IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

M.A., et al., *Plaintiffs*, v. ALEJANDRO MAYORKAS, Secretary of the Department of Homeland Security, in his official capacity, et al., *Defendants.*	No. 1:23-cv-01843-TSC

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT

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INTRODUCTION

In May 2023, the Departments of Homeland Security and Justice ("DHS" and "DOJ") rolled out dramatic changes to the expedited removal system. That system allows rapid border removals of certain noncitizens. But it includes the vital safeguard of "credible fear" interviews, which Congress designed to ensure that anyone with potential claims for protection can pursue those claims in the United States. The new changes, individually and collectively, eviscerate that safeguard for many noncitizens arriving at the southern border. Plaintiffs, who are a group of individuals seeking safety in this country and two organizations representing asylum seekers, challenge the new expedited removal regulations, policies, and procedures.

The new policies are all connected to Defendants' sweeping new bar to asylum eligibility for most noncitizens at the southern border who enter without a port-of-entry appointment. *See* Circumvention of Lawful Pathways, 88 Fed. Reg. 31,314 (May 16, 2023) (the "Rule"). The substance of that bar has been held unlawful in other proceedings. *See East Bay Sanctuary Covenant v. Biden*, ___ F. Supp. 3d ___, 2023 WL 4729278 (N.D. Cal. July 25, 2023), *appeal pending*, No. 23-16032 (9th Cir.). This case focuses on the Rule's operation in expedited removal proceedings.[1] Among many other flaws in the Rule, Defendants implemented the bar through

[1] In a contemporaneously filed motion, the parties have jointly moved that certain of Plaintiffs' claims against the Rule be held in abeyance pending further proceedings in *East Bay Sanctuary Covenant*, 2023 WL 4729278. Plaintiffs in that case prevailed in the district court on claims that, *inter alia*, the bar violates the asylum statute, 8 U.S.C. § 1158, and notice-and-comment procedures; that judgment is stayed pending the government's appeal. Plaintiffs respectfully submit it would be in the interest of judicial economy to hold in abeyance the analogous claims asserted in this case, as any appellate decisions in *East Bay Sanctuary Covenant* would likely inform future possible briefing and decision, if necessary, on the substantially similar claims here. But this case also advances various claims that are *not* at issue in the *East Bay Sanctuary Covenant* appeal and unlikely to be affected by any resulting analysis in that case—including Plaintiffs' claim that the bar, even if generally permissible, has been unlawfully implemented in expedited removal. Proceeding to judgment in a timely manner on the claims unique to this case will best

regulations that violate the expedited removal statute by abandoning the "significant possibility" screening standard Congress adopted. And, contemporaneously with the Rule, Defendants implemented several other expedited removal policies that work in concert with the new bar to block noncitizens from obtaining protection.

The result is an expedited removal process entirely unlike the one Congress designed to protect against rapid removal of noncitizens "to countries where they could face persecution." *Grace v. Barr*, 965 F.3d 883, 902 (D.C. Cir. 2020). Noncitizens are now barred from asylum in rapid proceedings without the benefit of Congress's "low screening standard." *Id*. Non-Mexicans are slated for removal to Mexico without complying with statutory procedures, and are surprised to learn they must establish fear of persecution and torture *as to Mexico* rather than their home countries. Noncitizens held in restrictive border facilities are afforded just 24 hours to prepare for this dramatically transformed interview process. And, facing all these barriers, non-Mexicans are repeatedly pushed to instead accept "voluntary" return to Mexico under false pretenses.

This concerted effort to drive down the rates at which noncitizens pass the credible fear screening has succeeded—as Defendants are touting in other litigation. For asylum seekers, the overall effect is a betrayal of the congressional promise that everyone, including people subject to expedited removal, is entitled to a real chance to seek protection in this country. These policy changes are unlawful and should be vacated.

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allow the parties and the Court to focus their attention and resources on the expedited-removal-specific issues set forth in this motion, and to address the urgent need for relief for vulnerable people being subjected to the unlawful policies challenged in this case.

BACKGROUND

A. Asylum, Related Relief, and the Expedited Removal System

People fleeing persecution and torture can seek three primary forms of protection: asylum under 8 U.S.C. § 1158; withholding of removal under 8 U.S.C. § 1231(b)(3); and protection under the Convention Against Torture ("CAT"), *see* 8 C.F.R. §§ 1208.16-18. These protections reflect "one of the oldest themes in America's history—welcoming homeless refugees to our shores." S. Rep. No. 96-256 at 1 (1979) (Refugee Act), *as reprinted in* 1980 U.S.C.C.A.N.141, 141. Asylum affords protection from removal to individuals who have a "well-founded fear of persecution"—which can be satisfied by showing a ten percent chance of persecution—on account of one or more of five protected grounds. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 428, 430, 440 (1987). Withholding of removal and CAT offer more limited protections and require applicants to meet a higher standard by proving that they are more likely than not to be persecuted or tortured. *See id.* at 430; *Nasrallah v. Barr*, 140 S. Ct. 1683, 1687 (2020). These forms of protection implement the United States' international humanitarian treaty obligations. *Cardoza-Fonseca*, 480 U.S. at 435.

Congress took care to ensure that noncitizens already within the United States or arriving at the border would be able to apply for asylum. Any person "who arrives in the United States" may apply for asylum "whether or not" they arrived "at a designated port of arrival." 8 U.S.C. § 1158(a)(1). The asylum statute includes a handful of carefully crafted bars to eligibility, two of which specifically address the circumstances where an individual may be denied asylum because protection is available to them in a third country. 8 U.S.C. §§ 1158(a)(2)(A), (b)(2)(A)(vi).

Asylum, withholding, and CAT protection are available in regular removal proceedings conducted under 8 U.S.C. § 1229a, called "defensive" proceedings; individuals not in removal proceedings can also submit an "affirmative" application for asylum. 8 C.F.R. §§ 208.2(a), 208.9.

In 1996, Congress created the "expedited removal scheme to substantially shorten and speed up the removal process" for certain noncitizens arriving without valid immigration documents. *Make the Rd. N.Y. v. Wolf*, 962 F.3d 612, 618 (D.C. Cir. 2020). The process "lives up to its name." *Id.* at 619. Absent an indication of fear of persecution or torture, a noncitizen may be removed almost immediately. *Id*. But Congress balanced the interest in "efficient removal" against "a second, equally important goal: ensuring that individuals with valid asylum claims are not returned to countries where they could face persecution." *Grace*, 965 F.3d at 902; *see id*. ("'Under this system, there should be no danger that [a person] with a genuine asylum claim will be returned to persecution.'") (quoting H.R. Rep. No. 104-469, pt. 1, at 158 (1995)).

Thus, noncitizens in expedited removal who express fear of removal, or an intention to apply for asylum, are entitled to a credible fear interview ("CFI") with an asylum officer—an employee of United States Citizenship and Immigration Services ("USCIS"), which is part of DHS. 8 U.S.C. § 1225(b)(1)(B). If noncitizens demonstrate a "significant possibility" that they "could establish eligibility for asylum," they are taken out of the expedited removal process and can pursue asylum and other forms of protection in regular removal proceedings. *See* 8 U.S.C. § 1225(b)(1)(B)(v). If a noncitizen does not establish a significant possibility of asylum eligibility, the asylum officer will also screen for withholding and CAT protection, with a positive finding likewise leading to regular proceedings. 8 C.F.R. § 208.30(e)(2)-(3). A negative finding by the asylum officer is reviewable by an immigration judge—a DOJ employee—but not subject to further review. 8 U.S.C. §§ 1225(b)(1)(B)(iii); 1252(a)(2)(A), (e)(2); 8 C.F.R. § 1208.30.

When noncitizens are placed in regular removal proceedings following a CFI, they have the rights to counsel, to present evidence, to examine the government's evidence and witnesses, and to appeal to both the Board of Immigration Appeals and a federal court of appeals. 8 U.S.C.

§§ 1229, 1229a, 1252(a), (b); 8 C.F.R. §§ 1003.12-1003.47. They also have substantially more time to gather evidence, consult with counsel and experts, develop arguments, and prepare. The CFI's significant-possibility standard asks whether noncitizens could prevail on their claims under those circumstances.

Historically, asylum officers have not applied any bars to asylum at the CFI screening stage. *See* Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18,078, 18,084 (Mar. 29, 2022) ("2022 Asylum Rule"). Likewise, under longstanding regulations, asylum, withholding of removal, and CAT protection have all been assessed under the significant-possibility standard. *Id*. at 18,091. Both of these historical practices were briefly suspended under the prior administration, but Defendants reaffirmed them in the 2022 Asylum Rule. *See* 87 Fed. Reg. at 18,084.

B. The New Asylum Bar and Its Application in Expedited Removal

On May 11, 2022, DHS and DOJ implemented their new Rule, 88 Fed. Reg. 31,314, upending the carefully balanced system described above by establishing a drastic new bar on asylum and implementing it in expedited removal proceedings.[2]

The Rule covers all non-Mexican adults and families who enter without authorization at the southern land border or adjacent coastlines. 8 C.F.R. § 208.33(a)(1), (2)(i). These noncitizens are barred from asylum unless they (1) arrive at a port of entry after obtaining one of a limited number of border port appointments through a smartphone application called CBP One, 8 C.F.R. § 208.33(a)(2)(ii)(B); (2) apply for asylum or similar relief in a transit country, and receive a final denial before coming to the United States, 8 C.F.R. § 208.33(a)(2)(ii)(C); or (3) receive advance

[2] Defendants in this case are these Departments, various of their sub-components, and their officers in their official capacities. Plaintiffs refer to the various governmental entities as the "agencies" or "agency" depending on the context.

permission to travel to the United States through a government-approved parole program, 8 C.F.R. § 208.33(a)(2)(ii)(A).

The Rule contains certain exceptions for those who fail to satisfy one of these conditions. It allows access to asylum for those who can demonstrate "exceptionally compelling circumstances," including an "acute medical emergency," an "imminent and extreme threat to life or safety," or "a severe form of trafficking in persons." *Id.* § 208.33(a)(3)(i). And people who arrive at ports of entry can avoid the appointment requirement if they can show it "was not possible to access or use the [CBP One app] due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle." 8 C.F.R. § 208.33(a)(2)(ii)(B).

The Rule's asylum bar applies to both affirmative and defensive asylum applications. Central to this case, the Rule also applies to expedited removal proceedings. 8 C.F.R. § 208.33(b). In choosing to apply the new bar at the CFI stage, the agencies broke with their conclusions in the 2022 Asylum Rule. 88 Fed. Reg. at 31,390.

The Rule eliminates Congress's significant-possibility standard as applied to the new bar, by requiring adjudicators to determine whether the noncitizen is *in fact* barred from asylum. Under the new regulations, credible fear adjudicators must "determine whether the [noncitizen] *is* covered by the presumption [of ineligibility] and, if so, whether the [noncitizen] *has rebutted* the presumption." 8 C.F.R. § 208.33(b)(1) (emphases added); *id*. at § 1208.33(b)(2) (same). In other words, the new regulations do not ask whether there is a significant possibility that an asylum seeker could later defeat the bar by satisfying one of the conditions or exceptions noted above in regular removal proceedings. Rather, the regulations require noncitizens to defeat the bar at the time of the CFI, without the benefit of the significant-possibility standard.

The Rule also departs from the agencies' conclusion in the 2022 Asylum Rule by imposing a higher reasonable-possibility standard to assess withholding and CAT relief for noncitizens deemed ineligible for asylum under the new bar. 88 Fed. Reg. at 31,336-37, 31,381.

C. The Collateral Expedited Removal Policies

The agencies also made a raft of other changes to the expedited removal system contemporaneous with the Rule. Three new policies are at issue in this motion.[3]

24-Hour CFI Policy. First, the agencies shortened the consultation period that precedes CFIs. Asylum officer guidance from 2019 explained that the purpose of this period is to allow the noncitizen "an opportunity to rest, collect his or her thoughts, and contact" an attorney or other person. Statement of Undisputed Facts ("SUF") ¶ 37. This consultation period has generally been no shorter than 48 hours. SUF ¶ 38. On May 10, 2023, USCIS implemented a policy shortening the minimum period to "24 hours after the noncitizen's acknowledgment of receipt of" a CFI informational form. SUF ¶¶ 34-35.

The Third Country Removal Policy. Second, the agencies contemporaneously implemented a new policy of removing nationals of Cuba, Haiti, Nicaragua, and Venezuela *to Mexico*. SUF ¶¶ 17-18. In contravention of the mandatory, multi-step statutory process governing the determination of the country of removal, 8 U.S.C. § 1231(b)(2), the new policy directs CBP agents that limitations on Immigration and Customs Enforcement ("ICE") deportation flight capacity permit the expedited removal of certain non-Mexican nationals to Mexico. SUF ¶¶ 19, 23-26.[4] Nothing

[3] Challenges to certain other collateral policies were previously held in abeyance pursuant to the parties' stipulation. ECF No. 30 ¶ 2 (addressing challenges to conducting CFIs in Customs and Border Protection ("CBP") custody, and utilizing non-Asylum Officers to conduct CFIs).

[4] The third country removal policy is reflected in several agency documents. SUF ¶ 20. The May 10, 2023 memorandum from Assistant Homeland Security Secretary Blas Nuñez-Neto contains the most detailed discussion of the new policy. *See* SUF ¶ 22. This memorandum does not

in the policy directs officers to notify noncitizens that the government intends to remove them to Mexico, SUF ¶ 28, leaving noncitizens unable to prepare for protection interviews that unexpectedly focus on dangers in Mexico rather than their home countries, *see, e.g.*, SUF ¶¶ 72, 81, 106.

The "Voluntary" Return Policy. Third, the agencies also have implemented a new policy aggressively encouraging nationals of those same four countries to "voluntarily" return to Mexico. Under this policy, individuals are pressed up to three times during their expedited removal processing to withdraw their applications for admission to the United States. SUF ¶¶ 43-45. The policy directs both CBP and USCIS officers to give "advisals" emphasizing country-specific processes the government has established to allow nationals of these four countries to apply for parole and permission to travel to the United States from abroad. SUF ¶ 46. These statements indicate that noncitizens will "remain eligible" for the parole programs if they accept voluntary return, *id*., but in reality almost all noncitizens subject to this policy are barred from those programs, SUF ¶¶ 48-49.

The impact of the Rule and these other contemporaneous policies has already proven devastating. The passage rate for CFIs has dropped precipitously, from 83% to 56%. SUF ¶ 11. Plaintiffs include individuals denied access to protection under these various policies, as well as organizations serving similar asylum seekers affected by these policies. SUF ¶¶ 55-144 (Individual Plaintiffs); ¶¶ 145-205 (Organizational Plaintiffs). Plaintiffs' declarations illustrate how the new

specifically refer to expedited removal but provides guidance to CBP agents, the officers who prepare expedited removal orders and determine the country of removal under the policy. SUF ¶¶ 19, 23-24. By contrast, in ordinary removal proceedings, an immigration judge decides the country of removal. 8 C.F.R. § 1240.10(f).

Rule and the associated expedited removal policies unfairly limit and deny protection to asylum seekers.

Plaintiffs' declarations also exemplify the types of extraordinary harms facing noncitizens returned to their home countries under these policies, including persecution by their governments; gender-based and intimate partner violence; sexual assault and torture by gangs; and other grave dangers. *See, e.g.*, SUF ¶¶ 55, 58, 62, 68, 75, 83, 89, 93, 98, 102, 109, 113, 120, 123, 126, 131, 134, 140 (describing harms the Individual Plaintiffs previously suffered). Likewise, noncitizens removed or returned to Mexico under these policies face the violence, extortion, and other dangerous conditions that are endemic there—particularly for migrants. *See* SUF ¶ 33 (comments documenting nearly 13,500 instances of kidnapping, rape, torture, murder, and other violent attacks on asylum seekers in Mexico in 2021 and 2022, and describing how cartels "prey upon people migrating through Mexico"); *see also, e.g.*, SUF ¶¶ 59, 69, 84, 94, 99, 103, 110, 114, 127, 141 (describing Plaintiffs' similar past experiences in Mexico). When asylum seekers were expelled to Mexico under a previous policy, the D.C. Circuit emphasized the "stomach-churning evidence of [resulting] death, torture, and rape." *Huisha-Huisha v. Mayorkas*, 27 F.4th 718, 733 (D.C. Cir. 2022); *see* id. at 734 (noting government's recognition as to an earlier policy of "'unacceptable risks' of 'extreme violence'" for asylum seekers in Mexico). The new policies challenged here impose those same harms on people seeking safety under the humanitarian protections Congress established.

LEGAL STANDARD

"When a plaintiff challenges an agency's final action under the Administrative Procedure Act ("APA"), summary judgment 'is the mechanism for deciding whether as a matter of law an agency action is supported by the administrative record and is otherwise consistent with the APA

standard of review.'" *Council of Parent Att'ys & Advocs., Inc. v. DeVos*, 365 F. Supp. 3d 28, 47 (D.D.C. 2019) (quoting *Louisiana v. Salazar*, 170 F. Supp. 3d 75, 83 (D.D.C. 2016)). "The APA requires courts to 'hold unlawful and set aside' an agency's action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Id*. (quoting 5 U.S.C. § 706(2)(A)).

ARGUMENT

Plaintiffs move for summary judgment on two sets of claims. *First*, the expedited removal provisions of the Rule are unlawful. Those regulations violate the expedited removal statute by abandoning the required significant-possibility standard, and the agencies' reasoning and explanation suffer from numerous flaws making them arbitrary and capricious. *Second*, the collateral policies are also unlawful. They violate the immigration statutes and regulations, and are likewise arbitrary and capricious. The Court should grant summary judgment, vacate the policies, and provide other appropriate relief.

I. THE RULE'S EXPEDITED REMOVAL PROVISIONS ARE UNLAWFUL.

A. The Expedited Removal Provisions Violate the Credible Fear Statute.

Congress established an intentionally low screening standard for asylum seekers facing expedited removal: Whenever there is "a significant possibility" that a noncitizen "could establish eligibility for asylum" in regular removal proceedings, the noncitizen must be taken out of the expedited removal system. 8 U.S.C. § 1225(b)(1)(B)(v). The Rule, however, contravenes this congressional mandate by directing adjudicators to decide whether an asylum seeker "*is* covered by the" bar to asylum eligibility, not whether there is a significant possibility that the noncitizen

will ultimately defeat the bar. 8 C.F.R. §§ 208.33(b)(1), 1208.33(b)(2) (emphasis added). Because the new regulations contradict Congress's standard, they are unlawful.

1. The significant-possibility standard is the cornerstone of the expedited removal system's "design" to "ensur[e] that individuals with valid asylum claims are not returned to countries where they could face persecution." *Grace*, 965 F.3d at 902. Congress directed that asylum eligibility must be assessed through a "low screening standard for admission into the usual full asylum process." *Id.* (quoting 142 Cong. Rec. 25,347 (1996) (statement of Sen. Hatch)). Thus, the statute requires that noncitizens with "a significant possibility" of success in future removal proceedings—where they would be able to fully prepare and marshal legal arguments as well as factual evidence, including potential expert testimony, to support their claims for protection—must be given the opportunity for that full hearing.

Congress's choice reflects the reality of credible fear assessments, which are "'often rushed'" and "can occur under 'tense conditions.'" *Kiakombua v. Wolf*, 498 F. Supp. 3d 1, 39 (D.D.C. 2020) (quoting *Lin Ming Feng v. Sessions*, 721 F. App'x 53, 55 (2d Cir. 2018)). As then-Judge Jackson explained:

> As a practical matter, a noncitizen "appearing at a credible fear interview has ordinarily been detained since his or her arrival in the United States and is therefore likely to be more unprepared, more vulnerable, and more wary of government officials than an asylum applicant who appears for an interview before immigration authorities well after arrival." *Zhang v. Holder*, 585 F.3d 715, 724 (2d Cir. 2009). Moreover, the interviewee "is not represented by counsel, and may be completely unfamiliar with United States immigration laws and the elements necessary to demonstrate eligibility for asylum." *Ramsameachire v. Ashcroft*, 357 F.3d 169, 179 (2d Cir. 2004) (Sotomayor, J.).

Id. The low significant-possibility standard is a key safeguard against erroneous return to persecution and torture under these difficult conditions.

The new regulations remove that safeguard. They direct credible fear adjudicators to ask whether the noncitizen before them "*is covered*" by the new bar, and "*has rebutted*" the bar—i.e., whether the noncitizen in fact "*has*" established one of its conditions or exceptions. 8 C.F.R. § 208.33(b)(1) (emphases added). Thus, although the Immigration and Nationality Act ("INA") requires a noncitizen to be placed in regular removal proceedings if she "*might* be able to establish the elements of her claim" in full removal proceedings, the new regulations permit her rapid removal unless she has actually "established" a defense or exception to the bar "at the time of her credible fear interview." *Kiakombua*, 498 F. Supp. 3d at 45. In this way, the regulations direct adjudicators to deny asylum to noncitizens who *can* show a significant possibility of eligibility, directly contrary to Congress's instructions. *See Brown v. Gardner*, 513 U.S. 115, 116 (1994) (invalidating regulation as not "consistent with the controlling statute").

This conflict between the Rule and the statute has serious practical consequences for people seeking asylum. For example, there is an exception to the bar for "exceptionally compelling circumstances." 8 C.F.R. §§ 208.33(a)(3)(i), 1208.33(a)(3)(i). Under the correct standard, a credible fear adjudicator must consider whether there is a significant possibility that a future immigration judge, the Board of Immigration Appeals, or a federal court of appeals could deem the circumstances—as illuminated by the applicant's full testimony and any additional evidence—sufficiently compelling to warrant an exception. *See Grace v. Whitaker*, 344 F. Supp. 3d 96, 139-40 (D.D.C. 2018), *aff'd in relevant part on other grounds*, 965 F.3d at 900-03.

The likelihood of a disagreement about the scope or application of "exceptionally compelling circumstances" is significant, particularly given that the exception was drafted to "preserve[] flexibility" regarding what it might cover. 88 Fed. Reg. at 31,394; *see, e.g.*, *id*. at 31,352 (discussing possible application of exception to climate change). Under the statutory

standard, noncitizens must be afforded "the benefit of that disagreement," *Grace*, 344 F. Supp. 3d at 140, and afforded regular removal proceedings based on claims that *could* be held to fall within this exception. The Rule, by contrast, instructs adjudicators making rapid judgments based on minimal evidence to decide for themselves whether the circumstances are compelling enough. That deprives noncitizens of the benefit of potential differences of opinion, perspective, and interpretation—thus denying access to asylum even to noncitizens who have a significant possibility of establishing exceptionally compelling circumstances, and therefore asylum eligibility, in regular removal proceedings.

2. Notably, the Rule's preamble concedes that the significant-possibility standard must be applied in credible fear proceedings, including when determining whether the new asylum bar applies. *See* 88 Fed. Reg. at 31,380 (conceding the standard "is required by statute" when assessing the bar in a CFI). The preamble claims, however, that the Rule complies with this legal requirement because credible fear adjudicators will in fact apply the correct threshold screening standard. *Id.* Those assertions do not cure the regulations' conflict with the statute.

"[I]t is the language of the regulatory text, and not the preamble, that controls." *Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 570 (D.C. Cir. 2002); *Texas Child.'s Hosp. v. Burwell*, 76 F. Supp. 3d 224, 237 (D.D.C. 2014) ("[A] preamble does not create law; that is what a regulation's text is for."); *accord Mejia-Velasquez v. Garland*, 26 F.4th 193, 202 (4th Cir. 2022); *Sierra Club v. EPA*, 964 F.3d 882, 893 (10th Cir. 2020); *Gustavsen v. Alcon Lab'ys, Inc.*, 903 F.3d 1, 13 (1st Cir. 2018). And here the regulatory text is clear.

The new regulations do not say or remotely suggest that credible fear adjudicators must apply the significant-possibility standard to the asylum bar. To the contrary, as explained above, the plain regulatory text directs credible fear adjudicators to "*determine* whether the [noncitizen]

is covered by the presumption [against asylum eligibility under the Rule and], if so, whether the [noncitizen] *has rebutted* the presumption." 8 C.F.R. § 208.33(b)(1) (emphasis added); *id.* § 1208.33(b)(2). But, as the agencies concede, "[t]he 'significant possibility' standard asks a predictive question: whether there is a 'significant possibility' that the noncitizen '*could* establish' asylum eligibility at a merits hearing" in regular removal proceedings. 88 Fed. Reg. at 31,380 (emphasis added). The new regulations do not ask that predictive question; they ask whether a noncitizen *is* subject to the ban.

"[T]here is no doubt that the word 'is' connotes 'a more certain determination' than 'could'"; thus, the only court to previously address the question has rejected the imposition in credible fear guidance of a "requirement of certainty, as conveyed by the use of the present tense 'is.'" *Kiakombua*, 498 F. Supp. 3d at 41 (quoting *Yusupov v. Att'y Gen. of U.S.*, 518 F.3d 185, 201 (3d Cir. 2008)). "Congress' use of a verb tense is significant in construing statutes," and here Congress employed both "significant possibility" and "could establish" to make clear that credible fear adjudicators may not make the actual eligibility determination. *Id.* (quoting *United States v. Wilson*, 503 U.S. 329, 333 (1992)) (cleaned up).

The regulatory context underscores the plain meaning of the text. The new regulations direct immigration judges reviewing CFIs to apply the significant-possibility standard to assess other asylum issues, like whether a noncitizen has a well-founded fear—but only *after* they have finished determining whether the new asylum bar applies. Immigration judges "shall first determine whether the [noncitizen] *is*" ineligible for asylum under the new bar. 8 C.F.R. § 1208.33(b)(2) (emphasis added). Only where they conclude a noncitizen "is not" barred for that reason do the regulations invoke the significant-possibility standard by directing immigration judges to "further determine . . . whether the [noncitizen] has established a significant possibility

of eligibility for asylum . . . ." *Id.* § 1208.33(b)(2)(i). That is, the regulations use both terms—"is" and "significant possibility"—in the same breath. "Where drafters use a term in one provision but not another, 'it is generally presumed' that the drafter acted 'intentionally and purposely in the disparate inclusion or exclusion.'" *Newman v. FERC*, 27 F.4th 690, 698 (D.C. Cir. 2022).

Here, the agencies easily "could have used" the same significant-possibility language in addressing the application of the bar, but "did not" do so. *Id*. Indeed, commenters specifically pointed out that the proposed regulations violated the significant-possibility standard. 88 Fed. Reg. at 31,379-80; *see* SUF ¶ 6. And the agencies made clarifying edits to other parts of the proposed regulations. *See, e.g.*, 88 Fed. Reg. at 31,321. Yet they declined to amend the proposed regulations to address their inconsistency with the statutory significant-possibility standard. Regardless of the preamble's assertions, the regulations are unlawful and cannot stand.

B. The Expedited Removal Provisions Are Arbitrary and Capricious.

Even if the expedited removal provisions of the Rule were not invalid for inconsistency with the statute, they would remain arbitrary and capricious for multiple reasons. First, the agencies never explain how they could interpret the regulatory text discussed above to be consistent with the significant-possibility standard. Second, the Rule provides no reasoned explanation for departing from the longstanding policy against applying asylum bars in expedited removal, which the agencies reaffirmed just last year. Third, the agencies similarly fail to justify raising the significant-possibility standard to a reasonable-possibility standard when evaluating claims for withholding or CAT protections. Fourth, the agencies failed to consider the impact of the Rule operating in conjunction with other drastic changes to the CFI process that the agencies concurrently adopted. Finally, all of these flaws trace back to the agencies' reliance on an

impermissible factor: their ultimate disagreement with Congress's choice to adopt the low significant-possibility standard.

i. The agencies failed to address the inconsistency between their regulations and the significant-possibility standard.

As an initial matter, the Rule's choice to jettison the significant-possibility standard is not only contrary to the statute, as discussed above, but also arbitrary and capricious. Conceding that the significant-possibility standard is required, the agencies' preamble asserts that credible fear adjudicators *will* apply that standard to the new bar. 88 Fed. Reg. at 31,380. That assertion is, however, contrary to the actual text of the regulations. And even if there were a question as to the regulations' proper interpretation, the agencies do not attempt to explain how they can interpret the regulatory text to mean what they claim. Such an "inconsistency between the language of the regulations and the preamble's explanation of what [the agency] did" reflects a "failure [to] adequately explain [the agency's] action," rendering "the action arbitrary and capricious." *Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191, 1220 (D.C. Cir. 1996). At a minimum, this disparity is likely to engender confusion and misunderstanding among credible fear adjudicators—yet the agencies did not acknowledge that obvious problem.

That failure of explanation is amplified here because the original Notice of Proposed Rulemaking ("NPRM") and the Final Rule articulate opposite views of what the materially identical regulatory text means. In the NPRM, the agencies contended that the proposed regulations were "consistent with" the statute by offering the following statement:

> If a noncitizen is subject to the lawful pathways condition on eligibility for asylum and not excepted and cannot rebut the presumption of the condition's applicability, there would not be a significant possibility that the noncitizen could establish eligibility for asylum.

88 Fed. Reg., 11,704. 11,742 (Feb. 23, 2023). Under the NPRM's stated understanding, adjudicators would not apply the significant-possibility standard to the ban: Doing so would be unnecessary because if a person *is* ineligible for asylum, they can have no *significant possibility* of establishing eligibility. That reasoning flouts the whole idea of the low credible fear standard, which, as already explained, was crafted to *not* require proof of actual eligibility at the screening stage. *Kiakombua*, 498 F. Supp. 3d at 45. When the agencies converted the NPRM into a Final Rule, they shifted ground, contending in the preamble that the same regulatory language actually *would* require adjudicators to apply the significant-possibility standard. 88 Fed. Reg. at 31,380. Even if these two views could be reconciled—which they cannot—here, the agencies neither acknowledged nor explained their own shifting understandings of the same regulatory language.

The agencies also failed to "respond to 'relevant and significant comments'" about this issue. *Del. Dep't of Nat. Res. & Env't Control v. EPA*, 785 F.3d 1, 15 (D.C. Cir. 2015). Commenters pointed out the flaw in the NPRM's justification, and the inconsistency of the regulatory language with the significant-possibility standard. SUF ¶ 8. The agencies made no material changes in response. Instead, the Final Rule's preamble simply asserted that adjudicators would in fact apply the significant-possibility standard to consideration of the ban. That conclusory assertion is the antithesis of reasoned decision-making.

ii. The agencies offered an illogical and inadequate justification for applying the bar in credible fear proceedings.

Even more fundamentally, the agencies' decision to apply the new asylum bar at all in credible fear proceedings is arbitrary and capricious. "While agencies are free to change their existing policies, in doing so they must provide a *reasoned explanation* for the change." *Nat'l Women's L. Ctr. v. Off. of Mgmt. & Budget*, 358 F. Supp. 3d 66, 89 (D.D.C. 2019) (emphasis added) (cleaned up); *see Am. Fed'n of Gov't Emps., AFL-CIO v. Fed. Lab. Rels. Auth.*, 25 F.4th 1, 5 (D.C.

Cir. 2022) (change "was not sufficiently reasoned"); *Council of Parent Att'ys*, 365 F. Supp. 3d at 50 (similar). Here, the application of the bar in CFIs contradicts the agencies' longstanding policy to not apply asylum bars in CFIs, which the agencies explicitly reaffirmed just last year in the 2022 Asylum Rule. 87 Fed. Reg. at 18,084. In that rule, the agencies recognized that devoting adjudicators' time to eliciting testimony, conducting analysis, and making decisions about asylum bars in the credible fear screening undermines the efficiency of that process and is unfair to applicants. *Id.* at 18,093. The new Rule's attempt to reconcile those conclusions with its application of the new bar in CFIs is illogical and insufficiently reasoned. Thus, it represents an inadequately explained departure from prior policy.

1. The agencies contend that this Rule is consistent with the 2022 Asylum Rule because the new bar is "less complex" than other asylum bars and will "involve a straightforward analysis." 88 Fed. Reg. at 31,390, 31,393. But that conclusory statement is not an adequate explanation given the many complexities evident on the face of the Rule itself. "An agency must explain why it chose to do what it did. And to this end, conclusory statements will not do; an agency's statement must be one of *reasoning*." *Nat'l Women's L. Ctr.*, 358 F. Supp. 3d at 89 (quoting *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014)) (cleaned up). Merely asserting that the new bar is simple, when plainly it is not, does not satisfy the agencies' obligation to engage in reasoned decision-making.

For example, the "exceptionally compelling circumstances" exception to the bar includes "an imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder." 8 C.F.R. § 208.33(a)(3)(B). But that list of specific threats is "not exhaustive." 88 Fed. Reg. at 31,393. Whether the particular dangers facing noncitizens—and such dangers are rife for asylum seekers in Mexico, SUF ¶ 33—qualify as "imminent and extreme threats of severe

pain and suffering" is a matter that calls for substantial judgment on a "case-by-case basis," *id*. at 31,352. There is nothing simple about this inquiry. Indeed, it requires a detailed examination of a noncitizen's basis for fear. Further, the general terms of the exception are open to interpretation, and the preamble's commentary on it seems to point in different directions—at some points urging that it be construed narrowly, 88 Fed. Reg. at 31,380, and at others suggesting a more capacious meaning, *id*. at 31,352 (addressing climate change).

