversies that are of the justiciable sort referred to in Article III . . . is standing." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks and citations omitted). Standing includes three elements: "[1] the plaintiff must have suffered an injury in fact…[2] there must be a causal connection between the injury and the conduct complained of…[and] [3] it must be likely…that the injury will be redressed by a favorable decision." *Id.* (internal quotation marks and citations omitted). Absent subject-matter jurisdiction over a case, the Court must dismiss it. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006).

When considering a motion to dismiss under Rule 12(b)(1), the Court must accept as true all uncontroverted material factual allegations in the complaint and "construe the complaint liberally, granting plaintiff the benefit of all inferences that can be derived from the facts alleged, and upon such facts determine jurisdictional questions." *Am. Nat'l Ins. Co. v. FDIC*, 642 F.3d 1137, 1139 (D.C. Cir. 2011) (internal citations and quotations omitted). The Court need not accept inferences drawn by the plaintiff, however, if those inferences are unsupported by facts alleged in the complaint or amount merely to legal conclusions. *Speelman v. United States*, 461 F. Supp. 2d 71, 73 (D.C. Cir. 2006). A Rule 12(b)(1) motion to dismiss may raise either a facial or factual challenge. *Erby v. United States*, 424 F. Supp. 2d 180, 182 (D.D.C. 2006). A facial challenge

requires the court to accept as true the allegations in the complaint and construe factual allegations in the light most favorable to the non-movant. *Id*. However, with a factual challenge "the court may not deny the motion to dismiss merely by assuming the truth of the facts alleged by the plaintiff[,]" and "the plaintiff's jurisdictional averments are entitled to no presumptive weight[.]" *Id.* at 183 (quotations omitted). With factual challenges, the court "'must go beyond the pleadings and resolve any disputed issues of fact the resolution of which is necessary to a ruling upon the motion to dismiss." *Id*. at 183 (citations omitted).

When considering a Rule 12(b)(6) motion to dismiss, courts must accept as true all well-pleaded facts and allegations in the complaint. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Courts need not accept a plaintiff's legal conclusions. *Id*. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*. (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Thus, "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id*. at 679 (citing *Twombly*, 550 U.S. at 556).

AGUMENT

I. The Court Should Dismiss the Complaint Under Rule 12(b)(1) for Lack of Subject-Matter Jurisdiction.

This Court should dismiss the entire Complaint for lack of subject-matter jurisdiction, because (1) none of the Plaintiffs have Article III standing, as their alleged injury was not caused by the challenged USCIS operational guidance, nor would it be redressed by its vitiation and (2) the Complaint serves as an improper collateral attack of the Individual Plaintiffs' removal orders, which is barred by the INA. Moreover, while several of the Individual Plaintiffs do not even have ripe claims, none have exhausted their administrative remedies, as is required under the APA and CARECEN (the organizational Plaintiff) lacks the necessary concrete injury to show standing.

A. Individual Plaintiffs Maria Floriselda Alvarez Gomez, Yolanda Maritza Ramirez Martinez, and Juan Francisco Medina's Claims are Not Yet Ripe for Review

This Court lacks subject matter jurisdiction over the claims of Individual Plaintiffs Maria Floriselda Alvarez Gomez ("Alvarez"), Yolanda Martiza Ramirez Martinez ("Ramirez"), and Juan Francisco Medina ("Medina") because their claims are not yet ripe for review. Ripeness has both a constitutional component and a prudential component. *Doe v. Pompeo*, 451 F. Supp. 3d 100, 114 (D.D.C. 2020) (citing *Nat'l Park Hosp. Ass'n v. Dep't of the Interior*, 538 U.S. 803, 808 (2003)). Constitutional ripeness requires "a threatened injury is sufficiently 'imminent' to establish standing." *Id.* (quoting *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1428 (D.C. Cir. 1996)). In other words, constitutional standing requires that the Article III standing requirements of injury, causation, and redressability be met. *Id.* If a case is not constitutionally ripe, it may be prudentially ripe. *Id.* In determining prudential ripeness, "[c]ourts must balance 'the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Id.* (quoting *Nat'l Treasury Emps. Union*, 101 F.3d at 1427). Exceptions to the ripeness doctrine include situations in which "the legal question is 'fit' for resolution and delay means hardship[.]" *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 13 (2000).

The claims of Alvarez and Ramirez are neither constitutionally nor prudentially ripe for review, nor do exceptions to the ripeness doctrine apply. With no I-485 application for adjustment of status even filed, there is no injury to Alvarez and Ramirez here to make their claims constitutionally ripe. Likewise, there is nothing prudentially ripe for this Court to review, nor would any hardship be imposed on these individuals without this Court reviewing their claims. Alvarez and Ramirez continue to hold TPS and they face no imminent threat of removal. Thus, no

exception to the ripeness doctrine applies to either of these individuals.[9]

The claims of Individual Plaintiff Medina are also not yet be ripe for review. In order to establish an injury for purposes of constitutional standing, and ripeness, the injury-in-fact must be "certainly impending." *Nat'l Immigration Project of Nat'l Lawyers Guild v. Exec. Office of Immigration Review,* 456 F. Supp. 3d 16, 21 (D.D.C. 2020). Here, even if Medina can claim an injury-in-fact due to a pending I-485 application—unlike Gomez and Martinez who lack an injury in the first place – he certainly cannot allege that he has an injury "certainly impending" due to his pending adjustment of status application, filed just under a year ago. Compl. ¶ 54. Thus, Medina fails to plead that he has an injury-in-fact certainly impending, and accordingly fails to establish constitutional standing and ripeness. Nor does Medina establish prudential ripeness as his case is not fit for judicial review nor will the delay result in hardship. In order for an issue to be ripe for judicial review, "'[f]inal agency action pursuant to the [APA] is a 'crucial prerequisit[e]'[.]" *Nevada v. Dep't of Energy,* 457 F.3d 78, 85 (D.C. Cir. 2006) (quoting *Better Gov't Ass'n v. Dep't of State,* 780 F.2d 86, 88 (D.C.Cir.1986)). Here, there has been no final agency action regarding the I-485 application, and thus, Medina's claims are not yet ripe for review. Further, as with Individual Plaintiffs Alvarez or Ramirez, no hardship will result to Medina if the court does not adjudicate his claims because he will retain TPS and cannot be removed while he retains that status.

This Court lacks subject matter jurisdiction over the claims of Alvarez, Martinez, and Medina because they are not ripe for review. Should this Court find that Medina's claims are ripe, it still lacks subject matter jurisdiction over his claims because he has no impending injury.

B. Individual Plaintiffs Lack Standing Because They Cannot Demonstrate Causation or Redressability.

[9] *See* https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-el-salvador (last visited December 2, 2020).

Even if this Court determines that Individual Plaintiffs Medina, Alvarez, and Ramirez's claims are ripe for review, they still lack standing to bring their claims, as do all Individual Plaintiffs in this case. Plaintiffs lack standing to bring suit in this case for two main reasons: (1) there is no causal connection between the challenged USCIS' operational guidance and their alleged injury – the denial of their I-485 applications; and (2) Plaintiffs cannot show that the relief they seek will likely redress their alleged injury. Standing includes three elements: (1) injury-in-fact, (2) a causal relationship between the defendant's action and the injury, and (3) the ability for a favorable decision to provide redress for the injury. *Lujan*, 504 U.S. at 560; *Arpaio v. Obama*, 27 F. Supp. 3d 185, 203 (D.D.C. 2014), aff'd, 797 F.3d 11 (D.C. Cir. 2015). Here, USCIS did not deny Plaintiffs' adjustment of status applications because of the December 20, 2019 operational guidance. Rather, USCIS relied on MTINA, which has been the law since 1991, to deny Plaintiffs applications. *See* Pub. L. 102-232, 304(c) 105 Stat. 1733 (1991). In fact, USCIS has been adjudicating adjustment applications consistent with MTINA well before the publication of the USCIS operational guidance. *See Galindo Gomez v. USCIS*, No. 19-cv-3456-ABJ (D.D.C. November 13, 2020) (attached as Exhibit 1); *Del Carmen Espinosa v. Swacina*, No. 19-21315-CIV, 2019 WL 6682836, at *1 (S.D. Fla. Dec. 6, 2019); *Santa Maria v. McAleenan*, No. CV H-18-3996, 2019 WL 2120725 (S.D. Tex. May 15, 2019).

Recently, a court in this District rejected similar arguments brought by Plaintiffs and dismissed for lack of jurisdiction the action finding that, in accordance with MTINA, the plaintiff's travel did not execute his deportation order, and therefore plaintiff was not an arriving-alien. In *Galindo Gomez*, the plaintiff entered the United States without inspection in 1991, and in 1994 he was ordered deported. *See Galindo Gomez*, No. 19-cv-3456-ABJ, at 3. Instead of departing the United States, Galindo Gomez applied for, and was granted TPS in 2001. In 2016 Galindo Gomez

traveled on advance parole, and in 2018, he applied for adjustment of status. *Id.* at 2-3. In July 2019, USCIS denied Galindo Gomez's adjustment of status application pursuant to MTINA because Galindo Gomez was an alien who entered without inspection and was subject to a removal order, and therefore only the immigration court, not USCIS, could properly adjudicate his application. *Id.* at 2-4 (noting that MTINA requires that aliens "shall be inspected and admitted in the same immigration status [he] had at the time of departure."). The court dismissed the suit brought by Galindo Gomez for lack of jurisdiction because traveling after a grant of TPS did not execute Galindo Gomez's deportation order and therefore, he was not an arriving alien. Accordingly, only the immigration court, not USCIS, could properly adjudicate his application for adjustment of status. *Id.* at 8. Similar to the Plaintiffs in this case, Galindo Gomez challenged the USCIS operational guidance claiming that USCIS denied his application because of the "new" guidance, and not MTINA. However, in rejecting the challenge the court found that the guidance had no causal connection to the denial of his adjustment of status application because the application was denied five months before the guidance was published. The court also reasoned that because Galindo Gomez's injury was not traceable to, or caused by the guidance, a favorable ruling could not redress his injury and thus the court dismissed the policy challenge. *Id.* at 12.

