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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

M.A., *et al.*, Plaintiffs, v. Alejandro Mayorkas, *et al.*, Defendants.	Civil Action No. 1:23-cv-01843-TSC

CROSS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs ask this Court to hold unlawful a rule, *Circumvention of Lawful Pathways*, 88 Fed. Reg. 31,314 (May 16, 2023) ("the Rule"), and guidance implementing certain procedures applicable in expedited removal that are critical to address unprecedented irregular migration throughout the Western Hemisphere. The Rule was promulgated by the Department of Homeland Security (DHS) and the Department of Justice (DOJ) in anticipation of a significant increase in migrants seeking to enter the United States at the southwest border following the end of the Title 42 public health Order—under which migrants without proper travel documents generally were not processed into the United States but instead expelled to Mexico or their home countries. The Rule generally conditions eligibility for a discretionary grant of asylum on noncitizens using certain orderly migration pathways into the United States or seeking and being denied asylum or other protection in a country through which they traveled, absent exceptionally compelling circumstances. The Departments reasonably concluded that temporarily imposing such a condition on asylum eligibility, including in expedited removal proceedings, as part of cooperative efforts with foreign governments to address increases in migration across the region would incentivize the use of orderly migration pathways and disincentivize irregular migration, which diverts limited government resources and threatens to overwhelm the immigration system.

To accomplish this dual goal, the government implemented a two-pronged approach. First, the United States significantly expanded the lawful, safe, and orderly options available for noncitizens to seek entry to the country and, if desired, to seek asylum after arrival. Second, through the Rule, the Departments determined that certain noncitizens who do not use those expanded lawful pathways (or seek protection in third countries) shall be presumed ineligible for a discretionary grant of asylum. Noncitizens subject to the Rule may overcome that presumptive ineligibility by demonstrating exceptionally compelling circumstances. Moreover, even

noncitizens who are unable to obtain discretionary asylum relief under the Rule nonetheless receive appropriate screening for statutory withholding of removal or protection under the Convention Against Torture (CAT), such that DHS will not remove them to a country where there is a reasonable possibility of persecution on protected grounds or torture. Over the last six months, the Rule's approach has helped encourage migrants to use orderly migration pathways, reduced noncitizen encounters between southwest border ports of entry, and alleviated the negative consequences of irregular migration.

Furthering these goals, DHS also implemented additional procedures applicable in expedited removal proceedings, three of which Plaintiffs presently challenge. First, as part of extensive joint, hemispheric efforts to address unprecedented irregular migration, the Government of Mexico agreed to continue to accept the return of nationals of Cuba, Haiti, Nicaragua, and Venezuela (CHNV) who cannot be removed to their native countries, and who have not availed themselves of orderly pathways. *See id.* § 1231(b). Second, because of this decision by the Government of Mexico, DHS components CBP and U.S. Citizenship and Immigration Service (USCIS) issued separate guidance implementing its discretionary authority under 8 U.S.C. § 1225(a)(4) to permit certain noncitizens to withdraw their applications for admission and voluntarily return to Mexico, rather than going through the expedited removal process. Third, USCIS issued guidance providing that credible fear interviews take place no earlier than 24 hours after the noncitizen receives information explaining the credible fear process. *See* 8 U.S.C. § 1225(b)(1)(B)(iv). Together with the Rule, these guidance memoranda have furthered the two-pronged approach of expanding lawful, safe, and orderly pathways for noncitizens while delivering appropriate consequences to those who do not avail themselves of such pathways.

Plaintiffs challenge the Rule's application in expedited removal proceedings and the three procedures, contending they violate the Administrative Procedure Act (APA). The Court should

reject Plaintiffs' challenges and grant summary judgment to Defendants. At the threshold, the organizational Plaintiffs lack Article III standing, they are not within the statute's zone of interests, and their claims are barred by multiple provisions of the INA. Moreover, the challenges to the withdrawal and third-country-removal procedures are not redressable, are barred by the INA, and do not satisfy the APA's "final agency action" requirement. Additionally, nearly all individual Plaintiffs lack standing as to any expedited removal guidance. On the merits, the Rule and challenged procedures are consistent with statutory authority, reasonable, and reasonably explained. And, in any event, the relief Plaintiffs seek—universal vacatur of the Rule and procedures and an injunction requiring the government to return certain Plaintiffs to the United States—is forbidden by the INA and unjustified by the equitable principles governing APA remedies. Should the Court find any relief warranted, given the significant and immediate harms that would occur if the Rule or procedures were vacated, the Court should remand to the agencies without vacatur. At an absolute minimum the Court should stay any order for fourteen days to allow the government to seek emergency relief in the court of appeals, if warranted.