Likewise, the regulations provide an exception to the requirement to obtain a CBP appointment where it "was not possible to access or use the [CBP One app] due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle." 8 C.F.R. § 208.33(a)(2)(B). The agencies "decline[d] to specify" how this exception could be met, and explained they left this gap in order "to preserve flexibility and account for . . . unique circumstances," 88 Fed. Reg. at 31,406. In doing so, they invited more judgment calls. Applying this exception is anything but simple, either legally or factually.

Even as to the bar's threshold questions, there are interpretive and factual complexities. For example, the Rule permits asylum if the noncitizen has "received a final decision denying" protection in another country, *see, e.g.*, 8 C.F.R. § 208.33(a)(2)(C), but that condition might well be subject to factual and legal dispute, as it was for Plaintiff R.E. He was in fact denied asylum in Mexico but was nevertheless barred from asylum in the United States under the Rule—apparently because of what the asylum officer deemed evidentiary uncertainties. SUF ¶¶ 137-138.

In many situations, these complexities may be magnified by the application of the congressionally mandated significant-possibility standard. As the agencies concede in the preamble, the ban and its exceptions must be examined through the lens of that standard. *Supra* Part I.A. While a given asylum officer might not, for example, think the particular threats facing a

noncitizen are enough to legally qualify as exceptionally compelling circumstances, the correct question is whether there is a significant possibility an immigration judge in removal proceedings, or the BIA, or the (as yet unknown) applicable court of appeals could think so. *See Grace*, 344 F. Supp. 3d at 139-40. The very open-endedness of the inquiry can make that predictive question about success following an evidentiary hearing in regular removal proceedings and appellate review even more complex.

2. The agencies offer the additional claim that, unlike other bars, "most of the facts relevant to" the new bar "involve circumstances at or near the time of the noncitizen's entry," and that noncitizens therefore "will have a sufficient opportunity to provide testimony regarding such events and circumstances." 88 Fed. Reg. at 31,390-91. That conclusory assertion is, like the agencies' claim of simplicity, belied by the terms of the bar and thus inadequately reasoned.

For example, under the regulations, a noncitizen arriving at a port is excused from making an appointment if there was a "significant technical failure" in CBP One. 8 C.F.R. § 208.33(a)(2)(B). But most noncitizens will be unable to marshal *any* evidence about the operation of the app at the credible fear stage beyond the personal experience of it simply not working. Indeed, even the asylum officer is unlikely to have relevant information about the internal technical workings of the app at that stage—and certainly would have no access to the kind of independent investigation and assessment that a noncitizen could bring to bear in full proceedings, given the opportunity of procuring counsel and marshaling expert evidence or reports documenting the experiences of numerous individuals.

Similarly, "exceptionally compelling circumstances" include "an acute medical emergency." 8 C.F.R. § 208.33(a)(3)(i), (i)(A). Medical conditions and judgments are a classic example of factual questions that often call for expert opinions and technical analyses. A medically

untrained noncitizen interviewed by a medically untrained asylum officer is very unlikely to possess key evidence relevant to the exception's applicability. That is particularly so because this exception "could include mental health emergencies," 88 Fed. Reg. at 31,348—but people experiencing such emergencies are even less likely to be able to adduce evidence substantiating their condition during the hurried credible fear process. And while the agencies suggest that opinions from CBP medical officials will sometimes be available to credible fear adjudicators, *id*. at 31,392, the point is that noncitizens are almost certain to lack the evidence they need to rebut those opinions (if such opinions exist at all) during the CFI.

3. These issues are no less complicated, and no less dependent on facts unavailable during CFIs, than other bars that the agencies have previously concluded should not be applied at the hurried CFI stage. Those bars include questions like whether an individual has "firmly resettled" in a third country before arriving in the United States, 88 Fed. Reg. at 31,390, an inquiry that—unlike the new bar—relates to facts that *are* generally available to the noncitizen at or near the time of entry. The agencies' justification for applying the Rule thus ultimately rests on conclusions that are facially incorrect or highly implausible given the Rule's terms. Yet the agencies never acknowledged those problems with their conclusions, or explained why they nevertheless believed this ban to be categorically different from other bans which, in the agencies' own view, are inappropriate for the credible fear process. Such an about-face "without giving a 'reasoned explanation for . . . treating similar situations differently'" is arbitrary and capricious. *City of Phoenix v. Huerta*, 869 F.3d 963, 972 (D.C. Cir. 2017) (quoting *W. Deptford Energy, LLC v. FERC*, 766 F.3d 10, 20 (D.C. Cir. 2014)).

4. In any event, in deciding to apply the new bar in CFIs, the agencies failed to consider an "important aspect of the problem": the fairness concerns that they previously

emphasized in the 2022 Asylum Rule. *Motor Veh. Mfrs. Ass'n v. State Farm Ins.*, 463 U.S. 29, 43 (1983). The agencies previously "recognize[d] that considerations of procedural fairness counsel against applying mandatory bars that entail extensive fact-finding during the credible fear screening process." 87 Fed. Reg. at 18,093; *see also id*. at 18,134-35. Because the agencies needed to balance the efficiency of the credible fear screening with ensuring fairness to the noncitizen, the agencies determined that these twin statutory goals could "be accomplished by returning to the historical practice of not applying mandatory bars at the credible fear screening stage." *Id*. at 18,135. However, the new Rule failed to acknowledge the fairness concerns implicated in applying the bar here. Where, as here, agencies have previously identified a factor as important to their consideration of an issue, and did so only a year ago, they cannot simply ignore that factor in later changing their position. *See Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016) ("a reasoned explanation is needed for disregarding facts and circumstances that underlay . . . the prior policy"); *Council of Parent Att'ys*, 365 F. Supp. 3d at 50 (agency reversal "either did not address" important aspects of earlier rulemaking "or responded to them in an inadequate or cursory manner"). Moreover, the agencies also failed to address comments raising those concerns. *See* 88 Fed. Reg. at 31,390; SUF ¶ 5. Again, this failure to meaningfully engage with comments "is not good enough." *Del. Dep't of Nat. Res.*, 785 F.3d at 16.

iii. The agencies relied on a flawed analogy to justify applying the reasonable-possibility standard to withholding and CAT screenings.

In addition to jettisoning the significant-possibility standard in applying the new bar, the Rule improperly changes the screening standard for withholding of removal and CAT claims, which are available even if someone is ineligible for asylum. Instead of applying the significant-possibility standard as before, the Rule adopts the reasonable-possibility standard to assess withholding and CAT, which is a "higher" and "more demanding" standard. 88 Fed. Reg. at

31,336-37, 31,381. The agencies had long applied the significant-possibility standard to withholding and CAT claims assessed in CFIs. Indeed, in the 2022 Asylum Rule, the agencies specifically rejected the use of the higher reasonable-possibility standard in CFIs. 87 Fed. Reg. at 18,092. Yet this Rule adopts that very standard. *See* 88 Fed. Reg. 31,336-38. Although the agencies acknowledged the change, they failed to provide a justification that was "sufficiently reasoned." *Am. Fed'n of Gov't Emps.*, 25 F.4th at 5.

In applying a protection screening standard, the risk of error—that is, of removing people even if they *will* likely be persecuted or tortured—is unquestionably "an important aspect of the problem" for the agencies' consideration. *State Farm*, 463 U.S. at 43. Unlike asylum, which is discretionary, both withholding of removal and CAT protection are mandatory obligations, stemming from treaty commitments to "non-refoulement," i.e., refraining from sending people to probable persecution or torture. *See Cardoza-Fonseca*, 480 U.S. at 440, 444; *Nasrallah*, 140 S. Ct. at 1687. Thus, in elevating the screening standard, it was incumbent on the agencies to meaningfully assess whether more people would be wrongfully removed to persecution and torture. Indeed, in rejecting the reasonable-possibility standard, the 2022 Asylum Rule specifically examined whether imposing a higher standard would adequately "ensur[e] the United States complie[s] with its non-refoulement obligations." 87 Fed. Reg. at 18,092. "[B]ased on the Departments' experience implementing divergent screening standards," they found "no evidence" that applying the reasonable fear standard in CFIs "resulted in more successful screening out of non-meritorious claims while" safeguarding against refoulement. *Id*.

In the new Rule, the agencies categorically rejected the concern, raised in comments, that applying the reasonable-possibility standard "will result in errors" and thus wrongfully return people to persecution and torture. 88 Fed. Reg. at 31,420. The agencies' position is insufficiently

examined and explained. Their core assertion was an analogy: Because the reasonable-possibility standard has been used in screenings applicable to *other* immigration contexts—principally reinstatement of prior removal orders under 8 U.S.C. § 1231(a)(5)—the agencies concluded that the standard can also be applied to expedited removal proceedings without erroneous denials of protection. 88 Fed. Reg. at 31,420.

That analogy is unsound. Reinstatement proceedings involve important procedures and circumstances that safeguard against refoulement but are absent under the Rule. For example, where an asylum officer finds no reasonable possibility of persecution or torture in the reinstatement context, the noncitizen may seek review not only by an immigration judge, but also by a federal court of appeals. *See, e.g.*, *Alonso-Juarez v. Garland*, __ F.4th ___, 2023 WL 5811043 (9th Cir. Sept. 8, 2023). By contrast, with very limited exceptions, there is no judicial review of expedited removal proceedings. *See* 8 U.S.C. §§ 1225(b)(1)(B)(iii); 1252(a)(2)(A), 1252(e)(2). Thus, quite unlike the reinstatement context, erroneous denials of withholding and CAT protection in expedited removal will never be reviewed and corrected by Article III courts. And the Rule further amplifies the risk of uncorrected erroneous denials by simultaneously eliminating the option to seek reconsideration by USCIS of credible fear denials. 8 C.F.R. § 208.33(b)(2)(v)(C). There is no similar restriction in the reinstatement context. *See* 8 C.F.R. § 1208.31.

Likewise, reinstatement applies to a very different population: People subject to reinstatement of removal "by definition ha[d] prior experience with the U.S. immigration system" because they were previously in removal proceedings, and many of these individuals will have "lived in the United States for extended periods of time." SUF ¶ 10. Noncitizens in reinstatement proceedings thus often have more of an opportunity to find legal representation and are better able to prepare for the interview. By contrast, individuals in expedited removal generally have little to

no opportunity to consult counsel or gather evidence. SUF ¶ 9.[5] Indeed, as previously explained, those realities are reflected in Congress's design of the expedited removal system. Thus, as these agencies previously acknowledged, the significant-possibility standard better "align[s] with Congress's intent that a low screening threshold standard apply" in expedited removal proceedings. 88 Fed. Reg. at 11,745-46 (citing 2022 Asylum Rule).

In nevertheless applying the reasonable-possibility standard in expedited removal, the agencies never acknowledged the critical differences between the expedited removal context and reinstatement proceedings. *Petroleum Commc'ns, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994) (agency must consider "circumstances that appear to warrant different treatment"); *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 824 (D.C. Cir. 1983) (failure to consider "obvious and substantial differences" was arbitrary and capricious). Moreover, the agencies were well aware of the use of the reasonable-possibility standard in reinstatement when they rejected that standard for CFIs in 2022, but were obviously not then persuaded by the analogy. *See* 86 Fed. Reg. 46,906, 46,914 n.37 (Aug. 20, 2021) (NPRM for 2022 Asylum Rule). Besides that flawed analogy, the agencies offered essentially no basis for asserting, contrary to their earlier conclusion, that the reasonable-possibility standard adequately protects against erroneously removing people to persecution or torture. 88 Fed. Reg. at 31,420. Thus, their conclusion that reasonable-possibility can safely be applied to CFIs is inadequately examined and explained.

iv. The agencies refused to consider the interacting effects of the various expedited removal policies they established at the same time.

The agencies violated a core APA requirement because they "entirely failed to consider an important aspect of the problem"—namely, how the Rule, and the agencies' justifications for the

[5] That is particularly so given the other contemporaneous changes at issue in this case. *See infra* Part II.B (discussing 24-hour CFI policy).

Rule, interact with contemporaneous and interrelated policy changes. *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 923 (D.C. Cir. 2017). An agency has an "obligation to acknowledge and account for a changed regulatory posture the agency creates," especially when the change is "contemporaneous and related." *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 187 (D.C. Cir. 2011). Here, the agencies made a number of interrelated policy changes to asylum processing close in time to the Rule's effective date. *See infra* Part II.

Each of these changes makes it more difficult for a person to pass a CFI. Take the decision to conduct CFIs in CBP custody. *See* SUF ¶ 40.[6] That custody involves horrific conditions of confinement including the use of frigid, bare concrete holding cells and sleep deprivation. SUF ¶ 41. CBP custody also imposes more highly restrictive access to contact with the outside world than even ICE custody. SUF ¶¶ 156, 159-160, 189-190. As a result, people held in CBP custody find it extremely difficult to consult with counsel before or during their CFIs. *See, e.g.*, SUF ¶¶ 42, 66, 116, 118, 156, 159-60, 189-90. Worse still, Defendants reduced the pre-credible fear consultation period to just 24 hours, effectively eliminating the statutory right to consultation for those subject to expedited removal. *See infra* Part II.B.

The agencies' own data—collected during an earlier use of CBP custody for CFIs—demonstrate that these policies impair noncitizens' ability to present their claims and pass the CFI. 88 Fed. Reg. at 31,362 (summarizing comment). The impact is illustrated by Plaintiffs' experiences. For example, Plaintiff Y.F. explains that she was not able to communicate with a lawyer prior to her interview, which occurred while she was in CBP custody. SUF ¶ 116. When she finally was afforded a supposed opportunity to consult, it was *after* her interview and after she

[6] While the parties agreed to hold in abeyance any "*challenge [to]* the use of [CBP] facilities to conduct credible fear interviews," ECF No. 30 ¶ 2 (emphasis added), the agencies' decision to pursue CFIs in CBP custody is relevant to various other claims in this case, including this one.

had already received a negative determination. SUF ¶ 118. Even then, the consultation slot CBP offered her was on a Sunday night at around 9:00 p.m. *Id.* Y.F. tried to call every organization on the list she was given but, unsurprisingly given the day and hour, no one answered. *Id*. An immigration judge affirmed the negative CFI determination the next day. SUF ¶ 119.

The third-country removal policy further depresses credible fear passage rates, because it switches the focus of the interview to Mexico for those slated for removal to that country. *See infra* Part II.A (addressing this policy). And the new policy does not even require notice of the government's intent to remove to Mexico, so noncitizens are not made aware of the need to prepare for such a Mexico-focused interview. *See id*.; SUF ¶ 28. For example, Plaintiff L.A. is from Nicaragua but, to his surprise, his entire CFI was focused on Mexico. SUF ¶¶ 102, 106. Even under the best of circumstances, a person from a third country will have difficulty substantiating a fear of persecution on a protected ground or torture in a country in which they have spent little time. Without preparation or counsel, success becomes yet more unlikely—despite the extremely dangerous conditions in Mexico.

The agencies then take advantage of this stacked deck by pushing certain noncitizens to give up even the severely limited access to immediate protection that remains by accepting so-called "voluntary" returns to Mexico. People are urged to accept such returns based on deeply misleading information, making them not voluntary at all. *See infra* Part II.C.

The policy changes enacted alongside the Rule therefore individually and collectively make it more difficult for people with colorable or even strong claims to protection to pass initial screening interviews. The Rule, however, ignores the impact of these "contemporaneous" and "closely related" policy changes. *Portland Cement Ass'n*, 665 F.3d at 187. Indeed, when confronted with questions about the impact of the ban in conjunction with possible other

limitations on the credible fear process, such as CFIs in CBP custody, limited consultation periods, and barriers to accessing counsel, the agencies' only response was to assert that these concerns were "beyond the scope of this [R]ule." 88 Fed. Reg. at 31,355, 31,362. But agencies must consider comments arguing that, "*given*" other policies, a rule should not be adopted. *Petroleum Commc'ns, Inc. v. FCC*, 22 F.3d 1164, 1173 (D.C. Cir. 1994). And they have duties to "account for [the] changed regulatory posture [the agencies] create[d]," *Portland Cement Ass'n*, 665 F.3d at 187, and to "examine all relevant factors," *Am. Wild Horse*, 873 F.3d at 923. The agencies' abandonment of those duties renders the credible fear portions of the Rule arbitrary and capricious.

This same flaw likewise infects the agencies' reasoning as to all of other the policies challenged in this case. Plaintiffs will not repeat these arguments elsewhere, but assert them as to each of the policies discussed in Part II, *infra*.

v. The agencies relied on an impermissible factor: disagreement with Congress's low credible fear screening standard.

Ultimately, all of these changes trace back to an overarching flaw in the Rule. The agencies emphasized, as a key problem to be solved, the existing "significant disparity" between the number of people found to have a credible fear and the number ultimately granted asylum or other protection. *See, e.g.*, 88 Fed. Reg. at 11,716; 88 Fed. Reg. at 31,329-30. But such a disparity is the point of the statutory significant-possibility standard. As discussed above, Congress deliberately chose a low screening standard. It follows from that choice that a significant proportion of people who pass Congress's low screening standard will not prevail under the higher ultimate standards for relief. The agencies therefore overstepped their authority in relying on a rationale that contradicts the core premise of the credible fear process. *See Nat'l Ass'n of Broadcasters v. FCC*, 39 F.4th 817, 820 (D.C. Cir. 2022) ("The [agency] cannot alter Congress's choice."); *ANR Storage Co. v. FERC*, 904 F.3d 1020, 1026 (D.C. Cir. 2018) (invalidating agency action whose

"justification" was not "reasonable"); *see Nat. Res. Def. Council, Inc. v. Daley*, 209 F.3d 747, 753 (D.C. Cir. 2000) (rejecting policy that "completely diverges from any realistic meaning" of the statute); *Kiakombua*, 498 F. Supp. 3d at 46 (same for policy that conflicted with "the goals of the [credible fear] statute") (quotation marks omitted).

The agencies offered the following reasoning in the NPRM: (1) there is "a significant disparity between the number of noncitizens who are found to have a credible fear and the number of noncitizens whom an IJ ultimately determines" should be granted asylum or other protection; and (2) regular removal cases can take years to conclude; so (3) noncitizens who pass credible fear but are "ultimately found ineligible for asylum or another form of protection are likely to spend many years in the United States prior to being ordered removed," imposing "costs to the system in terms of resources and time" and incentivizing migration. 88 Fed. Reg. at 11,716. Then, in the final Rule, they endorsed this reasoning, emphasizing that "the number of individuals who are referred to an IJ at the beginning of the expedited removal process greatly exceeds the number who are granted asylum or some other form of relief or protection." 88 Fed. Reg. at 31,330.

That is a key policy rationale for the Rule; indeed, in other litigation the government is now touting that, "*[a]s intended*, the rule has significantly reduced [credible fear] screen-in rates." SUF ¶ 12 (emphasis added); *see* SUF ¶ 11. (stating that the CFI pass rate has decreased from 83 to 56 percent); 88 Fed. Reg. at 11,737 ("the Departments expect that fewer noncitizens would ultimately be placed in section 240 proceedings as fewer will pass the screening process").

But that reasoning is ultimately premised on a *disagreement with Congress*. When it created expedited removal, Congress understood that screening people out of the rapid process and into regular proceedings would have consequences. Regular removal proceedings would necessarily take more time, not only because of the greater safeguards to ensure noncitizens could adduce

testimony and make arguments with assistance of counsel, but also because adverse decisions would be subject to administrative and judicial review which could take years. And to the extent Congress intended expedited removal as a deterrent to migration, taking more people out of the rapid process could be expected to impact any deterrent effect. But Congress nevertheless expressly chose to adopt a "low screening standard," selected to ensure that "individuals with valid asylum claims are not returned to countries where they could face persecution." *Grace*, 965 F.3d at 902 (internal quotation marks omitted). By setting the screening standard low, Congress necessarily chose to place significantly more noncitizens into ordinary proceedings than could be ultimately expected to prevail on their protection claims—that is the essence of a low screening standard. Congress made that choice despite the possible countervailing costs.

The agencies' treatment of this "significant disparity" as a problem the Rule is designed to solve is just another way of disagreeing with the low screening standard *Congress chose*. The agencies can make their case to Congress for new legislation, but they cannot use regulations to "alter the specific choices Congress made." *Nat'l Ass'n of Broadcasters*, 39 F.4th at 820. Nor can they rely on factors that contradict Congress's policy choices. *See, e.g.*, *Idaho Sporting Congress, Inc. v. Rittenhouse*, 305 F.3d 957, 971 (9th Cir. 2002) (invalidating rule whose "justification" was "directly contrary to one of [Congress's] fundamental purposes"). At a minimum, the agencies failed to acknowledge this contradiction or even attempt to explain how the Rule's rationale could coexist with the diametrically opposed congressional policy conclusions codified in the significant-possibility standard. *Indep. U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 854 (D.C. Cir. 1987) (agencies are "not free to substitute new goals in place of the statutory objectives without explaining how these actions are consistent with . . . the statute"). For all these reasons, the credible fear portions of the Rule are arbitrary and capricious.

II. THE COLLATERAL POLICIES ARE UNLAWFUL.

The other policies implemented alongside the Rule are likewise contrary to the governing statutes and regulations, and arbitrary and capricious.

A. The Third Country Removal Policy Violates Statutory Procedures and Exposes People to Persecution and Torture.

Contemporaneous with the Rule, the agencies also established a new, policy of conducting expedited removals to third countries—in practice, to Mexico. SUF ¶¶ 17-18. This policy is premised on a misapplication of the statute governing permissible countries of removal, rendering the policy both contrary to law and arbitrary and capricious. It also runs afoul of, and inadequately considered, the agencies' obligations to avoid returning noncitizens to persecution and torture.

1. Defendants assert that limits on their ability to remove nationals from Cuba, Haiti, Nicaragua, and Venezuela justify the routine removal of those nationals to *Mexico*. In particular, a May 10, 2023 memorandum repeatedly invokes an exception allowing for removal to a third country—where removal is otherwise "impracticable, inadvisable, or impossible"—and directs officers to assess that standard with reference to "current removal flight capacity." SUF ¶¶ 22-26. This directive contravenes the statute Congress enacted to regulate the selection of a country of removal.

Under that statutory scheme, removal being "impracticable, inadvisable or impossible" is *not* an exception to the core provisions governing the country of removal. 8 U.S.C. § 1231(b)(2). The INA obligates immigration officials to follow a specific four-step procedure to designate a noncitizen's country of removal. *See Jama v. ICE*, 543 U.S. 335, 341 (2005). In the overwhelming majority of cases, removal must be made to a country of citizenship, or another country of the noncitizen's choice. *See* 8 U.S.C. § 1231(b)(2)(A), (D). Officials may move on to other countries in particular situations, but removal being "impracticable, inadvisable, or impossible" is not a

general-purpose exception allowing removal to third countries of the government's choosing. *See Jama*, 543 U.S. at 341-42.

By nevertheless hinging its directives on the "impracticable, inadvisable, or impossible" standard, the agencies' policy runs afoul of the statute. Consider how the statute works in the context of this policy. A noncitizen arriving at the border and placed into expedited removal designates their home country for removal, or, if they decline to designate, the agency is generally required to select the country of their citizenship (or, equivalently, nationality or subjecthood). *See* 8 U.S.C. § 1231(b)(2)(A), (C)(i), (D). Absent some unusual circumstance like dual citizenship, these steps are simple—the country of citizenship is the only choice—and the government "shall remove" the noncitizen to that country. 8 U.S.C. § 1231(b)(2)(A), (D). Its options for disregarding the country of citizenship (whether designated or not) are limited—for example, if the country "is not willing to accept the [noncitizen] into the country." 8 U.S.C. § 1231(b)(2)(C)(ii), (iii), (D)(i).[7] The government cannot reject the country of citizenship (or designation) by relying on the "impracticable, inadvisable, or impossible" clause because that clause is not among the exceptions to these provisions. *See* 8 U.S.C. § 1231(b)(2)(C) (setting forth limited situations in which the government "may disregard a designation," not including that language); *id.* § 1231(b)(2)(D) (similar for country of citizenship).

In the event that it has exhausted the two previous steps, the government must examine a list of countries with which the noncitizen may have a lesser connection, such as a prior country of residence. 8 U.S.C. § 1231(b)(2)(E)(i)-(vi). It is only when removal to each of the countries in this lesser-connections list would be "impracticable, inadvisable or impossible" that the

[7] Even if it is unlikely that the designated country of deportation would accept a noncitizen, the government cannot rely on such a prediction—it must actively seek acceptance, and the decision lies with the designated country. *Andriasian v. INS*, 180 F.3d 1033, 1041 n.12 (9th Cir. 1999).

government may, as a last resort, consider removal to a different third country like Mexico that is willing to accept the noncitizen. *Id.* § 1231(b)(2)(E)(vii).

The new policy directs officers to remove non-Mexicans to Mexico under the premise that removal to their home country is "impracticable, inadvisable or impossible" because of the U.S. government's removal flight capacity. SUF ¶ 26. But Congress provided that the government generally *must* remove to the country a noncitizen designates or, in the primary alternative, to that person's country of citizenship. Even assuming flight capacity limits were enough to render it "impracticable, inadvisable or impossible" to effectuate removals to the specified countries, the statute does not permit the country of designation or citizenship to be set aside on that basis. The policy is contrary to law.

At a minimum, the third country removal policy is arbitrary and capricious. Even if it could be reconciled with a proper interpretation of § 1231(b)(2), the policy fails to explain *how* that reconciliation can occur. Where, as here, an agency's directives are in such stark tension with the governing statute, the agency must demonstrate that it understood and considered the correct statutory requirements, and "explain" how, in its view, "these actions are consistent with [its] authority under the statute." *Indep. U.S. Tanker Owners Comm.*, 809 F.2d at 854. Defendants failed to do so here.

2. The third country removal policy is also contrary to law and arbitrary and capricious because it fails to provide adequate notice to nationals of the covered countries that they face removal to Mexico, leaving them unable to meaningfully prepare and present claims of fear as to that country. Additionally, the policy is arbitrary and capricious because it fails to consider the risk of return to an applicant's home country *from Mexico* following removal—a process known as "chain refoulement"—further putting people at risk of being returned to harm.

The mandatory non-refoulement duty applies regardless of the country to which the government intends to remove a person. *Nasrallah*, 140 S. Ct. at 1687. The agencies have not only acknowledged that duty in the context of expedited removal, 8 C.F.R. §§ 208.30, 235.3, but also specifically required those protection screenings in the third country removal policy, SUF ¶ 27. Yet the agencies seriously undermine those screenings by failing to provide notice to noncitizens of their risk of being removed to Mexico, SUF ¶ 28, thus depriving people of the ability to prepare to explain how they might be endangered by that removal—either because of threats in Mexico itself or because of the danger of chain refoulement.

Ensuring that an affected noncitizen has a basic understanding of the CFI is obviously necessary to comply with the non-refoulement obligation. The CFI regulations thus recognize that a noncitizen seeking protection from persecution and torture must be afforded information about the fear determination process, and an opportunity to prepare for their interview. *See* 8 C.F.R. § 235.3(b)(4)(i); 8 C.F.R. § 208.30(d)(2); *see also* 8 U.S.C. 1225(b)(1)(B)(iv). These "basic procedural rights . . . are particularly important" because an applicant erroneously denied withholding or CAT relief could be subject to grave harm if forced to return to an unsafe third country. *See Marincas v. Lewis*, 92 F.3d 195, 203 (3d Cir. 1996) (addressing asylum).

Clear notice of the intended country of removal is a basic, but key, prerequisite for understanding the CFI, and therefore for any meaningful ability to pursue protection from refoulement. Noncitizens who do not know they are slated for removal to Mexico, as opposed to their home countries, will not understand the nature of the interviews they are walking into and will have no opportunity to prepare to answer questions about their fear of return *to Mexico. See Kossov v. INS*, 132 F.3d 405, 408-09 (7th Cir. 1998) (notice of intended removal country at outset of hearing was insufficient). Indeed, these very agencies have previously acknowledged the basic

principle that noncitizens "should be informed of the identity of a prospective country of removal" in advance of their screening interviews. 85 Fed. Reg. 84,160, 84,179 (Dec. 23, 2020), *effective date stayed,* 87 Fed. Reg. 79,789 (Dec. 28, 2022).

The third country removal policy fails to ensure this basic notice of the intended country of removal. Nowhere does it require immigration officers to inform applicants, in advance of their screening interview, that they face removal to Mexico. SUF ¶ 28. Notably, when these agencies intend to provide notice of the designated removal country, they know how to include clear language to that effect. For example, in a promulgated rule that never went into effect, the agencies explicitly required that applicants be "notified of the identity of the prospective third country of removal and provided an opportunity to demonstrate" that they face persecution in that country. 85 Fed. Reg. at 84,179, 84,194; *see also* 88 Fed. Reg. 18,227, 18,240 (Mar. 28, 2023) (noncitizen "shall be provided written notice" regarding "prospective receiving country" to allow fear claim).

Indeed, the first time that many noncitizens learn about their anticipated removal to Mexico is *during* the interview itself, when the questions focus on harm in Mexico—questions they have thus had no opportunity to prepare for. *See, e.g.*, SUF ¶¶ 72, 81, 106. "It is too much to expect that [noncitizens] should have the expertise to adapt instantaneously to such an unexpected turn of events." *Kossov*, 132 F.3d at 409.

In any event, the third country removal policy is arbitrary and capricious because it fails to acknowledge or consider the inevitable problems created by not requiring clear notice to noncitizens of the intended country of removal. *See Make The Rd. N.Y. v. McAleenan*, 405 F. Supp. 3d 1, 55 (D.D.C. 2019) (Jackson, J.), *rev'd on other grounds*, 962 F.3d 612 (D.C. Cir. 2020). Given the truncated timeline for expedited removal, the failure to give clear notice substantially heightens the risk that noncitizens will be removed to harm. As explained above, noncitizens are confused

and unprepared when the CFI abruptly shifts to focusing on dangers they face in Mexico. *Supra* Part I.B.iv. Their fears as to their home country—the reason they are seeking protection in the first place—are rendered largely irrelevant, and applicants are ultimately prevented from meaningfully advocating for protection from Mexico. *See, e.g.*, SUF ¶¶ 72, 81, 106.

The policy is additionally deficient because the agencies "entirely failed to consider an important aspect of the problem"—namely, the risk that noncitizens will be sent back to their home countries *from Mexico*. *State Farm*, 463 U.S. at 43. In evaluating fear-based protection claims, the likelihood of chain refoulement following removal to a third country is an important consideration. *See, e.g.*, SUF ¶ 30 (U.N. High Commissioner for Refugees, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (Jan. 26, 2007)) ("The prohibition of refoulement . . . applies not only in respect of return to the country of origin . . . but also to any other place where a person has reason to fear threats to his or her life . . . *or from where he or she risks being sent to such a risk.*") (emphasis added). In fact, the agencies have previously considered chain refoulement concerns. *See, e.g.*, 85 Fed. Reg. at 82,260, 82,273 n.27. However, they neglected to consider this same risk when issuing the third country removal policy, despite being on notice of the fact that refoulement from Mexico is an all-too-real possibility. *Cf. id.* at 82,270-73; SUF ¶ 32 (U.N. High Commissioner for Refugees explaining that the Rule may place noncitizens "at risk of chain refoulement to territories where their life or safety is in peril"); *id.* (Human Rights Watch explaining that removals to Mexico may lead to "chain refoulement," meaning "onward returns to persecution in an individual's country of origin"). Here, the third country removal policy and its record are bereft of *any* mention of the dangers of chain refoulement for people removed to

Mexico. The failure to consider an important aspect of the problem renders this policy arbitrary and capricious. *See Am. Wild Horse*, 873 F.3d at 923.

B. The 24-Hour CFI Policy Effectively Eliminates the Right to Consult.

Defendants also issued a contemporaneous new policy reducing the consultation period preceding CFIs to 24 hours. SUF ¶¶ 34-35. That time period is so short that, particularly given the extreme communication challenges posed by CBP holding facilities, the policy effectively forecloses the ability to prepare for interviews, rendering it both contrary to law and arbitrary and capricious.

This policy must be understood in context—namely, what the 24-hour limit means for people *in CBP custody*, where it is most likely to be applied and where the resulting consequences will be most severe. *See, e.g.*, *Nat'l Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1113-14 (D.C. Cir. 2019) (examining policy change in context of "key aspects of the program," including its likely consequences in practice). Conditions in CBP facilities are not only deplorable but also highly restrictive, dramatically curtailing noncitizens' ability to contact the outside world. SUF ¶¶ 41-42, 156, 159-60, 189-90. And access to phones and legal services for noncitizens in custody is so heavily restricted that contacting anyone in a 24-hour window is often impossible. *See* SUF ¶¶ 156, 162, 164-167, 189, 191. For example, Plaintiff M.P. was held in CBP custody had no opportunity to consult with an attorney before his CFI, which occurred the day after he was served with his credible fear paperwork. *See* SUF ¶¶ 65-66; *see also supra* Part I.B.iv (discussing Plaintiff Y.F.'s similar experience).