Other district courts have rejected the arguments advanced by Plaintiffs in this case. In *Espinosa*, the court dismissed the case finding that, pursuant to MTINA, the plaintiff's travel did not execute her decade old deportation order, plaintiff was not an arriving-alien and that the immigration judge rather than USCIS had jurisdiction over her adjustment application. *Del Carmen Espinosa*, 2019 WL 6682836, at *1. The plaintiff, a citizen of El Salvador, entered the United States without inspection and was ordered deported. Subsequently, Espinosa was granted TPS and traveled on an advance parole document. *Id.* at *2. Subsequently, Espinosa applied for

adjustment of status and just two days later, USCIS denied the application pursuant to MTINA for lack of jurisdiction because Espinosa was not an arriving alien. *Id.* And likewise in *Santa Maria*, USCIS administratively closed the plaintiff's application because it lacked jurisdiction pursuant to MTINA, reasoning: "you are considered upon return to be in the status you held at the time of departure, in your case an alien with an outstanding deportation order." *Santa Maria*, 2019 WL 2120725 at *1. The district court agreed with this reasoning and rejected the plaintiff's argument that her travel after a grant of TPS somehow executed her removal order and thus USCIS could adjudicate her application. *Id*. at *3. There, the plaintiff had a final removal order, was subsequently granted TPS, and traveled on an advance parole document in 2016.

Thus, *Galindo Gomez*, *Espinosa*, and *Santa Maria*, each show that USCIS was adhering to MTINA and interpreting the law to bar TPS beneficiaries with final orders of removal who traveled on advance parole documents—like the Individual Plaintiffs here—well before the 2019 USCIS operational guidance that Plaintiffs challenge. As it is clear that this practice was in place *before* the USCIS operational guidance, there is no causal connection between the challenged operational guidance and their alleged injury – the denial of their I-485 applications. Nor can Plaintiffs satisfy the redressability prong of Article III standing because the relief they seek (invalidation of the guidance) cannot redress their alleged injuries. If USCIS had a practice in the years preceding December 2019, then the USCIS operational guidance of December 20, 2019 cannot have initiated it and the vitiation of the USCIS operational guidance, would, despite Plaintiffs' request, have no effect. Because Plaintiffs cannot show the elements of causation or redressability, they do not have standing and, consequently, this Court does not have jurisdiction. *Lujan*, 504 U.S. at 561.

C. Organizational Plaintiff CARECEN Lacks Standing.

Organizational Plaintiff CARECEN cannot establish standing because it can show no injury-in-fact. As discussed *supra*, standing has three requirements: (1) injury-in-fact, (2)

causation, and (3) redressability. *Lujan*, 504 U.S. at 560. To determine whether an organization has standing in its own right, a court "ask[s], first, whether the agency's action or omission to act injured the [organization's] interest and, second, whether the organization used its resources to counteract that harm." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015) (alterations in original) (quoting *PETA v. USDA*, 797 F.3d 1087, 1093 (D.C. Cir. 2015)).

To establish an injury to its organizational interests that qualifies as injury in fact, "an organization must allege that the defendant's conduct 'perceptibly impaired' the organization's ability to provide services[.]" *Turlock Irrigation Dist. v. FERC,* 786 F.3d 18, 24 (D.C. Cir. 2015) (citing *Equal Rights Center...).* Such perceptible impairment requires the defendant's conduct to "inhibit[]" the organization's "daily operations." *PETA*, 797 F.3d at 1094 (quoting *Action All. of Senior Citizens of Greater Phila. v. Heckler*, 789 F.2d 931, 938 (D.C. Cir. 1986)). Organizational standing requires CARECEN, "like an individual plaintiff, to show 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." *Food & Water Watch*, 808 F.3d at 919 (internal quotations and citations omitted). "An organization must allege more than a frustration of its purpose because frustration of an organization's objectives 'is the type of abstract concern that does not impart standing.'" *Id.* (quoting *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1433 (D.C. Cir. 1995)).

The facts in *Food & Water Watch* are instructive here as to what constitutes an injury sufficient for organizational standing. In *Food & Water Watch*, a consumer group challenged new U.S. Department of Agriculture ("USDA") poultry inspection regulations that shifted responsibility for inspection tasks from the government to the industry. 808 F.3d at 910–11. The group alleged that this shift would cause an increased risk of consumers contracting foodborne illness from poultry and that, as a result, the group would be forced to spend resources on educating

the public. *Id*. at 920. The D.C. Circuit held that such alleged injury was "nothing more than an abstract injury" to the group's interest, considering that the group had failed to establish that its "activities have been perceptibly impaired in any way," and the group, therefore, lacked standing to challenge the USDA regulations. *Id*. at 920–21.

The Fourth Circuit's recent decision in *CASA de Maryland, Inc. v. Trump*, is also helpful. *See* 971 F.3d 220 (4th Cir. 2020). CASA, a non-profit organization that offered legal and other services to immigrants in Maryland, Washington D.C., Virginia, and Pennsylvania, claimed that the Department of Homeland Security's ("DHS") public charge rule was contrary to law, arbitrary and capricious, and in violation of the Equal Protection component of the Fifth Amendment, and illegal on other grounds. *Id.* at 36. The district court found that CASA had alleged an organizational injury-in-fact because DHS's rule forced CASA to reallocate resources and change their advocacy posture. *Id.* at 238. The Fourth Circuit reversed, finding that it was not relevant whether an organization "felt moved to act in a particular manner," and "a plaintiff's voluntary expenditure of resources to counteract governmental action that only indirectly affects the plaintiff does not support standing." *Id.* at 238-239. The court stated that "a voluntary budgetary decision, however well-intentioned, does not constitute Article III injury, in no small part because holding otherwise would give carte blanche for any organization to 'manufacture standing by choosing to make expenditures' about its public policy of choice." *Id.* at 239 (citations omitted). And in contrasting the facts in *CASA* with the Supreme Court's seminal case of *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), the court stated that " Organizational injury, properly understood, is measured against a group's ability to *operate* as an organization, not its theoretical ability to *effectuate* its objectives in its ideal world. Quite simply, nothing in the Rule directly impairs CASA's ability to provide counseling, referral, or other services to immigrants." *Id*. (emphasis in original).

Moreover, "[r]esource reallocations motivated by the dictates of preference, however sincere, are not cognizable organizational injuries because no action by the defendant has directly impaired the organization's ability to operate and to function." *Id.*

Here, CARECEN provides legal services to immigrants in the Washington D.C. metro area. Compl. ¶ 21. They allege that the USCIS operational guidance affects their ability to provide services because it must "divert resources…spend time and resources to study…and establish new procedures for screening." *Id.* ¶ 193. CARECEN, however, can still provide legal services to immigrants in the Washington D.C. metro area, to include legal advice and assistance in attaining both TPS and adjustment of status. As such CARECEN can still "*operate* as an organization," even if it cannot "*effectuate* its objectives in its ideal world." *CASA de Maryland, Inc.*, 971 at 239. While CARECEN would prefer to shepherd its clients to adjustment of status via USCIS rather than the immigration courts "[r]esource reallocations motivated by the dictates of preference, however sincere, are not cognizable organizational injuries because no action by the defendant has directly impaired the organization's ability to operate and function." *Id.* A contrary rule would afford a legal services organization, dealing with any type of law, standing to sue whenever it diverts its own resources in response to any policy or rulemaking that it views as inconsistent with its mission. The harm alleged, like that in *Food and Water Watch*, is "nothing more than an abstract injury," and CARECEN cannot show their "activities have been perceptibly impaired in any way." 808 F.3d at 920-921. As such, CARECEN has no cognizable injury and without an injury CARECEN does not have standing in this lawsuit and it must be dismissed as a party.

D. The Court Lacks Jurisdiction Under the APA Because Plaintiffs Have Failed to Exhaust Administrative Remedies.

Even if Plaintiffs establish standing, this Court still lacks subject matter jurisdiction over the claims of the Individual Plaintiffs because they have failed to exhaust their administrative

remedies. The APA authorizes judicial review of "final agency action" for which there is no other adequate remedy in a court. 5 U.S.C. § 704. Two conditions must be satisfied for agency action to be final: (1) "the action must mark the 'consummation' of the agency's decision-making process, e.g., that 'it must not be of a merely tentative or interlocutory nature'" and (2) "the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citation omitted). "Consequently, 'finality requires exhaustion of administrative remedies.'" *See Meza v. Cucinelli*, 438 F.Supp.3d 25, 31 (D.D.C. 2020)[10] (*quoting Pinho v. Gonzales*, 432 F.3d 193, 200 (3d Cir. 2005)).