LEGAL AND PROCEDURAL BACKGROUND[1]

Asylum. Asylum is a form of discretionary relief under the INA, 8 U.S.C. § 1101 *et seq.* *See id.* § 1158; *INS v. Cardoza-Fonseca*, 480 U.S. 421, 444 (1987). Generally, a grant of asylum protects noncitizens from removal, creates a path to lawful permanent residence and U.S. citizenship, authorizes noncitizens to work, and enables a noncitizen's immediate family members to seek asylum derivatively. *See id.* §§ 1158-1159. To obtain asylum, noncitizens must show that they: (1) qualify as a "refugee"—that is, that they are unable or unwilling to return to their home

[1] Defendants submit this background consistent with Local Rule 7(h)(2), (n). Notwithstanding these rules, Plaintiffs submitted a statement of facts citing extensive extra-record evidence. Defendants dispute the accuracy of this "statement" and separately move to strike portions of it. Should the Court not grant that motion, Defendants also respond with their own statement of facts.

country "because of persecution or a well-founded fear of persecution on account of" a protected ground, *id.* §§ 1101(a)(42), 1158(b)(1)(A); (2) are not subject to an exception or mandatory condition or bar that precludes applying for or receiving asylum, *id.* § 1158(a)(2), (b)(2); and (3) merit a favorable exercise of discretion, *id.* § 1158(b)(1)(A).

A request for asylum may arise in three circumstances: (1) a noncitizen present in the United States and not in removal proceedings may affirmatively apply to USCIS, *see Dhakal v. Sessions*, 895 F.3d 532, 536 (7th Cir. 2018); 8 C.F.R. § 208.2(a); (2) a noncitizen in removal proceedings under 8 U.S.C. § 1229a may apply before the immigration judge (IJ) as a defense to removal, 8 C.F.R. §§ 208.2(b), 1208.2(b), 1240.11(c); and (3) a noncitizen in expedited removal proceedings under 8 U.S.C. § 1225(b)(1) may request asylum.[2]

The INA forbids certain noncitizens from applying for asylum and deems others ineligible—for example, those who have participated in persecution or who were firmly resettled in another country before arriving in the United States. *See* 8 U.S.C. § 1158(a)(2), (b)(1)(B), (b)(2). And for decades, the Executive has promulgated mandatory bars that have rendered certain noncitizens ineligible for asylum. *See Circumvention of Lawful Pathways*, 88 Fed. Reg. 11,704, 11,734 (Feb. 23, 2023) (Lawful Pathways NPRM). Attorneys General originally adopted such limits pursuant to their general authority "to establish a procedure" for asylum. *See id.* Then, in 1996, Congress codified several of those limits. *See id.* Simultaneously, Congress reaffirmed that the Departments retain the same broad authority to establish new conditions, specifying that they "may by regulation establish additional limitations and conditions, consistent with [§ 1158], under

[2] Section 1225(b)(1)(A)(i), (iii) provides for the expedited removal of certain noncitizens arriving in the United States, but also allows the Secretary to designate a broader group of noncitizens as subject to expedited removal. *See Rescission of the Notice of July 23, 2019, Designating Aliens for Expedited Removal*, 87 Fed. Reg. 16,022 (Mar. 21, 2022) (returning application of expedited removal to noncitizens encountered within 100 air miles of the border and within 14 days of their entry into the United States).

which an alien shall be ineligible for asylum." 8 U.S.C. § 1158(b)(2)(C); *see id.* § 1158 (d)(5)(B); 6 U.S.C. § 552(d); 8 U.S.C. § 1103(a)(1), (a)(3), (g). Secretaries and Attorneys General have invoked that authority for decades to establish conditions beyond those in the statute. *See, e.g.*, *Asylum Procedures*, 65 Fed. Reg. 76,121, 76,126 (Dec. 6, 2000) (internal relocation bar).

While asylum is discretionary, withholding of removal under 8 U.S.C. § 1231(b)(3) and protection under the regulations implementing U.S. obligations under the CAT, 8 C.F.R. §§ 208.16-.18, 1208.16-.18, are mandatory and prohibit removal to a country where the noncitizen will likely be persecuted or tortured. *See Moncrieffe v. Holder*, 568 U.S. 184, 187 n.1 (2013).