The 24-hour policy violates the statutory and regulatory right to a consultation. By statute, a noncitizen is entitled to "consult with a person or persons of the [noncitizen's] choosing prior to the [credible fear] interview." 8 U.S.C. § 1225(b)(1)(B)(iv). Implementing regulations provide that

the person "shall be given time to contact and consult with any person or persons of the [noncitizen's] choosing," 8 C.F.R. § 235.3(b)(4)(ii), shall be informed of that right, *id.* § 235.3(b)(4)(i), and may have the person they consult "present at the interview," *id.* § 208.30(d)(4). There can be no reasonable dispute that these provisions impose a limit on how short the agency can lawfully cut the consultation period; an unduly short consultation window is no different from denying consultation altogether. This policy falls on the wrong end of that line. Twenty-four hours (which might occur entirely during holidays or weekends) to consult with an attorney before a life-or-death interview would be extraordinarily limiting under the best of circumstances; in the context of restrictive CBP facilities where this policy applies, it is tantamount to denying access to any consultation for many noncitizens. *See* SUF ¶¶ 162-163, 164-167, 191. Moreover, the policy also restricts rescheduling of CFIs to "extraordinary circumstances," exacerbating the impact of the 24-hour limitation on access to consultation. SUF ¶ 39.

The policy is also arbitrary and capricious. The agencies did not adequately consider the important fairness considerations that the consultation period is meant to protect. As explained above, the credible fear statute strikes a balance between speed of removals and ensuring access to protection, so whether the waiting period provides a fair opportunity to consult and prepare is plainly an "important aspect of the problem." *State Farm*, 463 U.S. at 43. Indeed, USCIS previously explained that the earlier 48-hour waiting period was in place to allow a noncitizen "to rest [and] collect his or her thoughts" in addition to contacting a person of one's choosing." SUF ¶ 37. The new policy neither addresses this factor nor grapples with the emphasis the agency previously placed on the need for time to rest and prepare. *See Council of Parent Att'ys*, 365 F. Supp. 3d at 50 (it is arbitrary and capricious to address an important consideration underlying a prior policy "in an inadequate or cursory manner").

More specifically, the agency never attempted to explain how 24 hours would be sufficient to permit meaningful preparation or comply with Defendants' statutory and regulatory obligations. *Am. Fed'n of Gov't Emps.*, 25 F.4th at 5 (change in course insufficiently reasoned). And nothing in the policy reflects any acknowledgement of the severe limitations on communication imposed in CBP facilities, another "important aspect of the problem," *State Farm*, 463 U.S. at 43, much less any attempt to explain how 24 hours could be considered an adequate waiting period under those circumstances, *see Make The Rd. N.Y.*, 405 F. Supp. 3d at 55 ("[A]n agency cannot possibly conduct reasoned, non-arbitrary decision making concerning policies that might impact *real* people and not take such *real life circumstances* into account.").

Indeed, the record is entirely bereft of any evidence—or even speculation—suggesting that 24 hours is sufficient. There is simply nothing from which a policymaker could conclude that people in CBP custody (or in general, for that matter) will have an *actual* opportunity to contact a person of their choosing within 24 hours. *See Am. Fed'n of Gov't Emps.*, 25 F.4th at 5 (court is "not bound by the [agency]'s conclusory and counterintuitive assertions . . . especially when the record contains no factual basis"); *Nat'l Women's L. Ctr.*, 358 F. Supp. 3d at 90 ("Courts 'do not defer to an agency's conclusory or unsupported suppositions.'"). If Defendants reached that conclusion—and, again, they never said so—they had no factual basis to do so.

The justification for the 24-hour policy that the agencies did advance is likewise entirely unsupported by the record. *Nat'l Lifeline Ass'n*, 921 F.3d at 1113 (arbitrary reasoning where agency "pointed to no record evidence" on key issues); *Nat'l Women's L. Ctr.*, 358 F. Supp. 3d at 89 ("conclusory statements will not do"). USCIS stated that the policy would "more quickly provide relief to those who are eligible [for asylum] while more quickly removing those who are not." SUF ¶ 36. The assumption underlying that claim is that reducing the waiting period will speed up

proceedings without impairing their accuracy—that is, without wrongfully removing people to danger. But the agency never stated or examined that premise and failed to cite any evidence to support it. *See Hispanic Affairs Proj. v. Acosta*, 901 F.3d 378, 389 (D.C. Cir. 2018) ("Agencies always bear the affirmative burden of examining a key assumption[.]") (cleaned up). And that premise is highly doubtful, to say the least: The policy shoves everyone through the process at breakneck speed, effectively eliminating the opportunity to consult with an attorney regardless of the strength of one's claims to protection. The predictable result will be that people who should pass their CFI will be denied and removed because they lack a fair opportunity to consult and prepare before their interview. Because the agency failed to explain and justify its contrary assumption, the policy is arbitrary and capricious.

C. The "Voluntary" Return Policy Misleads People into Acceptance.

Having dramatically limited access to protection in the United States through the policies described above, the agencies adopted a new policy of repeatedly urging noncitizens to withdraw their applications for admission to the United States and return to Mexico. *See* 8 U.S.C. § 1225(a)(4); 8 C.F.R. § 235.4; SUF ¶¶ 43-44. Plaintiffs have no disagreement with the availability of voluntary return in general, but the decision to withdraw an application for admission "must be made voluntarily." 8 C.F.R. § 235.4. Here, the new policy provides incorrect and misleading information to noncitizens about their eligibility for country-specific parole processes. That flaw renders the choice to return involuntary; the policy is thus contrary to law and arbitrary and capricious.

This policy directs both CBP agents and Asylum Officers to read specific "advisal" statements to noncitizens to encourage them to accept return. SUF ¶ 46. These statements focus their "pitch" on parole programs the government has established, through which nationals of Cuba,

Haiti, Nicaragua, and Venezuela may apply from abroad to come to the United States. SUF ¶¶ 43, 47. Noncitizens are offered the chance to voluntarily return to Mexico with the promise of returning to the United States through the parole programs applicable to these nationalities. SUF ¶ 47. The statements leave no doubt that, if noncitizens accept voluntary return, they will—so long as they have a "supporter in the United States" and satisfy the other requirements that the "advisal" specifies—"*remain eligible* for that parole process." SUF ¶ 47 (emphasis added).

That is simply not true. Any noncitizen who entered Panama or Mexico after the effective date of the relevant parole program without authorization in the course of their journey to the United States is categorically ineligible for the country-specific parole programs. SUF ¶ 48. And the overwhelming majority of nationals of Cuba, Haiti, Nicaragua, and Venezuela arriving at the southwest border entered at least one of those countries irregularly—as do nearly all non-Mexican asylum seekers at the border. *See* 88 Fed. Reg. at 31,444 (noting "recent surges in irregular migration" into Panama and Mexico); *see also* SUF ¶ 49 (comment noting that, in a study, 98.3% of asylum seekers indicated having entered Mexico irregularly); *id.* (comment discussing irregular entry into Panama). This policy thus constitutes a trap: Applicants are invited to accept voluntary return in order to "remain eligible" for the parole program, SUF ¶ 47, only to discover after arriving in Mexico that they are not in fact eligible for the program.

The omission of that crucial fact is deeply misleading. When noncitizens agree to withdraw their applications for admission based on misleading or inaccurate information, that choice is not made "voluntarily." *See, e.g.*, *Ibarra-Flores v. Gonzales*, 439 F.3d 614, 619-20 (9th Cir. 2006) (voluntary departure procured through "misrepresentation" was invalid). Noncitizens desperate to find safety who are misled in this way cannot be said to be voluntarily choosing to return to Mexico.

The consequences can be dire. For one thing, as previously explained, conditions in Mexico are extremely dangerous. For another, noncitizens are required to sign a form disclaiming fear in order to be eligible for voluntary return. *See* SUF ¶ 50. Such concessions are sometimes deployed against noncitizens in future proceedings. *Cf., e.g.*, *United States v. Mendoza-Alvarez*, No. 13CR1653 WQH, 2013 WL 5530791, at *2 (S.D. Cal. Oct. 4, 2013).[8] Because the withdrawal agreements obtained under the "voluntary" return policy are not made voluntarily, they are void, and the policy is contrary to law. *See* 8 C.F.R. § 235.4.

The policy is also arbitrary and capricious. The misleading presentation of the parole eligibility requirements contradicts prior agency policy, which repeatedly emphasized that "[w]ithdrawal is strictly voluntary and should not be coerced in any way." SUF ¶ 54. Defendants offer no justification for this change, which is an unexplained departure from longstanding agency practice. *See Am. Wild Horse*, 873 F.3d at 923. Nor do they attempt to explain how such a misleading process could be voluntary.

III. THE COURT SHOULD GRANT VACATUR AND OTHER RELIEF.

Where, as here, agency action is unlawful, "the ordinary result is that the rules are vacated." *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998); *see also Kiakombua*, 498 F. Supp. 3d at 54 (finding vacatur appropriate for credible fear policies); 5 U.S.C. § 706(2). That remedy is particularly appropriate here. As Plaintiffs' declarations illustrate, with

[8] This risk is particularly acute for those who were required to sign an old version of this form. That older form used for withdrawals, I-826, stated "I do not believe I face harm if I return to *my country*." SUF ¶ 51 (emphasis added). On or around May 18, 2023, agents were directed to use an updated version I-826M, which instead states "I do not believe I face harm if I return to *Mexico*." SUF ¶ 52 (emphasis added). That is far more appropriate as to voluntary removal to *Mexico*. But many people have been required to sign the old form, both before and since May 18, 2023, including Plaintiffs J.P. and E.B. SUF ¶¶ 51, 74, 82. In such situations, it is particularly illogical and unfair to require people who have *already* indicated fear of harm in their own country, triggering a CFI, to turn around and disclaim any such fear.

every day that passes, noncitizens fleeing persecution are being returned to harm without a fair assessment of their protection claims. And for all the reasons discussed above, the policies are both contrary to the governing statutes and regulations, and riddled with serious failures of reasoned decision-making. The Court should therefore follow "the normal course and vacate" the policies. *United Steel v. Mine Safety & Health Admin*., 925 F.3d 1279, 1287 (D.C. Cir. 2019).

In particular, Plaintiffs seek vacatur of the expedited removal regulations established by the Rule, 8 C.F.R. § 208.33(b); the 24-hour CFI policy; the third country removal policy; and the misleading "advisals" in the "voluntary" return policy. In addition, the Individual Plaintiffs request the Court vacate their negative credible fear and reasonable fear determinations, removal orders, and/or voluntary return documents, and order that Defendants return Plaintiffs who are abroad back to the United States. *See Grace,* 344 F. Supp. 3d at 144; Order at 3, *Grace*, No. 18-cv-1853 (D.D.C. Dec. 19, 2018), ECF No. 105. Plaintiffs also request that the Court enter appropriate declaratory relief. *See* Proposed Order.

CONCLUSION

The Court should grant summary judgment to Plaintiffs.

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Respectfully submitted,

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**Appearing under certificate of pro bono representation*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

M.A., et al., *Plaintiffs*, v. ALEJANDRO MAYORKAS, Secretary of the Department of Homeland Security, in his official capacity, et al., *Defendants.*	No. 1:23-cv-01843-TSC

PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56 and Local Rule 7(h), Plaintiffs submit the following Statement of Material Facts Not in Genuine Dispute in support of their motion for summary judgment. Relevant portions of the administrative records will be submitted in a joint appendix pursuant to Local Rule 7(n).

I. The Rule

1. On May 11, 2023, Defendants implemented a final rule titled "Circumvention of Lawful Pathways." 88 Fed. Reg. 31,314 (May 16, 2023) (codified at 8 C.F.R. §§ 208.33, 1208.33) (the "Rule").

2. The Rule established a new bar to asylum eligibility and applied that bar in credible fear interviews ("CFIs") conducted in the expedited removal process. 88 Fed. Reg. at 31,318, 31,321.

3. The Rule imposes a "reasonable possibility" standard to screen eligibility for withholding of removal and protection under the Convention Against Torture ("CAT") for those subject to the new asylum bar. 88 Fed. Reg. at 31,336-38, 31,381.

4. The Rule finalized a Notice of Proposed Rulemaking ("NPRM"). 88 Fed. Reg. 11,704 (Feb. 23, 2023).

5. Comments to the NPRM raised concerns about the fairness of applying the proposed new bar to asylum eligibility at the credible fear stage. *See, e.g.,* PC_30837, 33933 (applying bar at credible fear stage "inappropriate" given "limited nature of [CFI], which is not suited for complicated legal and factual issues").

6. Comments to the NPRM argued that the proposed credible fear regulations violated the "significant possibility" standard. *See, e.g.*, PC_33299 (comment from several states' Attorneys General noting that under the proposed regulations, "rather than determining whether the applicant has a significant possibility of establishing statutory eligibility for asylum, asylum officers 'shall first determine whether the [non-citizen] is covered by the'" asylum bar) (quoting proposed 8 C.F.R. § 208.33(c)(1)) (alteration in original); PC_22027-22030, 22457-22458, 33934-33936.

7. In the NPRM, the agencies contended that the proposed regulations were "consistent with" the statute by offering the following statement: "If a noncitizen is subject to the lawful pathways condition on eligibility for asylum and not excepted and cannot rebut the presumption of the condition's applicability, there would not be a significant possibility that the noncitizen could establish eligibility for asylum." 88 Fed. Reg. at.11,742.

8. Comments to the NPRM explained that this reasoning was flawed and contradicts the statutory standard. *See, e.g.*, PC_22030, 22457-22458.

9. Comments to the NPRM explained that individuals in expedited removal generally have little to no opportunity to consult counsel or gather evidence. *See, e.g.*, PC_21431 (noting that "[n]oncitizens undergoing credible fear screenings [during expedited removal] often do so

mere days after their initial encounter with DHS" and are "frequently detained and face inadequate access to counsel").

10. Comments to the NPRM explained that, by contrast, most people "subject to" reinstatement of removal under 8 U.S.C. § 1231(a)(5) and administrative expedited removal under 8 U.S.C. § 1228(b) "by definition ha[d] prior experience with the U.S. immigration system," "and many . . . lived in the United States for extended periods of time." PC_21430.

11. Defendants have indicated in other litigation that, from May 12 to July 31, 2023, the passage rate for CFIs was 56%. Declaration of Blas Nuñez-Neto, ¶ 14, *State of Indiana v. Mayorkas*, No. 23-cv-106 (D.N.D. Sept. 11, 2023), ECF No. 57-2 ("Nuñez-Neto Decl."). By contrast, the passage rate was 83% from 2014 to 2019. *Id*.

12. Defendants have indicated in other litigation that "[a]s intended, the rule has significantly reduced [credible fear] screen-in rates." *Id*.

II. Expedited Removal and Defendants' Prior Practice

13. In 2022, the Department of Homeland Security ("DHS") and the Department of Justice ("DOJ") issued a Rule titled "Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers." 87 Fed. Reg. 18,078 (Mar. 29, 2022) ("2022 Asylum Rule").

14. The 2022 Asylum Rule explained that it has been these Departments' "historical practice" to assess asylum, withholding of removal, and CAT claims in CFIs under the "significant possibility" standard. *Id*. at 18,091.

15. The 2022 Asylum Rule rejected the application of the "reasonable possibility" standard to withholding of removal and CAT claims in CFIs. *Id*. at 18,092.

16. The 2022 Asylum Rule "return[ed] to the existing and two-decade-long practice of not applying at the credible fear screening the mandatory bars to applying for, or being granted, asylum." *Id*. at 18,084.

III. The Third-Country Removal Policy

17. DHS has implemented a policy of removing nationals of Cuba, Haiti, Nicaragua, and Venezuela to Mexico. CBP_Removals_AR_1-5, 321-25; (in this section, "the policy").

18. The policy was implemented on or about May 11, 2023. *Id*. at 1.

19. The policy applies to individuals in expedited removal proceedings. *Id.* at 1-5, 321-25.

20. The policy, and related guidelines and procedures, are reflected in several documents. *Id*.

21. One of those documents, dated May 10, 2023, is updated U.S. Border Patrol guidance for processing individuals from Cuba, Haiti, Nicaragua, and Venezuela for voluntary withdrawal or removal to Mexico. *Id.* at 1-5.

22. Another of those documents is a May 10, 2023, memorandum from Assistant Homeland Security Secretary Blas Nuñez-Neto. *Id.* at 321-25 ("May 10, 2023 memorandum"); Ex. A to Declaration of Noor Zafar ("Zafar Decl.").

23. The May 10, 2023 memorandum provides guidance to Customs and Border Protection ("CBP") agents regarding how to determine the country to which a noncitizen will be removed. CBP_Removals_AR_321-25.

24. CBP agents prepare expedited removal orders and determine the country of removal for such orders under the policy. *Id*.

25. The May 10, 2023 memorandum repeatedly invokes an exception allowing for removal to a third country—where removal is otherwise "impracticable, inadvisable, or impossible." *Id.* at 321-22.

26. The May 10, 2023 memorandum directs CBP agents to assess "current removal flight capacity" in determining whether expedited removal of non-Mexican nationals to Mexico is an option based on "impracticability, inadvisability, or impossibility." *Id.* at 322.

27. The May 10, 2023 memorandum directs CBP agents to screen for fear of removal to selected removal country. *Id.* at 322.

28. The policy does not direct CBP agents to notify noncitizens in advance of their CFI that they face removal to Mexico. *Id.* at 321-25.

29. DHS and the DOJ have previously acknowledged that noncitizens "should be informed of the identity of a prospective country of removal" in advance of their screening interviews. 85 Fed. Reg. 84,160, 84,179 (Dec. 23, 2020), *effective date stayed,* 87 Fed. Reg. 79,789 (Dec. 28, 2022); *see also* 88 Fed. Reg. 18,227, 18,240 (Mar. 28, 2023).

30. The U.N. High Commissioner for Refugees has stated that the prohibition on refoulement under international refugee treaties encompasses a prohibition on removal to a third country where an individual faces a risk of being returned to persecution in their home country. *See* U.N. High Commissioner for Refugees, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (Jan. 26, 2007) ("The prohibition of refoulement . . . applies not only in respect of return to the country of origin . . . but also to any other place where a person has reason to fear threats to his or her life . . . or from where he or she risks being sent to such a risk."), Zafar Decl. Ex. B.

31. The agencies have previously considered concerns about such removal, which is known as "chain refoulement," in other rulemakings. *See, e.g.*, 85 Fed. Reg. at 82,260, 82,273 n.27.

32. Comments to the NPRM identified chain refoulement from Mexico as a risk faced by noncitizens removed there. *See, e.g.*, PC_12984 (U.N. High Commissioner for Refugees explaining that the Rule may place noncitizens "at risk of chain refoulement to territories where their life or safety is in peril"); *id.* at 20259 (Human Rights Watch explaining that removals to Mexico may lead to "chain refoulement," meaning "onward returns to persecution in an individual's country of origin"); *id.* at 31851-52 (similar).

33. Comments to the NPRM noted the danger asylum seekers face in Mexico. *See, e.g.*, PC_30901 (documenting nearly 13,500 reports of "murder, torture, kidnaping, rape, and other violent attacks on migrants . . . in Mexico"); PC_23082 (describing how cartels "prey upon people migrating through Mexico"); *id.* at 76248-87.

IV. The 24-Hour CFI Policy

34. U.S. Citizenship and Immigration Services ("USCIS") adopted a new policy that shortens the consultation period that precedes CFIs to "24 hours after a noncitizen's acknowledgement of receipt of the Form M-444, Information about Credible Fear Interview." USCIS_24-Hour_AR_1-3 (in this section, "the policy"); Zafar Decl. Ex. C.

35. The policy was implemented on or about May 10, 2023. USCIS_24-Hour_AR_1.

36. USCIS stated that the policy would "more quickly provide relief to those who are eligible [for asylum] while more quickly removing those who are not." *Id.* at 27; *see also id.* at 3 (similar).

37. Prior USCIS guidance from 2019 explained that the purpose of the consultation period is to allow the noncitizen "an opportunity to rest [and] collect his or her thoughts," in addition to contacting a person of one's choosing. *Id*. at 57.

38. This consultation period has generally been no shorter than 48 hours. *Id*. at 2, 55.

39. The policy requires a showing of "extraordinary circumstances" before approving a request to reschedule a noncitizen's CFI. *Id.* at 3.

40. USCIS is now conducting CFIs in CBP custody. CLP_AR_2188.

41. Comments to the NPRM noted that CBP custody involves harsh conditions of confinement. *See, e.g.*, PC_55616 (noting "verbal abuse, freezing conditions, inadequate food, lack of adequate medical care, and overcrowding" in CBP custody), *id*. at 56158-59 (report interviewing 12,895 individuals, detailing 30,000 incidents of abuse, and finding that "the abuses individuals report have remained alarmingly consistent for years … many are crammed into cells and subjected to extreme temperatures, deprived of sleep, and threatened with death by Border Patrol agents"), *id*. at 56278 (concluding that CBP facilities are "wholly inadequate for **any** overnight detention" and "conditions are reprehensible … even with respect to truly short-term detention") (bold in original).

42. Comments to the NPRM noted that people held in CBP custody find it extremely difficult to consult with counsel before or during their CFIs. *See, e.g.*, *id.* at 31507-09 ("dire conditions and lack of access to counsel" in CBP custody would "exacerbate due process nightmare" migrants face), *id.* at 32980-82 (attorneys describing "many obstacles in representing and even just speaking with [ ] detained clients").

V. The "Voluntary" Return Policy

43. CBP and USCIS adopted a new policy directing officers to ask nationals of Cuba, Haiti, Nicaragua, and Venezuela whether they will withdraw their applications for admission to

the United States and voluntarily return to Mexico. CBP_Withdrawals_AR_333; USCIS_Withdrawals_AR_3-4 (in this section, "the policy").

44. The policy was implemented on or about May 12, 2023. CBP_Withdrawals_AR_333.

45. Under the policy, noncitizens are asked up to three or more times whether they would like to accept voluntary return to Mexico. CBP_Withdrawals_AR_333; USCIS_Withdrawals_AR_3-4.

46. The policy directs CBP and USCIS officers to provide "advisal[s]" to noncitizens about voluntary return. CBP_Withdrawals_AR_6; Zafar Decl. Exs. D, E.

47. The "advisals" state that the noncitizens will—so long as they have a "supporter in the United States" and satisfy the other requirements that the "advisal" specifies—"remain eligible" for country-specific parole processes if they "voluntarily" "withdraw [their] application for admission to the United States and return to Mexico." *Id*.

48. Noncitizens who entered Panama or Mexico without authorization in the course of their journey to the United States are ineligible for the country-specific parole programs referred to in the "advisals" if they entered those countries on or after the effective date of the relevant parole program: for Venezuelans, after Oct. 19, 2022; for Cubans, Haitians, and Nicaraguans, after Jan. 9, 2023. *See* 87 Fed. Reg. 63,507, 63,515 (Oct. 19, 2022) (Venezuela); 87 Fed. Reg. 1243, 1252 (Oct. 19, 2022) (Haiti); 88 Fed. Reg. 1255, 1263 (Jan. 9, 2023) (Nicaragua); 88 Fed. Reg. 1266, 1276 (Jan. 9, 2023) (Cuba); *see also Processes for Cubans, Haitians, Nicaraguans, and Venezuelans*, USCIS, https://www.uscis.gov/CHNV, (last updated Sept. 20, 2023) (listing criteria for eligibility).

49. Comments to the NPRM noted that the vast majority of Cuban, Haitian, Nicaraguan, and Venezuelan nationals arriving at the southwest border entered Panama or Mexico without authorization. *See e.g.*, PC_29770 (in a study, 98.3% of asylum seekers indicated having entered Mexico irregularly); *id.* at 29535 (discussing irregular entry into Panama).

50. Noncitizens are required to sign a form disclaiming fear in order to be eligible for voluntary return. *See* CBP_Withdrawals_AR_333-34.

51. The version of the form that noncitizens were originally required to sign under the policy, Form I-826, stated "I do not believe I face harm if I return to my country." CBP_Withdrawals_AR_334. In the Spanish language version of this form, "my country" is translated as "mi país." *See, e.g.*, Zafar Decl. Exs. F, G (Form I-826 for Plaintiffs J.P. and E.B.).

52. On or around May 18, 2023, agents were directed, for returns under the policy, to use an updated version, Form I-826M, which instead states "I do not believe I face harm if I return to Mexico." CBP_Withdrawals_AR_333-34.

53. Many people subject to the policy were required to sign the old form, both before and since May 18, 2023. *See, e.g.*, Zafar Decl. Exs. F, G.

54. CBP previously emphasized that "[w]ithdrawal is strictly voluntary and should not be coerced in any way." Zafar Decl. Ex. H

VI. Facts Relating to Individual Plaintiffs

Plaintiff M.A.

55. Plaintiff M.A. is an asylum seeker from Guatemala who fears persecution by her abusive ex-husband, who has ties to the MS-13 gang. Declaration of M.A. ECF No. 4, Ex. 2, ¶¶ 1-8. Her ex-husband stabbed M.A., repeatedly raped her, subjected her to a gang rape by his associates, and threatened to kill her. *Id*. ¶¶ 2-7.

56. On or about May 14, 2023, M.A. entered the United States without inspection and without a CBP One appointment. *Id*. ¶ 10.

57. M.A. had a CFI pursuant to the Rule's new credible fear provisions. *Id.* ¶¶ 12-13. A USCIS officer found she did not satisfy the Rule's standards for asylum, withholding of removal, or CAT protection. *Id.* ¶ 12. An immigration judge affirmed the negative determination. *Id.* ¶ 14.

Plaintiff R.S.

58. Plaintiff R.S. is an asylum seeker from El Salvador whose family was targeted by MS-13. Declaration of R.S. ECF No. 4, Ex. 3, ¶¶ 1-13. Her brother was murdered and she was tortured, sexually assaulted, and threatened with death. *Id*. ¶¶ 3, 10-11.

59. R.S. was robbed in Mexico. *Id.* ¶ 17.

60. On or about May 19, 2023, R.S. entered the United States without inspection and without a CBP One appointment. *Id.* ¶ 21.

61. R.S. had a CFI pursuant to the Rule's new credible fear provisions. *Id.* ¶ 25. A USCIS officer found she did not satisfy the Rule's standards for asylum, withholding of removal, or CAT protection. *Id.* ¶ 29. An immigration judge affirmed the negative determination. *Id.* ¶ 32.

Plaintiff M.P.

62. Plaintiff M.P. is an asylum seeker from Guatemala who witnessed a violent attack and helped the victim report it. Declaration of M.P., ECF No. 4, Ex. 4, ¶¶ 1-9. He was threatened with death by the assailants. *Id*. ¶ 5.

63. On or about June 4, 2023, M.P. entered the United States without inspection and without a CBP One appointment. *Id.* ¶¶ 13-14.

64. M.P. was detained by CBP and had his CFI in CBP custody. *Id*. ¶¶ 14-16.

65. M.P. had his CFI one day after he was provided with initial information about the CFI process. *Id.* ¶¶ 15-16; Zafar Decl. Ex. I (Form I-860 for M.P.).

66. M.P. had no opportunity to consult with an attorney before his interview. Declaration of M.P., ECF No. 4, Ex. 4, ¶ 16.

67. M.P.'s CFI was conducted pursuant to the Rule's new credible fear provisions. *Id.* ¶ 17. A USCIS officer found he did not satisfy the Rule's standards for asylum, withholding of removal, or CAT protection. *Id.* An immigration judge affirmed the negative determination. *Id.* ¶ 19.

Plaintiff J.P.

68. Plaintiff J.P. is an asylum seeker from Venezuela who fears harm because of his political activism. Declaration of J.P., ECF No. 4, Ex. 5, ¶¶ 1-9. He was threatened with death and beaten. *Id*. ¶¶ 3-4, 9.

69. After fleeing, J.P. was the twice victimized in Mexico. *Id*. ¶ 12. The first time was by a group that J.P. initially believed to be police. *Id.* This group stopped a bus he was on, forced passengers to strip, and robbed and beat them; after these events, J.P. concluded they were a cartel. *Id*. Later, J.P. was robbed and threatened by police in Mexico. *Id*. ¶ 14.

70. J.P. presented himself at a port of entry without a CBP One appointment; he was permitted to seek entry into the United States on May 12, 2023. *Id.* ¶¶ 15-17.

71. J.P. had a CFI pursuant to the Rule's new credible fear provisions. *Id.* ¶¶ 17, 22-24.

72. J.P. did not understand why the CFI was focused on Mexico, rather than his home country. *Id*. ¶¶ 24-25. J.P. did not understand why the process was so different from what he had seen in a CBP orientation video. *Id*. ¶ 25.

73. J.P. was told he was ineligible for asylum and encouraged to accept voluntary return to Mexico. *Id*. ¶¶ 24, 26. The officer conducting his interview indicated that parole was an available option for J.P. *Id*. ¶ 26.

74. On or about June 1, 2023, J.P. was directed to sign Form I-826, which indicated that he agreed to return to Mexico and incorrectly indicated that J.P. disclaimed fear of return to his home country. *Id.* ¶¶ 27-28; Zafar Decl. Ex. F. The Form I-826 contained no references to Mexico. *Id*.

Plaintiff E.B.

75. Plaintiff E.B. is an asylum seeker from Venezuela who was threatened because of his political opinion. Declaration of E.B., ECF No. 4, Ex. 6, ¶¶ 1-4.

76. On or about May 23, 2023, E.B. entered the United States without inspection and without a CBP One appointment. *Id.* ¶ 10.

77. E.B. was detained by CBP and had a CFI in CBP custody. *Id.* ¶ 11.

78. E.B.'s CFI occurred two days after he was taken to a CBP detention facility. *Id*. During those two days, he was able to consult with an attorney by phone. *Id*.

79. E.B. was not provided with a pen or pencil to write down the attorney's phone number. *Id.* As a result, he was not able to have an attorney present during the interview. *Id.*

80. E.B. was given a CFI pursuant to the Rule's new credible fear provisions. *Id.* ¶ 12. The interview focused on Mexico, not Venezuela. *Id*.

81. E.B. did not understand why the officer was so focused on Mexico, as he had understood that the purpose of the interview was to inquire into his fear of returning to Venezuela. *Id*.

82. On June 1, 2023, E.B. signed Form I-826, which indicated that he agreed to return to Mexico and incorrectly indicated that E.B. disclaimed fear of return to his home country. *Id.* ¶ 15; Zafar Decl. Ex. G. The Form I-826 contained no references to Mexico. Zafar Decl. Ex. G.

Plaintiff M.N.

83. Plaintiff M.N. is an asylum seeker from the Dominican Republic whose stepfather beat and raped her. Declaration of M.N., ECF No. 4, Ex. 7, ¶¶ 1-12.

84. M.N. was sexually assaulted and robbed while she was in Mexico. *Id.* ¶ 14. She believes she was targeted because she was a migrant. *Id*.

85. M.N. entered the United States on or about May 15, 2023, without inspection and without a CBP One appointment. *Id.* ¶ 15.

86. M.N. had a CFI pursuant to the Rule's new credible fear provisions. *Id.* ¶¶ 18-19.

87. A USCIS officer found she did not satisfy the Rule's standards for asylum, withholding of removal, or CAT protection. *Id.* ¶ 19. An immigration judge affirmed the negative determination. *Id.* ¶ 20.

88. After the immigration judge decision, M.N. filed a *pro se* request for reconsideration of the decision but was informed that there is no option to seek reconsideration. *Id.*

Plaintiff K.R.

89. Plaintiff K.R. is an asylum seeker from Honduras who fears persecution by the 18th Street Gang. Declaration of K.R., ECF No. 4, Ex. 8, ¶¶ 1-6. The gang tried to recruit her children, and they also sexually assaulted, beat, and threatened K.R. with death. *Id*. ¶¶ 2-4.

90. On or about May 19, 2023, K.R. entered the United States without inspection and without a CBP One appointment. *Id.* ¶ 9.

91. K.R. had a CFI pursuant to the Rule's new credible fear provisions. *Id.* ¶ 10.

92. A USCIS officer found she did not satisfy the Rule's standards for asylum, withholding of removal, or CAT protection. *Id.* ¶ 11. An immigration judge affirmed the negative determination. *Id.*

Plaintiff M.R.

93. Plaintiff M.R. is an asylum seeker from Ecuador who was threatened with death because of his refusal to work with a gang and corrupt police officers. Declaration of M.R., ECF No. 4, Ex. 9, ¶¶ 1, 3-10.

94. In Mexico, near the U.S.-Mexico border, M.R. was kidnapped by cartel members and held for four days, during which time he was fed only once a day. *Id.* ¶¶ 11-12.

95. M.R. feared he would be kidnapped or attacked again if he waited in Mexico any longer. *Id.* ¶ 13.

96. On or around May 25, 2023, M.R. entered the United States without inspection and without a CBP One appointment. *Id.*

97. M.R. had a CFI pursuant to the Rule's new credible fear provisions. *Id.* ¶¶ 13-14. A USCIS officer found he did not satisfy the Rule's standards for asylum, withholding of removal, or CAT protection. *Id.* ¶ 15. An immigration judge affirmed the negative determination. *Id.* ¶ 16.

Plaintiff B.H.

98. Plaintiff B.H. is an asylum seeker from Peru who was beaten and threatened with death because of her political activism. Declaration of B.H., ECF No. 4, Ex. 10, ¶¶ 1-9.

99. B.H. was robbed in Mexico. *Id.* ¶ 10.

100. On or about May 25, 2023, B.H. entered the United States without inspection and without a CBP One appointment. *Id.* ¶¶ 12-13.

101. B.H. had a CFI pursuant to the Rule's new credible fear provisions. *Id.* ¶¶ 15-16. A USCIS officer found she did not satisfy the Rule's standards for asylum, withholding of removal, or CAT protection. *Id.* ¶ 16. An immigration judge affirmed the negative determination. *Id.* ¶ 17.