These principles, applied here, deprive the Court of subject-matter jurisdiction over this case because, in seeking to adjust their status, each of the Plaintiffs have failed to exhaust administrative remedies that are available to them. INA regulations provide that non-arriving aliens subject to deportation or removal orders like Plaintiffs, may only seek to adjust status with an IJ in deportation or removal proceedings. *See* 8 C.F.R. §§ 1240.1(a)(1)(ii), 1245.2(a)(1). If an IJ denies adjustment, the alien may appeal to the BIA. *See* 8 C.F.R. §§ 1003.1(b), 1003.3(a). If the BIA's decision is adverse, the alien may appeal it (on limited grounds) via petition for review of the final order in the relevant circuit court of appeals. See 8 U.S.C. § 1252(a)(5), (b)(2), (b)(9). The alien "is not entitled," however, "at any stage of this process, to review of his [or her] application in any district court." *Jafarzadeh v. Duke*, 270 F. Supp. 3d 296, 306 (D.D.C. 2017).

Within the aforementioned statutory scheme, "[i]f there remain steps that the immigrant can take to have an action reviewed within the agency, then the action is not final and judicial review is premature." *Pinho*, 432 F.3d at 200; *Meza*, 438 F.Supp.3d at 31.[11] In *Meza*, plaintiff

[10] On May 20, 2020, a Notice of Appeal was filed in *Meza* with the Court of Appeals for the District of Columbia. The appeal has been assigned Case No.: 20-5079.

[11] On May 20, 2020, a Notice of Appeal was filed in *Meza* with the Court of Appeals for the

challenged that he was an arriving alien. USCIS did not agree and denied his adjustment of status application for lack of jurisdiction. Meza was placed in removal proceedings and ordered removed in 2002. The District Court for the District of Columbia gave deference to the USCIS determination that plaintiff was not an arriving alien and found that plaintiff had not exhausted his administrative remedies because he had not filed a motion to reopen his removal proceedings. *Id*. at 34.

Plaintiffs have not established final agency action in their respective cases because they have not exhausted their administrative remedies. When USCIS denies an application for adjustment of status, the applicant, if not an arriving alien, may seek to renew the application in removal proceedings 8 C.F.R. § 1245.2(a)(5)(ii). Here, Individual Plaintiffs have all been ordered removed. However, these Plaintiffs remain in proceedings and may seek to reopen their removal proceedings. And they have not alleged or provided any evidence that they have sought to reopen removal proceedings so that their adjustment of status applications may be adjudicated in immigration court. Each Individual Plaintiff must avail her/himself of any administrative remedies available, which includes seeking adjudication of her/his adjustment of status application in a reopened removal proceeding. Administrative remedies are therefore still available. Each Individual Plaintiff may move to reopen removal proceedings to adjudicate adjustment of status applications before the IJs. *See generally*, 8 U.S.C. § 1229a (outlining in various subsections process for reopening removal proceedings); *Meza*, 438 F. Supp at 34-35; *see also* 8 C.F.R. § 1003.2 (same). Because Individual Plaintiffs are in removal proceedings and are not arriving aliens, they must exhaust administrative remedies in seeking to adjust their status. If a Plaintiff's motion to reopen or request for adjustment of status is denied at the agency level, that Plaintiff could bring a subsequent challenge through a petition for review in the proper circuit court of

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District of Columbia. The appeal has been assigned Case No.: 20-5079.

appeals. Given each Plaintiffs' failure to take the available steps in the statutory and regulatory scheme, each Plaintiff has failed to allege or offer evidence that he/she exhausted her/his administrative remedies, there is no final agency action, and thus the Court lacks jurisdiction.[12]

E. The Court Lacks Jurisdiction Because the INA Strips the Court of Jurisdiction Over Plaintiffs' Claims

If this Court finds that Plaintiffs have standing and have exhausted their administrative remedies, several provisions of the INA expressly prohibit this Court from exercising jurisdiction over this case. The Complaint avers that each Individual Plaintiff is subject to a valid, unexecuted removal order. *See* Compl. ¶¶ 27, 33, 39, 45, 52, 58, 63. Plaintiffs remain "in proceedings" until their removal order is executed pursuant to 8 C.F.R. § 1245.1(c)(8) and thus any application for adjustment of status where the alien is not an "arriving alien" in proceedings is subject solely to the jurisdiction of the immigration judge. Plaintiffs claim that the policy flowing from the USCIS operational guidance serves as an impediment to the execution of their removal orders. *Id.* ¶ 11. Plaintiffs ask this Court in seven counts to do one thing: remove the impediment. *Id.* ¶¶ 203, 209, 214, 221, 226, 229, 234. As such, in essence, Plaintiffs' complaint is a collateral attack on their removal orders, and this is clearly not permitted. *See Chen v. Rodriguez*, 200 F. Supp. 3d 174, 181 (D.D.C. 2016) ("when a claim by an alien challenges an agency determination that is 'inextricably linked' to a removal order, § 1252(a)(5) prohibits it from being heard in district court.").

The statutory and regulatory scheme is well established in Plaintiffs' situations and works to prevent forum shopping, maintain the immigration court's and the BIA's authority over such

[12] Plaintiffs claim that their challenge is to USCIS operational guidance. However, the redress that individual plaintiffs seek is approval of their adjustment of status applications by USCIS. *See* Compl. at 55, ¶ 3. These individual Plaintiffs have not exhausted their administrative remedies. *See Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 61 (D.C. Cir. 1990) ("courts usually look at the purposes of exhaustion and the particular administrative scheme in deciding whether they will hear a case or return it to the agency for further processing.").

cases, and allows Plaintiffs, and those similarly situated, avenues for review of removal orders and any adjustment of status application denials before BIA and eventually a circuit court. If USCIS were to violate this scheme and adjudicate and approve Plaintiffs' applications for adjustment of status, this would have the impact of granting Plaintiffs lawful permanent residence, despite a pre-existing removal order from an immigration judge in another agency, and would usurp the authority of the immigration judge's discretion on whether to grant adjustment of status, taking into account the outstanding removal order, the factors that led to the removal order, and the passage of time. Moreover, it would deprive the immigration court and the BIA from being able to review the very assertions Plaintiffs make regarding administrative jurisdiction.

The INA strips district courts of jurisdiction to grant any relief in actions directly or indirectly challenging final orders of removal. Title 8, section 1252(a)(5) provides that "a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter." 8 U.S.C. § 1252(a)(5) (emphasis added). Section 1252(b)(9) further provides that "[j]udicial review of all questions of law and fact…arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section." 8 U.S.C. § 1252(b)(9). These two sections make clear that once a removal order has been issued, an alien subject to the order "may only seek adjustment of status by filing a motion to reopen removal proceedings with an immigration judge, and [that] any subsequent challenges may be brought via petition for review of the final removal order" in the court of appeals. *Akinmulero v. Holder*, 347 F. App'x 58, 61 (5th Cir. 2009).

Therefore, "[r]egardless of how it is framed, when a claim by an alien challenges an agency

determination that is 'inextricably linked' to a removal order, § 1252(a)(5) prohibits it from being heard in district court." *Chen v. Rodriguez*, 200 F. Supp. 3d 174, 181 (D.D.C. 2016) (agreeing that § 1252(a)(5) prohibits APA claims that indirectly challenge a removal order). Because the Individual Plaintiffs' claims are inextricably linked to their removal orders, they are barred under § 1252(a)(5). *Id.* at 181-82 ("Although Plaintiff only 'indirectly challenges' the removal order to which he is subject by framing this case as seeking judicial review of USCIS's decision to administratively close his adjustment application," his case was "inextricably linked" to outstanding deportation and barred by § 1252(a)(5)); *see also Singh v. USCIS*, 878 F.3d 441, 445-46 (2d Cir. 2017) (lawsuit barred by § 1252(a)(5) where it challenged USCIS's decision that it lacked jurisdiction to consider adjustment due to existing deportation order); *Estrada v. Holder*, 604 F.3d 402, 408 (7th Cir. 2010) (district court lacked jurisdiction, under § 1252(a)(5), because if alien obtained requested relief, his order of removal "would necessarily be flawed"); *Martinez v. Napolitano*, 704 F.3d 620, 622-23 (9th Cir. 2012) (holding that § 1252(a)(5) eliminated jurisdiction over plaintiff's APA claims, which were nothing more than indirect attacks on his order of removal); *Gonzalez-Alarcon v. Macias*, 884 F.3d 1266, 1274-75 (10th Cir. 2018) (petitioner's claims were based on the alleged invalidity of his removal order and, therefore, barred by § 1252(a)(5)).[13]

[13] To the extent that individual Plaintiffs claims "arise[e] from the decision . . . to commence proceedings, adjudicate cases, or execute removal orders" the Court is also divested of jurisdiction pursuant to 8 U.S.C. S 1252(g). Section 1252(g) expressly prohibits the district court from hearing "any cause or claim … arising from the decision … to commence proceedings, adjudicate cases, or execute removal orders …." 8 U.S.C. § 1252(g) (emphasis added). Although the Complaint does not specifically request that the Court delve into the merits of their removal orders, the complaint does request the re-adjudication of their Form I-485 adjustment of status applications. Compl., at 55, ¶ 3. If USCIS re-adjudicated the Form I-485s and granted the applications, then this suit would prevent the Attorney General from executing the outstanding deportation orders against them, were TPS to no longer apply. Section 1252(g) precludes the Court from considering such a claim. *See Cardoso v. Reno*, 216 F.3d 512, 516-17 (5th Cir. 2000) (barring district court review of

Because all Plaintiffs in this case lack standing, Individual Plaintiffs have failed to exhaust their administrative remedies, and the INA strips this Court of jurisdiction over Individual Plaintiffs' claims, this Court lacks subject matter jurisdiction over this case.