Expedited Removal. In expedited removal proceedings certain noncitizens arriving in the United States or who entered illegally who lack valid entry documentation or make material misrepresentations shall be "order[ed] ... removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under [8 U.S.C. § 1158] or a fear of persecution." 8 U.S.C. § 1225(b)(1)(A)(i); *see id.* § 1182(a)(6)(C), (a)(7). If the noncitizen "indicates either an intention to apply for asylum ... or a fear of persecution," the inspecting officer must "refer the alien for" an interview conducted by an asylum officer (AO).[3] *Id*. § 1225(b)(1)(A)(ii). At the interview, an AO assesses whether the noncitizen has a "credible fear of persecution," meaning "that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under [8 U.S.C. § 1158]." *Id*. § 1225(b)(1)(B)(v). The statute allows for consideration of all issues bearing on eligibility, including those that stem from regulations promulgated by the Departments as described above, but does not generally permit adjudicators to rely on case-by-case discretionary

[3] Noncitizens are also screened for eligibility for withholding of removal and CAT protection. *See* 8 C.F.R. §§ 208.30(e)(2), 235.3.

determinations at this stage. *See Kiakombua v. Wolf*, 498 F. Supp. 3d 1, 42 (D.D.C. 2020). "An alien who is eligible for such interview may consult with a person or persons of the alien's choosing prior to the interview or any review thereof" and "[s]uch consultation shall be at no expense to the Government and shall not unreasonably delay the process." 8 U.S.C. § 1225(b)(1)(B)(iv); 8 C.F.R. § 208.30(d)(4).

If the AO determines the noncitizen has a credible fear, USCIS may refer the noncitizen to removal proceedings under 8 U.S.C. § 1229a where the noncitizen may apply for asylum and other protection from removal, or USCIS may retain jurisdiction and consider the noncitizen's application for asylum in the first instance. *Id.*, § 1225(b)(1)(B)(ii); 8 C.F.R. § 208.30(f).

If the AO determines that the noncitizen lacks a credible fear, the noncitizen may seek *de novo* review before an IJ. 8 U.S.C. § 1225(b)(1)(B)(iii)(I), (III). If the IJ concludes that the noncitizen has established a credible fear, the AO's decision is vacated, and the noncitizen's case is returned to USCIS for it to determine whether to initiate removal proceedings under 8 U.S.C. § 1229a (during which the noncitizen may apply for asylum) or retain jurisdiction over the asylum application. 8 C.F.R. §§ 1280.30(g)(2)(iv)(B), 1208.2(a)(1)(ii). If the IJ finds that the noncitizen lacks a credible fear, the noncitizen is "removed from the United States without further hearing or review." 8 U.S.C. § 1225(b)(1)(B)(iii)(I); 8 C.F.R. § 1208.30(g)(2)(iv)(A). The INA precludes further review by the Board of Immigration Appeals or any court of the credible-fear determination. 8 U.S.C. §§ 1225(b)(1)(C), 1252(a)(2)(A)(iii), (e)(2).

Withdrawals and Third-Country Removals. A noncitizen "applying for admission may, in the discretion of the [Secretary] and at any time, be permitted to withdraw the application for admission and depart immediately from the United States." 8 U.S.C. § 1225(a)(4). By regulation, a noncitizen's "decision to withdraw his or her application for admission must be made voluntarily," 8 C.F.R. § 235.4, but no noncitizen has any right to withdraw their application. *See*

id. ("nothing in this section shall be construed as to give an alien the right to withdraw his or her application for admission"); *accord* 8 U.S.C. § 1225(a)(4) (decision is discretionary).

In addition, noncitizens subject to removal orders need not be removed to their native country. Generally, noncitizens ordered removed "may designate one country to which the alien wants to be removed," and DHS "shall remove the noncitizen to [that] country[.]" 8 U.S.C. § 1231(b)(2)(A). In certain circumstances, DHS will not remove the noncitizen to their designated country, including where "the government of the country is not willing to accept the alien into the country." *Id.* § 1231(b)(2)(C)(iii). In such a case, the noncitizen "shall" be removed to the noncitizen's country of nationality or citizenship, unless that country "is not willing to accept the noncitizen[.]" *Id.* § 1231(b)(2)(D). If a noncitizen cannot be removed to the country of designation or the country of nationality or citizenship, then the government may consider other options, including "[t]he country from which the alien was admitted to the United States," "[t]he country in which the alien was born," or "[t]he country in which the alien last resided[.]" *Id.* §§ 1231(b)(2)(E)(i), (iii)-(iv). Where removal to any of the countries listed in subparagraph (E) is "impracticable, inadvisable, or impossible," then the noncitizen may be removed to any "country whose government will accept the alien into that country." *Id.* § 1231(b)(2)(E)(vii).