Plaintiff L.A.

102. Plaintiff L.A. is an asylum seeker from Nicaragua who was threatened with death for his connections to a political opposition party. Declaration of L.A., ECF No. 4, Ex. 11, ¶¶ 1-4.

103. While in Mexico, L.A. and his sons were attacked by men wearing what appeared to be police or military uniforms, but who were in fact cartel members, and his sons were kidnapped. *Id.* ¶ 6. L.A. was also raped in Mexico, robbed and threatened multiple times, and hit with a car. *Id*. ¶¶ 6-7.

104. In early June 2023, L.A. entered the United States without inspection and without a CBP One appointment. *Id.* ¶¶ 9-10.

105. L.A. had a CFI pursuant to the Rule's new credible fear provisions. *Id.* ¶ 12, 14.

106. L.A. did not understand why his CFI was focused on Mexico, or why he was not permitted to explain his fear of return to Nicaragua. *Id.* ¶ 12.

107. A USCIS officer found he did not satisfy the Rule's standards for asylum, withholding of removal, or CAT protection. *Id.* ¶ 15.

108. After this suit was filed, an immigration judge vacated the officer's decision. First Amended Complaint, ECF No. 19, ¶ 29.

Plaintiff R.V.

109. Plaintiff R.V. is an asylum seeker from El Salvador who was beaten by police because of his political opinion and activities protesting the Salvadoran government. Declaration of R.V., ECF No. 4, Ex. 12, ¶¶ 1-7.

110. In Mexico, R.V. and his wife were stopped by a group of armed men who shot at them when they tried to escape. *Id.* ¶¶ 9-10.

111. At the end of May, R.V. and his wife entered the United States without authorization or a CBP One appointment. *Id.* ¶ 11. R.V. was separated from his wife by CBP. *Id.* ¶ 12.

112. R.V. had a CFI pursuant to the Rule's new credible fear provisions. *Id.* ¶ 14. A USCIS officer found he did not satisfy the Rule's standards for asylum, withholding of removal, or CAT protection. *Id*. An immigration judge affirmed the negative determination. *Id.* ¶ 15.

Plaintiff Y.F.

113. Plaintiff Y.F. is an asylum seeker from El Salvador who witnessed a gang murder and was attacked and threatened with death and almost raped to intimidate her from reporting it to the police. Declaration of Y.F., ECF No. 4, Ex. 13, ¶¶ 1-7.

114. In Mexico, Y.F. was robbed multiple times. *Id.* ¶¶ 11, 13. She was targeted because she was a migrant. *Id*. ¶ 11.

115. On or around May 25, 2023, Y.F. entered the United States without inspection and without a CBP One appointment. *Id.* ¶¶ 14, 16.

116. While in CBP custody, Y.F. had a rapid CFI. *Id.* ¶ 17. Y.F. was never given the opportunity to consult with a lawyer prior to the CFI. *Id*.

117. Y.F.'s CFI was pursuant to the Rule's new credible fear provisions. *Id.* ¶ 19. A

USCIS officer found she did not satisfy the Rule's standards for asylum, withholding of removal, or CAT protection. *Id*.

118. After the CFI denial, on Sunday, June 4, 2023, around 9:00 p.m., an officer took her to an area with a phone and a list of lawyers. *Id.* ¶ 20. Y.F. tried to call every lawyer on the list, but no one answered. *Id.*

119. The next day, an immigration judge affirmed the negative determination. *Id.* ¶ 21.

Plaintiff M.S.

120. Plaintiff M.S. is an asylum seeker from Brazil who was threatened with death because of his participation in a police investigation of a crime involving a powerful local gang. Declaration of M.S., ECF No. 4, Ex. 14, ¶¶ 1-5.

121. M.S. entered the United States on or around May 12th or 13th, 2023, without inspection and without a CBP One appointment. *Id.* ¶ 7.

122. M.S. had a CFI pursuant to the Rule's new credible fear provisions. *Id.* ¶ 10. A USCIS officer found he did not satisfy the Rule's standards for asylum, withholding of removal, or CAT protection. *Id.* ¶ 11. An immigration judge affirmed the negative determination. *Id.* ¶ 12.

Plaintiff F.C.

123. Plaintiff F.C. is an asylum seeker from Ecuador who was threatened with death and whose house was shot by a criminal organization after he cooperated with police. Declaration of F.C., ECF No. 20, Ex. 2, ¶¶ 1-8.

124. F.C. entered the United States on or about May 28, 2023, without inspection and without a CBP One appointment. *Id.* ¶ 13.

125. F.C. had a CFI pursuant to the Rule's new credible fear provisions. *Id.* ¶¶ 14-15. A USCIS officer found he did not satisfy the Rule's standards for asylum, withholding of removal,

or CAT protection. *Id*. ¶ 15 An immigration judge affirmed the negative determination. *Id.*

Plaintiff D.M.

126. Plaintiff D.M. is an asylum seeker from Venezuela who fears harm in that country because of his political opinion and who was assaulted and threatened with death by gangs. Declaration of D.M., ECF No. 20, Ex. 3, ¶¶ 1-7.

127. In Mexico, he was robbed and extorted, and heard various accounts of other migrants being kidnapped. *Id*. ¶ 8.

128. D.M. entered the United States on or about May 27, 2023, without inspection and without a CBP One appointment. *Id.* ¶¶ 9, 11.

129. D.M. had a CFI pursuant to the Rule's new credible fear provisions. *Id.* ¶ 12. A USCIS officer found he did not satisfy the Rule's standards for asylum, withholding of removal, or CAT protection. *Id*. ¶ 13. An immigration judge affirmed the negative determination. *Id.*

130. D.M. was ordered removed to Mexico. *Id*. ¶ 14.

Plaintiff J.S.

131. Plaintiff J.S. is an indigenous asylum seeker from Ecuador. Declaration of J.S., ECF No. 20, Ex. 4, ¶ 3. J.S. fled Ecuador because of physical and sexual abuse by her ex-partners, and racism against her as an indigenous woman. *Id.* ¶¶ 1-13.

132. On or about May 15, 2023, J.S. entered the United States without inspection and without a CBP One appointment. *Id.* ¶ 14.

133. J.S. had a CFI pursuant to the Rule's new credible fear provisions. *Id.* ¶¶ 18-22. A USCIS officer found she did not satisfy the Rule's standards for asylum, withholding of removal, or CAT protection. *Id.* ¶ 23. An immigration judge affirmed the negative determination. *Id.* ¶¶ 24-25.

Plaintiff R.E.

134. Plaintiff R.E. is an asylum seeker from Cuba who has faced harm including kidnapping in that country. Declaration of Elizabeth Kalmbach Clark in Support of R.E., ECF No. 20, Ex. 5, ¶¶ 2, 14.

135. R.E. entered the United States on or about June 10, 2023, without inspection and without a CBP One appointment. *Id.* ¶ 2.

136. R.E. had a CFI pursuant to the Rule's new credible fear provisions. *Id.* ¶¶ 2, 13, 15.

137. During his CFI, R.E. told the officer that he had "applied for asylum" in Mexico and "they denied it." *Id.* ¶ 13. The USCIS officer conducting the interview asked if R.E. had any documents related to his asylum application, and he responded "yes." *Id*. The USCIS officer asked if R.E. had copies of the documents, to which R.E. responded "[i]n my phone I think." *Id*. There were no further follow-up questions. *Id*.

138. The USCIS officer found R.E. did not satisfy the Rule's standards for asylum, withholding of removal, or CAT protection. *Id.* ¶ 15. An immigration judge affirmed the negative determination. *Id.* ¶¶ 5, 15.

139. R.E. was ordered removed to Mexico. *Id.* ¶ 6.

Plaintiff S.U.

140. Plaintiff S.U. is an asylum seeker from Venezuela who was beaten and threatened by government agents because of his refusal to pay bribes to corrupt officials. Declaration of S.U., ECF No. 20, Ex. 6, ¶¶ 1-4.

141. S.U. was kidnapped in Mexico two days before he entered the United States; he was also robbed in Mexico. *Id*. ¶ 7.

142. S.U. entered the United States on or about June 8, 2023, without inspection and

without a CBP One appointment. *Id.* ¶ 9.

143. S.U. had a CFI pursuant to the Rule's new credible fear provisions. *Id.* ¶ 11. A USCIS officer found he did not satisfy the Rule's standards for asylum, withholding of removal, or CAT protection. *Id*. An immigration judge affirmed the negative determination. *Id*. ¶ 13.

144. S.U. was ordered removed to Mexico. *Id*. ¶ 14.

VII. Facts Relating to Organizational Plaintiffs

Plaintiff Refugee and Immigrant Center for Education and Legal Services (RAICES)

145. Organizational plaintiff the Refugee and Immigrant Center for Education and Legal Services (RAICES) is a 501(c)(3) non-profit organization with headquarters in San Antonio, Texas. Declaration of Javier Hidalgo ¶ 3.

146. RAICES also has offices in Austin, Corpus Christi, Dallas, Fort Worth, and Houston, Texas. *Id.* ¶ 5.

147. RAICES's mission is to defend the rights of immigrants and refugees; empower individuals, families, and communities of immigrants and refugees; and advocate for liberty and justice. *Id.* ¶ 3.

148. RAICES offers a wide array of free and low-cost legal services, including filing affirmative asylum applications and representing noncitizens in defensive removal cases and in bond proceedings before the Executive Office for Immigration Review ("EOIR"), both in immigration court and before the Board of Immigration Appeals ("BIA"). *Id.* ¶ 6.

149. RAICES's Pre-Removal Services team consists of 14 staff members who represent detained individuals in the expedited removal process. *Id.* ¶ 7.

150. The Pre-Removal Services team operates a hotline that has traditionally been used for people in the custody of Immigration and Customs Enforcement ("ICE"). *Id.* Earlier this year,

RAICES added the hotline number to a list distributed to people seeking asylum who are held in, and have CFIs in, detention facilities run by CBP. *Id.* ¶ 8.

151. Since the Rule took effect on May 12, 2023, the Pre-Removal Services team has seen hundreds of clients and potential clients adversely affected by the Rule and the related policy changes. *Id.* ¶ 9.

152. The Rule requires RAICES staff to engage in much more complex and cumbersome pre-CFI consultations than what was required prior to the Rule's implementation. *Id.* ¶ 13. Among other things, RAICES staff must ask questions to determine whether a noncitizen could not use CBP One or had an "imminent and extreme" threat of harm in Mexico. *Id.* ¶¶ 14-15.

153. RAICES has historically been able to communicate with individuals in ICE custody before their CFI and before immigration judge review of negative decisions. *Id.* ¶ 11.

154. RAICES staff members typically only have one phone call with a noncitizen in which to cover all of the information relevant to a CFI. *Id.* ¶ 18.

155. Almost all of RAICES's clients enter the country via the U.S.-Mexico border and are from countries other than Mexico, and many enter between ports of entry. *Id.* ¶ 47.

156. CBP custody is much more isolated than ICE custody. *Id.* ¶ 24. In particular, RAICES cannot enter CBP facilities, and there is not a system that allows them to schedule telephone calls with people in CBP custody. *Id.*

157. RAICES has been able to schedule follow-up calls with people in CBP custody in some, but not all, cases. *Id.* ¶ 25.

158. Some people in CBP custody do not have access to a pen and paper. *Id.* ¶ 26.

159. CBP does not have a standardized procedure allowing noncitizens held in CBP custody to send signed forms to, or return telephone calls from, their counsel. *Id.*

160. For noncitizens held in CBP custody, RAICES has often been able to speak to a noncitizen only after their CFI has already taken place. *Id.* ¶ 29.

161. There is no online locator for people held in CBP custody, and there is no feasible way for RAICES or anyone else outside the government to track the location of those people. *Id.* ¶ 27. RAICES therefore cannot effectively act on referrals regarding people held in CBP custody. *Id.*

162. The pre-CFI waiting period of 24 hours means that most people detained in CBP custody have no ability to contact RAICES before their CFI. *Id.* ¶ 28.

163. Without access to RAICES or the few other organizations that are willing to provide CFI consultations in CBP custody, noncitizens functionally lack a right to consult with counsel before the CFI. *Id.* ¶ 30.

164. The shortened 24-hour pre-CFI period has forced RAICES to overhaul its processes to handle an increased number of calls coming into its hotline from CBP. *Id.* ¶ 31. RAICES has shifted staff away from ICE hotline calls and moved staff from other RAICES teams to work on incoming calls from CBP detention. *Id.* ¶¶ 31, 33, 45-46. Differences between CBP and ICE custody have also forced RAICES to bifurcate the hotline process, which was previously uniform across all facilities. *Id.* ¶ 45.

165. If RAICES misses a call from CBP custody, CBP agents sometimes decline to leave a voicemail or provide any information about the person attempting to reach RAICES, which makes it impossible for RAICES to provide pre-CFI consultation on the shortened timeline. *Id.* ¶ 32.

166. Despite its efforts, RAICES is unable to assist many people before their CFIs on the shortened timeline. *Id.* ¶ 35.

167. As a result of the compressed timeline, RAICES is routinely unable to support clients during CFIs. *Id.* ¶ 36. Although it consistently tries to represent people at their CFIs, it has been able to do so only with one or two individuals among the hundreds of people subject to the Rule who have contacted RAICES. *Id.*

168. The 24-hour period has forced RAICES to engage in much more work later in the CFI process, and the stage of immigration judge review, where its ability to provide meaningful assistance is diminished. *Id.* ¶¶ 37-38.

169. The policies of removing or returning people of certain non-Mexican nationalities to Mexico further complicates RAICES's pre-CFI consultations. *Id.* ¶¶ 39-42. RAICES staff must now prepare those people for questions about both their home country and Mexico. *Id.* ¶¶ 40-41.

170. The Rule, 24-hour period, and third country removal, and "voluntary" return policies mean that calls to RAICES's hotline now take much longer than calls did before the policies took effect, reducing the number of clients that RAICES can serve. *Id.* ¶ 44.

171. Many of RAICES's clients are no longer eligible for asylum, meaning that RAICES staff must prepare claims for withholding of removal and CAT relief, which require more evidence and more staff time than asylum claims. *Id.* ¶ 48.

172. For clients in full removal proceedings, RAICES attorneys must now also spend time preparing arguments that a client qualifies for an exception to the asylum bar—and preparing asylum claims in case an immigration judge agrees. *Id.* ¶ 49.

173. The Rule and related policy changes have forced RAICES to divert resources to updating internal and external training materials. *Id.* ¶ 50.

174. The Rule and related policy changes have materially harmed the well-being of RAICES staff. *Id.* ¶¶ 51-52.

Plaintiff Las Americas Immigrant Advocacy Center (Las Americas)

175. Organizational plaintiff the Las Americas Immigrant Advocacy Center (Las Americas) is a non-profit organization based in El Paso, Texas. Declaration of Jennifer Babaie ¶ 3.

176. Las Americas serves immigrants on both sides of the U.S.-Mexico border, in West Texas, New Mexico, and Ciudad Juarez, Mexico. *Id.*

177. Las Americas' mission is to provide high-quality legal services to low-income immigrants, and to advocate for human rights. *Id.*

178. Las Americas offers a wide array *pro bono* services, including representation in CFIs and reasonable fear interviews, and representing noncitizens in defensive removal cases and in bond proceedings before the immigration courts. *Id.* ¶¶ 3, 8, 12-13, 15.

179. Las Americas' staff consists of 16 people, including attorneys, accredited representatives, paralegals, and two staff who work for Las Americas in Mexico under the auspices of a legal entity recognized in Mexico. *Id.* ¶ 10.

180. Las Americas assists individuals and families who have entered the United States, as well as people who are or have been stranded in Mexico due to U.S. policies. *Id.* ¶ 11.

181. Since the Rule took effect on May 12, 2023, Las Americas has assisted more than 1,000 clients and potential clients adversely affected by the Rule and the related policy changes. *Id.* ¶¶ 16, 24.

182. The Rule has required that Las Americas Mexico spend a great deal of time providing direct assistance to people unable to navigate the CBP One app on their own. *Id.* ¶¶ 21-25.

183. Las Americas Mexico has been forced to divert resources to addressing the CBP One app, and helping people to understand the new procedural hurdles that they face. *Id.* ¶ 21.

184. The Rule has forced Las Americas to focus its resources on helping people navigate the Rule, both in the process of using CBP One and in trying to meet one of the Rule's exceptions during the CFI process. As a result, Las Americas is less able to put those resources toward its mission of assisting asylum seekers with CFIs, reviews of negative determinations, and representation in immigration court. *Id.* ¶¶ 25, 41-42, 63-65.

185. Las Americas has a history of doing both credible fear and reasonable fear interview preparation with clients. *Id.* ¶ 31. CFI consultation, preparation, and representation form the heart of Las Americas' detained legal services work. *Id.* ¶¶ 12, 46.

186. By requiring people to show that they satisfy one of its three asylum eligibility conditions or can prove one of the Rule's two limited exceptions, the Rule requires Las Americas staff to change their pre-CFI consultations. *Id.* ¶ 26. Among other things, Las Americas staff must ask questions to determine whether a noncitizen could not use CBP One or had an "imminent and extreme" threat of harm in Mexico. *Id.* ¶¶ 27-29. Las Americas must also prepare clients to overcome the Rule's bar on the merits, without the benefit of the significant possibility standard. *Id.* ¶ 30. These changes have required Las Americas to engage in consultations that are more complex, cumbersome, and time consuming than they were prior to the Rule's implementation. *Id.* ¶¶ 32-33.

187. Because Las Americas has a history of doing both credible fear and reasonable fear work, they have firsthand exposure to the fact that the reasonable possibility standard, which applies to the majority of people they serve because they are unable to overcome the Rule, represents a notably higher standard. *Id.* ¶ 31. To address that reality, Las Americas staff must spend additional time with people trying to explain to them how they might go about trying to meet that higher standard. *Id.*

188. Because of the Rule, Las Americas is forced to provide increased representation to people who have failed their CFIs and request immigration judge review. *Id.* ¶ 36.

189. Because CFIs now take place in both CBP and ICE custody, Las Americas has created two different workflows and has had to focus on providing pre-CFI consultations to people in ICE custody. *Id.* ¶ 34. Access to individuals in CBP custody is virtually impossible, and that difficulty is often coupled with the expedited timeline imposed by the 24-hour consultation period. *Id.* ¶¶ 46-48. Las Americas staff is not allowed to enter CBP facilities, and they do not have direct access to people detained there via telephone. *Id.* ¶ 46.

190. Even if family members attempt to refer a loved one in CBP custody to Las Americas, its staff is unable to make arrangements to communicate with those individuals. *Id.*

191. Because people detained in CBP facilities will have their CFIs so quickly, it is not possible to provide a CFI consultation to someone before their interview occurs. *Id.* ¶ 47.

192. Las Americas does not have the capacity to operate a hotline for people detained in CBP custody. *Id.* ¶ 48. Because they are not operating a hotline, Las Americas does not receive phone calls from non-clients detained in CBP custody. *Id.*

193. The shortened 24-hour pre-CFI period has forced Las Americas to stop providing CFI consultation to people in CBP custody before their interview occurs. *Id* ¶ 47. Las Americas has had to overhaul its processes to move some of its CFI consultations to the Mexico side of the border. *Id.* ¶ 49. Las Americas continues to provide CFI preparation to individuals in ICE custody. *Id.*

194. Las Americas' capacity to provide CFI preparation in Mexico is hampered by the need to provide competing services, including assistance with accessing the CBP One app. *Id.* ¶¶ 20-23.

195. Even when Las Americas assists people with CFI preparation in Mexico, the 24-hour rule prevents attorneys who have entered an appearance before USCIS from representing those individuals in their CFIs because the interviews are scheduled without notice to the attorney or the client. *Id.* ¶ 49.

196. The 24-hour period has forced Las Americas to engage in much more work later in the CFI process, and the stage of immigration judge review, where its ability to provide meaningful assistance is diminished. *Id.* ¶ 50.

197. The policies of removing or returning people of certain non-Mexican nationalities to Mexico further complicates Las Americas' pre-CFI consultations. *Id.* ¶¶ 51-59. Las Americas staff must now prepare those people for questions about both their home country and Mexico and discuss what "voluntary" return to Mexico would mean for a person and their case. *Id.* ¶¶ 52-55.

198. Las Americas staff often encounter third-country nationals who have been returned to Mexico under these policies. *Id.* ¶ 56. Some of these individuals receive notice from the Mexican government that they are required to leave Mexico within a short period of time, and as a result are at risk of chain refoulment. *Id.* ¶ 58. Those individuals are often unclear about whether they have been returned voluntarily or under a removal order, and because they need this information to adequately advise clients of the legal consequences of those returns , Las Americas staff must divert resources to investigate which occurred. *Id.* ¶ 59. Or else they must explain the consequences of both types of return, which further complicates the services they are trying to provide. *Id.*

199. The Rule, the 24-hour period, and the third-country removal and "voluntary" return policies mean that each consultation that Las Americas staff performs now takes much longer than before the policies took effect, reducing the number of clients that Las Americas can serve. *Id.* ¶¶ 41-42.

200. Many of Las Americas' clients are no longer eligible for asylum, meaning that Las Americas staff must prepare claims for withholding of removal and relief under CAT, which require more evidence and more staff time than asylum claims. *Id.* ¶ 43.

201. For clients in regular removal proceedings, Las Americas attorneys must now also spend time preparing arguments that a client qualifies for an exception to the asylum bar—and preparing asylum claims in case an immigration judge agrees. *Id.*

202. The Rule and related policy changes have forced Las Americas to divert resources to updating internal and external training materials. *Id.* ¶¶ 26, 40, 62.

203. The Rule and related policy changes have forced Las Americas to triage, choosing between preparing a larger number of asylum seekers for the new screening processes, and providing full representation to people who are proceeding with their substantive claims. *Id.* ¶ 64.

204. The Rule and related policy changes have put Las Americas' funding at risk. *Id.* ¶ 9. Some funders expect Las Americas to meet specific quotas for clients served, but the Rule and related changes reduce their capacity to do screenings outside of the CFI context. *Id.* Other funders expect Las Americas to demonstrate a growth trajectory or a reduction in amount of time required for each case, but these are impossible because of the Rule. *Id.* ¶ 61.

205. The Rule and related policy changes have materially harmed the well-being of Las Americas staff. *Id.* ¶ 65.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

M.A., et al., *Plaintiffs*, v. ALEJANDRO MAYORKAS, Secretary of the Department of Homeland Security, in his official capacity, et al., *Defendants.*	No. 1:23-cv-01843-TSC

DECLARATION OF NOOR ZAFAR

I, Noor Zafar, declare as follows:

1. I am an attorney with the American Civil Liberties Union Foundation Immigrants' Rights Project, and am counsel for Plaintiffs in this case.

2. An appendix containing relevant excerpts of the administrative records in this case will be filed with the Court pursuant to LCvR 7(n). Certain excerpts are also attached here for the Court's convenience.

3. Attached as Exhibit A is a true and correct copy of the May 10, 2023 memorandum from Assistant Homeland Security Secretary Blas Nuñez-Neto titled "Process for Determining Country of Removal for Nationals of Cuba, Haiti, Nicaragua, and Venezuela," available at CBP_Removals_AR_321-25.

4. Attached as Exhibit B is a true and correct copy of the United Nations High Commissioner for Refugees publication "Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and

its 1967 Protocol" (Jan. 26, 2007), available at https://www.unhcr.org/sites/default/files/legacy-pdf/4d9486929.pdf.

5. Attached as Exhibit C is a true and correct copy of the May 10, 2023 memorandum from John L. Lafferty, Chief, Asylum Division titled "Scheduling of Credible Fear Interviews," available at USCIS_24-Hour_AR_1-3.

6. Attached as Exhibit D is a true and correct copy of the "Withdrawal of Application for Admission Advisal Statement," available at CBP_Withdrawals_AR_6.

7. Attached as Exhibit E is a true and correct copy of the May 12, 2023 document titled "Circumvention of Lawful Pathways (CLP) & Voluntary Withdrawal of Admission Step-by-Step Guide." Counsel for Defendants provided this document to counsel for Plaintiffs, and confirmed that it is the document referred to as "Appendix A" in "Guidance for Asylum Staff on the Circumvention of Lawful Pathways (CLP) Rule and Procedures for Certain Noncitizens in Border Patrol Custody in the Credible Fear Screening Process," available at USCIS_Withdrawals_AR_1-8.

8. Attached as Exhibit F is a true and correct copy of the Spanish language version of Form I-826 signed by Plaintiff J.P. It has been redacted to remove J.P.'s identifying information and the identifying information of immigration agents.

9. Attached as Exhibit G is a true and correct copy of the Spanish language version of Form I-826 signed by Plaintiff E.B. It has been redacted to remove E.B.'s identifying information and the identifying information of immigration agents.

10. Attached as Exhibit H is a true and correct copy of a March 9, 2015 memorandum from the Customs and Border Patrol Acting Executive Director for Admissibility and Passenger Programs titled "Withdrawal of Application Procedures at Ports of Entry," available at:

https://www.cbp.gov/sites/default/files/assets/documents/2022-May/Withdrawal%20of%20Application%20Procedures%20at%20Ports%20of%20Entry_Redacted.pdf.

11. Attached as Exhibit I is a true and correct copy of Form I-860, "Notice and Order of Expedited Removal," issued to Plaintiff M.P. It has been redacted to remove M.P.'s identifying information and the identifying information of immigration agents.

I, Noor Zafar, declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 28th day of September, 2023 in Dallas, Texas.

Noor Zafar

Exhibit A

U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

May 10, 2023

ADVISORY MEMORANDUM

FROM: Blas Nuñez-Neto
Assistant Secretary for Border and Immigration Office of Strategy, Policy, and Plans

TO: Troy Miller
Acting Commissioner
U.S. Customs and Border Protection

Tae Johnson
Senior Official Performing the Duties of the Director
U.S. Immigration and Customs Enforcement

SUBJECT: Process for Determining Country of Removal for Nationals of Cuba, Haiti, Nicaragua, and Venezuela

Purpose

This memorandum describes current U.S. capacity to conduct removal flights to Cuba, Haiti, Nicaragua, and Venezuela. It is meant to inform U.S. Customs and Border Protection (CBP) determinations in making referrals to U.S. Immigration and Customs Enforcement (ICE) based on (1) population in ICE Enforcement and Removal Operations (ERO) custody by nationality, and (2) removal flight capacity both to third countries and countries of origin, and to advise CBP concerning processes that comport with DHS's authority to remove noncitizens to third countries.

This memorandum, which relates to a foreign affairs function of the United States, does not establish binding standards and it is not intended to, shall not be construed to, may not be relied upon to, and does not create any rights, privileges, or benefits, substantive or procedural, enforceable by any party against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

Background

The Immigration and Nationality Act (INA) establishes the authority to remove noncitizens with final orders of removal to countries other than the country designated by the noncitizen or their country of citizenship in certain circumstances. If removal to each of the countries identified in the statute as potential additional removal countries (including country of birthplace) is **impracticable,**

inadvisable, or impossible, the noncitizen may be removed to a third country that will accept the noncitizen.

CBP should work through the framework set forth at INA § 241(b)(2), 8 U.S.C. § 1231(b)(2), to determine the appropriate country of removal for noncitizens who enter the United States between the ports of entry. Under the statute, the analysis begins by the noncitizen designating one country to which they want to be removed (noncitizens may not designate Mexico, Canada, or an adjacent island unless they are a national, citizen, or resident thereof). Next, if that government is not willing to accept the noncitizen, CBP should then determine whether the noncitizen may be removed to their country of citizenship or nationality (if this was not the country designated by the noncitizen). Last, if the noncitizen is not removed to the country designated or the country of citizenship or nationality, CBP should then consider removal to a country where the noncitizen resided before they entered the country from which they entered the United States, the country where they were born, or the country that had sovereignty over the noncitizen's birthplace when they were born.[1] If it is determined that it is impracticable, inadvisable, or impossible to remove the noncitizen to any of the countries described in the previous sentence, DHS may remove the noncitizen to any other country that will accept the noncitizen.

[redacted]

For removal to a third country to be an available option based on impracticability, inadvisability, or impossibility, CBP should refer enough Cuban, Haitian, Nicaraguan, and Venezuelan nationals to ICE-ERO to meet current removal flight capacity under ICE's country removal guidelines. If the number of removable noncitizens of a given nationality in ERO custody exceeds monthly flight capacity to country of origin, CBP should pursue a process to identify third countries as the country of removal for such noncitizens pursuant to INA § 241(b)(2), 8 U.S.C. § 1231(b)(2).

Protection Screening

Screening for fear of removal to the designated third country should be conducted in accordance with the procedures set forth in 8 C.F.R. §§ 208.30, 208.33, and 235.3, as amended by the Circumvention of Lawful Pathways final rule, and accompanying guidance.

[1] This memorandum relates only to noncitizens who have entered the United States between ports of entry and not to arrivals at ports of entry. Therefore, the listing of alternate countries of removal in this memorandum does not include the following additional removal countries per the statute: the country from which the noncitizen traveled to be admitted to the United States, and the country in which is located the foreign port from which the noncitizen left for the United States or for a foreign territory contiguous to the United States.

Current Removal Flight Capacity

Country	Agreement	Max Removal Capacity / Flight	Max Removals / Month
Cuba	[redacted]	[redacted]	[redacted]
Haiti	[redacted]	[redacted]	[redacted]
Nicaragua	[redacted]	[redacted]	[redacted]
Venezuela	[redacted]	[redacted]	[redacted]

[redacted]

Appendix 1: Country Conditions

Below, DHS PLCY characterizes U.S. Government bilateral negotiations with Cuba, Haiti, Nicaragua, and Venezuela in relation to removal flights, and where applicable, diplomatic efforts to increase the number or cadence of removal flights to those four countries.

Cuba. Formal diplomatic relations have been reestablished with the Cuban government. In April 2022, the U.S. Government and Government of Cuba agreed to restart bilateral Migration Talks, and in January 2023, the two countries restarted the bilateral Law Enforcement Dialogue. Both these engagements are important lines of communication, allowing DHS and other U.S. Government departments to continue cooperating with Cuban counterparts on matters related to migration, removals, migrant smuggling, and other areas.

Following the April 2022 Migration Talks, the Cuban government agreed to resume removal charter flights in accordance with the Migration Accords; the first flight took place in April 2023. Following the April 2023 Migration Talks, the Cuban government agreed to provide approval, within 10 working days, of the list of nationals nominated for removal, and approval for the U.S. to send a flight manifested with those nationals later than three days before the date of departure. The Cuban government also agreed to allow removals via commercial flights. [redacted]

In FY 2022, despite best efforts, DHS repatriated or expelled only about 2.5 percent of Cuban encounters. More than 97% of Cubans encountered at the border in FY2022 were ultimately conditionally released into the interior of the United States.[2]

Haiti. The United States and Haiti have full diplomatic relations. After six months of operating with limited capacity, as of April 27, 2023, the GoH and the International Organization for Migration (IOM) repatriation support actors reported their operations had normalized. U.S. Embassy Port Au Prince assessed, based on information from GoH and IOM, that they have capacity to repatriate up to 450 migrants across three separate repatriation events in Port-au-Prince or Cap-Haitien on any given day. This is due to improved capabilities in identifying, responding to, and mitigating day-to-day challenges with communications, logistics, site infrastructure, fuel access, and insecurity. The Embassy also analyzed the potential of alternative repatriation locations but found no other locations are currently viable.[3] [redacted]

In FY 2022, DHS repatriated 28% of Haitian encounters. 72% of Haitian nationals encountered at the SWB in FY2022 were conditionally released into the U.S.[4]

Nicaragua. [redacted]

[2] DHS Office of Immigration Statistics (OIS) analysis of historic CBP data.
[3] "Haiti: Migrant Repatriation Capacity Improves." U.S. State Department cable, Embassy Port Au Prince, April 27, 2023.
[4] DHS Office of Immigration Statistics (OIS) analysis of historic CBP data.

[redacted]

[redacted]In FY 2022, DHS repatriated 2,538, and expelled 4,159 (a total of 6,890) Nicaraguans, or 4.4 percent of Nicaraguan encounters. More than 95 percent of Nicaraguans encountered at the SWB were conditionally released into the United States in FY2022.[5]

Venezuela. [redacted]

[redacted]

[5] DHS Office of Immigration Statistics (OIS) analysis of historic CBP data.

Exhibit B

Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*

Introduction

1. In this advisory opinion, the Office of the United Nations High Commissioner for Refugees ("UNHCR") addresses the question of the extraterritorial application of the principle of *non-refoulement* under the 1951 Convention relating to the Status of Refugees[1] and its 1967 Protocol.[2]

2. Part I of the opinion provides an overview of States' *non-refoulement* obligations with regard to refugees and asylum-seekers under international refugee and human rights law. Part II focuses more specifically on the extraterritorial application of these obligations and sets out UNHCR's position with regard to the territorial scope of States' *non-refoulement* obligations under the 1951 Convention and its 1967 Protocol.

3. UNHCR has been charged by the United Nations General Assembly with the responsibility of providing international protection to refugees and other persons within its mandate and of seeking permanent solutions to the problem of refugees by assisting governments and private organizations.[3] As set forth in its Statute, UNHCR fulfils its international protection mandate by, *inter alia*, "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto."[4] UNHCR's supervisory responsibility under its Statute is mirrored in Article 35 of the 1951 Convention and Article II of the 1967 Protocol.