II. The Court Should Alternatively Dismiss the Complaint Under Rule 12(b)(6) for Failure to State a Claim Upon Which Relief May Be Granted.

Even if the Court determines that it has jurisdiction over some or all of Plaintiffs' claims, there are several bases to dismiss the Complaint for failure to state a claim under Rule 12(b)(6).

A. Plaintiffs Fail to State a Claim Because, Legally, They Retained the Same Immigration Status Upon Return to the United States that They Had When They Departed; They Did Not Become "Arriving Aliens"

Not only does this Court lack of subject matter jurisdiction to adjudicate this complaint, the Court also has several bases for dismissing the complaint in its entirety for failure to state a claim. While the Court must accept well-pleaded facts as true when evaluating a motion to dismiss under Rule 12(b)(6), no such deference is afforded to legal conclusions. *Ashcroft*, 556 U.S. at 678. Where, as is the case here, a claim is premised upon an erroneous legal conclusion – that USCIS has the authority to adjudicate Plaintiffs' applications – the plaintiffs fail to state their claims, and their claims should be dismissed under Rule 12(b)(6). As discussed above, the immigration court has exclusive jurisdiction over an adjustment application if the alien is in deportation or removal proceedings unless the alien is an "arriving alien." 8 C.F.R. § 1245.2(a)(1); *see also Meza*, 2020 WL 601888, at *3. USCIS has exclusive jurisdiction over an adjustment application if the alien is an "arriving alien." 8 C.F.R. § 1245.2(a)(1); 8 U.S.C. § 1255(a). Consequently, whether Plaintiffs even stated a claim turns on whether they became "arriving aliens" under the INA upon returning

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denial of adjustment, under § 1252(g), where aliens were apparently subject to removal orders); see also Chen, 200 F. Supp. 3d at 182. Simply put, Plaintiffs cannot avoid the terms of § 1252(g) "by simply characterizing [their] complaint as a challenge to a denial of adjustment of status, rather than a challenge to the execution of a removal order." *Cardoso*, 216 F.3d at 516.

to the United States under a grant of advance parole.

Though Plaintiffs do not state or argue that they are "arriving aliens" in their complaint, the fact that they seek adjustment of status from USCIS rather than the IJ implies as much. *See* Compl. at 55, ¶ 3. Plaintiffs did not become "arriving aliens" when they returned to United States after travel outside the United States, *see* Compl. ¶ 25, because they traveled pursuant to USCIS's grant of an advance parole document. Ordinarily, if an alien with a removal order travels outside the United States, that alien is considered to have "departed" from the United States, thereby triggering various immigration consequences, including execution of that deportation order. *See* 8 U.S.C. § 1101(g).[14] [15] However, the TPS-specific provisions allow an alien to travel without these consequences. *See* 8 U.S.C. § 1254a(f)(3) (providing that an alien with TPS "may travel abroad with prior consent of the [Secretary of Homeland Security]").[16] Pursuant to MTINA, which controls Plaintiffs' advance parole, Plaintiffs were "admitted in the same immigration status [they] had at the time of departure." 8 U.S.C. § 1254a(f)(3); Pub. L. 102-232, § 304(c) 105 Stat. 1733 (1991).[17] MTINA governs the travel of aliens with TPS. Specifically, MTINA provides that a TPS beneficiary who travels and returns with authorization from the Attorney General, barring certain crimes, "shall be inspected and admitted in the same immigration status the alien had at the time

[14] TPS does not protect an alien from being placed in removal proceedings or from being ordered removed and it cannot serve as a basis for termination of removal proceedings. Matter of Sosa Ventura, 25 I&N Dec. 391, 393, 396 (BIA 2010). Accordingly, while the Government may not execute a removal order against an alien who has TPS, any underlying deportation or removal order remains valid and may be executed upon termination of TPS. *See id*. at 393, 396.

[15] If Plaintiffs claim that their trips outside of the United States executed their removal orders (which they do not assert explicitly in the complaint) then they would be statutorily inadmissible for ten years from their date of departure. *See* 8 U.S.C. § 1182(a)(9)(A)(ii)(II).

[16] Though 8 U.S.C. § 1254a(f)(3) references the Attorney General, he has been replaced by the Secretary of Homeland Security pursuant to the Homeland Security Act function transferring provisions. 6 U.S.C. §§ 251, 557.

[17] The relevant provisions of MTINA appear as a note to 8 U.S.C. § 1254a.

of departure." Pub. L. 102-232, § 304(c)(1)(A). When Plaintiffs departed the United States with advance parole, they were aliens who had entered without inspection and who were subject to outstanding deportation or removal orders. Thus, when Plaintiffs returned to the United States pursuant to the grant of advance parole, they remained in that same status and did not become an "arriving alien." Plaintiffs, therefore, remain aliens who entered without inspection, have TPS, and are subject to a final order of deportation or removal; Plaintiffs are not "arriving aliens." *See, e.g., Gonzalez v. Mayorkas*, 1:13- cv-1230, 2014 WL 585863, *5-6 (E.D. Va. Feb. 12, 2014), *aff'd sub nom. Gonzalez v. Zannotti*, 585 Fed. App'x 130 (4th Cir. 2014); *see also Espinosa*, 2019 WL 6682836, at *2 n. 2; *Pineda v. Wolf*, Civil Action No. 19-11201-RGS at 3 (D. Mass. May, 13, 2020) (Attached as exhibit 2).

The District Court for the Eastern District of Virginia addressed this issue in *Gonzalez*, and this Court should follow that court's reasoning. *Gonzalez*, 2014 WL 585863. at *5-6. The petitioner in *Gonzalez* was a TPS recipient with a final order of deportation who filed suit seeking to compel USCIS to adjudicate his adjustment application after USCIS administratively closed his application. *Id.* *1. In arguing that USCIS had jurisdiction over his application, the petitioner claimed that he was an "arriving alien" because he was paroled into the United States in 1991 after a visit to El Salvador. *Id.* at *5. The court disagreed:

> [T]he fact that he entered illegally in 1984 controlled his status….The category of aliens who entered without inspection and the category of arriving aliens are mutually exclusive; **an alien cannot be both inadmissible as having entered without inspection and at the time an arriving alien**. Nor is this conclusion altered by the fact that petitioner was at one time granted TPS and paroled into the United States after a 1991 visit to El Salvador. **The grant of parole does not erase petitioner's original entry without inspection, nor does it convert his status to that of an arriving alien.**

Id. (emphasis added). Accordingly, the petitioner in *Gonzalez* retained the same immigration status

that he had when he departed, an alien who entered without inspection, not an "arriving alien." *See also Espinosa*, 2019 WL 6682836, at *2 n. 2 (plaintiff who traveled under advance parole was not converted into an arriving alien upon return to the United States); *Pineda*, No. 19-11201-RGS at 2 ("Pineda's argument that his status changed to that of an "arriving alien" when he returned to the United States after being given permission to depart is simply wrong.")

Similarly, Plaintiffs did not become "arriving aliens" when they returned to the United States with advance parole documents. Under controlling law, Plaintiffs returned under the same immigration status they had at the time of their departure – those of aliens who entered without inspection and who are subject to final orders of deportation or removal. As a result, USCIS lacks jurisdiction over their adjustment applications (for those who even have adjustment applications pending), and seeking to overturn USCIS's operational guidance to obtain USCIS's administrative jurisdiction does not get Plaintiffs around their failure to state a claim, as MTINA, enacted prior to the operational guidance, would still control. Plaintiffs, therefore, fail to state a claim for relief, and the complaint should be dismissed for failure to state a claim pursuant to Rule 12(b)(6).

B. Plaintiffs' Rulemaking Challenge is Meritless Because USCIS's Operational Guidance is Either a General Policy Statement or an Interpretive Rule

This Court should likewise dismiss Plaintiffs' challenge to the USCIS operational guidance, which provides interpretive guidance to aid USCIS employees in the execution of their duties. Plaintiffs contend that the USCIS operational guidance is a legislative rule that should have been subject to notice and comment procedures pursuant to 5 U.S.C. § 553. *See* Compl. ¶¶ 213-214. Plaintiffs argue that the USCIS operational guidance "carries legal force and imposes [new] obligations." *Id.* at ¶ 213. Yet, Plaintiffs are mistaken. The USCIS operational guidance merely interprets existing statutory and regulatory requirements; it does not impose any new requirements or obligations and, as such, was not and is not subject to notice and comment procedures under the

APA.

"Legislative rules have the force and effect of law and may be promulgated only after public notice and comment," whereas "the APA does not require notice and comment for interpretive rules." *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 250 (D.D.C. 2014) (internal citations and quotation marks omitted). An interpretive rule merely "clarifies" a statutory or regulatory term or "reminds" parties of existing statutory or regulatory duties, *Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 236-37 (D.C. Cir. 1992), and reflects "'the agency's construction of the statutes and rules which it administers.'" *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015) (quoting *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995)).