In addition, DHS "may not remove an alien to a country if [it] decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion," 8 U.S.C. § 1231(b)(3)(A); 8 C.F.R. §§ 208.16(a)-(b), 1208.16(a)-(b), or if the noncitizen faces a likelihood of torture, 8 C.F.R. §§ 208.16(c), 208.17, 1208.16(c), 1208.17.

Title 42. From March 20, 2020, through May 11, 2023, a series of Center for Disease Control (CDC) Title 42 public health Orders were in effect to combat the COVID-19 pandemic. These Orders implemented the CDC's authority under 42 U.S.C. § 265 to prevent the introduction

of individuals into the United States to avoid a serious danger to public health arising from a communicable disease. *See* AR565-78. Under the Title 42 Orders, covered noncitizens were expelled to Mexico or their home countries without processing under Title 8, including processing for asylum. The expiration of the public health emergency on May 11, 2023, caused the then-operative Order to terminate.

The Circumvention of Lawful Pathways Rule. Absent any policy change, the end of the Title 42 Order was expected to cause the number of migrants seeking to illegally enter the United States at the southwest border to increase to all-time highs—an estimated 11,000 migrants daily. 88 Fed. Reg. at 31,331. Those migrants could no longer be promptly expelled under Title 42 and instead would have to be processed at the border through the substantially more resource-intensive procedures required by Title 8. *Id.* at 31,442; 88 Fed. Reg. at 11,705. Under those procedures, many noncitizens who establish a fear of persecution during expedited removal proceedings are found to have credible fear and are statutorily entitled to remain in the United States pending resolution of their asylum claims. 88 Fed. Reg. at 31,337 (citing 83% positive screening rate). Because the number of noncitizens who satisfy this screening standard far exceeds the capacity of the immigration system to process them quickly, many noncitizens remain in the United States for years before their claims are adjudicated. *See id.* at 31,326. This process, along with the insufficient resources to execute removal orders, may incentivize nonmeritorious asylum claims and potentially dangerous irregular migration. *Id.* at 31,326, 31,337-38; *see* 88 Fed. Reg. at 11,716.

The Departments thus faced a looming urgent situation: absent policy change, the end of Title 42 would result in many more migrants crossing the border and asserting asylum claims, which would in turn overwhelm the government's ability to process migrants in a safe, expeditious, and orderly way. To address this exigent circumstance, DHS and DOJ promulgated a final rule, following an NPRM, a 33-day comment period, and review of 51,952 comments. The Rule

generally imposes a condition on asylum eligibility on noncitizens who fail to pursue specified processes for entry into the United States or seek protection in a third-country. 8 C.F.R. §§ 208.33(a), 1208.33(a). That condition on eligibility is, however, subject to various exceptions, and its application may be rebutted in exceptionally compelling circumstances. The Rule was made effective immediately, 88 Fed. Reg. at 31,444-47, and it applies to asylum determinations made in any context, including in removal proceedings, 8 C.F.R. §§ 208.13(f), 1208.13(f), and in credible fear screenings, *id.* §§ 208.33(b), 1208.33(b).

Specifically, the Rule applies "[a] rebuttable presumption of ineligibility for asylum ... to an alien who" "enters the United States from Mexico at the southwest land border or adjacent coastal borders without documents sufficient for lawful admission" (1) "between May 11, 2023 and May 11, 2025," (2) "[s]ubsequent to the end of" the Title 42 Order, and (3) "[a]fter the alien traveled through a country other than the alien's country of citizenship [or] nationality." 8 C.F.R. §§ 208.33(a)(1), 1208.33(a)(1). The presumption does not apply to unaccompanied children or migrants who availed themselves of, or were traveling with a family member who availed themselves of, certain lawful, safe, and orderly pathways—specifically, those who (1) were "provided appropriate authorization to travel to the United States to seek parole, pursuant to a DHS-approved parole process"; (2) "[p]resented at a port of entry, pursuant to a pre-scheduled time and place"[4] or "presented at a port of entry without a pre-scheduled time and place" but who can "demonstrate[] by a preponderance of the evidence that it was not possible to access or use the DHS scheduling system due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle"; or (3) "[s]ought asylum or other protection in a country through