4. The views of UNHCR are informed by over 50 years of experience supervising international refugee instruments. UNHCR is represented in 116 countries. It provides guidance in connection with the establishment and implementation of national procedures for refugee status determinations and also conducts such determinations under its own mandate. UNHCR's interpretation of the provisions of the 1951

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* This Opinion was prepared in response to a request for UNHCR's position on the extraterritorial application of the *non-refoulement* obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. The Office's views as set out in the Advisory Opinion are offered in a broad perspective, given the relevance of the legal questions involved to a variety of situations outside a State's national territory.

1 The 1951 Convention relating to the Status of Refugees, 189 U.N.T.S. 137, *entered into force* 22 April 1954 [hereinafter "1951 Convention"].

2 The 1967 Protocol relating to the Status of Refugees, 606 U.N.T.S. 267, *entered into force* 4 October 1967 [hereinafter "1967 Protocol"].

3 See: *Statute of the Office of the United Nations High Commissioner for Refugees*, G.A. Res. 428(V), Annex, U.N. Doc. A/1775, para. 1 (1950).

4 *Id.*, para. 8(a).

UNHCR

Convention and 1967 Protocol is considered an authoritative view which should be taken into account when deciding on questions of refugee law.

I. *NON-REFOULEMENT* OBLIGATIONS UNDER INTERNATIONAL LAW

A. The Principle of *Non-Refoulement* Under International Refugee Law

1. *Non-Refoulement* Obligations Under International Refugee Treaties

(i) The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol

5. The principle of *non-refoulement* constitutes the cornerstone of international refugee protection. It is enshrined in Article 33 of the 1951 Convention, which is also binding on States Party to the 1967 Protocol.[5] Article 33(1) of the 1951 Convention provides:

> "No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion."

6. The protection against *refoulement* under Article 33(1) applies to any person who is a refugee under the terms of the 1951 Convention, that is, anyone who meets the requirements of the refugee definition contained in Article 1A(2) of the 1951 Convention (the "inclusion" criteria)[6] and does not come within the scope of one of its exclusion provisions.[7] Given that a person is a refugee within the meaning of the 1951 Convention as soon as he or she fulfills the criteria contained in the refugee definition, refugee status determination is declaratory in nature: a person does not become a refugee because of recognition, but is recognized because he or she is a refugee.[8] It follows that the principle of *non-refoulement* applies not only to recognized refugees, but also to

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[5] Article I(1) of the 1967 Protocol provides that the States Party to the Protocol undertake to apply Articles 2–34 of the 1951 Convention.

[6] Under this provision, which is also incorporated into Article 1 of the 1967 Protocol, the term "refugee" shall apply to any person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [or her] nationality and is unable or, owing to such fear, unwilling to avail him [or her]self of the protection of that country; or who, not having a nationality and being outside the country of his [or her] habitual residence is unable or, owing to such fear, unwilling to return to it".

[7] Exclusion from international refugee protection means denial of refugee status to persons who come within the scope of Article 1A(2) of the 1951 Convention, but who are not eligible for protection under the Convention because

- they are receiving protection or assistance from a UN agency other than UNHCR (first paragraph of Article 1D of the 1951 Convention); or because
- they are not in need of international protection because they have been recognized by the authorities of another country in which they have taken residence as having the rights and obligations attached to the possession of its nationality (Article 1E of the 1951 Convention); or because
- they are deemed undeserving of international protection on the grounds that there are serious reasons for considering that they have committed certain serious crimes or heinous acts (Article 1F of the 1951 Convention).

[8] See: UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, 1979, Reedited Geneva 1992, para. 28.

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those who have not had their status formally declared.[9] The principle of *non-refoulement* is of particular relevance to asylum-seekers. As such persons may be refugees, it is an established principle of international refugee law that they should not be returned or expelled pending a final determination of their status.

7. The prohibition of *refoulement* to a danger of persecution under international refugee law is applicable to any form of forcible removal, including deportation, expulsion, extradition, informal transfer or "renditions", and non-admission at the border in the circumstances described below. This is evident from the wording of Article 33(1) of the 1951 Convention, which refers to expulsion or return (*refoulement*) "in any manner whatsoever".[10] It applies not only in respect of return to the country of origin or, in the case of a stateless person, the country of former habitual residence, but also to any other place where a person has reason to fear threats to his or her life or freedom related to one or more of the grounds set out in the 1951 Convention, or from where he or she risks being sent to such a risk.[11]

8. The principle of *non-refoulement* as provided for in Article 33(1) of the 1951 Convention does not, as such, entail a right of the individual to be granted asylum in a particular State.[12] It does mean, however, that where States are not prepared to grant asylum to persons who are seeking international protection on their territory, they must adopt a course that does not result in their removal, directly or indirectly, to a place where their lives or freedom would be in danger on account of their race, religion, nationality, membership of a particular social group or political opinion.[13] As a general rule, in order to give effect to their obligations under the 1951 Convention and/or 1967 Protocol, States will be required to grant individuals seeking international protection access to the territory and to fair and efficient asylum procedures.[14]

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[9] This has been reaffirmed by the Executive Committee of UNHCR, for example, in its Conclusion No. 6 (XXVIII) "*Non-refoulement*" (1977), para. (c) (reaffirming "the fundamental importance of the principle of *non-refoulement* … of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees."). The UNHCR Executive Committee is an intergovernmental group currently consisting of 70 Member States of the United Nations (including the United States) and the Holy See that advises the UNHCR in the exercise of its protection mandate. While its Conclusions are not formally binding on States, they are relevant to the interpretation and application of the international refugee protection regime. Conclusions of the Executive Committee constitute expressions of opinion which are broadly representative of the views of the international community. The specialized knowledge of the Committee and the fact that its conclusions are reached by consensus adds further weight. UNHCR Executive Committee Conclusions are available at http://www.unhcr.org/cgi-bin/texis/vtx/doclist?page=excom&id=3bb1cd174 (last visited on 26 October 2006).

[10] The meaning of the terms "expel or return ("*refouler*")" in Article 33(1) is also discussed *infra* at Part II.A.

[11] See: UNHCR, *Note on Non-Refoulement* (EC/SCP/2), 1977, para. 4. See also P. Weis, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis*, Cambridge University Press, Cambridge (1995), at p. 341.

[12] See: P. Weis, *supra* footnote 11, at p. 342.

[13] This could include, for example, removal to a safe third country or some other solution such as temporary protection or refuge under certain circumstances. *See* E. Lauterpacht and D. Bethlehem, "The scope and content of the principle of *non-refoulement: Opinion*", in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, Cambridge (2003), para. 76.

[14] The 1951 Convention and the 1967 Protocol define those to whom international protection is to be conferred and establish key principles such as non-penalisation of entry (Article 31) and *non-refoulement* (Article 33). However, they do not set out procedures for the determination of refugee status as such. Yet it is generally recognised that fair and efficient procedures are an essential element

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9. The *non-refoulement* obligation under Article 33 of the 1951 Convention is binding on all organs of a State party to the 1951 Convention and/or the 1967 Protocol[15] as well as any other person or entity acting on its behalf.[16] As discussed in more detail in Part II below, the obligation under Article 33(1) of the 1951 Convention not to send a refugee or asylum-seeker to a country where he or she may be at risk of persecution is not subject to territorial restrictions; it applies wherever the State in question exercises jurisdiction.

10. Exceptions to the principle of *non-refoulement* under the 1951 Convention are permitted only in the circumstances expressly provided for in Article 33(2), which stipulates that:

> "The benefit of [Article 33(1)] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he [or she] is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."

The application of this provision requires an individualized determination by the country in which the refugee is that he or she comes within one of the two categories provided for under Article 33(2) of the 1951 Convention.[17]

11. The provisions of Article 33(2) of the 1951 Convention do not affect the host State's *non-refoulement* obligations under international human rights law, which permit no exceptions. Thus, the host State would be barred from removing a refugee if this

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in the full and inclusive application of the 1951 Convention outside the context of mass influx situations. *See* UNHCR, Asylum Processes (Fair and Efficient Asylum Procedures), EC/GC/01/12, 31 May 2001, paras. 4–5. See also Executive Committee, Conclusion No. 81 (XLVIII) *"General"* (1997), para. (h); Conclusion No. 82 (XLVIII), "*Safeguarding Asylum*" (1997), para. (d)(iii); Conclusion No. 85 (XLIX), "*International Protection*" (1998), para. (q); Conclusion No. 99 (LV), "*General Conclusion on International Protection*" (2004), para. (l).

15 See *supra* footnote 5.

16 Under applicable rules of international law, this applies to the acts, or omissions, of all organs, sub-divisions and persons exercising governmental authority in legislative, judicial or executive functions, and acting in that capacity in the particular instance, as well as to the conduct of organs placed at the disposal of a State by another State, even if they exceed their authority or contravene instructions. Pursuant to Articles 4–8 of the Articles of State Responsibility, the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct (*Articles on State Responsibility*, Articles 4–8). The Articles of State Responsibility were adopted by the International Law Commission without a vote and with consensus on virtually all points. The Articles and their commentaries were subsequently referred to the General Assembly with the recommendation that the General Assembly initially take note of and annex the text of the articles in a resolution, reserving to a later session the question whether the articles should be embodied in a convention on State responsibility. *See* J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentary.* Cambridge University Press, UK: 2002. The General Assembly annexed the Articles on State Responsibility to its resolution 56/83 of 12 December 2001 on Responsibility of States for Internationally Wrongful Acts.

17 For a detailed discussion of the criteria which must be met for Article 33(2) of the 1951 Convention to apply, *see* E. Lauterpacht and D. Bethlehem, *supra* footnote 13, paras. 145–192. On the "danger to the security" exception, *see also* "*Factum of the Intervenor, UNHCR, Suresh v. the Minister of Citizenship and Immigration; the Attorney General of Canada, SCC No. 27790*" (hereinafter: "UNHCR, *Suresh Factum*"), in 14:1 International Journal of Refugee Law (2002).

would result in exposing him or her, for example, to a substantial risk of torture.[18] Similar considerations apply with regard to the prohibition of *refoulement* to other forms of irreparable harm.[19]

12. Within the framework of the 1951 Convention/1967 Protocol, the principle of *non-refoulement* constitutes an essential and non-derogable component of international refugee protection. The central importance of the obligation not to return a refugee to a risk of persecution is reflected in Article 42(1) of the 1951 Convention and Article VII(1) of the 1967 Protocol, which list Article 33 as one of the provisions of the 1951 Convention to which no reservations are permitted. The fundamental and non-derogable character of the principle of *non-refoulement* has also been reaffirmed by the Executive Committee of UNHCR in numerous Conclusions since 1977.[20] Similarly, the General Assembly has called upon States "to respect the fundamental principle of *non-refoulement*, which is not subject to derogation."[21]

(ii) Other International Instruments

13. States' *non-refoulement* obligations with respect to refugees are also found in regional treaties, notably the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa[22] and the 1969 American Convention on Human Rights.[23]

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[18] See: UNHCR, *Suresh Factum*, *supra* footnote 17, paras. 18–50; E. Lauterpacht and D. Bethlehem, *supra* footnote 13, para. 159(ii), 166 and 179.

[19] See the discussion of *non-refoulement* obligations under international human rights law *infra* at Part IB.

[20] See, for example, Executive Committee, Conclusion No. 6 (XXVIII), *supra* footnote 9, para. (c) (reaffirming "the fundamental humanitarian principle of *non-refoulement* has found expression in various international instruments adopted at the universal and regional levels and is generally accepted by States."); Conclusion No. 17 (XXXI) *"Problems of extradition affecting refugees"* (1980), at. para (b) (reaffirming "the fundamental character of the generally recognized principle of *non-refoulement."); ;* Conclusion No. 25 (XXXIII) *"General"* (1982), para. (b) (reaffirming "the importance of the basic principles of international protection and in particular the principle of *non-refoulement* which was progressively acquiring the character of a peremptory rule of international law."); Conclusion No. 65 (XLII) *"General"* (1981), para. (c) (emphasizing "the primary importance of *non-refoulement* and asylum as cardinal principles of refugee protection…"); Conclusion No. 68 (XLIII) *"General"* (1982), para. (f) (reaffirming "the primary importance of the principles of *non-refoulement* and asylum as basic to refugee protection); No. 79 (XLVIII) "*General*" (1996), para. (j) (reaffirming "the fundamental importance of the principle of *non-refoulement*); No. 81 (XLVIII), *supra* footnote 14, para. (i) (recognizing "the fundamental importance of the principle of *non-refoulement*"); No. 103 (LVI) *"Provision of International Protection Including Through Complementary Forms of Protection*" (2005), at (m) (calling upon States "to respect the fundamental principle of *non-refoulement*").

[21] See, for example, A/RES/51/75, 12 February 1997, para. 3; A/RES/52/132, 12 December 1997, at preambular para. 12.

[22] OAU Convention Governing Specific Aspects of Refugee Problems in Africa, 1969, 1001 U.N.T.S. 45, *entered into force* 20 June 1974 [hereinafter, "1969 OAU Convention"]. Article II(3) reads: "No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paras. 1 and 2 *[concerning persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion or who is compelled to leave his country of origin or place of habitual residence in order to seek refuge from external aggression, occupation, foreign domination or events seriously disturbing public order]*."

[23] 1969 American Convention on Human Rights "Pact of San José, Costa Rica", 1144 U.N.T.S. 123, *entered into force* 18 July 1978 [hereinafter, "ACHR"]. Article 22(8) reads: "In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that

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Non-refoulement provisions modelled on Article 33(1) of the 1951 Convention have also been incorporated into extradition treaties[24] as well as a number of anti-terrorism conventions both at the universal and regional level.[25] Moreover, the principle of *non-refoulement* has been re-affirmed in the 1984 Cartagena Declaration on Refugees[26] and other, important non-binding international texts, including, in particular, the Declaration on Territorial Asylum adopted by the United Nations General Assembly on 14 December 1967.[27]

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country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions."

[24] In the context of extradition, these provisions are usually referred to as "discrimination clauses". *See*, for example, Article 3(2) of the 1957 European Convention on Extradition, ETS 024, 359 U.N.T.S. 273 *entered into force* 18 April 1960 ("[Extradition shall not be granted] if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons."); Article 4(5) of the 1981 Inter-American Convention on Extradition, 20 I.L.M. 723 (1981), *entered into force* 28 March 1992 ("Extradition shall not be granted … when, from the circumstances of the case, it can be inferred that persecution for reasons of race, religion or nationality is involved, or that the position of the person sought may be prejudiced for any of these reasons.")

[25] See, for example, Article 9(1) of the 1979 International Convention against the Taking of Hostages, 1316 U.N.T.S. 205, *entered into force* 3 June 1983 ("A request for the extradition of an alleged offender, pursuant to this Convention, shall not be granted if the requested State Party has substantial grounds for believing: (a) that the request for extradition for an offence set forth in article 1 has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality, ethnic origin or political opinion; or (b) that the person's position may be prejudiced: (i) for any of the reasons mentioned in subpara. (a) of this para. …"). *See also* Article 12 of the 1997 International Convention for the Suppression of Terrorist Bombings, 37 I.L.M. 249 (1998), *entered into force* 23 May 2001 ("Nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance, if the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in article 2 or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons."), and the almost identical provisions in Article 15 of the 1999 International Convention for the Suppression of the Financing of Terrorism, 39 I.L.M. 270 (2000), *entered into force* 10 April 2002; Article 5 of the 1977 European Convention on the Suppression of Terrorism, ETS 090, 1137 U.N.T.S. 93, *entered into force* 4 August 1978; Article 14 of the 2002 Inter-American Convention against Terrorism, 42 I.L.M. 19 (2003), *entered into force* 7 October 2003.

[26] Cartagena Declaration on Refugees, 22 November 1984, Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1, at 190-93 (1984-85) [hereinafter, "Cartagena Declaration"]. The Conclusion set out in section III(5) reads: "To reiterate the importance and meaning of the principle of *non-refoulement* (including the prohibition of rejection at the frontier) as a corner-stone of the international protection of refugees…" While not legally binding, the provisions of the Cartagena Declaration have been incorporated into the legislation of numerous States in Latin America.

[27] A/RES/2312 (XXII), 14 December 1967, at Article 3 ("No person referred to in Article 1, para. 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution."). *See also* Resolution (67) 14 on Asylum to Persons in Danger of Persecution, adopted by the Committee of Ministers of the Council of Europe on 29 June 1967, para. 2 (recommending that Governments should "…ensure […] that no one shall be subjected to refusal of admission at the frontier, rejection, expulsion or any other measure which would have the result of compelling him to return to, or remain in, a territory where he would be in danger of persecution.").

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2. *Non-Refoulement* of Refugees Under Customary International Law

14. Article 38(1)(b) of the Statute of the International Court of Justice lists "international custom, as evidence of a general practice accepted as law", as one of the sources of law which it applies when deciding disputes in accordance with international law.[28] For a rule to become part of customary international law, two elements are required: consistent State practice and *opinio juris*, that is, the understanding held by States that the practice at issue is obligatory due to the existence of a rule requiring it.[29]

15. UNHCR is of the view that the prohibition of *refoulement* of refugees, as enshrined in Article 33 of the 1951 Convention and complemented by *non-refoulement* obligations under international human rights law, satisfies these criteria and constitutes a rule of customary international law.[30] As such, it is binding on all States, including those which have not yet become party to the 1951 Convention and/or its 1967 Protocol.[31] In this regard, UNHCR notes, *inter alia*, the practice of non-signatory States hosting large numbers of refugees, often in mass influx situations.[32] Moreover, exercising its supervisory function,[33] UNHCR has closely followed the practice of Governments in relation to the application of the principle of *non-refoulement*, both by States Party to the 1951 Convention and/or 1967 Protocol and by States which have not adhered to either instrument. In UNHCR's experience, States have overwhelmingly indicated that they accept the principle of *non-refoulement* as binding, as demonstrated, *inter alia*, in numerous instances where States have responded to UNHCR's representations by providing explanations or justifications of cases of actual or intended *refoulement*, thus implicitly confirming their acceptance of the principle.[34]

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[28] Article 38(1) of the Statute of the International Court of Justice, 59 Stat. 1031, 1060 (1945).

[29] See: International Court of Justice, *North Sea Continental Shelf, Judgment,* 1969 ICJ Reports, page 3, para. 74. See also International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, 1984 ICJ Reports, page 392, para. 77.

[30] See: UNHCR, *The Principle of Non-Refoulement as a Norm of Customary International Law,* Response to the Questions posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93 (available at: http://www.unhcr.org/home/RSDLEGAL/437b6db64.html, last accessed on 30 October 2006); UNHCR, *Note on the Principle of Non-Refoulement (EU Seminar on the Implementation of the 1995 EU Resolution on Minimum Guarantees for Asylum Procedures)*, 1 November 1997 (available at: http://www.unhcr.org/home/RSDLEGAL/438c6d972.html, last accessed on 30 October 2006). *See also* New Zealand Court of Appeal, *Zaoui v. Attorney General*, 30 September 2004, (No 2) [2005] 1 NZLR 690, para. 34 ("The prohibition on refoulement, contained in art 33.1 of the Refugee Convention, is generally thought to be part of customary international law, the (unwritten) rules of international law binding on all States, which arise when States follow certain practices generally and consistently out of a sense of legal obligation.") and para. 136 ("The Refugee Convention is designed to protect refugees from persecution and the non-refoulement obligation is central to this function. It is non-derogable in terms of art 42.1 and, as discussed above at para [34] has become part of customary international law."). *See also* E. Lauterpacht and D. Bethlehem, *supra* footnote 13, paras. 193–219; G. Goodwin-Gill, *The Refugee in International Law*, 2nd edition, Oxford University Press (1996), at pp. 167–171.

[31] The prohibition of *refoulement* of refugees under customary international law also applies, with regard to non-European refugees, in States which are party to the 1951 Convention, but which maintain the geographical limitation provided for Article 1B(1) of the Convention.

[32] This is the case, for example, in Bangladesh, India, Pakistan and Thailand.

[33] Under Paragraph 8 of the Statute of UNHCR, Article 35 of the 1951 Convention and Article II of the 1967 Protocol (see also *supra* footnote 3).

[34] As noted by the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.)*, Merits, 1986 ICJ Reports, page 14, para. 186, "[i]n order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in

16. In a Declaration which was adopted at the Ministerial Meeting of States Parties of 12–13 December 2001 and subsequently endorsed by the General Assembly, the States party to the 1951 Convention and/or 1967 Protocol acknowledged "…the continuing relevance and resilience of this international regime of rights and principles, including at its core the principle of *non-refoulement*, whose applicability is embedded in customary international law."[35] At the regional level, the customary international law character of the principle of *non-refoulement* has also been re-affirmed in a Declaration adopted by Latin American States participating at a gathering to celebrate the twentieth anniversary of the 1984 Cartagena Declaration.[36]

B. *Non-Refoulement* Obligations Under International Human Rights Law

1. International Human Rights Treaties

17. *Non-refoulement* obligations complementing the obligations under the 1951 Convention, which preceded the major human rights treaties, have also been established under international human rights law. More specifically, States are bound not to transfer any individual to another country if this would result in exposing him or her to serious

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general, be consistent which such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule."

[35] Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol adopted at the Ministerial Meeting of States Parties of 12–13 December 2001, HCR/MMSP/2001/09, 16 January 2002 (available at: http://www.unhcr.org/home/RSDLEGAL/3d60f5557.pdf, last accessed on 30 October 2006) at preambular para. 4. Earlier, the Executive Committee of UNHCR observed that "the principle of *non-refoulement* … was progressively acquiring the character of a *peremptory rule* of international law." *See* Executive Committee Conclusion No. 25 (XXXIII), *supra* footnote 20, para. (b). Pursuant to Article 53 of the 1969 Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, *entered into force* 27 January 1980 [hereinafter: "1969 Vienna Convention"], peremptory norms of general international law, or *jus cogens*, are norms accepted and recognized by the international community of States as a whole as norms from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. Article 64 of the 1969 Vienna Convention provides that peremptory norms of international law prevail over treaty provisions.

[36] Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America of 16 November 2004 (available at: http://www.unhcr.org/home/RSDLEGAL/424bf6914.pdf, last accessed on 30 October 2006), at preliminary para. 7 ("*Recognizing* the *jus cogens* nature of the principle of *non-refoulement*, including non-rejection at the border, the cornerstone of international refugee law, which is contained in the 1951 Convention relating to the Status of Refugees and its Protocol of 1967, and also set out in Article 22 (8) of the American Convention on Human Rights and Article 3 of the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, …"). *See also* Section III(5) of the 1984 Cartagena Declaration on Refugees, *supra* footnote 26 ("…[The] principle [of *non-refoulement*] is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of *jus cogens*.").

human rights violations, notably arbitrary deprivation of life[37], or torture or other cruel, inhuman or degrading treatment or punishment.[38]

18. An explicit *non-refoulement* provision is contained in Article 3 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[39] which prohibits the removal of a person to a country where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

19. Obligations under the 1966 Covenant on Civil and Political Rights,[40] as interpreted by the Human Rights Committee, also encompass the obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by Articles 6 [right to life] and 7 [right to be free from torture or other cruel, inhuman or degrading treatment or punishment] of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.[41] The prohibition of *refoulement* to a risk of serious human rights violations, particularly torture and other forms of ill-treatment, is also firmly established under regional human rights treaties.[42]

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[37] The right to life is guaranteed under Article 6 of the ICCPR and, for example, Article 2 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 005, 213 U.N.T.S. 222, *entered into force* 3 September 1953 [hereinafter: "ECHR"]; Article 4 ACHR; Article 4 of the African (Banjul) Charter on Human and People's Rights, 21 I.L.M. 58 (1982), *entered into force* 21 October 1986 [hereinafter: "Banjul Charter"].

[38] The right to be free from torture is guaranteed under Article 1 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and Article 2 of the 1985 Inter-American Convention to Prevent and Punish Torture, 25 I.L.M. 519 (1992), *entered into force* 28 February 1987. Article 16 of the Convention Against Torture prohibits other cruel, inhuman or degrading treatment or punishment. A prohibition of torture and other cruel, inhuman or degrading treatment or punishment is guaranteed under Article 7 of the ICCPR and provisions in regional human rights treaties, such as, for example, Article 3 of the ECHR; Article 5(2) of the ACHR; or Article 5 of the Banjul Charter.

[39] The 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85, *entered into force* 26 June 1987 [hereinafter: "Convention Against Torture"].

[40] 1966 International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, *entered into force* 23 March 1976 [hereinafter: "ICCPR"].

[41] With regard to the scope of the obligations under Article 7 of the ICCPR, *see* Human Rights Committee in its *General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment),* 10 March 1992, U.N. Doc. HRI/ GEN/1/Rev.7, para. 9 ("States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement")*; and *General Comment No. 31 on the Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 12. Similarly, in its *General Comment No. 6 (2005) on the Treatment of unaccompanied and separated children outside their country of origin*, U.N. Doc. CRC/GC/2005/6, 1 September 2005, the Committee on the Rights of the Child stated that States party to the Convention on the Rights of the Child "[…] shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 [right to life] and 37 [right to be free from torture or other cruel, inhuman or degrading treatment or punishment and right not to be arbitrarily deprived of liberty] of the Convention." (para. 27).

[42] See, for example, the jurisprudence of the European Court of Human Rights, which has held that *non-refoulement* is an inherent obligation under Article 3 of the ECHR in cases where there is a real risk of exposure to torture, inhuman or degrading treatment or punishment, including, in particular, the Court's decisions in *Soering v. United Kingdom*, Application No. 14038/88, 7 July 1989 and subsequent cases, including *Cruz Varas v.* Sweden, Application No. 15567/89, 20 March 1991;

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20. The prohibition of *refoulement* to a country where the person concerned would face a real risk of irreparable harm such as violations of the right to life or the right to be free from torture or cruel, inhuman or degrading treatment or punishment extends to all persons who may be within a State's territory or subject to its jurisdiction, including asylum seekers and refugees,[43] and applies with regard to the country to which removal is to be effected or any other country to which the person may subsequently be removed.[44] It is non-derogable and applies in all circumstances,[45] including in the context of measures to combat terrorism[46] and during times of armed conflict.[47]

Vilvarajah et al. v. United Kingdom, Application No. 13163/87 et al., 30 October 1991; *Chahal v. United Kingdom*, Application No. 22414/93, 15 November 1996; *Ahmed v. Austria*, Application No. 25964/94, 17 December 1996; *TI v. United Kingdom*, Application No. 43844/98 (Admissibility), 7 March 2000. In the Americas, see, for example, Article 22(8) of the 1969 ACHR ("In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.") or Article 13(4) of the 1985 Inter-American Convention to Prevent and Punish Torture ("Extradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting State.").

[43] For States Party to the ICCPR, this has been made explicit by the Human Rights Committee in its *General Comment No. 31*, *supra* footnote 41, para. 10 ("… [T]he enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. …"). *See also infra* at Part II.B.

[44] See: Human Rights Committee, *General Comment No. 31*, *supra* footnote 41, para. 12. *See also supra* footnote 41.

[45] See, for example, Human Rights Committee, *General Comment No. 29 on States of Emergency (Article 4),* U.N. Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 11; Human Rights Committee, *Concluding Observations/Comments* on Canada, U.N. Doc. CCPR/C/CAN/CO/5, 20 April 2006, para. 15; Committee Against Torture, *Gorki Ernesto Tapia Paez v. Sweden*, U.N. Doc. CAT/C/18/D/39/1996, 28 April 1997, para. 14.5. The absolute nature of the prohibition of *refoulement* to a risk of torture and other forms of ill-treatment under Article 3 of the ECHR has been affirmed by the European Court of Human Rights, for example, in *Chahal v. United Kingdom*, *supra* footnote 42.

[46] See, for example, Committee Against Torture, *Agiza v. Sweden*, U.N. Doc. CAT/C/34/D/233/2003, 20 May 2005; Human Rights Committee, *Alzery v. Sweden*, U.N. Doc. CCPR/C/88/D/1416/2005, 10 November 2006; Inter-American Commission on Human Rights, *Report on the Situation of Human Rights of Asylum-Seekers within the Canadian Refugee Determination System*, 28 February 2000, para. 154. *See also* United Nations Commission on Human Rights, Resolution 2005/80 of 21 April 2005 on Protection of human rights and fundamental freedoms while countering terrorism; Security Council resolutions 1456 (2003) of 20 January 2003, 1535 (2004) of 26 March 2004, 1624 (2004) of 14 September 2005, the Declaration on Measures to Eliminate International Terrorism (annex to General Assembly resolution 49/60 of 9 December 1994), the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism (annex to General Assembly resolution 51/210 of 17 December 1996), the 2005 World Summit Outcome (General Assembly resolution 60/1 of 16 September 2005) and the Plan of Action annexed to the United Nations Global Counter-Terrorism Strategy adopted by the General Assembly on 8 September 2006 (A/RES/60/288).

[47] International human rights law does not cease to apply in case of armed conflict, except where a State has derogated from its obligations in accordance with the relevant provisions of the applicable international human rights treaty (for example, Article 4 ICCPR). In determining what constitutes a violation of human rights, regard must be had to international humanitarian law, which operates as *lex specialis* to international human rights in law during a time of armed conflict. This has been confirmed, *inter alia*, by the International Court of Justice in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, para. 25; and the judgement of 19 December 2005 in *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, paras. 215–219. *See also*, for example, Concluding Observations of the Human Rights Committee, United States of America, U.N. Doc. CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para. 10; Human Rights Committee, *General Comment No. 31*, *supra* footnote 41, para. 11; *see*

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2. Human Rights-Based *Non-Refoulement* Obligations Under Customary International Law

21. The prohibition of torture is also part of customary international law, which has attained the rank of a peremptory norm of international law, or *jus cogens.*[48] It includes, as a fundamental and inherent component, the prohibition of *refoulement* to a risk of torture, and thus imposes an absolute ban on any form of forcible return to a danger of torture which is binding on all States, including those which have not become party to the relevant instruments. The prohibition of arbitrary deprivation of life, which also includes an inherent obligation not to send any person to a country where there is a real risk that he or she may be exposed to such treatment, also forms part of customary international law.[49] The prohibition of *refoulement* to a risk of cruel, inhuman or degrading treatment or punishment, as codified in universal as well as regional human rights treaties is in the process of becoming customary international law, at the very least at regional level.[50]

22. Under the above-mentioned obligations, States have a duty to establish, prior to implementing any removal measure, that the person whom it intends to remove from their territory or jurisdiction would not be exposed to a danger of serious human rights violations such as those mentioned above. If such a risk exists, the State is precluded from forcibly removing the individual concerned.

II. EXTRATERRITORIAL APPLICABILITY OF THE PRINCIPLE OF *NON-REFOULEMENT* UNDER THE 1951 CONVENTION AND/OR ITS 1967 PROTOCOL

23. The Sections of this Advisory Opinion which follow examine the territorial scope of Article 33(1) of the 1951 Convention in light of the criteria provided for under international law for the interpretation of treaties. In accordance with the relevant rules,

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also Conclusions and recommendations of the Committee against Torture concerning the second report of the United States of America, U.N. Doc. CAT/C/USA/CO/2, 25 July 2006 para. 14.

[48] See, for example, Human Rights Committee, *General Comment No. 29: Article 4: Derogations during a State of Emergency,* U.N. Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 11 ("The proclamation of certain provisions of the Covenant as being of a non-derogable nature, in article 4, para. 2, is to be seen partly as recognition of the peremptory nature of some fundamental rights ensured in treaty form in the Covenant (e.g., articles 6 and 7). "); *see also* the decisions of the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Prosecutor v Delalic and Others*, Trial Chamber, Judgement of 16 November 1998, para. 454; *Prosecutor v. Furundzija*, Trial Chamber, Judgement of 10 December 1998, paras. 134–164; *Prosecutor v. Kunarac and Others*, Trial Chamber, Judgement of 22 February 2001, para. 466. *See also* the judgement of the House of Lords in *Pinochet Ugarte, re.* [1999] 2 All ER 97, paras. 108–109. *See also*, for example, *Filartiga v. Pena Irala,* 630 F.2d 876 (2d. Cir. 1980).

[49] See Human Rights Committee, *General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.6, 4 November 1994, para. 8 ("… [P]rovisions in the Covenant that represent customary international law (and *a fortiori* when they have the character of peremptory norms) may not be the subject of reservations. Accordingly, a State may not reserve the right to engage in … torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives …").

[50] See, for example, the jurisprudence of the European Court of Human Rights referred to *supra* footnote 42; *see also* Article 19(2) of the European Charter of Fundamental Rights, [2000] OJ C364; and preambular para. 13 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 2002/584/JHA, adopted by the Council of the European Union.

as stated in the 1969 Vienna Convention on the Law of Treaties,[51] the meaning of a provision in an international treaty must be established by examining the ordinary meaning of the terms employed, in light of their context and the object and purpose of the treaty.[52] Subsequent practice of States in applying the treaty as well as relevant rules of international law must also be taken into consideration in interpreting a treaty.[53]

24. For the reasons set out below, UNHCR is of the view that the purpose, intent and meaning of Article 33(1) of the 1951 Convention are unambiguous and establish an obligation not to return a refugee or asylum-seeker to a country where he or she would be risk of persecution or other serious harm, which applies wherever a State exercises jurisdiction, including at the frontier, on the high seas or on the territory of another State.[54]

A. Scope *Ratione Loci* of Article 33(1) of the 1951 Convention: Ordinary Meaning, Context, Object and Purpose of the 1951 Convention

25. As noted above, the focus of the present inquiry is the territorial scope of the *non-refoulement* provision under Article 33(1) of the 1951 Convention. In keeping with the primary rule of treaty interpretation stated in Article 31(1) of the 1969 Vienna Convention, it is necessary, first, to examine the ordinary meaning of the terms of Article 33(1) of the 1951 Convention, taking into account their context as well as the object and purpose of the treaty of which it forms part.