There is no definitive test for determining whether a particular guidance document is a legislative rule, an interpretive rule, or a general policy statement, but the D.C. Circuit has pointed to several factors to guide courts in making this determination. First, the D.C. Circuit has explained that the agency's clear expression of its intention "is an important consideration" "in determining whether the agency has issued a binding norm or only an unreviewable statement of policy." *See Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 806 (D.D.C. 2006); *see also Cmty. Fin. Servs. Ass'n of Am., Ltd. v. Fed. Deposit Ins. Corp.*, 132 F. Supp. 3d 98, 120 (D.D.C. 2015) ("While this alone does not totally insulate the documents from having legal consequences, the agency's characterization of the documents is one of the relevant factors for consideration"); *Broadgate Inc. v. U.S. Citizenship & Immigration Servs.*, 730 F. Supp. 2d 240, 245 (D.D.C. 2010) (emphasizing that the language in an H-1B memorandum states on its face that it was only intended to provide guidance).

The USCIS operational guidance updates the USCIS Policy Manual. *See* USCIS

operational guidance, ECF No. 21-1 at 1. Here, according to USCIS's website, the policy manual "does not remove [immigration officers'] discretion in making adjudicatory decisions," and "does not create any substantive or procedural right or benefit," but rather "assists immigration officers in rendering decisions." *See* "About the Policy Manual," https://www.uscis.gov/policy-manual (last visited on December 4, 2020). Given that USCIS has clearly stated that it intends for the policy manual to assist immigration officers by providing relevant guidance and examples—and not to remove their discretion—the update (USCIS operational guidance) to the policy manual is not a legislative rule subject to notice and comment. *See* 5 U.S.C. § 553(b)(A).

Second, an agency's intent to exercise legislative power may be shown where the agency issues a rule that effectively amends the previously adopted substantive legislative rule, either by repudiating it or because the two rules are irreconcilable. *See Funeral Consumer Alliance*, 481 F.3d 860, 863-64 (D.C. Cir. 2007) (explaining that the task of courts is to determine "whether the agency has 'repudiated' or 'supplemented' one of its rules. . ."). In contrast, an agency action does not become an amendment merely because it supplies "crisper and more detailed lines than the authority being interpreted." *Id.* at 863 (citing *Am. Min. Cong. v. MSHA*, 995 F.2d 1106, 1107 (D.C. Cir. 1993)). If it were otherwise, "no rule could pass as an interpretation of a legislative rule unless it were confined to parroting the rule or replacing the original vagueness with another." *Id.*

The USCIS operational guidance does not repudiate any prior legislative rule; nor is it irreconcilable with the law it interprets. Section 304(c)(1) of MTINA provides

> (1) In the case of an alien described in paragraph (2) whom the Attorney General authorizes to travel abroad temporarily and who returns to the United States in accordance with such authorization – (A) the alien shall be inspected and admitted in the same immigration status the alien had at the time of departure[.]

Pub. L. No. 102-232, § 304(c)(1)(A). The USCIS operational guidance provides clarification to both the public and immigration officers of the application of this law to particular scenarios: that

of aliens under TPS, like Plaintiffs, who have outstanding removal orders and travel, as well as aliens under TPS who are in removal proceedings and travel. The USCIS operational guidance's scenarios provide an interpretation of the law that is clearly nested within a reasonable reading of the law itself and merely provides "crisper and more detailed lines than the authority being interpreted." *Funeral Consumer Alliance*, 481 F.3d at 863.

Third, where the guidance document does not cabin the agency's discretion, it is not a legislative rule. *See Ctr. for Auto Safety*, 452 F.3d at 806, 809 (if a policy is "permissive" or if officials are "free to exercise their discretion" pursuant to the policy, then "rights or obligations" have not been determined); *see, e.g., RCM Tech., Inc. v. U.S. Dep't of Homeland Sec.*, 614 F. Supp. 2d. 39, 46 (D.D.C. 2009) (in the context of the H-1B program, a purported policy that "gives adjudicators *permission* to require master's degrees" but that does not "*require* adjudicators to require master's degrees in all cases" is not binding) (emphasis in original).

As shown above, the policy manual—which the USCIS operational guidance updates—expressly states that it does not cabin individual immigration officer's discretion. Thus, officers are "free to exercise their discretion." *RCM Tech.*, 614 F. Supp. 2d. at 46. This factor, therefore, suggests that the USCIS operational guidance is *not* a legislative rule, as Plaintiffs purport. These factors show that the USCIS operational guidance is not a legislative rule, but merely interpretive guidance.[18] It provides an example of the application of law that is "crisper and more detailed"

[18] While it is material that the USCIS operational guidance is not a legislative rule, it is immaterial whether the USCIS operational guidance is an interpretive rule or a general policy statement because neither require notice and comment procedures. As explained in *Nat'l Min. Ass'n v. McCarthy*, "[a]s to interpretive rules, an agency action that merely interprets a prior statute or regulation, and does not itself purport to impose new obligations or prohibitions or requirements on regulated parties, is an interpretive rule." 758 F.3d at 252. However, "[a]n agency action that merely explains how the agency will enforce a statute or regulation—in other words, how it will exercise its broad enforcement discretion or permitting discretion under some extant statute or rule—is a general statement of policy." *Id.*

and it is not a repudiation or substitution for previous guidance. *Funeral Consumer Alliance*, 481 F.3d at 863. As such, the APA does not require a notice and comment procedure for the TPS Policy and Plaintiffs' challenge based on such assertion should be dismissed. *See also Diaz v. U.S. Citizenship & Immigration Servs.*, 499 F. App'x 853, 855-56 (11th Cir. 2012) (USCIS "manual does not create enforceable, substantive federal rights" and "does not have the force and effect of law.").

C. Mr. Cuccinelli Lawfully Served As Acting Director of USCIS.

Plaintiffs' fail to plausibly allege that Mr. Cuccinelli unlawfully served as Acting Director of USCIS, and Counts Four, Five, and Six of the Complaint must also be dismissed for that reason. *See* Compl., ¶¶ 215-229. Each of these counts depends upon Plaintiffs' argument that Mr. Cuccinelli's service as Acting Director of USCIS was either statutorily or constitutionally deficient, but the Complaint fails to plausibly allege any such deficiency. The Complaint does not dispute, for example, that the Acting Secretary had the power to create the role of Principal Deputy Director and to amend the DHS order of succession to set the Principal Deputy Director as first assistant to the Director. Nor do Plaintiffs allege that Mr. Cuccinelli was ineligible to be appointed as Principal Deputy Director. Lacking these basic factual allegations, the Complaint instead offers only a strained reading of the FVRA and invented constitutional arguments. These flawed legal theories lack merit and Counts Four, Five, and Six should therefore be dismissed.

1. **Mr. Cuccinelli's Service as Acting Director Did Not Violate the FVRA.**

Count Four alleges that "Mr. Cuccinelli's service as Acting Director was unlawful under the Federal Vacancies Reform Act." Compl. ¶ 216. Not so. Under the FVRA, when an office requiring Presidential appointment is vacant, the "first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity," absent the designation of another person under subsections (a)(2) or (a)(3). 5 U.S.C. § 3345(a)(1). Mr.

Cuccinelli, as Principal Deputy Director, was designated first assistant to the office of Director and therefore became Acting Director under subsection (a)(1) of the FVRA. While Count Four of the Complaint vaguely offers several conclusory and legally errant reasons why Mr. Cuccinelli's service did not comply with subsection (a)(1), none are consistent with the FVRA.

First, Count Four claims that Mr. Cuccinelli "never served as a first assistant within the meaning of the statute," but fails to explain what this means. Compl. ¶ 216. Plaintiffs may be referring to their claim that Principal Deputy Director role was not established by Congress. *See* ECF No.1 ¶¶ 133-134. But the Complaint nowhere explains the significance of that fact. While Congress *may* establish who shall serve as "first assistant" to an office for purposes of FVRA, *see, e.g.*, 6 U.S.C. § 113(1)(A) (Deputy Secretary of Homeland Security "shall be the Secretary's assistant for purposes of" the FVRA); 7 U.S.C. § 2211 (similar for Deputy Secretary of Agriculture); 28 U.S.C. § 508 (similar for Deputy Attorney General), it did *not* do so with respect to Director of USCIS. In the absence of such a Congressional mandate, determining which position shall serve as "first assistant" to a vacant office is left to the (in this case) Acting Secretary, who has the authority of the "head of the Department and shall have direction, authority, and control over it." 6 U.S.C. § 112(a)(2); *see also* S. Rep. 105-250 at 12 (noting that "[c]ertain officers have first assistants designated by statute" while "[o]ther departments and agencies have established first assistants by regulation"). Plaintiffs do not allege that the Acting Secretary lacks the power to create the position of Principal Deputy Director and to designate it as "first assistant" to the Director of USCIS, and it is therefore immaterial that Congress did not create the role.

Second, Count Four alleges that Mr. Cuccinelli "was not serving as the first assistant to the office of the Director" and "had not been serving in an office which was constituted as the first assistant to the office of the Director" at the time Mr. Cissna resigned as Director of USCIS.