[4] DHS has also increased the number of daily appointments available for orderly processing at ports of entry. 88 Fed. Reg. at 31,396; CBP Newsroom, https://www.cbp.gov/newsroom/national-media-release/cbp-one-appointments-increased-1450-day

which the alien traveled and received a final decision denying that application *Id.*, §§ 1208.33(a)(2). In addition, noncitizens subject to the presumption and who do not establish an exception may overcome that presumption by "demonstrating" by a preponderance of the evidence that "exceptionally compelling circumstances exist." *Id.* §§ 208.33(a)(3)(i), 1208.33(a)(3)(i). And such circumstances necessarily exist where, at the time of entry, the migrant, or a family member with whom the migrant is traveling, "[f]aced an acute medical emergency"; "[f]aced an imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder"; or was a "victim of a severe form of trafficking in persons" under 8 C.F.R. § 214.11(a). *Id.* §§ 208.33(a)(3)(i)(A)-(C), (ii), 1208.33(a)(3)(i)(A)-(C), (ii). Finally, a noncitizen presumed ineligible for asylum under the Rule will still be assessed as to whether they established a reasonable possibility of persecution or torture; a noncitizen who establishes a reasonable possibility is still eligible to apply for statutory withholding of removal or CAT protection and thus may not be removed to a country where it is likely that they will be persecuted because of a protected ground or tortured.[5]

The Rule's presumption applies not only during asylum merits adjudications but also during credible fear screenings, consistent with those screenings' focus on a noncitizen's ability to ultimately establish eligibility for asylum. *Id.*, §§ 208.33(b), 1208.33(b). Under the Rule, noncitizens subject to expedited removal who indicate an intention to apply for asylum, or express a fear of persecution or torture, or a fear of return to their country, are referred to USCIS for a credible fear interview during which noncitizens are first screened to assess whether the Rule's limitation applies and, if so, whether there is a significant possibility that the noncitizen would be

[5] The Rule also provides additional protections for family unity, *see* 8 C.F.R. § 1208.33(c), and exempts noncitizens who were minors when they entered but who apply for asylum as principal applicants after the two-year period expires. *Id.* §§ 208.33(c)(2), 1208.33(d)(2).

able to overcome that limitation during a merits adjudication. *Id.*, § 208.33(b). If the AO determines that the limitation does not apply or the noncitizen could likely overcome the limitation, the general procedures governing the credible fear process then apply. *See id.*, § 208.33(b)(1)(ii). On the other hand, if the AO determines that the limitation does apply and no exception or rebuttal ground applies, the AO will consider whether the noncitizen has established a reasonable possibility of persecution or torture with respect to the designated country or countries of removal. *See id.*, § 208.33(b)(1)(i), (2). If a noncitizen is found to have a reasonable possibility of persecution or torture in any designated country, then DHS will commence § 1229a removal proceedings, during which the noncitizen may seek relief or protection from removal. *Id.*, §§ 208.33(b)(2)(ii), 1208.33(b)(4).

Although a district court vacated the Rule, the Ninth Circuit stayed that order pending appeal. Dkt. 21, *East Bay Sanctuary Covenant v. Biden*, No. 23-16032 (9th Cir. Aug. 3, 2023).

Additional expedited removal procedures. As relevant to this lawsuit, DHS has also implemented three procedures applicable to individuals in expedited removal proceedings.

(1) *Third-Country Removal Procedure:* As part of extensive joint, hemispheric efforts to address unprecedented irregular migration, the government of Mexico agreed to continue to accept returns and removals of CHNV nationals to Mexico following the termination of the Title 42 Order. *See* AR (Customs and Border Protection (CBP) Removals) 321-25 (memorandum from Assistant Secretary Nuñez-Neto). Such removals are governed by the statutory framework regarding designation of the removal country by the noncitizen and the circumstances when DHS may disregard that designation and instead remove the noncitizen to a third country. *See* AR (CBP Removals) 22-24, 321-25. Given the restrictions and limitations on removal of individuals to CHNV countries, DHS directed its components to work through the statutory framework and, in circumstances where the relevant country of citizenship or nationality will not accept the

noncitizen, to designate Mexico as the country of removal. *See* AR (CBP Removals) 24 (designation of country of removal work sheet and form).