26. The obligation set out in Article 33(1) of the 1951 Convention is subject to a geographic restriction only with regard to the country where a refugee may not be sent to, not the place where he or she is sent from. The extraterritorial applicability of the *non-refoulement* obligation under Article 33(1) is clear from the text of the provision itself, which states a simple prohibition: "No Contracting State shall expel or return *("refouler")* a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened…".

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[51] *Supra* footnote 35 [hereinafter, "1969 Vienna Convention"]. The 1969 Vienna Convention is generally regarded as expressing rules which constitute customary international law.

[52] Article 31(1) of the 1969 Vienna Convention provides: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

[53] Article 31(3) of the 1969 Vienna Convention provides that, in interpreting a treaty: "… there shall be taken into account, together with the context, … (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between parties."

[54] In a decision which addressed the applicability *inter alia* of Article 33(1) of the 1951 Convention to the return to Haiti of persons intercepted on the high seas by U.S. coast guard vessels, the United States Supreme Court determined that Article 33(1) of the 1951 Convention is applicable only to persons within the territory of the United States (*Sale, Acting Commissioner, Immigration and Naturalization Service, et al., Petitioners v. Haitian Centers Council, Inc., et. al.,* 509 U.S. 155 (1993)). For the reasons set out in this advisory opinion, UNHCR is of the view that the majority opinion of the Supreme Court in *Sale* does not accurately reflect the scope of Article 33(1) of the 1951 Convention. *See also* Inter-American Commission on Human Rights in *The Haitian Centre for Human Rights et al. v. United States*, *supra* footnote 42, para. 157 ("… The Commission shares the view advanced by the United Nations High Commissioner for Refugees in its Amicus Curiae brief in its argument before the Supreme Court, that Article 33 had no geographical limitations.").

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27. The ordinary meaning of "return" includes "to send back" or "to bring, send, or put back to a former or proper place".[55] The English translations of "*refouler*" "include words like 'repulse', 'repel', 'drive back'."[56] It is difficult to conceive that these words are limited to refugees who have already entered the territory of a Contracting State. The ordinary meaning of the terms "return" and "*refouler*" does not support an interpretation which would restrict its scope to conduct within the territory of the State concerned, nor is there any indication that these terms were understood by the drafters of the 1951 Convention to be limited in this way.[57]

28. A contextual analysis of Article 33 of the 1951 Convention further supports the view that the scope *ratione loci* of the *non-refoulement* provision in Article 33(1) is not limited to a State's territory. The view has been advanced that Article 33(2) of the 1951 Convention, which permits exceptions to the principle of *non-refoulement* only with regard to a refugee who constitutes a danger to the security or the community of the country in which he is, implies that the scope of Article 33(1) is also limited to persons within the territory of the host country.[58] However, in UNHCR's opinion this view is contradicted by the clear wording of Article 33(1) and 33(2), respectively, which address different concerns,[59] as well as the fact that the territorial scope of a number of other provisions of the 1951 Convention is made explicit.[60] Thus, where the drafters of the 1951 Convention intended a particular clause of the 1951 Convention to apply only to

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[55] See: *Merriam-Webster Online Dictionary*, 10th edition, available at: http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=return (last accessed on 15 October 2006).

[56] This was also noted by the majority of the United States Supreme Court in *Sale, supra* footnote 54 (at 181) which, however, went on to state that "'return' means a defensive act of resistance or exclusion at a border rather than an act of transporting someone to a particular destination" (at 182), and that "… because the text of Article 33 cannot reasonably be read to say anything at all about a nation's actions toward aliens outside its own territory, it does not prohibit such actions." (at 183). As noted by Blackmun J in his dissenting opinion in *Sale*, *supra* footnote 54, "[t]he majority's puzzling progression ('*refouler*' means repel or drive back; therefore 'return' means only exclude at a border; therefore the treaty does not apply) hardly justifies a departure from the path of ordinary meaning. The text of Article 33(1) is clear, and whether the operative term is 'return' or '*refouler*', it prohibits the Government's actions." (at 192–193).

[57] In support of its finding that Article 33(1) does not apply outside a State's territory, the majority of the United States Supreme Court in *Sale*, *supra* footnote 54, relied on statements by a number of delegates involved in the drafting of the 1951 Convention. However, these statements were expressions of concern related to a possible obligation to grant asylum to large numbers of arrivals in mass influx situations. In UNHCR's view, these portions of the negotiating history do not warrant the conclusion that the drafters of the 1951 Convention reached consensus about an implicit restriction of the territorial scope of the principle of *non-refoulement* as provided for in Article 33(1). *See also* UNHCR, *The Principle of Non-Refoulement as a Norm of Customary International Law*, *supra* footnote 30.

[58] See: *Sale*, *supra* footnote 54, at 179–180.

[59] See also the dissenting opinion of Blackmun J in *Sale*, *supra* footnote 54, at 194 ("Far from constituting 'an absurd anomaly […], the fact that a state is permitted to 'expel or return' a small class of refugees found within its territory but may not seize and return refugees who remain outside its frontiers expresses precisely the objectives and concerns of the Convention. Non return is the rule; the sole exception (neither applicable nor invoked here) is that a nation endangered by a refugee's very presence may 'expel or return' him to an unsafe country if it chooses. The tautological observation that only a refugee already in a country can pose a danger to the country 'in which he is' proves nothing.")

[60] For example, Articles 2, 4 and 27 require simple presence of a refugee in the host country, while Articles 18, 26 and 32 require that he or she be "lawfully on the territory" of a Contracting State, and Articles 15, 17(1), 19, 21, 23, 24 and 28 apply to refugees who are "lawfully staying" in the country of refuge.

those within the territory of a State Party, they chose language which leaves no doubt as to their intention.

29. Furthermore, any interpretation which construes the scope of Article 33(1) of the 1951 Convention as not extending to measures whereby a State, acting outside its territory, returns or otherwise transfers refugees to a country where they are at risk of persecution would be fundamentally inconsistent with the humanitarian object and purpose of the 1951 Convention and its 1967 Protocol. In this context, it is worth recalling the first two paragraphs of the Preamble to the 1951 Convention, which read:

"Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,[61]

Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms."

30. A comprehensive review of the *travaux préparatoires*[62] confirms the overriding humanitarian object and purpose of the Convention and provides significant evidence that the *non-refoulement* provision in Article 33(1) was intended to prohibit any acts or omissions by a Contracting State which have the effect of returning a refugee to territories where he or she is likely to face persecution or danger to life or freedom. For example, when the 1951 Convention was in the course of preparation, the Secretary-General stated in a Memorandum dated 3 January 1950 to the *Ad Hoc* Committee on Statelessness and Related Problems that "turning a refugee back to the frontier of the country where his life or liberty is threatened… would be tantamount to delivering him into the hands of his persecutors."[63] During the discussions of the Committee, the representative of the United States vigorously argued that:

> "[w]hether it was a question of closing the frontier to a refugee who asked admittance, or of turning him back after he had crossed the frontier, or even expelling him after he had been admitted to residence in the territory, the problem was more or less the same. Whatever the case might be, whether or not

[61] One of the fundamental rights enshrined in the Universal Declaration of Human Rights, General Assembly resolution 217A (III), U.N. Doc. A/810 at 71 (1948), is the right of everyone "to seek and enjoy in other countries asylum from persecution" under Article 14.

[62] Pursuant to Article 32 of the 1969 Vienna Convention, *supra* footnote 35, recourse to the preparatory work of the treaty is a supplementary means of treaty interpretation is permitted only where the meaning of the treaty language is ambiguous or obscure; or where interpretation pursuant to the general rules set out in Article 31 of the 1969 Vienna Convention leads to a result which is manifestly absurd or unreasonable. It is a well-established principle that when the meaning of the treaty is clear from its text when viewed in light of its context, object and purpose, supplementary sources are unnecessary and inapplicable, and recourse to such sources is discouraged. *See*, for example, International Court of Justice, *Interpretation of the Treaty of Lausanne*, P.C.I.J., Ser. B, No. 12 (1925), at 22; The *Lotus Case*, P.C.I.J., Ser. A, No. 10 (1927), at 16; *Admission to the United Nations Case*, 1950 ICJ Reports 8. Thus, while UNHCR is of the view that recourse to the drafting history of Article 33(1) of the 1951 Convention is not necessary given the unambiguous wording of this provision, the *travaux préparatoires* are nevertheless of interest in clarifying the background, content and scope of Article 33(1).

[63] *Ad Hoc* Committee on Statelessness and Related Problems, Status of Refugees and Stateless Persons – Memorandum by the Secretary General, U.N. Document E/AC.32/2, 3 January 1950, Comments on Article 24 of the preliminary draft, para. 3.

> the refugee was in a regular position, he must not be turned back to a country where his life or freedom could be threatened."[64]

31. The same representative of the United States proposed that the words "undertakes not to expel or return (*refouler*)" should replace the words "not turn back" in order to settle any doubts that *non-refoulement* applied to refugees whether or not they had been regularly admitted to residence,[65] an amendment that ultimately formed the basis for the "expel or return" final wording of Article 33 of the 1951 Convention. It is also worth noting that at one point the Chairman of the *Ad Hoc* Committee suspended the discussion, observing that it had indicated agreement on the principle that refugees fleeing from persecution on account of their race, religion, nationality or political opinion should not be pushed back into the arms of their persecutors.[66]

B. Extraterritorial Applicability of Article 33(1) of the 1951 Convention: Subsequent State Practice and Relevant Rules of International Law

32. Limiting the territorial scope of Article 33(1) of the 1951 Convention to conduct of a State within its national territory would also be at variance with subsequent State practice and relevant rules of international law applicable between the States party to the treaty in question. In accordance with Article 31(3) of the 1969 Vienna Convention,[67] these elements also need to be taken into account in interpreting a provision of an international treaty.

33. Subsequent State practice is expressed, *inter alia*, through numerous Executive Committee Conclusions which attest to the overriding importance of the principle of *non-refoulement* irrespective of whether the refugee is in the national territory of the State concerned.[68] Subsequent State practice which is relevant to the interpretation of the *non-refoulement* obligation under the 1951 Convention and 1967 Protocol is also evidenced by other international refugee and human rights instruments drawn up since 1951, none of which places territorial restrictions on States' *non-refoulement* obligations.[69]

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64 Statement of Mr. Henkin of the United States, U.N. Doc. E/AC.32/SR.20, Feb 1, 1950, paras. 54–55.

65 U.N. Doc. E/AC.32/SR.20, para. 56.

66 Statement of the Chairman, Mr. Chance of Canada, U.N. Doc. E/AC.32.SR.21, 2 February 1950, at page 7. The Chairman then invited the representatives of Belgium and the United States to confer with him to attempt the preparation of a suitable draft for later consideration.

67 *Supra* footnote 53.

68 See, for example, Executive Committee, Conclusion No. 6 (XXVIII), *supra* footnote 9, at para (c) (reaffirming "the fundamental importance of the observance of the principle of *non-refoulement* – both at the border and within the territory of a State …"); Conclusion No. 15 (XXX) *"Refugees without an Asylum Country"* (1979) paras. (b) and (c) (stating that "[a]ction whereby a refugee is obliged to return or is sent to a country where he has reason to fear persecution constitutes a grave violation of the principle of *non-refoulement*" and noting that "[i]t is the humanitarian obligation of all coastal States to allow vessels in distress to seek haven in their waters and to grant asylum, or at least temporary refuge, to persons on board wishing to seek asylum."); Conclusion No. 22 (XXXII) *"Protection of Asylum-Seekers in Situations of Large-Scale Influx"* (1981), at II.A.2. ("In all cases the fundamental principle of *non-refoulement* – including non-rejection at the frontier – must be scrupulously observed."); Conclusion No. 53 (XXXIX) *"Stowaway Asylum-Seekers"* (1988), para. (1) (providing *inter alia* that "[l]ike other asylum seekers, stowaway asylum-seekers must be protected against forcible return to their country of origin.").

69 These include, in particular, the 1969 OAU Convention (*supra* footnote 22); the 1969 ACHR (*supra* footnote 23); and the Convention Against Torture (*supra* footnote 39). See also the expressions of the principle of *non-refoulement* in non-binding texts such as, for example, the 1984 Cartagena

34. In keeping with the above-mentioned rules of treaty interpretation, it is also necessary to have regard to developments in related areas of international law when interpreting the territorial scope of Article 33(1) of the 1951 Convention. International refugee law and international human rights law are complementary and mutually reinforcing legal regimes.[70] It follows that Article 33(1), which embodies the humanitarian essence of the 1951 Convention and safeguards fundamental rights of refugees, must be interpreted in a manner which is consistent with developments in international human rights law. An analysis of the scope *ratione loci* of States' *non-refoulement* obligations under international human rights law is particularly pertinent to the question of the extraterritorial applicability of the prohibition on returning a refugee to a danger of persecution under international refugee instruments.

35. As discussed in more detail below, States are bound by their obligations not to return any person over whom they exercise jurisdiction to a risk of irreparable harm. In determining whether a State's human rights obligations with respect to a particular person are engaged, the decisive criterion is not whether that person is on the State's national territory, or within a territory which is *de jure* under the sovereign control of the State, but rather whether or not he or she is subject to that State's effective authority and control.

36. In its General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the [ICCPR], the Human Rights Committee has stated that "States are required by Article 2(1) [of the ICCPR] to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party."[71] The General Comment reaffirms consistent jurisprudence of the Human Rights Committee to the effect that States can "be held accountable for violations of rights under the ICCPR which its agents commit on the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it"[72] and that in certain

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Declaration (*supra* footnote 26); the 1967 Declaration of Territorial Asylum adopted by the General Assembly (*supra* footnote 27); and Resolution (67) 14 of the Committee of Ministers of the Council of Europe (*supra* footnote 27).

70 The complementarity between *non-refoulement* obligations under international refugee and human rights law has been highlighted, for example, in the Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America of 16 November 2004 (available at: http://www.unhcr.org/home/RSDLEGAL/424bf6914.pdf, last accessed on 30 October 2006). This Declaration was adopted by Latin American States participating at a gathering to celebrate the twentieth anniversary of the 1984 Cartagena Declaration. *See also* Executive Committee, Conclusion No. 79 (XLVII), *supra* footnote 20; No. 81(XLVII) "*General*" (1997); Conclusion No. 82 (XLVIII) "*Safeguarding Asylum*" (1997), which specifically refer to the prohibition of return to torture, as set forth in the Convention Against Torture, and Executive Committee Conclusion No. 95 (LIV) "*General Conclusion on International Protection*" (2003), para. (l) (noting the "complementary nature of international refugee and human rights law as well as the possible role of the United Nations human rights mechanisms in this area …").

71 General Comment No. 31, *supra* footnote 41, para. 10.

72 See the decisions of the Human Rights Committee in *Lopez Burgos v. Uruguay*, U.N. Doc. CCPR/C/13/D/52/1979, 29 July 1981, para. 12.3; and *Celiberti de Casariego v. Uruguay,* U.N. Doc. CCPR/C/13/D/56/1979, 29 July 1981, para. 10.3. In both decisions, the Human Rights Committee has also held that "it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory." *See also* the decision of the

circumstances, "persons may fall under the subject-matter of a State Party [to the ICCPR] even when outside that State's territory."[73]

37. The International Court of Justice has confirmed that the ICCPR is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.[74] The Court observed that, "while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions."[75]

38. Similarly, the Committee against Torture has affirmed that the *non-refoulement* obligation contained in Article 3 of the Convention Against Torture applies in any territory under a State party's jurisdiction.[76] With regard to those provisions of the Convention Against Torture which "are expressed as applicable to 'territory under [the State party's] jurisdiction'", the Committee Against Torture reiterated "its previously expressed view that this includes all areas under the de facto effective control of the State party, by whichever military or civil authorities such control is exercised" and made it clear that these provisions "apply to, and are fully enjoyed, by all persons under the effective control of its authorities, of whichever type, wherever located in the world."[77]

39. The extraterritorial applicability of human rights treaties is also firmly established at the regional level. The European Court of Human Rights has examined the concept of "jurisdiction" in a number of decisions and consistently held that the decisive criterion is not whether a person is within the territory of the State concerned, but whether or not, in respect of the conduct alleged, he or she is under the effective control

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Human Rights Committee in *Pereira Montero v. Uruguay*, U.N. Doc. CCPR/C/18/D/106/1981, 31 March 1983, para. 5.

[73] See, for example, Concluding Observations of the Human Rights Committee, United States of America, U.N. Doc. CCPR/C/79/Add.50, 3 October 1995, para. 284. In 2006, the Human Rights Committee also reaffirmed the applicability of the provisions of the ICCPR with reference to conduct of the United States at Guantánamo Bay. *See* Concluding Observations of the Human Rights Committee, United States of America, *supra* footnote 47, para. 10. See also Concluding Observations of the Human Rights Committee, Israel, U.N. Doc. CCPR/C/79/Add.93, 18 August 1998, para. 10 and U.N. Doc. CCPR/CO/78/ISR, 21 August 2003, para. 11.

[74] See the Advisory Opinion of the International Court of Justice in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* (2004) ICJ Gen. List No. 131, 9 July 2004, para. 111. See also the recent judgement of the International Court of Justice in *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda*), (2005) ICJ Gen. List No. 116, 19 December 2005, para. 216.

[75] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* footnote 74, para. 109.

[76] See, for example, Committee Against Torture, Conclusions and recommendations of the Committee against Torture concerning the second report of the United States of America, *supra* footnote 47. Having requested the State Party's views on the extraterritorial applicability of Article 3 of the Convention against Torture in the context of Guantánamo Bay, the Committee expressed its concern ("…that the State party considers that the non-refoulement obligation, under article 3 of the Convention, does not extend to a person detained outside its territory. … The State party should apply the *non-refoulement* guarantee to all detainees in its custody, …, in order to comply with its obligations under article 3 of the Convention. …") (para. 20).

[77] *Id*., para. 15. This applies, *inter alia*, to Article 16 of the Convention Against Torture, which prohibits acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1 of the Convention.

of, or is affected by those acting on behalf of, the State in question. Thus, in a decision in which it examined the circumstances in which the obligations under the European Convention apply extraterritorially, the European Court of Human Rights held that while, "from the standpoint of public international law, the jurisdictional competence of a state is primarily territorial",[78] it may extend extraterritorially if a State, "through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the government of that territory, exercises all or some of the public powers normally to be exercised by that government."[79] A situation in which a person is brought under the "effective control" of the authorities of a State if they are exercising their authority outside the State's territory may also give rise to the extraterritorial application of Convention obligations.[80]

40. Also relevant in the present context is the judgement of the European Court of Human Rights in *Issa and Ors v. Turkey*, which confirmed that

> "a State may also be held accountable for violations of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State […]. Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory […]."81

41. The Inter-American Commission on Human Rights held in its decision in *Coard et al. v. the United States* that "while the extraterritorial application of the American Declaration has not been placed at issue by the parties, the Commission finds it pertinent to note that, under certain circumstances, the exercise of its jurisdiction over acts with an extraterritorial locus will not only be consistent with, but required by the norms which pertain."[82]

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78 *Bankovic et al. v. Belgium and 16 other contracting States (Admissibility)*, Application No. 52207/99, 12 December 2001, para. 59.

79 *Id.*, para. 71. See also *Loizidou v. Turkey (Preliminary Objections),* Application No. 15318/89, Judgement of 23 February 1995, Series A, No. 310, para. 62 ("In this respect the Court recalls that, although Article 1 (art. 1) sets limits on the reach of the Convention, the concept of 'jurisdiction' under this provision is not restricted to the national territory of the High Contracting Parties. […] [t]he responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory.").

80 *Öcalan v. Turkey (Preliminary Objections)*, Application No. 46221/99, Judgement of 12 March 2003, para. 93 (the former PKK leader had been arrested by Kenyan authorities and handed over to Turkish officials operating in Kenya). *See also Ilascu and Others v. Russia and Moldova*, Application No. 48787/99, Judgement of 8 July 2004, paras. 382-394 (finding that the complainants came within the "jurisdiction" of the Russian Federation, and that the responsibility of the Russian Federation for acts which occurred on the territory of Moldova was engaged by the conduct of its own soldiers there, as well as that of the Transdniestran authorities, on the basis of the support provided by Russia to the latter) on the basis of the actions of its own soldiers as well as their support to the Transdniestran authorities).

81 *Issa and Ors v. Turkey,* Application No. 3821/96, Judgement of 16 November 2004, para. 71, with references, *inter alia*, to decisions of the Human Rights Committee and the Inter-American Commission of Human Rights.

82 *Coard et al. v. the United States*, Case No. 10.951, Report No. 109/99, 29 September 1999, para. 37.

UNHCR

42. In UNHCR's view, the reasoning adopted by courts and human rights treaty bodies in their authoritative interpretation of the relevant human rights provisions is relevant also to the prohibition of *refoulement* under international refugee law, given the similar nature of the obligations and the object and purpose of the treaties which form their legal basis.[83]

43. Thus, an interpretation which would restrict the scope of application of Article 33(1) of the 1951 Convention to conduct within the territory of a State party to the 1951 Convention and/or its 1967 Protocol would not only be contrary to the terms of the provision as well as the object and purpose of the treaty under interpretation, but it would also be inconsistent with relevant rules of international human rights law. It is UNHCR's position, therefore, that a State is bound by its obligation under Article 33(1) of the 1951 Convention not to return refugees to a risk of persecution wherever it exercises effective jurisdiction. As with *non-refoulement* obligations under international human rights law, the decisive criterion is not whether such persons are on the State's territory, but rather, whether they come within the effective control and authority of that State.

UNHCR, Geneva
26 January 2007

[83] As noted by the International Law Commission in its Report of the fifty-eighth session (1 May-9 June and 3 July-11 August 2006), U.N. Doc. A/61/10, at pp. 414–415, "Article 31(3)(c) [of the 1969 Vienna Convention, *supra* footnote 36] also requires the interpreter to consider other treaty-based rules so as to arrive at a consistent meaning. Such other rules are of particular relevance where parties to the treaty under interpretation are also parties to the other treaty, where the treaty rule has passed into or expresses customary international law or where they provide evidence of the common understanding of the parties as to the object and purpose of the treaty under interpretation or as to the meaning of a particular term."

Exhibit C

INFORMATION MEMORANDUM

TO: Andrew Davidson
Acting Deputy Director

THROUGH: Ted Kim, Associate Director
Refugee, Asylum and International Operations Directorate

TED H KIM Digitally signed by TED H KIM Date: 2023.05.10 15:17:15 -04'00'

FROM: John L. Lafferty, Chief
Asylum Division

JOHN L LAFFERTY Digitally signed by JOHN L LAFFERTY Date: 2023.05.10 14:50:46 -04'00'

SUBJECT: Scheduling of Credible Fear Interviews

DATE: May 10, 2023

Purpose: To inform you that, consistent with the applicable statutory and regulatory provisions, the Asylum Division will schedule credible fear interviews to take place no earlier than 24 hours after the noncitizen's acknowledgement of receipt of the Form M-444, Information about Credible Fear Interview.

Background: The Immigration and Nationality Act (INA) authorizes the expedited removal of certain noncitizens seeking admission who are determined to be inadmissible under certain grounds of inadmissibility. INA Sec. 235(b)(1). If noncitizens in expedited removal proceedings indicate an intention to apply for asylum or express a fear of persecution or torture or of return to their country, they are referred to a USCIS asylum officer for a credible fear interview, INA Sec. 235(b)(1)(A)(ii), 8 C.F.R. § 235.3(b)(4); and generally will be detained throughout the credible fear screening process, INA Sec. 235(b)(1)(B)(iii)(IV), 8 C.F.R. § 235.3(b)(4)(ii).

The INA requires that the noncitizen be given information about the credible fear interview and provides the right for noncitizens in the credible fear process to consult with a person or persons of their choosing prior to the interview, so long as the consultation is conducted "according to regulations prescribed by [DHS]." INA Sec. 235(b)(1)(B)(iv). Under those regulations, if the noncitizen is represented, the representation shall be at no expense to the government, and consultations "shall be made available in accordance with the policies and procedures of the detention facility where the [noncitizen] is detained, and […] shall not unreasonably delay the process." 8 C.F.R. § 235.3(b)(4)(ii). The applicable regulations further require that noncitizens be provided a Form M-444, *Information About Credible Fear Interview*, that explains the credible fear interview process, and "be given time to contact and consult with any person or persons of the [noncitizen's] choosing" after being referred to USCIS for a credible fear interview. 8 C.F.R. § 235.3(b)(4)(i)-(ii). The regulations do not require that the noncitizen be allowed a particular

amount of time to consult with the person or persons of their choosing. Prior to the interview, the noncitizen can request access to a phone and seek to consult with someone. *See* Form M-444.

Under the current policy, credible fear interviews have generally taken place at least 48 hours after the time of the noncitizen's arrival at the detention facility, unless the noncitizen specifically requests to be interviewed more quickly. That policy originated with the initial implementation of the expedited removal process by the former Immigration and Naturalization Service in 1997 but was not mandated by statute and is not set forth in the regulations.[1]

Considerations: Between the time a noncitizen arrives at a DHS holding or detention facility and the credible fear screening takes place, USCIS must receive the documents referring the noncitizen for a credible fear screening from the DHS component holding the noncitizen, schedule a time and date for an available asylum officer to conduct the credible fear interview, and request that the DHS component with custody make the noncitizen available to participate in the scheduled interview. While these steps are being taken to schedule the credible fear interview, the noncitizen can make use of available phone lines to consult with a person or persons of their choosing in advance of the interview.

As noted in the April 27, 2023 Fact Sheet that accompanied the announcement of the multiple actions being taken to manage regional migration with the upcoming end of the CDC's Title 42 public health Order, Fact Sheet: U.S. Government Announces Sweeping New Actions to Manage Regional Migration | Homeland Security (dhs.gov), DHS is returning to the use of Title 8 immigration authorities to expeditiously process and remove noncitizens who cross the U.S. border unlawfully and have no basis to legally remain in the United States, generally processing them in a matter of days. To support expeditious processing, DHS is increasing its holding capacity, expanding capabilities and technologies across the expedited removal process continuum, and installing hundreds of additional phone lines and privacy booths to provide increased opportunities for noncitizens to consult with the person or persons of their choice prior to their credible fear interviews and for credible fear interviews to be conducted in an expeditious manner. Completing immigration proceedings at the border in a safe, orderly, and humane manner is necessary in order to maximize the number of noncitizens who can be processed using this increased holding capacity.

To support this effort, USCIS has been closely working with our government partners to establish a streamlined process for receiving credible fear referral documents, scheduling interviews, and issuing decisions on credible fear claims. In addition, USCIS is increasing its capacity by training and preparing additional staff to conduct credible fear interviews and support the processing of

[1] USCIS reduced the credible fear consultation period to 24 hours in 2019. Memorandum for the Acting Secretary from Ken Cuccinelli II, *Reduction of Credible Fear Consultation Period* (July 2, 2019). But that policy was set aside in 2020 as *ultra vires* under the Federal Vacancies Reform Act of 1998, 5 U.S.C. § 3348(d)(1), and the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), because the court concluded that Mr. Cuccinelli was not lawfully appointed to serve as the acting Director of USCIS. *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 37 (D.D.C. 2020).

these cases, including scheduling credible fear interviews as soon as, but no earlier than, 24 hours after the noncitizen's acknowledgement of receipt of the Form M-444. Once it has received a complete credible fear referral document package from either U.S. Immigration and Customs Enforcement (ICE) or U.S. Customs and Border Protection (CBP), USCIS will schedule the interview as soon as possible and ensure the noncitizen has no less than 24 hours for consultation before the credible fear interview.

The number of migrants expected to travel without authorization to the United States is expected to significantly increase after the end of the CDC's Title 42 public health Order.[2] To ensure DHS's continued ability to safely, humanely, and effectively enforce and administer the immigration laws, USCIS must make changes to reduce the amount of time noncitizens who do not have a legal basis to remain in the United States spend in DHS custody before being removed. This change in the consultation period is being made in alignment with the April 27, 2023 announcement regarding the whole-of-government approach to managing regional migration. This change will enable the United States to expeditiously process and remove individuals who arrive at the Southwest border and do not have a legal basis to remain in the United States. In order to effectively implement the change to the consultation period, USCIS is also establishing a new policy of requiring extraordinary circumstances warranting approval of a request to reschedule so that USCIS can ensure, consistent with the statute and regulations, that the consultation period does not unreasonably delay the overall process.

USCIS is also taking all necessary steps to ensure that noncitizens understand the credible fear process, have been given at least 24-hours to seek consultation prior to the interview, and are given a full and fair opportunity to have their claims for protection or fear of return heard by a fully trained USCIS officer, and, to the extent it applies, consistent with the Americans with Disabilities Act. In practice, this means noncitizens will have longer than 24 hours to consult depending on when they acknowledge receipt of the Form M-444. USCIS will continually assess the feasibility of scheduling credible fear interviews as soon as 24 hours after the noncitizen's acknowledgement of the Form M-444 and may determine, in its discretion, that a return to a 48-hour period prior to the scheduled credible fear interview is appropriate.

The approach described in this memorandum is an internal general policy that USCIS is pursuing in order to improve procedural efficiency and ensure appropriate disincentives for irregular migration after the end of the CDC's Title 42 public health Order. It does not set or modify any binding standard. It is not intended to, shall not be construed to, may not be relied upon to, and does not create any rights, privileges, or benefits, substantive or procedural, enforceable by any party against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

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[2] *See, e.g.*, Secretary Mayorkas Remarks at a Press Conference on New Regional Migration Management Measures (Apr. 28, 2023), https://www.dhs.gov/news/2023/04/28/secretary-mayorkas-remarks-press-conference-april-27-2023.

Exhibit D

Title: Updated guidance
Date: 05/10/2023

Annex two

Withdrawal of Application for Admission Advisal Statement

You may withdraw your application for admission to the United States and return to Mexico instead of being placed in removal proceedings. It is a voluntary decision. You are not required to withdraw your application for admission and depart, and you may instead decide to remain in the United States to be placed in removal proceedings and seek relief or protection from removal, including asylum, if appropriate.

The United States currently offers parole processes that allows *Cuba, Haiti, Nicaragua, and Venezuela* nationals and their immediate family members to come to the United States. Those parole processes provide a safe and orderly way for Cuba, Haiti, Venezuela, or Nicaragua nationals who lack documents sufficient for admission to the U.S. to be considered, on a case-by-case basis, for advance authorization to travel and a temporary period of parole into the United States for up to 2 years. Participants in such processes must have a supporter in the United States, pass certain security checks, and fly to an interior location in the United States. To seek participation in one of these processes, however, you must be outside the United States. You may choose to depart the United States voluntarily a single time and still be eligible for the parole process. You are being given an opportunity now to withdraw your application for admission and return to Mexico so that you remain eligible for that parole process.

Exhibit E

Circumvention of Lawful Pathways (CLP) & Voluntary Withdrawal of Admission Step-by-Step Guide

[redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

Step 2: Voluntary Withdrawal of Admission

Nationals of Cuba, Haiti, Nicaragua, and Venezuela (CHNV) who entered on or after May 12, 2023 at 12:00 AM ET may have a designated country of removal of Mexico. CHNV nationals with a designated country of removal of Mexico in Border Patrol (BP) custody may be allowed the opportunity to voluntarily withdraw their application for admission.

The designated country of removal will be listed on a continuation page to the I-213. If there is no country of removal designation on the I-213, the designated country of removal is the noncitizen's country of nationality.

If the noncitizen is not a CHNV national in BP custody with Mexico as the designated country of removal, skip to Step 3.

If the noncitizen is a CHNV national in BP custody with Mexico as the designated country of removal, where appropriate, provide the following voluntary withdrawal advisal at the beginning of the interview:

> Before we begin your Credible Fear interview today, I want to let you know about a process that is currently in place for individuals in your situation.
>
> I will give you an opportunity before we start the interview to choose to follow this process if it is something you would like to do. Here is an explanation of the process:
>
> The United States currently offers a parole process that allows nationals of certain countries and their immediate family members to come to the United States. That parole process provides a safe and orderly way for those nationals who lack sufficient U.S. entry documents to be considered, on a case-by-case basis, for advance authorization to travel and a temporary period of parole into the United States for up to 2 years. Participants in that process must have a supporter in the United States, pass certain security checks, and have a passport or other identification allowing them to fly to an interior location in the United States. To seek participation in that process, however, you must be outside the United States. You may choose to depart the United States voluntarily a single time and still be eligible for the parole process. You are being given an opportunity now to withdraw your application for admission to the United States and return to Mexico so that you remain eligible for that parole process.