Compl. ¶ 216. But subsection (a)(1) *nowhere* says either that a person must be serving as first assistant, or that the first assistant role must exist, at the time the vacancy arises to permit acting service. To the contrary, the statute "expressly applies to 'the first assistant *to the office* of [the officer who resigned],'" and not the first assistant of the officer. *See* Designation of Acting Associate Attorney General, 25 OLC Op. 177, 179 (Aug. 7, 2001) ("2001 OLC Op.") (quoting 5 U.S.C. § 3345(a)(1)) (emphasis added). A person therefore need only be the first assistant to the *office* during a vacancy in order to satisfy § 3345(a)(1), rather than the first assistant to the particular officer who resigned.[19] Reading § 3345(a)(1) to require the first assistant to be in place at the time the vacancy arises "renders the words 'to the office' meaningless," which is particularly problematic here given that Congress expressly substituted that language for the phrase "to the *officer*" when it replaced the Vacancies Act of 1868 with the FVRA. *Id.* (citing 144 Cong. Rec. S12,822 (daily ed. Oct. 21, 1998)); *see also Murphy v. Smith*, 138 S. Ct. 784, 789 (2018) (giving effect to Congress's purposeful omission of prior statutory language); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (holding that Congress "does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language").

Plaintiffs' attempt to graft these requirements onto the FVRA finds no support in the text of the statute and, if adopted, would frustrate the scheme adopted by Congress. For example, it would impede the functioning of the Executive Branch, which routinely relies on acting officers who serve in that capacity upon being installed as first assistants after the officer position has become vacant.[20] Plaintiffs' request to read additional requirements into subsection (a)(1) would

[19] In the wake of the 2001 OLC Opinion, the Government Accountability Office likewise adopted "the position that a person need not have been in the first assistant position before the vacancy occurs in order to serve as acting officer." See Letter from Victor S. Rezendes, GAO to Sen. Joseph I. Lieberman, *et al.* (Dec. 7, 2001), https://www.gao.gov/assets/80/75053.pdf.

[20] This practice is most common at the beginning of a new Administration, which typically fills

eliminate this practice. These non-textual requirements would create redundancies within the FVRA itself, particularly as to § 3345(b)(1). That section forbids a person from continuing to serve as an acting officer upon their nomination to the same office if, in the 365 days preceding the vacancy, the person "did not serve in the position of first assistant to the office of such officer." 5 U.S.C. § 3345(b)(1)(A)(i). That limitation would be superfluous if, as Plaintiffs urge, subsection (a)(1) barred a first assistant from serving in an acting capacity if that person was not *already* the first assistant at the time the vacancy occurred. Such "interpretations resulting in textual surplusage are typically disfavored." *United States v. Ali*, 718 F.3d 929, 937 (D.C. Cir. 2013).

Third, Plaintiffs allege that Mr. Cissna was "forced to resign" and "effectively fired" and thus did not resign "in the manner contemplated by the FVRA." Compl., ¶ 217. But the Complaint offers no detail about how Mr. Cissna was "effectively fired," instead admitting that Mr. Cissna "submitted his resignation 'at the request of the president.'" *Id.* ¶ 127. Plaintiffs fail to explain how such a request is tantamount to "effectively firing" Mr. Cissna. This conclusory allegation is therefore inadequately pled. Even if Plaintiffs' had explained their allegation sufficiently, "[t]he FVRA does not distinguish between voluntary and involuntary resignation." *United States v. Valencia*, No. 517CR882DAE12, 2018 WL 6182755, at *4 (W.D. Tex. Nov. 27, 2018) (citing 5 U.S.C. § 3345), *appeal dismissed*, 940 F.3d 181 (5th Cir. 2019); *see also* Designating an Acting Attorney General, 2018 WL 6131923, 42 Op. O.L.C. __, at *4 n.1 (2018) (concluding that an officer's resignation at the request of the President falls "within the meaning" of the term "resigned" in § 3345(a)). The FVRA attaches no significance to *why* an officeholder resigns or is otherwise unable to perform the duties of the office. *See* 5 U.S.C. § 3345(a).[21] Plaintiffs' admission

vacancies in Senate-confirmed positions by appointing first assistants, who then serve in an acting capacity until the Senate confirms the new Administration's nominees.

[21] The FVRA's Senate Report reinforces that the law applies in cases of death, resignation, or

that Mr. Cissna resigned is fatal to any theory that Mr. Cuccinelli's service was improper due to the manner in which Mr. Cissna left office.[22]

Finally, Plaintiffs' remaining alleged deficiencies with Mr. Cuccinelli's service fail to track the requirements of the FVRA. For example, Plaintiffs allege that there is "no statute or rule, directive, or other agency action published in the Federal Register" that established the office of Principal Deputy Director or that designated it as first assistant to the Director. Compl. ¶ 217; *see also id.* ¶ 134. But Plaintiffs do not allege that establishing the role or designating it as first assistant is beyond the power of the Acting Secretary; nor do they allege that formal rulemaking or a Federal Register notice are *requirements* for such acts—they are not.[23] Plaintiffs also claim that Mr. Cuccinelli "never served in USCIS, any other component of DHS, nor any other federal agency." Compl. ¶ 135. But subsection (a)(1) requires no such prior service.[24] And Plaintiffs further

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inability to perform the functions and duties of the office "regardless of how the situation is characterized." S. Rep. 105-250 at 12.

[22] Even if Mr. Cissna was fired—and Plaintiffs have failed to adequately allege that is the case—the FVRA would still govern his acting successor because such an officer is "otherwise unable to perform the functions and duties of the office" within the meaning of § 3345(a). *See* Guidance on Application of Federal Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 61 (1999) (concluding that an officer would be "otherwise unable to perform the functions and duties of the office" if he or she were fired); Designating an Acting Director of the Bureau of Consumer Financial Protection, 2017 WL 6419154 , 41 Op. O.L.C. __, at *4 (same)); Designating an Acting Attorney General, 2018 WL 6131923, 42 Op. O.L.C. __, at *4 n.1 (2018) (same).

[23] To the extent Plaintiffs are arguing that these actions were not memorialized, extrinsic public records show that is not the case. *See* Exs. 3 (June 10, 2019 Letter, McAleenan to Cuccinelli), 4 (June 10, 2019 Order Amending Succession).

[24] By contrast, service under subsection (a)(3) requires an officer to have served in the agency "not less than 90 days" in the "365-day period preceding the date of death, resignation, or beginning of inability to serve of the applicable officer. *See* 5 U.S.C. ¶ 3345(a)(3)(A). Congress's decision to include such a timing requirement in one provision indicates that it did not intend for a similar requirement to apply to a parallel provision. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it *in another section of the same Act*, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.")

speculate that Mr. Cuccinelli may have had difficulty achieving Senate confirmation to serve as Director of USCIS, *id.* ¶¶ 136-137, 140, but again fail to explain what relevance such allegations have to whether acting service is lawful under the FVRA. The Complaint therefore fails to allege any deficiency in the manner of Mr. Cuccinelli's acting service.

Although not actually referenced in Count Four, Plaintiffs allude to fact that another court within this district found that Mr. Cuccinelli did not lawfully serve as Acting Director. *See* Compl. ¶¶ 142-143; *see also L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1 (D.D.C. 2020), *appeal dismissed*, No. 20-5141 (Aug. 13, 2020). This Court should decline Plaintiffs' apparent invitation to adopt the reasoning of that narrow decision. In *L.M.-M.*, Judge Moss concluded that Mr. Cuccinelli was not serving in compliance with the FVRA because the Principal Deputy Director position ceased to exist upon Mr. Cuccinelli's assumption of the Acting Director role, and therefore the role was never "subordinate" to the Director. *See L.M-M.*, 442 F. Supp. 3d at 24-25. That decision hinged upon the belief that a "first assistant" *must* at some point be subordinate to the principal office." *Id.* at 24-26. But that conclusion finds no support in the text of the FVRA, which never uses the term "subordinate." Rather, the designation of an office as "first assistant" is, in the absence of an express Congressional mandate, left to the discretion of the head of the Department. *See* 6 U.S.C. § 112(a)(2). Congress imposed no such mandate here. The Senate Report further confirms that Congress was aware of the potential for "manipulation of first assistants to include persons highly unlikely to be career officials" through the appointment of "brief-serving first assistants." S. Rep. 105-250 at 13. But rather than adopt the requirements urged by Plaintiffs, or the *L.M.-M.* court's "subordinate" test, Congress instead chose to respond with a "length of service" requirement that it intended to be "sufficiently long to prevent [such] manipulation." *Id.* This Court should respect the scheme adopted by Congress and decline to impinge upon the Secretary's vesting-and-

delegation power through the adoption of non-textual requirements for first assistants.

2. Acting Secretary McAleenan Lawfully Appointed Mr. Cuccinelli As Principal Deputy Director.

Count Four claims that, even if Mr. Cuccinelli otherwise served in accordance with the FVRA, his initial appointment to the role of Principal Deputy Director was improper because his appointing officer also served in violation of the FVRA. *See* Compl. ¶¶ 219-221; *see also id.* ¶¶ 16, 144-150. The Court should reject this attempt to salvage Plaintiffs' FVRA claim.