(2) *Guidance Regarding Withdrawal of Applications for Admission:* CBP and USCIS separately issued guidance concerning its discretionary authority under § 1225(a)(4) to permit CHNV nationals to withdraw their applications for admission and voluntarily return to Mexico either during inspection before CBP or during credible fear interviews before USCIS. *See* AR (CBP Withdrawals) 3-6, 12-21; AR (USCIS Withdrawals) 3-4. This guidance instructs CBP and USCIS officials, when exercising their discretion to permit withdrawals, to inform CHNV nationals that they may withdraw their application for admission and that, if they do, they may be eligible to request advance authorization to travel to the United States to seek parole under relevant parole processes, and that withdrawal may allow them to apply for parole under such processes. *See* AR (CBP Withdrawals) 6; AR (USCIS Withdrawals) 3. USCIS issued superseding guidance on June 11, 2023. Ex. C, Decl. of Mallory Lynn, ¶¶ 5-6, Exs. 1-2.

(3) *Consultation Period Guidance:* USCIS issued guidance directing AOs to provide noncitizens a minimum consultation period of 24 hours between when they acknowledge receipt of Form M-444, Information About Credible Fear Interview, and their credible fear interview. AR (Waiting Period) 1-3. This replaced prior guidance allowing for a 48 hour period between the noncitizen's arrival in the detention facility and their credible fear interview. *Id.* at 2. This change was made in anticipation of an increase in noncitizens seeking to travel to the United States following the end of the Title 42 Order, and as a way "to expeditiously process and remove individuals who ... do not have a legal basis to remain in the United States." *Id.* at 3.

This Lawsuit. Eighteen individuals and two organizations that provide services to noncitizens and refugees seek vacatur of the Rule. Compl., Prayer for Relief. In their motion, Plaintiffs seek relief on the claims alleging the provisions of the Rule governing expedited removal

and three procedures applicable in expedited removal proceedings violate the APA because they exceed the government's statutory authority and are arbitrary and capricious. *Id.* ¶¶ 133-39, 147-49, 152-68, 174-76 (claims 1, parts of 3, 5-10, and parts of 13). Plaintiffs ask the Court to vacate the Rule nationwide, vacate the individual plaintiffs' negative credible fear determinations, and order the government to return individual plaintiffs already removed. Dkt. 37 at 43.

ARGUMENT

I. Plaintiffs' Claims Are Foreclosed on Numerous Threshold Grounds

A. The organizational Plaintiffs lack standing

1. *United States v. Texas* forecloses Article III standing

The organizational Plaintiffs have failed to identify a "legally and judicially cognizable" injury traceable to the challenged agency actions that would be redressed by a favorable decision in this case. *United States v. Texas*, 143 S. Ct. 1964 (2023). The Rule's direct effect is to limit asylum eligibility for certain noncitizens in the exercise of the Executive's discretion, including in expedited removal proceedings. And the procedures' direct effect is to implement expedited removal procedures. "[A] private citizen"—including an organization—"lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973). An individual who does not face prosecution "lacks standing to contest the policies of the prosecuting authority." *Id*. An individual similarly has "no judicially cognizable interest in procuring" or preventing "enforcement of the immigration laws" against someone else. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984). The Supreme Court recently made clear these principles preclude standing in cases like this involving challenges to the Executive's immigration enforcement policies. *See Texas*, 143 S. Ct. at 1970. There, the Court rejected the State plaintiffs' argument that they had standing because, for example, they might spend money on incarceration and social services for "noncitizens who should be (but are not being) arrested by the Federal

Government." *Id*. at 1969. The Supreme Court held that the States' asserted injury, which flowed from the Executive's exercise of immigration enforcement discretion against third parties, was not judicially cognizable under the principles articulated above. *See id.* at 1970-71.

Those principles decide this case. Like the States in *Texas*, the organizations here challenge several discretionary immigration enforcement initiatives and argue they have standing because they will incur additional expenditures to "serve" and "advis[e] clients" and for "pre-credible fear interview preparation." Compl. ¶¶ 129-32. But like the States in *Texas*, the organizations cannot leverage the incidental effects of enforcement actions directed at third parties to create Article III standing for themselves. Changes the organizations may make in their own affairs in light of the Executive's exercise of enforcement discretion with respect to others are not judicially cognizable injuries. *Texas*, 143 S. Ct. at 1871 ("When … a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else,* much more is needed.").

The Supreme Court detailed why "federal courts have not traditionally entertained lawsuits of this kind." *Id*. When the Executive makes a discretionary enforcement decision regarding a third party, it "does not exercise coercive power" over "the plaintiff." *Id*. Additionally, lawsuits challenging enforcement policies "run up against the Executive's Article II authority to enforce federal law"—and such suits in the immigration context "implicate[] not only normal domestic law enforcement" discretion "but also foreign-policy objectives." *Id*. at 1971-72. And the Court explained that the contrary-to-law and arbitrary-and-capricious challenges in *Texas* should be dismissed because courts lack "meaningful standards for assessing" discretionary enforcement policies that reflect the Executive's weighing of factors like "resource constraints" and "public-safety and public-welfare needs." *Id*. at 1972.