If you decide to withdraw your application for admission, I will not continue with your credible fear interview today and DHS will process your case as a withdrawal of your application for admission. If you decide not to withdraw your application for admission, I will continue with your credible fear interview. Following your credible fear interview, you may receive a notice to appear in immigration court, where you can file your application for asylum, or you may receive a negative determination because the asylum officer did not find that you have a credible fear. You may request to have the negative determination reviewed by an immigration judge. If the immigration judge agrees with the negative determination or if you decline such review, you will be ordered removed from the United States without any further hearing and you will be barred from re-entering the United States for at least 5 years, unless you apply for and receive permission to reapply for admission.

Unfortunately, I cannot answer any questions about this process, predict what will happen to you, or provide you with any advice or more information than the explanation I just gave you.

Would you like to voluntarily withdraw your application for admission at this time so that you can return to Mexico and remain eligible to request access to the parole process I just described?

An Asylum Officer (AO) cannot answer any questions on the parole process, provide legal advice of any sort, or predict what will happen to the noncitizen if they decide to withdraw. Please do not attempt to answer any questions or tell the noncitizen what might happen to them in the future. Please stick to the exact language of the above script.

- **If asked any questions on the above explanation, please answer:** I am not in a position to answer any questions on this process or to provide legal advice. All I can do right now is provide you this explanation of the process and ask if you would like to voluntarily withdraw your application for admission so that you can return to Mexico and participate in the process. Is that something you would like to do?

- **If asked for time to speak with a consultant:** Consult with a supervisor regarding the request to reschedule.

Voluntary Withdrawal Requested: If the noncitizen voluntarily withdraws their application for admission, conclude the interview, upload your interview notes and then administratively close the CF case in Global as "CHNV Voluntary Withdrawal."

Voluntary Withdrawal <u>Not</u> Requested: If noncitizen does not voluntarily withdraw their application for admission or lacks the capacity to do so, continue to Step 3.

[redacted]

[redacted]

- [redacted]

- [redacted]
- [redacted]

[redacted]

[redacted]

- [redacted]
  - [redacted]
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- [redacted]

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[redacted]

[redacted]

- [redacted]
- [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Step 9: Voluntary Withdrawal of Admission

If the noncitizen is not a CHNV national in BP custody with Mexico as the designated country of removal, skip to Step 10.

For noncitizens who are CHNV nationals in BP custody with Mexico as the designated country of removal, provide a second voluntary withdrawal advisal**:**

> Thank you for answering my questions so far. Based on your testimony, it does not appear that you have demonstrated an exception or rebutted the presumption that you are ineligible for asylum. If I continue with your interview, I will not be screening you for asylum and will only be screening you for eligibility for withholding of removal under section 241(b)(3) of the Immigration and Nationality Act or protection under the Convention Against Torture regulations.
>
> Before I continue, I would like to offer you another chance to withdraw your application for admission like I offered you at the beginning of the interview. Do you want me to repeat the explanation of that offer?
>
> [Only if noncitizen asks for the explanation to be repeated, please read again: The United States currently offers a parole process that allows nationals of certain countries and their immediate family members to come to the United States. That parole process provides a safe and orderly way for those nationals who lack sufficient U.S. entry documents to be considered, on a case-by-case basis, for advance authorization to travel and a temporary period of parole into the United States for up to 2 years. Participants in that process must have a supporter in the United States, pass certain security checks, and fly to an interior location in the United States. To seek participation in that process, however, you must be outside the United States. You may choose to depart the United States voluntarily a single time and still be eligible for the parole process. You are being given an opportunity now to withdraw your application for admission and return to Mexico so that you remain eligible for that parole process.]
>
> If you decide to withdraw your application for admission, I will not continue any longer with your credible fear interview today and DHS will process your case as a withdrawal of your application for admission. If you decide not to withdraw, I will continue with your interview and ask you questions to see if there is a reasonable possibility you would be persecuted or tortured in Mexico [and any other country designated for removal].
>
> Would you like to voluntarily withdraw your application for admission at this time so that you can return to Mexico and be eligible for the parole process I described to you earlier?

Voluntary Withdrawal Requested: If the noncitizen volunteers to withdraw their application for admission, complete and upload the CLP Presumption Worksheet along with the interview notes, and then administratively close the CF case in Global as "CHNV Voluntary Withdrawal."

Voluntary Withdrawal <u>Not</u> Requested: If noncitizen does not volunteer to withdraw, continue to Step 10.

[redacted]

Exhibit F

Subject ID: [redacted]

DEPARTMENT OF HOMELAND SECURITY

FINS [redacted] NOTIFICACIÓN DE DERECHOS Y SOLICITUD DE RESOLUCIÓN

Event No: [redacted]

Nombre: [redacted] Expediente No: [redacted]

AVISO DE DERECHOS Y NOTIFICACIONES

Usted ha sido arrestado(a) porque los oficiales de inmigración creen que usted está en los Estados Unidos ilegalmente. Usted tiene el derecho a una audiencia ante la corte de inmigración para que se determine si puede permanecer en los Estados Unidos. Si usted pide una audiencia ante un juez de inmigración, podría permanecer detenido(a) o podría ser elegible para salir de la detención, ya sea con o sin el pago de una fianza.

Usted tiene el derecho de contactar a un abogado de inmigración u otro representante legal para que lo represente en sus audiencias, o para que le conteste cualquier pregunta concerniente a sus derechos legales en los Estados Unidos. El oficial que le ha dado esta notificación le proveerá una lista de servicios legales que podrían representarlo(a) de gratis o a bajo costo. Usted tiene el derecho de comunicarse con los oficiales consulares o diplomáticos de su país. Usted puede utilizar el teléfono para llamar a un abogado, otro representante legal o al oficial consular en cualquier momento antes de su salida de los Estados Unidos.

Como alternativa, usted puede pedir que lo devuelvan a su país lo más pronto posible, sin una audiencia. Si elige regresar a su país, usted podría perder la oportunidad de solicitar ciertos beneficios de inmigración o formas de prevenir la remoción que solamente están disponibles para las personas presentes en los Estados Unidos. Si elige regresar a su país, usted puede cambiar de idea y pedir una audiencia ante un juez en la corte de inmigración en cualquier momento antes de su salida de los Estados Unidos. Usted debe notificar inmediatamente a un oficial de inmigración si cambia de idea.

Si usted ha estado en los Estados Unidos sin estatus legal por un año o más y elige regresar a su país, usted no podrá regresar a los Estados Unidos legalmente por diez años, a no ser que obtenga una dispensa. Si usted ha estado en los Estados Unidos sin estatus legal por más de 180 días pero por menos de un año y elige regresar a su país, usted no podrá regresar a los Estados Unidos legalmente por tres años, a no ser que obtenga una dispensa. Usted puede solicitar una dispensa solamente si tiene un cónyugue o un padre que es ciudadano o residente permanente legal de los Estados Unidos.

SOLICITUD DE RESOLUCIÓN

_____ Iniciales — Solicito una audiencia ante la corte de inmigración que resuelva si puedo o no permanecer en los Estados Unidos.

_____ Iniciales — Considero que estaría en peligro si regreso a mi país. Mi caso se trasladará a la corte de inmigración para la celebración de una audiencia.

[redacted] Iniciales — Admito que estoy ilegalmente en los Estados Unidos, y no considero que estaría en peligro si regreso a mi país. Renuncio a mi derecho a una audiencia ante la corte de inmigración. Deseo regresar a mi país en cuanto se pueda disponer mi salida. Entiendo que pudiera permanecer detenido hasta mi salida.

[redacted] Firma del Sujeto — 06/01/2023 Fecha

CERTIFICATION OF SERVICE

☐ Notice read by subject.

☒ Notice read to subject by [redacted], in the SPANISH language.

[redacted] Name of Immigration Officer (Print)

Name of Interpreter (Print)

Signature of Officer

June 01, 2023 06:13 PM Date and Time of Service

Exhibit G

DEPARTMENT OF HOMELAND SECURITY

Subject [redacted] NOTIFICACIÓN DE DERECHOS Y SOLICITUD DE RESOLUCIÓN

FINS #: [redacted] Event [redacted]

Nombre [redacted] Expediente No. A [redacted]

AVISO DE DERECHOS Y NOTIFICACIONES

Usted ha sido arrestado(a) porque los oficiales de inmigración creen que usted está en los Estados Unidos ilegalmente. Usted tiene el derecho a una audiencia ante la corte de inmigración para que se determine si puede permanecer en los Estados Unidos. Si usted pide una audiencia ante un juez de inmigración, podría permanecer detenido(a) o podría ser elegible para salir de la detención, ya sea con o sin el pago de una fianza.

Usted tiene el derecho de contactar a un abogado de inmigración u otro representante legal para que lo represente en sus audiencias, o para que le conteste cualquier pregunta concerniente a sus derechos legales en los Estados Unidos. El oficial que le ha dado esta notificación le proveerá una lista de servicios legales que podrían representarlo(a) de gratis o a bajo costo. Usted tiene el derecho de comunicarse con los oficiales consulares o diplomáticos de su país. Usted puede utilizar el teléfono para llamar a un abogado, otro representante legal o al oficial consular en cualquier momento antes de su salida de los Estados Unidos.

Como alternativa, usted puede pedir que lo devuelvan a su país lo más pronto posible, sin una audiencia. Si elige regresar a su país, usted podría perder la oportunidad de solicitar ciertos beneficios de inmigración o formas de prevenir la remoción que solamente están disponibles para las personas presentes en los Estados Unidos. Si elige regresar a su país, usted puede cambiar de idea y pedir una audiencia ante un juez en la corte de inmigración en cualquier momento antes de su salida de los Estados Unidos. Usted debe notificar inmediatamente a un oficial de inmigración si cambia de idea.

Si usted ha estado en los Estados Unidos sin estatus legal por un año o más y elige regresar a su país, usted no podrá regresar a los Estados Unidos legalmente por diez años, a no ser que obtenga una dispensa. Si usted ha estado en los Estados Unidos sin estatus legal por más de 180 días pero por menos de un año y elige regresar a su país, usted no podrá regresar a los Estados Unidos legalmente por tres años, a no ser que obtenga una dispensa. Usted puede solicitar una dispensa solamente si tiene un conyugue o un padre que es ciudadano o residente permanente legal de los Estados Unidos.

SOLICITUD DE RESOLUCIÓN

_____ Iniciales — Solicito una audiencia ante la corte de inmigración que resuelva si puedo o no permanecer en los Estados Unidos.

_____ Iniciales — Considero que estaría en peligro si regreso a mi país. Mi caso se trasladará a la corte de inmigración para la celebración de una audiencia.

[redacted] Iniciales — Admito que estoy ilegalmente en los Estados Unidos, y no considero que estaría en peligro si regreso a mi país. Renuncio a mi derecho a una audiencia ante la corte de inmigración. Deseo regresar a mi país en cuanto se pueda disponer mi salida. Entiendo que pudiera permanecer detenido hasta mi salida.

[redacted] 06/01/2023

Firma del Sujeto — Fecha

CERTIFICATION OF SERVICE

☐ Notice read by subject.

☑ Notice read to subject by [redacted], in the SPANISH language.

[redacted]

Name of Immigration Officer (Print)

Signature of Immigration Officer

Name of Interpreter (Print)

June 03, 2023 07:17 AM

Date and Time of Service

Exhibit H

1300 Pennsylvania Avenue NW
Washington, DC 20229

U.S. Customs and Border Protection

MAR 0 9 2015

MEMORANDUM FOR: Directors, Field Operations
Director, Preclearance Operations
Office of Field Operations

FROM: (b)(6)(b)(7)(C)
Acting Executive Director
Admissibility and Passenger Programs

SUBJECT: Withdrawal of Application Procedures at Ports of Entry

The purpose of this memorandum is to clarify the Withdrawal of Application for Admission procedures at Ports of Entry. According to the Immigration and Nationality Act (INA) Section 235(a)(4) and Title 8 Section 235.4 of the Code of Federal Regulations (CFR), an alien who is an applicant for admission may be permitted to withdraw his or her application for admission in lieu of removal proceedings.

Before a CBP officer allows an alien to withdraw his or her application for admission, the officer must ensure the alien has both the intent and the means to depart immediately from the United States. An alien cannot, as a matter of right, withdraw his or her application for admission. An officer must provide the alien with that benefit. Withdrawal is strictly voluntary and should not be coerced in any way. Further, withdrawal may only be considered as an alternative to removal proceedings when the alien is clearly inadmissible.

In light of the consequences associated with the issuance of an expedited removal order, including a five (5) year bar to re-entry, the decision of whether to extend the benefit of a withdrawal should be based on the consideration of relevant favorable and unfavorable factors in order to reach an equitable decision. Such factors might include, but are not limited to:

- The seriousness of the immigration violation;
- Previous findings of inadmissibility against the alien;
- Intent on the part of the alien to violate the law;
- Ability to easily overcome the ground of inadmissibility (i.e., lack of documents);
- Age or poor health of the alien; and,
- Humanitarian or public interest considerations.

In situations where there is (b)(7)(E) an expedited removal order should ordinarily be issued except in Preclearance where Expedited Removals or

Expedited Removal/Credible Fear cases are not authorized and aliens determined to be inadmissible to the U.S. are refused admission.

(b)(7)(E)

Please ensure that this memorandum is disseminated to all ports of entry within your jurisdiction. If you have any questions or require additional information, please contact (b)(6)(b)(7)(C), Branch Chief at (b)(6)(b)(7)(C) or (b)(6)(b)(7)(C), Director Enforcement Programs Division at (b)(6)(b)(7)(C).

Exhibit I

U.S. Department of Homeland Security

Notice and Order of Expedited Removal

DETERMINATION OF INADMISSIBILITY

Event No [redacted]

File No: [redacted]

Date: June 06, 2023

In the Matter of: [redacted]

Pursuant to section 235(b)(1) of the Immigration and Nationality Act (Act), (8 U.S.C. 1225(b)(1)), the Department of Homeland Security has determined that you are inadmissible to the United States under section(s) 212(a) ☐ (6)(C)(i); ☐ (6)(C)(ii); ☒ (7)(A)(i)(I); ☐ (7)(A)(i)(II); ☐ (7)(B)(i)(I); and/or ☐ (7)(B)(i)(II) of the Act, as amended, and therefore are subject to removal, in that:

1. You are not a citizen or national of the United States;

2. You are a native of GUATEMALA and a citizen of GUATEMALA ;

3. You are an immigrant not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document required by the Immigration and Nationality Act; on or about June 4, 2023, you illegally entered the United States at or near HIDALGO, TX and were not inspected by an Immigration Officer.

[redacted]

BORDER PATROL AGENT
Name and title of immigration officer (Print)

[redacted]
Signature of immigration officer

ORDER OF REMOVAL
UNDER SECTION 235(b)(1) OF THE ACT

Based upon the determination set forth above and evidence presented during inspection or examination pursuant to section 235 of the Act, and by the authority contained in section 235(b)(1) of the Act, you are found to be inadmissible as charged and ordered removed from the United States.

[redacted]

BORDER PATROL AGENT
Name and title of immigration officer (Print)

[redacted]
Signature of immigration officer

[redacted]

ACTING/PATROL AGENT IN CHARGE
Name and title of supervisor (Print)

[redacted]
Signature of supervisor, if available

☐ Check here if supervisory concurrence was obtained by telephone or other means (no supervisor on duty).

CERTIFICATE OF SERVICE

I personally served the original of this notice upon the above-named person on 06/06/2023
(Date)

[redacted]
Signature of immigration officer

Form I-860 (Rev. 08/01/07)

ACKNOWLEDGEMENT

I acknowledge receipt of this notification Refused to Sign

Signature of alien

**DECLARATION OF JAVIER HIDALGO,
THE REFUGEE AND IMMIGRANT CENTER FOR
EDUCATION AND LEGAL SERVICES (RAICES)**

I, Javier Hidalgo, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I make this declaration based on my personal knowledge except where I have indicated otherwise. If called as a witness, I could and would testify competently and truthfully to these matters.

2. I am a Legal Director at the Refugee and Immigrant Center for Education and Legal Services (RAICES). I joined RAICES in 2018 and have served in my current role since 2022. Before I assumed my current position I worked as a supervisor and previously, as a staff attorney. In my role as Legal Director, I work closely with Pre-Removal Services and oversee that program's work, which among other things serves people facing expedited removal from the United States.

3. RAICES is a 50l(c)(3) nonprofit, non-partisan organization headquartered in San Antonio, Texas. RAICES's mission is to defend the rights of immigrants and refugees; empower individuals, families, and communities of immigrants and refugees; and advocate for liberty and justice. This mission encompasses striving to ensure access to asylum and protection for noncitizens, including those arriving at the border and subject to expedited removal. RAICES provides free and low-cost immigration legal services to underserved immigrant children, families, and individuals. RAICES also conducts social services programming for immigrants, engages in advocacy work, and provides bond assistance to individuals seeking release from custody of the Department of Homeland Security (DHS). To execute our mission, we strive to serve as many noncitizens as possible through our various avenues of work.

4. As discussed in detail below, RAICES has and will continue to experience substantive harm under the Circumvention of Lawful Pathways Rule (the Rule) issued by DHS and the Department of Justice (DOJ). RAICES is also harmed by contemporaneous policy changes that have impacted expedited removal proceedings. These related policies include, but are not limited to: (a) the reduction of the consultation time before a credible fear interview (CFI) from 48 to 24 hours, a harm that particularly impacts RAICES' efforts to support people in expedited removal while in the custody of Customs and Border Protection (CBP); (b) the policy that allows DHS to carry out expedited removals of people who are not Mexican to Mexico; and (c) the policy of "voluntarily" returning people to Mexico in the expedited removal process even though those returns are often neither knowing nor voluntary.[1]

RAICES's Mission & Scope

5. Founded in 1986 as the Refugee Aid Project by community activists in South Texas, RAICES has grown to be the largest immigration legal services provider in Texas. With offices in Austin, Corpus Christi, Dallas, Fort Worth, Houston, and San Antonio, RAICES is a frontline organization that combines expertise developed from the daily practice of immigration law with a deep commitment to advocacy. Its staff includes nearly 300 people, including attorneys, legal assistants, social workers, advocates, and support staff.

6. Since RAICES's founding, its staff, volunteers, and pro bono attorneys have counseled and represented thousands of noncitizens throughout Texas. RAICES offers a wide array of legal services. That includes filing "affirmative" asylum applications, which can be submitted to U.S. Citizenship and Immigration Services (USCIS) by noncitizens who are

[1] RAICES and other plaintiffs have challenged other policies in this litigation, but because those claims are being held in abeyance, *see* ECF No. 30, they are not addressed in this declaration.

not in removal proceedings. It also includes representing noncitizens—including adults, children, and families—in regular removal proceedings under 8 U.S.C. § 1229a and in bond proceedings before the Executive Office for Immigration Review (EOIR), both in immigration court and before the Board of Immigration Appeals (BIA). In regular proceedings, which are defensive proceedings, we represent people seeking (among other forms of relief from removal) asylum, withholding of removal, and protection under the Convention Against Torture (CAT). RAICES's defensive legal representation also continues into the federal courts, where we represent clients before the United States Court of Appeals for the Fifth Circuit and the Supreme Court, where appropriate.

7. Importantly for this case, RAICES also provides services to numerous individuals in expedited removal proceedings, including those assessed for protection through the CFI screening process. The team that is most involved in our work serving individuals facing expedited removal is our Pre-Removal Services team, which represents detained individuals in the expedited removal process. That team currently consists of 5 attorneys, 5 legal assistants, 3 data clerks, and an administrative assistant. We currently operate hotlines specifically for individuals detained at South Texas Detention Center, in Pearsall, Texas; Laredo Detention Center in Laredo, Texas; and the Karnes County Immigration Processing Center in Karnes, Texas.

8. In addition to these hotlines, earlier this year we added our hotline number to a list distributed by EOIR to asylum seekers who are required to undergo their CFI while in CBP custody. We also post signup sheets in Immigration and Customs Enforcement (ICE) detention centers and receive referrals from both the family members of detained people and other nongovernmental organizations (NGOs).

9. From January 1, 2022 through September 15, 2023, the Pre-Removal Services team provided legal consultation or representation to 1,417 individuals in expedited removal proceedings. Since the Rule took effect on May 12, 2023, the Pre-Removal Services team has seen hundreds of clients and potential clients adversely affected by the Rule and the related policy changes.

The Rule Harms RAICES and Our Clients

10. The Rule and the other policies challenged in this suit have compromised RAICES's mission and forced us to divert resources from other services, clients and programs, and will continue to do so. Thus far, it has forced us to divert our limited resources to preparing the relevant teams to properly and ethically represent clients impacted by the Rule. We have had to devote internal resources to training staff to understand the Rule and related policies to advise clients how these changes impact their cases, and advocate for clients. We have also had to redirect staff resources: Pre-Removal staff has trained other RAICES employees, previously working on non-expedited-removal representation, to provide consultations to callers in CBP custody. Even with these reallocations of staff, we are not able to fully support people impacted by the Rule.

The Rule's Changes to the Credible Fear Process

11. The Rule has caused and will continue to cause significant disruption to our work on behalf of individuals facing expedited removal. Historically, CFIs have been conducted while people are in ICE custody. When CFIs were done exclusively in ICE custody, we were consistently able to schedule consultations—either in person or remote—with noncitizens identified through our hotline or referral systems *before* their CFIs (which must be conducted by Asylum Officers from USCIS). We have also been able to consistently consult with individuals

in ICE custody who receive a negative CFI and prepare them for an immigration judge review of that determination. We sometimes are able to attend these interviews and review hearings with clients, although RAICES attorneys have limited capacity to do so. In addition, we have been able, on a limited basis, to enter appearances to file requests for reconsideration with USCIS for individuals who have received negative credible fear determinations.

12. In our experience, RAICES's work providing consultations (and in some cases representation) is critically important at each step of the expedited removal process. In particular, our consultations advance our mission by helping people understand and prepare for the CFI process. People fleeing persecution have little knowledge of the U.S. immigration system and often find it difficult to speak of past traumatic experiences with agents of a foreign government, particularly when they are detained, when the interview takes place shortly after the frequently horrendous journey to this country, and when noncitizens have had minimal time to rest, recover, and prepare. Asylum seekers are also unaware of what specific information is most relevant to the CFI process and are at risk of omitting critical details because they do not know where to focus their answers in the limited time allotted them during a CFI.

13. The Rule makes this already difficult process much more so. It completely changes the content of a CFI, as well as the immigration judge's review. Now, we have had to spend additional time explaining the changes to people and preparing them to answer questions not only about their fear of persecution or torture in their home countries, but also about the Rule's eligibility conditions and exceptions, which are completely separate from that fear of persecution. The Rule introduces new elements to a CFI by requiring people to show that they satisfy one of its three asylum eligibility conditions or can prove one of the Rule's two limited

exceptions. As a result, RAICES staff must now engage in much more complex and cumbersome consultations and screening interviews.

14. For example, because the Rule requires people to seek an appointment using the CBP One phone application ("CBP One") or otherwise demonstrate that they should be exempt from that requirement, our staff must now figure out if applicants presented at a port of entry but without a CBP One appointment and ask detailed questions about a person's experience with the app. They also must elicit information about language or other barriers to using the app and gather information about the myriad technical failures that a person might have experienced trying to use CBP One. Of course, like most people, most asylum seekers have no technical background and so do not generally understand *why* the app may not have worked for them, making it more challenging to prepare people for their interviews on this topic.

15. Our staff must also elicit information about the Rule's other limited exception—whether the person faced "exceptionally compelling circumstances" such as an "imminent and extreme" threat to their life or safety that may have prevented them from waiting for an appointment. Analyzing whether someone could qualify for an exception requires gathering detailed facts about any harm that the person might have experienced in Mexico and the timing and immediacy of those dangers; gathering facts about medical emergencies or conditions they or a family member may have faced on the way to the border; and screening for potential past incidents where they may have been victim to a form of human trafficking.

16. Many of the asylum seekers we advise have experienced violence and exploitation in Mexico and so these inquiries take a good deal of time, analysis, and trauma-informed services. In fact, helping noncitizens prepare to articulate their "exceptionally compelling circumstances" is in some ways similar to helping them articulate their underlying

claims for protection from harm in their home country. But because the terms of that exception are totally different from eligibility for asylum or other forms of relief, our staff effectively needs to undertake this sensitive and complex process of consultation and preparation for two separate sets of facts.

17. Moreover, the standard that is applied to these questions about the new asylum bar in a CFI is now higher under the Rule, and in many cases, impossible to meet. For people who are seeking to avoid the bar imposed by the Rule, they do not get the benefit of the significant possibility standard as they should. First, instead of determining if a person could rebut the presumption in full removal proceedings, the officer assesses that question on its merits: Did the person meet an exception to the Rule? Then, for people who are subjected to the Rule, to be permitted to present their claims on the merits, they must overcome the "reasonable possibility" standard, which has traditionally been applied in the reinstatement of removal context, and which is higher than the significant possibility standard. For RAICES, the Rule's changes require us to make consultations more detailed, careful, and time-intensive. That is true because we understand people will be forced to prove, for example, "exceptionally compelling circumstances" instead of a *significant possibility* of later demonstrating "exceptionally compelling circumstances" and they will be required to demonstrate their substantive claims to protection under the higher reasonable possibility standard.

18. In addition to these new substantive complexities, as explained below, the timeline for us to do all of this much more complicated work is now very condensed. As discussed below, CFIs and immigration judge reviews are also happening more quickly, RAICES staff typically only have one phone call with an asylum seeker to cover this more complex set of information. This leads to not being able to prepare asylum seekers as thoroughly

for their CFIs and immigration judge reviews and can also lead to having to spend additional time on the phone with each asylum seeker.

19. Finally, it is important to note just how broadly this Rule is impacting RAICES and our clients. In our experience, the Rule leads to *many* more people receiving negative credible fear findings. In turn, that means that RAICES must prepare many more individuals for immigration judge review. These changes have significantly impeded our efforts to serve recently arrived noncitizens as explained more fully below.

Contemporaneous and Related Changes to the Expedited Removal Process

20. In addition to the Rule itself, other related policy changes have altered the expedited removal process in ways that have significantly impaired our ability to access noncitizens and have frustrated our efforts to assist these people in the process.

21. In particular, DHS has shifted to giving individuals in CBP custody only 24 hours for consultation, instead of 48 hours. As described in more detail below, that has upended our ability to connect with clients before their CFIs.

22. DHS has also begun carrying out expedited removals of nationals from certain third countries to Mexico and to first offer those same individuals the option to accept "voluntary return" to Mexico. As elaborated below, these changes have also made our consultations much more complex and time-consuming.

A. 24-Hour Consultation Period for CFIs in CBP Custody

23. One of the new changes, as noted above, is a shortening of the period people have to consult with an attorney or other person before their CFI. That consultation is vitally important for all the reasons explained above. Under this new policy, people are guaranteed only 24 hours to consult after they are given the initial information about the CFI process (including a list of

legal service providers, which lists RAICES as one of just a few options). There are numerous reasons why holding CFIs in CBP custody after a reduced 24-hour consultation period disrupts our critical work.

24. First, the limitations on communication with the outside world are much more severe in CBP custody than ICE custody, which makes 24 hours a virtually impossible time frame for consultations. Unlike in ICE facilities, NGOs cannot enter CBP facilities, which means we cannot post signup sheets there or receive referrals from other legal service providers because none operate inside CBP facilities.

25. Additionally, unlike in ICE facilities, we are also unable to schedule specific times for calls with people who are in CBP custody; instead, noncitizens must call us on our hotline. And noncitizens are not permitted free access to a phone; instead, they are provided limited windows in which they may contact us, often outside of normal business hours, meaning that unfortunately people often cannot reach us or other providers. We have been able to schedule follow-up calls with only a limited number of individuals in CBP custody, and even when we can it is a time-intensive, cumbersome, and impractical process.

26. Second, CBP facilities are not set up to hold people who have counsel or may be trying to access attorneys. We can email requests for signatures on forms like attorney appearances (form G-28) and follow-up calls to each CBP sector. Often, however, CBP does not respond quickly enough for RAICES attorneys to be able to properly represent an individual. RAICES staff often must send many follow-up emails to eventually get a response. When our lawyers attempt to ensure access to follow-up calls by entering a notice of appearance, this often does not work. There do not seem to be protocols in place to allow or facilitate noncitizens' ability to return phone calls or send us signed forms. In addition, in our experience some people

in CBP custody have not even been given access to a pen and paper, which means that even if they do reach us, they cannot take notes about their interview or how to arrange to call us back for follow up.

27. Third, referrals from family members also are of little help for those in CBP custody because it is functionally impossible to track a person's whereabouts when in CBP custody, so we do not know where a referred person is located. Unlike with ICE custody, there is no "online detainee locator" for people in CBP custody. Moreover, the transfers and CFI process in CBP custody happen so quickly that people do not have time to even learn that DHS has assigned them a critically important "Alien Registration Number" (A number), memorize it, and communicate it to us or their families in the highly limited opportunities they have to make phone calls. The result is that we often have literally nothing to work with when attempting to locate clients, other than their names. The best we can do is ask families to do their best to pass our hotline number on to their family member seeking legal help from CBP custody and hope they are able to access a legal visitation call prior to their CFI.

28. The reduction of the pre-CFI consultation time to as little as 24 hours significantly exacerbates these problems. These restrictions mean that people simply do not have enough time to reach us before their CFI.

29. Because we are seeing many people only after they have already received a negative CFI, we are limited to helping the individual prepare for immigration judge review.

30. Our routine inability to provide consultations is a significant problem. RAICES is one of just a few organizations that offers CFI consultations to people in CBP custody, and yet the timeline makes that extremely difficult and impracticable. And without access to our services, the right to a consultation prior to the CFI is illusory at best for many asylum seekers.

31. Because of the shortened timeframe for CFI consultations and the general expedited removal process in CBP custody, we had to overhaul our processes in order to handle an increased number of calls coming into our hotline from CBP, as it is our only means of communicating with this group of asylum seekers preparing for a CFI interview. Previously, we would accept hotline calls from individuals in ICE custody based on our capacity and then schedule follow-up calls or visits. This system worked because we knew people could try reaching us several times over the course of a few days, and that if we were unable to answer those calls immediately people could leave a message that we could return by setting up a call with them in ICE detention. Now, however, we have had to shift our hotline staffing and operations to handle a significant number of calls coming from individuals in CBP custody. The super-expedited nature of CFIs in CBP has required us to make this shift: because noncitizens in this space will only have 24 hours of consultation before their CFI (and a similarly short window for immigration judge review), if we do not focus our resources in this way to catch as many calls as possible, we will never be able to communicate with people in this posture at all.

32. And even with these shifts, we continue to face significant hurdles. If we do not answer a call on the spot, at times the CBP agents decline to leave voicemails and do not provide any information about the people trying to reach us. Without any information about the client, we cannot call back or set up a consultation call, and because of the shortened 24-hour time frame, we cannot track people down before their interviews happen. Even when we do receive a voicemail with client information, it is impossible with the current constraints on our capacity to try and get a scheduled follow-up call with individuals for whom we do not have a signed G-28. We often receive voicemails with timestamps well before and after normal business hours,

meaning individuals given access to phone calls at these times have no real chance of securing legal consultation or representation prior to their CFI.

33. Essentially, our staff must strive to immediately answer every call to our hotline because that is our sole means of advising asylum seekers in CBP custody in advance of CFIs. This has required us to devote a dramatically increased amount of staff time—including the time of staff from other parts of RAICES who do not generally conduct in-depth orientations and instead focus on longer-term representation in immigration court—to ensure that we can answer and respond to hotline calls. Staff who are trained to take these CBP calls take, on an ad hoc basis, as many calls as possible between scheduled meetings with clients in ICE custody, court dates, and other work duties.

34. Responding to this stream of calls, each of which is incredibly urgent because of the 24-hour consultation window, diverts resources from potential clients in ICE custody that RAICES staff would have otherwise had time and capacity to assist. That frustrates our ability to advance our mission in providing services to other noncitizens facing removal, such as those in regular proceedings and held in ICE custody.

35. And despite the expenditure of significant extra resources diverted from our work with clients in ICE custody, we still lack capacity to answer many calls and many people are unable to call us before their CFIs in any event. Thus, we are frequently unable to assist clients before their CFIs, which is a critical part of our service mission for individuals subject to expedited removal. The reduced, 24-hour consultation period means that we will miss many potential clients entirely and will never know that they were in CBP custody or that they had a CFI.

36. Further, although we try (in addition to providing consultations) to represent as many people as we can at their CFIs, we have been able to do so for only one or two individuals in CBP custody among the hundreds who have contacted us and are subject to the Rule. That is both because our resources are stretched so thin by the need to answer hotline calls, and also because the speed of interviews makes it practically impossible to arrange to appear at a CFI. Prior to the policies at issue in this case, RAICES staff simply had more time to meet with and prepare clients and to coordinate with the asylum office to be present at interviews. This lack of access means more noncitizens are going to their CFIs both unprepared and unrepresented. These factors, particularly when coupled with the new hurdles imposed by the Rule, make it much harder for individuals to receive a positive credible fear determination.

37. Because of these changes, our work has heavily shifted to helping people prepare for immigration court review *after* they have a CFI denial from an asylum officer. But that hurts noncitizens by depriving them of a fair chance to prepare for *both* stages, if necessary. And many of the same barriers that exist in pre-CFI representation exist for clients at this stage, and in our experience our ability to intervene and achieve a positive outcome is limited once an asylum officer has already found no credible fear.