Section 113(g)(2) of the Homeland Security Act permits the Secretary to "designate such other officers of the Department in further order of succession to serve as Acting Secretary." 6 U.S.C. § 113(g)(2). In April 2019, then-Secretary of Homeland Security Kirstjen Nielsen exercised this power to designate an order of succession for the office of the Secretary in the event of a vacancy. *See* Ex. 5 Designation of an Order of Succession for the Secretary (Apr. 9, 2019) ("April 2019 Order"). That new order of succession, in turn, made the Senate-Confirmed Commissioner of U.S. Customs and Border Protection ("CBP")—Kevin McAleenan—third in line to serve as Acting Secretary of Homeland Security. *See* April 2019 Order at 2. Ms. Nielsen resigned shortly after designating this new order of succession and, because the first two officers in the succession order were vacant, Mr. McAleenan became Acting Secretary at that time. Consistent with her order, Ms. Nielsen swore in Mr. McAleenan as Acting Secretary on April 10, 2019.[25]

Ms. Nielsen was the first Secretary to exercise the power to designate an order of succession under § 113(g)(2), which was enacted in December 2016. *See* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 1903, 130 Stat. 2000 (2016) (codified at 6 U.S.C. § 113(g) (Dec. 23, 2016)). Prior to her April 2019 Order, the order of

[25] *See* Farewell Message From Secretary Kirstjen M. Nielsen (April 10, 2019), https://www.dhs.gov/news/2019/04/10/farewell-message-secretary-kirstjen-m-nielsen.

succession for the Secretary in cases of death, resignation, or inability to perform the functions of the Office was governed by Executive Order 13753, a presidentially-issued order of succession under the FVRA. In parallel, and pursuant to the Secretary's longstanding vesting-and-delegation power in 6 U.S.C. § 112(b)(1), Secretary Nielsen's predecessor delegated the authorities of his office to a list of officials in the event that he was temporarily "unavailable to act during a disaster or catastrophic emergency." Both of these orders were memorialized in Sections II.A. and II.B., respectively, of Revision 8 of DHS Delegation 00106.[26]

Plaintiffs do not allege that Secretary Nielsen lacked authority under § 113(g)(2) to designate the order of succession, nor that then-CBP Commissioner McAleenan was not the highest-ranking Senate-confirmed officer in that order of succession at the time of Secretary Nielsen's resignation. Plaintiffs instead allege that the April 2019 Order failed to designate an order of succession for cases of resignation—even though the order states *five times* that it intended to designate an order of succession for the office of Secretary, without qualification—and instead only modified the existing order of delegation where the Secretary is "unavailable to act during a disaster or catastrophic emergency." *See* Compl. ¶ 147. But that is wrong because delegations occur under a separate source of statutory authority than designating an order of succession. The former is performed under the Secretary's vesting-and-delegation powers in § 112(b)(1), but Secretary Nielsen's April 2019 order *repeatedly* invoked the Secretary's newly enacted power to designate an order of succession under § 113(g)(2). The April 2019 order unambiguously invokes the Secretary's power in § 113(g)(2) and sets forth an unqualified order of succession for cases of vacancy: "By the authority vested in me as Secretary of Homeland Security, including the

[26] *See* Ex. 6, *DHS Orders of Succession and Delegations of Authorities for Named Positions*, DHS Delegation No. 00106, Revision No. 08 (Dec. 15, 2016).

Homeland Security Act of 2002, 6 U.S.C. § 113(g)(2), I hereby designate the order of succession for the Secretary of Homeland Security as follows… .” *See* April 2019 Order at 2.

To defeat the plain text of the April 2019 Order, the Complaint relies entirely on the flawed reasoning of an August 14, 2020 Government Accountability Office (“GAO”) decision that found that Secretary Nielsen’s order failed to designate an order of succession and instead merely modified the list of delegations in Section II.B. of Delegation 106.[27] *See* Compl. ¶ 146. But the GAO decision, and those judicial decisions adopting its reasoning, commit two fundamental errors.

First, the GAO decision wrongly assumes that the controlling document is Revision 8.5 to Delegation 00106, which was issued shortly after the April 2019 Order and inaccurately memorialized the contents of that order. But Delegation 00106 is merely an administrative document that compiles various orders of succession and delegation for purposes of ministerial convenience; the Secretary *alone* has the power under § 113(g)(2) to designate an order of succession. Secretary Nielsen never signed Revision 8.5 and only the April 2019 Order carries the force of the Secretary’s designation power under § 113(g)(2). *Cf. Vill. of Bald Head Island v. U.S. Army Corps of Eng’rs*, 714 F.3d 186, 195 (4th Cir. 2013) (agency’s “formal approval” of a project was final agency action, not the “subsequent activities in carrying it out”).

Second, the GAO Decision ignores the distinction between orders of succession and delegations of authority. The power to designate the former was, until enactment of § 113(g)(2) in

[27] Since Plaintiffs filed their complaint, several district courts have issued opinions adopting the GAO’s reasoning and concluding that the April 2019 Order did not set an unqualified order of succession. *See Casa de Maryland, Inc. v. Wolf*, No. 8:20-CV-02118-PX, 2020 WL 5500165, at *20 (D. Md. Sept. 11, 2020); *Immigrant Legal Res. Ctr. v. Wolf*, No. 20-CV-05883-JSW, 2020 WL 5798269, at *7 (N.D. Cal. Sept. 29, 2020); *Batalla Vidal v. Wolf*, No. 16CV4756NGGVMS, 2020 WL 6695076, at *6 (E.D.N.Y. Nov. 14, 2020); *La Clinica de la Raza v. Trump*, No. 19-CV-04980-PJH, 2020 WL 6940934, at *14 (N.D. Cal. Nov. 25, 2020). These decisions are errant for substantially the same reasons as the GAO decision.

December 2016, reserved for the President, while the ability to delegate authority is a longstanding feature of the Secretary's vesting-and-delegation power in § 112(b)(1). *Compare* 6 U.S.C. § 113(g)(2) (order of succession), *with* § 112(b)(1) (delegation of authority). The GAO errantly concluded "[e]ach ground," that is, Section II.A and Section II.B of Delegation 00106, "had its own order of succession." Decision at 5. But as explained, when Ms. Nielsen signed the April 2019 Order, Section II.B. in Delegation 00106 was *not* an order of succession—it was a delegation of authority. So if, as the GAO Decision concludes, Ms. Nielsen's order applied only to Section II.B, then she set an order for delegation of authority, not an order of succession. And under that reading, the GAO Decision has no explanation for how—by signing an order to "amend the order of succession" under § 113(g)(2)—Ms. Nielsen *actually* did nothing but amend the order for delegation of authority under § 112(b)(1). That conclusion cannot be squared with the April 2019 Order's repeated invocation of § 113(g)(2) and its stated intent to "designate the order of succession for the Secretary of Homeland Security." April 2019 Order at 2.

The Court should reject Plaintiffs' reliance on the flawed GAO decision and interpret the April 2019 Order in accordance with its plain text. Doing so further requires that Plaintiffs' collateral attack on Mr. Cuccinelli's appointment as Principal Deputy Director be dismissed.

3. Mr. Cuccinelli's Service as Acting Director Did Not Violate the Appointments Clause.

Count Five claims that, as Acting Director, Mr. Cuccinelli was "serving as an officer for the purposes of the Appointments Clause at the time he enacted the TPS Policy Alert" but had "not been nominated by the President and confirmed by the Senate." Compl., ¶¶ 224-225. This count should be dismissed because, as explained above, Mr. Cuccinelli's acting service complied with the FVRA and Plaintiffs do not allege that, if Mr. Cuccinelli lawfully served under the FVRA, his service independently violated the Appointments Clause. *See* Compl., ¶¶ 222-226. Such an

argument would call into question the Congress's ability to enact laws governing acting service in cases of vacancy—an issue where Congress has actively legislated since the time of the founding. *See, e.g.*, Act of May 8, 1792, ch. 37, § 8, 1 Stat. 281 (authorizing acting service in "cas[s]e of the death, absence from the seat of government, or sickness of the Secretary of State, Secretary of the Treasury, or of the Secretary of the War department, or of any officer of either of the said departments whose appointment is not in the head thereof"); Act of Feb. 13, 1795, 1 Stat. 415 (modifying the 1792 act to apply to cases of "vacancy" limiting the term of acting service to no longer than six months). Because Mr. Cuccinelli's temporary acting service complied with the scheme adopted by Congress in the FVRA, Plaintiffs' constitutional challenge fails.[28]

D. Plaintiffs Fail to State an Adequate Fifth Amendment Equal Protection Claim

Plaintiffs' equal protection challenge also fails to state a claim. Plaintiffs cite to persuasive and distinguishable authority from other circuits to support their theory that the TPS operational guidance violated their rights to equal protection under the Fifth Amendment and was "motivated by animus . . . and discrimination."[29] Compl. ¶ 232; *see id.* ¶¶ 16; 170-179.[30] However, as explained below, the Complaint fails to lend support to Plaintiffs' conclusory allegations. *See Mirv*

[28] Count Six—which claims that Mr. Cuccinelli's actions were *ultra vires*—must in turn fail. That count rests entirely on the claim that "Mr. Cuccinelli's service was not authorized by DHS's own succession order, HAS Delegation 00106, the Federal Vacancies Reform Act, or the Appointments Clause of the U.S. Constitution." Compl. ¶ 229. But as explained, Mr. Cuccinelli's service lawfully complied with the relevant authorities. *See supra* 30-36. Plaintiffs do not otherwise allege that Mr. Cuccinelli's issuance of the TPS Policy Alert was *ultra vires*.

[29] Plaintiffs provide no support for their assertion that harm to Plaintiffs' family members, communities, or legal advocates should be accorded the same equal protection that Plaintiffs here, seek (on the basis of these individuals' and entities' relationships to Plaintiffs). *See* Compl. ¶ 234.