Each of those rationales highlights the organizations' inability to demonstrate a cognizable

injury here. The organizations do not challenge any exercise of coercive government power directed at them, but instead complain about the incidental effects of the government's choices with respect to third parties. Plaintiffs directly challenge the Executive's exercise of its Article II and statutory enforcement authority to establish conditions on asylum and implement expedited removal procedures, and threaten to upset the substantial foreign-policy objectives undergirding the Rule and procedures. And the Rule and procedures are themselves the product of the complicated balancing of many different factors—including factors related to the government's limited enforcement resources, its assessment of public-safety and public-welfare implications of the situation at the southwest border, and its efforts to address hemisphere-wide migration patterns and intergovernmental initiatives—that courts are not well-situated to assess.

2. The organizations lack standing under *Havens*

Even if *Texas* did not foreclose the organizations' claims of injury, prior case law would. The organizations assert only injury to themselves, specifically a need to expend resources to "serve" and "advis[e] clients" and on "pre-credible fear interview preparation." Compl. ¶¶ 129-32. But these harms are not cognizable.

Where an organization sues on its own behalf, it must establish standing in the same manner as an individual. *See Warth v. Seldin*, 422 U.S. 490, 511 (1975). Organizations may have standing in some situations where they are injured, as recognized in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). The D.C. Circuit has developed a two-part inquiry for determining standing in circumstances where an organization has claimed a diversion-of-resources injury: (1) "whether the defendant's allegedly unlawful activities injured the plaintiff's interest in promoting its mission," and, if so, (2) "whether the plaintiff used its resources to counteract that injury." *ASPCA v. Feld Entm't, Inc.*, 659 F.3d 13, 25 (D.C. Cir. 2011). As that framework makes clear, nothing about expending resources alone cognizably injures an organization. At most, such expenditures on their

own may constitute "setback[s] to [the organization's] abstract social interests." *Havens*, 455 U.S. at 379. And "[t]he mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization." *Nat'l Treasury Emps. Union (NTEU) v. United States*, 101 F.3d 1423, 1434 (D.C. Cir. 1996); *Turlock Irr. Dist. v. FERC*, 786 F.3d 18, 24 (D.C. Cir. 2015) ("impairment of its advocacy" not enough).

Instead, the organizational plaintiff must also demonstrate that the challenged actions have injured the plaintiff in the first instance. And here, the organizations plaintiffs fail to make that showing by alleging they must "serve" and "advis[e] clients" and for "pre-credible fear interview preparation," Compl. ¶¶ 129-32, i.e. things the organizations already do. *See ASPCA*, 659 F.3d at 25. Critically, they are also premised on a fundamental misunderstanding of the Rule. Plaintiffs contend that they need to advise clients on credible fear proceedings because they believe the Rule requires USCIS employees to not apply the "significant possibility" standard provided for by statute. Dkt. 37-3, ¶ 17 (RAICES); Dkt. 38-4, ¶ 30 (Las Americas, similar). But that view is mistaken, as the rule implements the statutory significant possibility standard, *infra* 29-31, and so any injury stemming from this mistake is entirely self-inflicted. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013). *Clapper*, 568 U.S. at 416.

Even if not speculative or self-inflicted, in their capacity as lawyers for asylum-seeking clients, the organizational Plaintiffs here have no legally or judicially cognizable interest in avoiding whatever reallocation of resources they may choose to make in light of the Rule or guidance—a merely "indirect effect[]" of the Rule or guidance that makes their assertion of injury "more attenuated," *Texas*, 143 S. Ct. at 1972 n.3, and with which the asylum statute is not concerned. *See Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 804-07 (D.C. Cir. 1987). "If the law were otherwise, an enterprising plaintiff would be able to secure" the right to challenge a

governmental action without any otherwise cognizable injury "simply by making an expenditure" in response to the action. *Clapper*, 568 U.S. at 416. Plaintiffs' theory would also, as a practical matter, nullify the principle that a lawyer has no independent litigable interest in the legal rules applicable to the lawyer's clients. *See, e.*g., *Kowalski v. Tesmer*, 543 U.S. 125, 130-34 (2004). Nothing in precedent or logic countenances such limitless theories of standing.