38. Submitting an appearance for the immigration judge review is difficult because hearing dates are scheduled and completed in an extremely tight timeline. Typically, hearing dates are scheduled and completed within 24 to 48 hours of an individual receiving notice of a negative CFI determination. This makes it difficult to plan, within our limited capacity, for attorney representation with such little notice. Simply put, the compression at the front end of the expedited removal process to just one day for the pre-CFI consultation period has forced us to

engage in much more work at the end of that process where our ability to provide meaningful assistance and consultation to noncitizens is diminished.

B. Removals and "Voluntary" Returns of Third Country Nationals to Mexico

39. Due to other policy changes, our staff must also now focus on preparing some clients—whether in CBP or ICE custody—regarding the possibility of being removed or asked to accept "voluntary" return as to Mexico. That is because individuals from Cuba, Haiti, Nicaragua, and Venezuela may have to present fear claims as to their home countries *as well as* or even *instead of* Mexico.

40. For individuals from Cuba, Haiti, Nicaragua, and Venezuela, CBP is designating their country of deportation to Mexico instead of their home country, meaning, that if they overcome the presumption against their claim, they will be asked about their fear of returning to their home country. If they do not, they will only be screened for fear of returning to their country of deportation, namely, Mexico. We must help clients understand this distinction and prepare them for both possible outcomes. These consultations are longer and more complex.

41. Eliciting information about persecution is time-consuming and sensitive, as it frequently requires us to walk the client through recent, highly traumatic events—a process that requires time to build rapport with clients to make them feel safe disclosing these difficult events. And for this population, we must now go through this process for two different countries, in addition to preparing them for questions about the Rule itself and its exceptions as discussed above. In addition, for many of these individuals, our staff must explain what the "voluntary return" policy means for them and their case. All of these further considerations only add to the length of these consultations.

42. As discussed below, the combination of these changes, which have now been in place for several months, are frustrating and having a detrimental impact on staff morale, in addition to diverting away time and resources from other services and programs.

Additional Harms Flowing from Expedited Removal Changes

43. The Rule and associated changes have impacted RAICES's work in the expedited removal process and have impacted our ability to fulfill our mission, while impacting our resources and other aspects of our work.

44. First, the additional complexities mentioned above mean that our hotline calls now take much longer than they did before, reducing the number hotline callers we can serve and increasing the number of potential clients with whom we can never speak at all. That is true even though we have scaled up the staff resources we commit, including some of our removal defense attorneys' time, to the hotline.

45. Second, because the impact of the reduced consultation period is felt nearly exclusively by people undergoing CFIs in CBP custody, we have had to focus heavily on providing assistance with CFIs to people in CBP custody. That has required us to divert resources away from our existing program that provides assistance for people facing expedited removal in ICE custody. And because the process we need to engage in to undertake CFI preparation varies so much depending on whether a person is in CBP or ICE custody, we have effectively been forced to split our previous, unified contact-and-consultation process into two different processes. The extensive time we must spend on hotline calls with people held by CBP given the urgent, 24-hour timing, directly detracts from our ability to take hotline calls from people detained by ICE.

46. Both the Rule itself and the associated changes have required staff to spend less time on other aspects of their work.

47. In addition to all of these harms, the Rule also has a broader impact on our overarching asylum work. Nearly all of RAICES's clients enter the United States via the U.S.-Mexico land border, 99% of them are from countries other than Mexico, and many of them entered outside of ports of entry. In addition to these factors, none of RAICES's clients—like most asylum seekers—have been able to seek lasting protection in Mexico or another transit country.

48. Given all of these factors, many of the clients who we would have helped to seek asylum are no longer eligible for that relief under the Rule. Rather, they must focus on securing withholding of removal and relief under the CAT, both of which impose higher evidentiary standards than asylum and therefore require more evidence and more staff time.

49. Whether it is for a CFI or an immigration judge review, our staff must spend time preparing arguments that our clients meet an exception to the asylum bar—and must have an asylum case prepared in case the adjudicator agrees.

50. In addition to the substantive additional time that doing all of this extra work entails, we have also been forced to divert resources in order to reshape our training materials, both for our own staff and for *pro bono* attorneys and other volunteers.

51. Everything described above is taking a serious toll on RAICES's staff. The new credible fear procedures mean that our staff are in a constant fire drill. Legal assistants anxiously monitor the hotline to make sure we never miss a call, as it could be our only chance to speak with someone before they are rushed through a CFI and deported, potentially to a place where they face persecution or torture. Our hotline is also where the Asylum Office can reach us to

participate in CFIs. Should we miss an unexpected call, that noncitizen may have to go forward with an interview without preparation or the opportunity to seek representation. The unpredictability of the calls has placed intense stress on our processes and infrastructure.

52. When we do receive calls—and they often come in bursts—our attorneys must immediately drop all their other work and do their best to talk a client through all of the Rule's convoluted exceptions, as well as withholding and CAT claims (sometimes for Mexico as well as their home country), on the spot. Staff must also spend a great deal of time trying to track down clients who previously called and determine if, and when, those clients have further hearings scheduled. It is difficult to plan for capacity under these constraints and unknowns. Our staff are already suffering from burnout due to the chaotic, frenetic pace.

Conclusion

53. Overall, RAICES has been harmed by the Rule and the related changes because, together and independently, they severely restrict our ability to effectively serve people who are facing expedited removal and denial of protection. These policies are unrealistic and dangerous, and send the message that the United States is not welcoming of asylum seekers. All of these changes are fundamentally contrary to our organization's mission and vision, and they are devastating RAICES's ability to serve asylum seekers, particularly those facing expedited removal.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Javier Hidalgo

Executed on the 27th day of Sept., 2023, in San Antonio, TX.

DECLARATION OF JENNIFER BABAIE
LAS AMERICAS IMMIGRANT ADVOCACY CENTER

I, Jennifer Babaie, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I make this declaration based on my personal knowledge except where I have indicated otherwise. If called as a witness, I could and would testify competently and truthfully.

2. I am an attorney licensed to practice law in California and focused on immigration practice. Since January 2023, I have been the Advocacy and Legal Services Director at Las Americas Immigrant Advocacy Center (Las Americas). Prior to joining Las Americas, I worked in various related positions. Starting in 2018, I worked as a supervising attorney and program director at the International Refugee Assistance Project, where I represented refugees, asylum seekers, and others seeking humanitarian assistance and family reunification, and I ran a cross-border program focused on providing direct legal services to persons in Ciudad Juarez seeking access to safety and family reunification in the United States.

3. Las Americas is a nonprofit legal services organization based in El Paso, Texas. Our mission is to provide high-quality legal services to low-income immigrants, and to advocate for human rights. We provide immigration counseling and representation to immigrants seeking asylum and those detained by the U.S. government in and around West Texas, New Mexico, and Ciudad Juarez, Mexico, including by representing individuals facing expedited removal who are undergoing Credible Fear Interviews (CFIs). We also represent people subject to reinstatement of a prior removal order in Reasonable Fear Interviews (RFIs). Our goal is to ensure that individuals have a fair opportunity to establish their eligibility for protection and are not wrongfully removed to persecution or torture.

4. I am writing to address the substantive harm that Las Americas has experienced and will continue to experience because of a new rule issued by the Department of Justice (DOJ)

and the Department of Homeland Security (DHS) entitled Circumvention of Lawful Pathways ("the Rule"). The Rule imposes new bars to asylum eligibility, and it applies both to people facing "regular" removal proceedings and to people facing expedited removal who must undergo a CFI. The Rule has various provisions, but in practice, it requires any asylum seeker at the southern border to present themselves at a port of entry, and only after obtaining an appointment through a smartphone app called "CBP One." People who enter outside of a port of entry or at the port but without an appointment are presumed ineligible for asylum. As discussed below, CBP One is a complex, error-prone, smart phone application. Helping asylum seekers try to comply with the Rule's requirement to use it has caused considerable harm to our work, and it has required us to spend significant amounts of time working to counteract that harm.

5. I also address harms caused by related and contemporaneous policy changes that impact the implementation of expedited removal following the expiration of Title 42, the public health measures that were used to justify closure of the U.S. border to individuals seeking protection. I address harms relating to (a) the decision to conduct CFIs while people are detained by Customs and Border Protection (CBP) shortly after their arrival in detention, with only 24 hours to consult an attorney; (b) the decision to use expedited removal to systematically deport people who are not Mexican to Mexico, and (c) the use of purportedly "voluntary" returns to Mexico for individuals who are not Mexican and who are not returning voluntarily.[1]

Las Americas' Mission & Programs

6. Las Americas has served people in our community from over 80 countries since 1987. We are dedicated to serving the legal needs of low-income noncitizens and asylum seekers

[1] Las Americas and other plaintiffs have challenged other policies in this litigation, but because those claims are being held in abeyance, *see* ECF No. 30, they are not addressed in this declaration.

in West Texas, New Mexico, and Ciudad Juarez, Mexico. We assist individuals pursuing entry to the United States by providing targeted legal information, advice, and translation and referral support, in order to help these individuals preserve eligibility for asylum. We also provide legal information presentations centered on clarifying the purpose and consequences of documents received upon crossing the border.

7. Our goal in all of our work with asylum seekers is to ensure that everyone has a fair opportunity to establish their eligibility for protection and that they are not wrongfully removed to persecution or torture. It is absolutely essential to our vision that all asylum seekers have a meaningful chance to fully develop and present their claims. To advance this mission, our goal is to serve as many asylum seekers as possible with our limited resources.

8. We are one of the only organizations providing *pro bono* representation to immigrants, asylum seekers, and other persons migrating or in removal proceedings in the West Texas, New Mexico, and Ciudad Juarez area. We receive a significant number of referrals and play a critical role in the community. Whenever we are suddenly forced to significantly limit or change our services, which has been necessary in order to respond to the Rule and the related changes, it has a palpable impact on these migrant communities and our ability to serve them.

9. Las Americas' total budget in the fiscal year ending 2022 was about $1.7 million. The grants we receive make up approximately 78% of our budget, and some of them have requirements regarding the number of people we serve. For example, one grant requires that we accept about 75 referrals a year. Thus far, we have not been able to meet that quota and are concerned that our future funding could be cut if we cannot meet that requirement. Low bono client fees and other individual contributions make up the remainder of our income sources, but

all of our detention related services, including CFI and RFI services, and our services in Mexico are provided at no cost to the individual.

10. Las Americas' United States staff consists of 14 people, including attorneys, accredited representatives, and paralegals. Two additional staff work in Mexico. We have several programmatic areas; the most relevant to the Rule and related policies are detailed here.

11. Las Americas' asylum work straddles the U.S.-Mexico border. We assist individuals and families who have entered the United States, as well as people who are or have been stranded in Mexico due to U.S. policies, including the so-called Migrant Protection Protocols (MPP or "Remain in Mexico" program), Title 42, and now the Rule.

12. Our Detained Program serves migrants in the El Paso Processing Center, Otero Service Center, and the Torrance and Cibola detention facilities, in New Mexico. The heart of our Detained Program is helping individuals in expedited removal proceedings through the credible fear process and then seeking their release from detention. We provide consultations in advance of the CFI and full representation in CFIs on a limited basis where our capacity permits. However, the Rule and related new policies, including the short, 24-hour notice period before an interview, have significantly impeded this service. Due to the overwhelming need for our CFI-related services, we recently added a legal fellow who is focused on these services, and we have partnered with the CUNY School of Law to provide remote CFI preparations and to expand capacity to support representation in CFIs and immigration judge (IJ) review.

13. For individuals who are able to clear the CFI hurdle, our detained team helps with subsequent stages of the immigration process when capacity allows, including asylum applications, evidence gathering, appeals, bond and parole requests, mental health screenings, competency evaluations, and more. Where resources allow, we provide these services as part of

full representation in immigration court and before the Board of Immigration Appeals. In other cases, we offer these services as *pro se* assistance. For *pro se* individuals, we also provide assistance with document preparation and translation.

14. In early 2019, Las Americas created the Las Americas Mexico Program (LAMX). LAMX was created as a temporary measure to assist noncitizens who were subject to MPP and thus required to wait in Mexico for their asylum cases to be considered. As U.S. immigration policy has changed, we have adapted LAMX's services and formalized LAMX as an incorporated entity in Mexico. While Title 42 was in place and preventing asylum seekers from presenting at the ports to request asylum, we helped people seeking exemptions to that policy as well as parole. Now, LAMX provides *pro se* asylum support and Know Your Rights presentations in shelters and other community spaces. In these presentations, we teach people about the CFI process, advise them about what to expect in the expedited removal process, and field questions from people who are trying to understand how to navigate this process.

15. In 2022, Las Americas served over 4,200 people. We secured Title 42 exemptions for approximately 3,250 people and helped them get paroled into the United States. We also served nearly 400 individuals in Immigration and Customs Enforcement (ICE) custody. This work occurred alongside our casework on behalf of people seeking immigration benefits from USCIS or the immigration courts. Across programs, we opened over 700 new cases last year. More than half of the clients that Las Americas serves are asylum seekers, and at present, we have about 100 open cases in our Detained Program.[2] Additionally, we serve hundreds of people each month with Know Your Rights presentations in shelters, both in El Paso and in Mexico.

[2] We collected information for 2022 calendar year data on May 5, 2023. Please note that due to the tight capacity of the organization and the general difficulty of allocating sufficient resources

16. Since before the implementation of the Rule and related changes, Las Americas has been focused on helping people prepare for CFIs on both sides of the U.S.-Mexico border. Because of the Rule and related changes, however, that work is immensely more complex and time consuming. For example, our team in Mexico must now educate people on ways in which the Rule impedes access to asylum, explain the legal significance of getting an appointment using CBP One, and help people undertake that process or prepare for the potential consequences if they decide to enter the United States outside of a port or without an appointment. From May 12, 2023, to September 20, 2023, LAMX has assisted more than 1,000 people in this manner.

17. In addition to this work helping people prepare for the expedited removal process on the front end, we have also worked with many people who were deported or "voluntarily" returned to Mexico even though they are not Mexican nationals. We are continuously working to develop systems to serve these individuals, as discussed in greater detail below.

The Rule Harms Las Americas' Clients and General Operations

18. The Rule challenged in this suit has caused and will continue to cause harm to Las Americas' mission. In particular, the Rule has forced us to divert limited resources away from individual representation to continue to meet the most urgent needs of the community—which currently means aiding people attempting to navigate the CFI process.

19. In addition, because our mission is premised on ensuring access to asylum for people who are coming to the United States, the Rule fundamentally frustrates our organization's purpose by cutting off the right to seek asylum in the United States for huge numbers of people based on factors unrelated to a person's need for protection.

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to administrative and technological support, all data reported should be taken as estimates reflecting current case data to the best of my knowledge.

The Rule's Reliance on CBP One

20. As noted above, the Rule requires people to make an appointment using CBP One to preserve the right to seek asylum at the border. The harms imposed by this requirement impair the operations of Las Americas before an asylum seeker ever reaches the United States.

21. First, the CBP One requirement has caused a dramatic diversion of resources in our Mexico office. While we have consistently provided Know Your Rights assistance in Mexico, that work has existed alongside direct legal representation. Now, many of those resources are diverted to explaining the Rule, addressing the CBP One requirement, and helping people to understand the new procedural hurdles that they face. In our experience, asylum seekers prefer to come to the United States in a lawful manner. Historically, this has meant that we worked with people who would wait in Mexico for an opportunity to present at the port of entry even though their lives were in danger. Now that the Rule requires using CBP One, we have received hundreds of requests for assistance with the app. Our staff in Mexico now primarily provide assistance with using the app, education as to the purpose of scheduling an appointment with the app, and guidance as to consequences for entering without an appointment. While we have continued to flag highly vulnerable cases directly with CBP in an attempt to seek humanitarian protection for them, our capacity to do so is limited by the amount of time we must spend helping those trying understand the Rule's CBP One requirement.

22. We have also had to divert resources to overhaul the content of the legal presentations we provide to people preparing to enter the United States. Historically, we have focused our presentations on clarifying the purpose and consequences of documents received upon crossing the border, educating people about what to expect from expedited removal, and

preparing for the credible fear process. We have also historically acted as a referral partner whenever clients indicate a need for housing or other psycho-social support in Ciudad Juarez.

23. With the advent of the Rule, this work has become immensely more complex. On top of having to change our work to educate people about the substantive changes to asylum imposed by the Rule (discussed below), we now spend a great deal of time providing direct assistance to people unable to navigate CBP One on their own.

24. Because the app is riddled with technical issues and difficult to use in general, our work in this arena is in incredibly high demand. As mentioned above, in the last four months, we have assisted more than 1,000 individuals in Mexico with the process of understanding the Rule and the CBP One requirement.

25. Simply put, the Rule's requirement that people use the app to preserve asylum eligibility has forced Las Americas to spend resources helping people use the app rather than putting those resources toward its mission of assisting asylum seekers with CFIs, reviews of negative determinations, and representation in immigration court.

The Rule's Changes to the Credible Fear System

26. In addition, the Rule and associate changes have impaired and will continue to impair our work helping individuals who are seeking asylum and subject to the credible fear process. To serve this population, we have had to divert resources to overhauling our educational materials, and the substantive consultations we now must perform are completely different.

27. Specifically, we must explain what the Rule requires, and for anyone who might be subject to it, what they must do to try to overcome it. Helping people prepare to demonstrate an exception to the Rule requires gathering information that is not relevant to an asylum claim.

28. For instance, for some people, we have to help them show how they were not able to access the app "due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle." To do so, we have to ask detailed questions about the clients' use or attempted use of the CBP One app. We have to try to figure out what kind of phone they have and whether it could run the app. We have also had to ask detailed questions about their attempts to book an appointment and what happened each time they tried.

29. Las Americas staff must also inquire about whether the individual faced an "imminent and extreme" threat to their life or safety that prevented them from waiting in Mexico until they could get a CBP One appointment. To determine whether they qualify for that exception, staff must ask about what happened to people in Mexico. Many of our clients have experienced violence and threats in Mexico that make it unsafe for them. Due to the limited and ambiguous nature of this exception, however, staff must spend additional time learning about how the exception is applied in order to properly advise individuals who seek to invoke it.

30. In addition, the Rule now imposes a higher standard that people must overcome in order to obtain the right to seek asylum. It does so in two ways. First, it requires people to prove that they in fact *have* satisfied one of the Rule's exceptions, whereas before, people would pass a CFI if they proved a *significant possibility* that they could establish their eligibility for asylum.

31. Second, people who are not exempt from the Rule—the majority of people—will have to show that they have a reasonable possibility of persecution or torture and not a significant possibility. Because Las Americas has a history of doing both credible fear and reasonable fear work, we have firsthand exposure to the fact that the reasonable fear standard (which is primarily used in the reinstatement context) represents a notably higher standard. To address that reality, we must spend additional time trying to help people meet a higher burden.

32. These changes make many fewer applicants eligible for asylum and makes our consultations more emotionally complex. Now, we have to prepare people for a realistic chance that they will not be permitted to seek asylum, and that they face removal if they cannot overcome the higher standard.

33. These changes have injured our operations because our procedures for educating people on how to proceed through this system are more complicated and time consuming. We must prepare people for multiple potential scenarios and outcomes. Since the Rule took effect, the duration of our CFI screening consultations has significantly increased, and it has become difficult for us to conduct such screening conversations in less than 90 minutes.

34. Moreover, the fact CFIs now occur both in ICE and CBP custody means that we have had to create two different workflows. For people in ICE custody, we continue to provide consultations prior to the CFI itself. But for individuals in CBP custody, both the fact that they are in CBP custody and the reduced consultation window means that we cannot reach them after their entry but prior to their CFI. Instead, we must try to assist them in Mexico, *before* they even enter the United States. This issue is discussed in detail below.

35. Because of these complexities, it is harder for us to serve as many people, which undermines our mission and complicates our ability to run a sustainable legal department.

36. In addition to making CFI preparation harder and more time-consuming, the Rule has increased demand for Las Americas' representation for people who have failed their CFIs and need IJ review and requests for review by USCIS. But, but our capacity to provide this representation is diminished because we must spend so much of our time and resources providing pre-CFI support. Previously, the need to provide this post CFI-work was a more modest because many clients received a positive result from the CFI.

The Rule's Cascading Impact Beyond the Credible Fear Interview

39. In response to the Rule's heightened burdens and convoluted processes that impede access to asylum at our southern border, it is fair to say that *all* of Las Americas' work has been forced to change.

40. Las Americas has already diverted, and will continue to be forced to divert, significant resources to understanding the new Rule and its impact on the communities we serve, training staff and volunteers, and advising our clients, prospective clients, and immigration communities. In addition, we will need to continue to spend resources developing educational materials, including internal training materials, external trainings, and *pro se* materials designed to help the impacted communities. We also need to reroute resources towards helping our non-legal partners on both sides of the border have a better understanding of access to asylum in the United States, so that they are able to appropriately direct individuals for referrals.

41. As a concrete example of this diversion, because of the Rule, we have frequently had to send U.S.-based staff to Mexico to help intending asylum seekers understand the Rule and navigate the CFI process, and to train partners in Ciudad Juarez on the Rule and appropriate usages of CBP One. For our ICE-based CFI work, we have also been able to attend fewer CFI interviews because the interviews themselves have taken significantly longer and occur seven days a week, making it close to impossible to guarantee representation during the interview. The same is true for our consultations. We are able to consult with fewer people because the process of explaining the Rule and its consequences takes additional time.

42. As a result of these changes, we have been forced to significantly reduce the number of individuals we can assist in their efforts to obtain lasting protection or relief. For example, we now have fewer resources to help people who have cleared the CFI hurdle with the

next step of completing their asylum applications. And recently, DHS has changed the application process for work authorization, but we are forced to choose between trying to help some people navigate the Rule over helping other people secure this more lasting benefit. We have also had to reduce the number of individuals we can represent who remain in immigration custody and who are in need of full representation. While resource limitations have always existed for Las Americas, the Rule has brought that strain to a new breaking point.

43. For the cases that we are able to take on in regular removal proceedings, if they are subject to the Rule, we will have to expend significantly more resources on representing them in immigration court as well. That is true for various reasons. First, because the Rule applies in removal proceedings, we will have to continue to argue that people should be exempt from it. But in addition, we will have to prepare these cases as applications for withholding of removal and under the Convention Against Torture (CAT), which are subject to more difficult standards. Unlike asylum claims, applications for withholding and CAT do not allow a principal applicant to petition for derivative applicants, and the Rule's presumption of ineligibility for asylum may be lifted only if derivative family members have no claim to relief of their own. This means that, to ensure the safety of our clients and their families, Las Americas will have to file and prepare additional applications for clients who could have previously received protections as derivatives on a parent or spouse's case. Over time, we expect these cases to require markedly more resources than asylum cases not subject to the Rule. Such additional resources will likely include, for example, significant attorney time, separate and additional expert testimony, and separate and additional counseling to prepare for testimony that would not otherwise be required.

Contemporaneous and Related Changes to the CFI Process

44. Related changes that impact the implementation of the Rule have also made it significantly more difficult to further our mission and assist our clients.

45. First, DHS has started holding CFIs while individuals are in CBP custody and ensuring only 24 hours of consultation time before the CFI. This change has dramatically affected our ability to provide consultations to people who are preparing for their CFIs.

46. As mentioned above, CFI consultations and representation are central to Las Americas' detained legal services. While we continue to provide this service, there is now an entire population of people—those in CBP custody—that we cannot reliably help. That is true because access to individuals in CBP custody is virtually impossible, particularly on an expedited timeline. We are not allowed to enter CBP facilities nor do we have direct access to people detained there via telephone. Even if a family member contacts us about a loved one in CBP custody, we are unable to make arrangements to communicate with them.

47. The 24-hour timeline for trying to communicate with people in CBP custody exacerbates the communication problem. Because people detained in those facilities will have their CFIs so quickly, it is not possible for us to provide a CFI consultation before the interview actually occurs, forcing us to make the difficult decision to move forward with CFI legal services nearly exclusively for individuals in ICE custody.

48. And while people in CBP custody may be able to make a limited number of outbound calls, the only numbers that they see are for organizations who have been able to set up hotlines specifically for CBP custody. Because we do not have the capacity to operate such a hotline, asylum seekers in CBP custody likely do not have any way to contact us before their CFIs or even after the interview if the result was negative and they wish to challenge it.

49. As mentioned above, our limited ability to help people in CBP custody before they actually have a CFI has forced us to move some of our CFI consultation work to Mexico. There, we try to predict who is most likely to wind up in CBP custody (as opposed to ICE custody, where we are continuing to provide CFI consultations) to give them information about the process before they enter. Even when we try to help people prepare for CFIs while in Mexico and even when we agree to represent them in their CFIs, we are often unable to do so because of the speed with which CFIs occur in CBP custody. Several Las Americas clients have been forced to forego having their attorney present during their CFI because the asylum office scheduled it without providing any advance notice, even in cases where an attorney has made an appearance.

50. In these circumstances, we are limited to assisting people with the IJ review of a negative CFI determination. This assistance is also hindered by lack of information and notice. Staff who plan to attend IJ reviews must spend time and resources keeping track of whether a hearing has been scheduled, as well as preparing substantively for arguing exceptions and eligibility for asylum, withholding of removal, and protection under CAT.

51. In addition to holding CFIs within 24 hours in CBP custody, the government has imposed two other policies that are causing significant harm to Las Americas and the clients we serve: polices to either deport or "voluntarily" return some non-Mexican nationals to Mexico.

52. Specifically, for people from Cuba, Haiti, Nicaragua, and Venezuela, we have to prepare them for the possibility that they will face removal or return to Mexico, or that they will have to establish a fear of persecution or torture *as to Mexico.* This change means that, for people from these countries, staff must prepare people to seek protection from removal to two countries—their country of origin and Mexico—which takes up more time and resources.

53. We have also seen individuals offered the opportunity to "voluntarily" return to Mexico if they withdraw their application to enter the United States. This "offer" is made at multiple points during a CFI and even before the CFI when a person is first screened by CBP.

54. If a person accepts voluntary return before the interview begins, they could be passing up the opportunity to have an exemption applied to them. But if they are offered voluntary return later, it is often because an officer has determined an exemption does not apply. Regardless of when a person receives such an offer, and despite any explanations they receive about what the offer means, our experience is that these offers are confusing to the individuals who end up taking them.

55. We have observed a variety of misinformation about the voluntary return process. We have seen people from Cuba, Haiti, Venezuela, and Nicaragua be informed that they could apply for parole to enter the United States if they accept a voluntary return. However, in reality, most of our clients would not be eligible for these parole programs. First, people are ineligible if they entered Mexico or Panama irregularly after January 2023. Nearly all of the people we assist would be disqualified on that basis alone. Second, the parole programs require that the asylum seeker have a passport, a sponsor, and enough money to book a plane ticket to an interior point of entry. These resources are out of reach for most of the people we assist, who are indigent.

56. There is another aspect of these voluntary return promises that is also problematic. We have assisted many people who have been returned to Mexico who, in the process, have been required to sign a form indicating that they do not fear being returned to their *home countries.* That statement is antithetical to the fact that they are being returned to Mexico and that they are doing so in the context of a CFI, which is triggered when a person expresses a fear of return to their home country.

57. It is my understanding that, at some point, the government has changed this form to require people to state that they do not have a fear of returning *to Mexico*, but the vast majority of people we see in this posture do not have the documents in their possession. Thus, while I have not been able to personally examine this document, it is my understanding from individual accounts of this experience that many people signed a version of this form that speaks to fear of return to their home country. Requiring people to sign this form will have ongoing potential consequences in future asylum cases, where the forms could be used against them, so we have had to be vigilant about advising people as to the realities of this potential problem, usually without access to the relevant documentation.

58. As to the people who are removed (and not returned) to Mexico, we have seen another problem. In many of these cases, the individual is not actually permitted to stay in Mexico; some receive notice from the Mexican government that they are required to leave Mexico within a short period of time. As a result, people are being deported to Mexico only to face rapid deportation to their home countries where they face persecution or torture. But in our experience officers are not asking any questions about this problem sort of "chain refoulment."

59. All told, the return and removal of certain individuals to Mexico has caused another significant diversion of our resources. Staff has to try to understand what occurred in an individual's situation: Often a person does not know if they were returned or deported. Only with that information are we able to adequately advise them of the legal consequences of returns and removals. And for people who have not yet suffered either of these fates, explaining the possibility of being subjected to one of these two policies only further complicates the services we are trying to provide to people in Mexico who are preparing to enter the United States.

Overarching Harms from the Rule & Related Policies

60. The combined impact of the Rule and related policy changes has fundamentally altered access to asylum at the U.S-Mexico border. As policy has shifted and immigration legal services work has become more difficult, Las Americas needs to hire more staff to try to meet the demands of our community. While we strive to increase *pro bono* representation and provide high quality legal representation, we are not government-funded and none of our grants are guaranteed beyond two to three years. Moreover, it is difficult to secure funding for legal services, even in areas such as El Paso with clear needs and broad gaps in *pro bono* providers.

61. Additionally, many funders are interested in work that is maximally impactful. Because the Rule will increase the workload for each case and prohibit us from taking as many cases, we risk losing out on grants that expect the reach of our work to maintain a growth trajectory. For example, we have one funding source that has a stated goal of decreasing the amount of time staff take to provide services. This Rule has the opposite effect on our work.

62. Additionally, our programs rely on volunteers. We already spend significant resources to coordinate, manage, and train volunteers. These changes injure our ability to rely on volunteers because the pace and complexity of the issues presented at the border continues to grow. The result is that many people on staff, myself included, have to devote resources to volunteer training and management, to the detriment of other work.

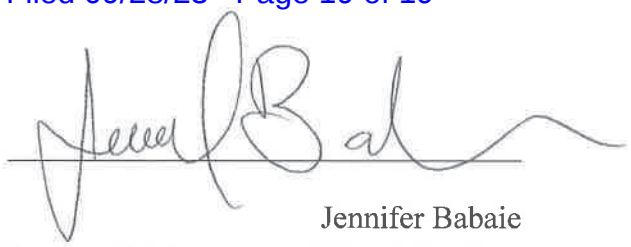
63. In addition, as mentioned above, the need for us to focus on the front end of the expedited removal process detracts from our ability to provide ongoing legal representation in full removal proceedings, before the Board of Immigration Appeals, and with USCIS. This change will result in more denied asylum applications without fully-developed records, more appeals, and less capacity to do that work both for Las Americas and similar organizations.

64. In essence, the Rule and related border polices force us into full-time triage mode. We are now in a position of having to choose between preparing a larger number of asylum seekers for the new screening processes, and providing full representation to people who are actually proceeding with their substantive claims.

65. Moreover, I would be remiss not to highlight the mental and physical toll these changes have had on our team. Living and working on the border, our staff are closely connected to the communities they serve. We witness firsthand the harmful effects of asylum bans and related enforcement-minded policies. Attempting to lead a team that is already inundated with work through more tumult is having a serious, detrimental impact. Since May 2023, I have observed many staff members foregoing their paid leave because of the volume of work. And because so much of our time is spent on the front end of the expedited removal process, staff are feeling less satisfied by the work because we do not have resources to provide longer-term services with the same frequency. The sense that people cannot put their energy to the work that meaningfully advances Las Americas' mission is already leading to a sense of frustration and burnout. These harms will only persist as time goes on.

Conclusion

66. It is difficult for me to overstate the detrimental impact that this Rule and the related changes has had and will continue to have on Las Americas' clients, staff, and mission. These changes will do nothing to improve the functioning of our immigration courts, and will instead infringe on our clients' rights to seek asylum, cost us numerous resources while forcing us to cut back on our services, and impose insurmountable bureaucratic obstacles on people with legitimate asylum claims seeking refuge from persecution and torture.



Jennifer Babaie
Director of Advocacy and Legal Services
Las Americas Immigrant Advocacy Center

Executed this 28th day of September 2023 in El Paso, Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

M.A., et al., *Plaintiffs*, v. ALEJANDRO MAYORKAS, Secretary Homeland Security, in his official capacity, et al., *Defendants.*	No. 1:23-cv-01843-TSC

[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Before the Court is Plaintiffs' motion for summary judgment. Having considered the motion, the memoranda and exhibits in support thereof, and the brief in opposition thereto, the Court **GRANTS** Plaintiffs' motion for summary judgment. The Court hereby:

1. **VACATES** the expedited removal regulations established by the Circumvention of Lawful Pathways Rule ("the Rule") at 8 C.F.R. §§ 208.33(b), 1208.33(b); the policy of reducing the consultation period preceding a credible fear interview to 24 hours; the policy of conducting expedited removals to third countries; and the misleading advisals in the "voluntary" return policy.
2. **DECLARES** that the expedited removal regulations established by the Rule, 8 C.F.R. §§ 208.33(b), 1208.33(b), are contrary to law, and arbitrary and capricious.
3. **DECLARES** that the 24-hour policy is contrary to law, and arbitrary and capricious.
4. **DECLARES** that the third-country-removal policy is contrary to law, and arbitrary and capricious.
5. **DECLARES** that the misleading advisals vitiate the voluntariness of a subsequent

withdrawal agreement, are contrary to law, and are arbitrary and capricious.

6. **VACATES** any negative credible fear determinations, withdrawal of admission agreements, and/or expedited removal orders issued to each plaintiff.

7. **ORDERS** Defendants to bring back into the United States any plaintiff who is outside the United States at no expense to the plaintiff, and parole them into the United States for the duration of their removal proceeding so that they may apply for asylum, withholding of removal, and/or protection under the Convention Against Torture.

Dated: _____

_____
Hon. Tanya S. Chutkan
United States District Court Judge