[30] *Ramos v. Nielsen*, 336 F.Supp.3d 1075 (N.D. Cal. 2018) cited by Plaintiffs in their briefing has since been overruled by *Ramos v. Wolf*, 975 F.3d 872, 896–97 (9th Cir. 2020). The Ninth Circuit in *Ramos* determined that Plaintiffs had failed to adequately plead an equal protection claim because they failed to provide evidence to support their claim. That is the case here, as well, as explained below.

Holdings, LLC v. United States Gen. Servs. Admin., 454 F. Supp. 3d 33, 41 (D.D.C. 2020), *appeal dismissed*, No. 20-5140, 2020 WL 3635113 (D.C. Cir. June 30, 2020) (quoting *Hettinga*, 677 F.3d at 476). (internal citations omitted) ("While the Court must 'assume [the] veracity' of any 'well-pleaded factual allegations' in a complaint, conclusory allegations 'are not entitled to the assumption of truth.' Thus, '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.'").

Challenges under the Fifth Amendment's Equal Protection clause are subject to the highly deferential rational basis review. *See Narenji v. Civletti*, 617 F.2d 745, 747 (D.C. Cir. 1979) (citations omitted) ("Distinctions on the basis of nationality may be drawn in the immigration field by the Congress or the Executive. So long as such distinctions are not wholly irrational they must be sustained."). The court in *Narenji* rejected an equal protection challenge to a regulation that expressly singled out Iranian nationals for stricter enforcement. *See Narenji*, 617 F.2d at 748 (citation omitted) ("[T]he responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government."). Here, there is no such singling out. USCIS's operational guidance at issue in this case was simply meant to provide USCIS a practice in line with the existing law (MTINA). Also, to the extent that other cases cited by Plaintiffs, such as *NAACP v. DHS*, 364 F. Supp. 3d 568 (D. Md. 2019), rejected rational basis review, that was in the context of TPS termination and did not have to do with the operational guidance at issue here. Here, there is a clear rational basis for the government's operational guidance and Plaintiffs' equal protection allegation fails to state a claim, under the highly deferential and difficult to overcome rational basis standard.

Even under the higher standard of review articulated in *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), Plaintiffs' equal protection claim also fails. *See*

Dep't of Homeland Sec. v. Regents of the University of California, 140 S. Ct. 1891 (2020). Under *Arlington Heights*, "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." 429 U.S. at 265. A plaintiff bringing an equal protection claim is not require[d] "to prove that the challenged action rested solely on racially discriminatory purposes . . . or even that a particular purpose was the 'dominant' or 'primary' one. *Id.* Plaintiffs need only show that the alleged "discriminatory purpose" was a "motivating factor" for the challenged action. *See id.* at 255-56 ("When there is a proof that a discriminatory purpose has been a motivating factor in the decision, th[e] judicial deference [that courts normally afford legislators and administrators] is no longer justified."). And "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* at 266. Factors to consider include the:

- "impact of the official action [and] whether it bears more heavily on one race than another." *Id.* at 266;
- "historical background of the decision [and] . . . if it reveals a series of official actions taken for invidious purposes." *Id.* at 267;
- "specific sequence of events leading up to the challenged decision . . . [and whether there is a] [d]eparture from the normal procedure[e]", including "substantive departures." *Id.* at 267.
- "legislative or administrative history" including "contemporary statements" made by decisionmakers. *Id.* at 268.

In "extraordinary circumstances," testimony by decisionmakers might be considered if not barred by privilege. *Id.* at 268.

Applying these factors to this case, Plaintiffs fail to provide the requisite evidence to support their Equal Protection claim that racial discrimination was a reason or even a motivating factor in USCIS's issuance of the operational guidance at issue in this case. First, while the operational guidance at issue here will necessarily affect only nationals of certain countries who are included in the TPS program at this time, the Supreme Court has recently rejected this

argument, in the context of a DACA termination challenge, stating, "Latinos make up a large share of the unauthorized alien population, one would expect them to make up an outsized share of recipients of any cross-cutting immigration relief program." *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1915 (2020) (citations omitted). As the Court pointed out, "Were this fact sufficient to state a claim, virtually any generally applicable immigration policy could be challenged on equal protection grounds." *Id.* The operational guidance Plaintiffs take issue with clarifies that the agency must comply with MTINA, and the TPS statute in general, and those statutes are silent as to race, pointing only to those individuals who qualify for the protection of TPS. Individuals of many different races enjoy the protection of TPS and diversity is likely to persist as countries are added and subtracted from the list of nations currently included (El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, Sudan, South Sudan, Syria, Yemen).

Second, as was the case in *Regents*, "there is nothing irregular about the history leading up to" the issuance of the guidance at issue in this case. 140 S. Ct. at 1916. Also, like the Plaintiffs in *Ramos*, Plaintiffs here fail to show that the historical background or "overarching goal" of the operational guidance "was motivated by racial animus." *Ramos v. Wolf*, 975 F.3d 872, 899 (9th Cir. 2020). Instead, like the Defendants in *Ramos* (who were seeking termination of the TPS program), Defendants motivations here are rooted in "the administration's immigration policy[,]" and a desire to ensure consistent practice across USCIS offices, as explained herein. Third, even assuming that Plaintiffs have adequately alleged a departure from procedure – which Defendants do not concede – they fail to adequately plead that such an alleged departure was tied to a discriminatory reason or motive. Fourth, like the presidential statements cited by Plaintiffs in *Regents*, the statements of President Trump and Acting Director Cuccinelli, here, "are unilluminating[,]" *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891,

1916 (2020), and are "remote in time and made in unrelated contexts" and "do not qualify as "contemporary statements" probative of the decision at issue." *Id.*

In support of their claim, Plaintiffs cite to one news article from January 11, 2018 (*see* Compl. ¶ 14) – approximately two years before USCIS issued the operational guidance at issue in this case – in which President Trump made derogatory statements regarding certain countries. Other articles and tweets with similar comments, while unfortunate, are neither close in time to the issuance of USCIS's operational guidance, nor do they relate to it. For example, statements regarding asylum seekers, not TPS holders, from April 2019 and November 2018, fail to demonstrate the purported "direct or circumstantial evidence of discriminatory intent[,]" underlying USCIS's operational guidance at issue in this case. *See Saget*, 345 F.Supp.3d at 301. Similarly, remarks by Acting Director Cuccinelli, from 2013, October 2018, and June 2019 do not meet the standard of providing evidence of intent as to the operational guidance at issue in this case. Thus, Plaintiffs' conclusory allegations fail to state a claim upon which relief may be granted. *Mirv Holdings*, 454 F. Supp. 3d 33, 41 ("[T]he Court need not accept 'legal conclusions cast as factual allegations,' or 'inferences drawn by [the] plaintiff if those inferences are not supported by the facts set out in the complaint.'"). And this Court must accord USCIS's decision to issue operational guidance, the presumption of regularity to which it is entitled, *see USPS v. Gregory*, 534 U.S. 1, 10 (2001), especially since there is no evidence of animus, here.

Further, much of Plaintiffs' authority concerns termination of TPS status. [31] While Plaintiffs try to tie the possible future termination of certain TPS designations to the operational guidance (see Compl. ¶ 20), the two are unrelated. Various courts have enjoined termination of

[31] *See Saget v. Trump*, 345 F.Supp.3d 287 (EDNY 2018); *see also NAACP v. U.S. Dep't of Homeland Sec.*, 364 F.Supp.3d 568 (D.Md. 2019); *Ramos v. Nielsen*, 336 F.Supp.3d 1075 (N.D. Cal. 2018), *vacated and remanded by Ramos v. Wolf*, 975 F.3d 872 (9th Cir. 2020).

TPS for beneficiaries from many countries including those of the Individual Plaintiffs in this case hail, making the connection between "imminent risk of remov[al]" due to the potential termination of TPS (*see* Compl. ¶ 20) and the operational guidance at issue in this case, tenuous, at best. *See* https://www.uscis.gov/humanitarian/temporary-protected-status; *see also* Compl. ¶¶ 76-78.[32]

In the end, Plaintiffs' attempt to bring an equal protection challenge regarding operational guidance issued by USCIS fails. The Government provided a rational basis for the issuance of the guidance – consistency across all of USCIS in line with MTINA. And even under the heightened *Arlington Heights* standard, Plaintiffs fail to state an adequate equal protection claim.

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' motion and dismiss the Complaint in its entirety.

[32] Another case cited by Plaintiffs, *Make the Rd. New York v. Pompeo*, No. 19 CIV. 11633 (GBD), 2020 WL 4350731, at *19 (S.D.N.Y. July 29, 2020), a challenge to a presidential proclamation and Department of State guidance regarding public charge, is also inapposite, here. In that unpublished case, the court determined that the statistical evidence provided by Plaintiffs in support of their equal protection claims, contemporaneous statements by officials regarding the public charge guidance, and the fact that similar challenge had been upheld in a comparable case provided sufficient support for Plaintiffs' equal protection claim. *Make the Rd. New York v. Pompeo*, No. 19 CIV. 11633 (GBD), 2020 WL 4350731, at *19 (S.D.N.Y. July 29, 2020). Not only is the USCIS operational guidance here distinct from the presidential proclamation and public charge guidance at issue in *Make the Rd.*, but Plaintiffs in this case have not provided the same kind of support for an equal protection claim, here.

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Washington, DC

Respectfully submitted,

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