B. Section 1252(e)(3) bars the organizational Plaintiffs' claims

The Court lacks jurisdiction over the organizational Plaintiffs' claims. Although 28 U.S.C. § 1331 generally supplies jurisdiction, 8 U.S.C. § 1252(a)(2)(A) eliminates such jurisdiction, other than as permitted by § 1252(e). *See Make The Rd. New York v. Wolf*, 962 F.3d 612, 626 (D.C. Cir. 2020). Section 1252(a)(2)(A) and (e)(3) sharply limit jurisdiction over claims involving expedited removal procedures or proceedings, and the organizational Plaintiffs do not qualify for any limited exception to that preclusion. Section 1252(a)(2)(A), titled "Matters not subject to judicial review," provides that "[n]otwithstanding any other provision of law ... no court shall have jurisdiction to review ... except as provided in subsection (e)," "any [] cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1)," "a decision ... to invoke the provisions of such section," or "procedures and policies adopted ... to implement" § 1225(b)(1). 8 U.S.C. § 1252(a)(2)(A)(i), (ii), (iv). Section 1252(a)(2)(A) thus removes from federal courts any jurisdiction to review issues "relating to section 1225(b)(1)," i.e., expedited removal proceedings or credible fear determinations, other than as permitted by § 1252(e).[6] *See Patchak v. Zinke*, 138 S. Ct. 897, 905 (2018) ("notwithstanding any other provision of law" in jurisdictional provision encompasses 28 U.S.C. § 1331).

Section 1252(e)(3) authorizes "[j]udicial review of determinations under section 1225(b)

[6] Section 1252(e)(2), permitting review of expedited removal orders, is not at issue here.

of this title and its implementation" in this Court, "limited to determinations of—(i) whether [§ 1225(b)], or any regulation issued to implement such section, is constitutional; or (ii) whether such a regulation, or a written policy directive, written policy guideline, or written procedure … implement[ing] such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law." 8 U.S.C. § 1252(e)(3)(A). Such suits "must be filed no later than 60 days after the date the challenged action, regulation, directive, guideline, or procedure ... is first implemented." *Id*. § 1252(e)(3)(B); *see generally M.M.V. v. Garland*, 1 F.4th 1100, 1106-11 (D.C. Cir. 2021); *Make the Road*, 962 F.3d at 625-31.

Under these provisions, and binding D.C. Circuit precedent, the organizations' claims are barred. To be sure, § 1252(e)(3) does not bar claims by organizations entirely. Section 1252(e)(3) restores jurisdiction over two limits types of claims. *Make the Road*, 962 F.3d at 627. "While romanettes (i) and (iii) refer to claims pressed by individuals to whom the expedited removal scheme is being "appli[ed]" or an order of removal is being "implement[ed]," the other two romanettes for which review under § 1252(e)(3) is "specifically authorized are not textually confined to claims arising from individual removal actions." *Id*. However, as the D.C. Circuit has twice held, claims brought by organizations are limited to claims advanced on behalf of *individuals* under a theory of associational standing. *See id.* at 627-28. Through § 1252(e)(3), "Congress meant to allow actions *only by aliens* who have been subjected to the summary procedures contained in § 1225(b) and its implementing regulations." *Am. Immigr. Laws. Ass'n v. Reno (AILA)*, 199 F.3d 1352, 1359 (D.C. Cir. 2000) (emphasis added); *accord id*. ("lawsuits challenging [actions]" through § 1252(e)(3) "would be brought, if at all, by *individual aliens* who—during the sixty-day period—were aggrieved by the statute's implementation") (emphasis added).

The D.C. Circuit recently reaffirmed this view. Rejecting an argument that organizations suing on behalf of noncitizens actually subjected to expedited removal procedures, the Court

explained that *AILA* "rejected third party organizational standing ... as a basis to sue under Subsection 1252(e)(3)," but distinguished, as *AILA* did, "a case [brought] on behalf of individuals directly regulated and affected by the challenged rule." *Make the Road*, 962 F.3d at 627. *Make the Road* explicitly restates the holding of *AILA* that § 1252(e)(3) "contemplate[s] that litigation could be brought by affected individual themselves" only. *Id.* at 628. As *Make the Road* further explains, "[w]hether aggrieved individuals sue on their own or band together through a representative association does not change the nature of the lawsuit as seeking to remedy *the individual members' injuries* ... . That is because associational (sometimes called 'representational') standing *is derivative and reflective of individual standing*." *Make the Road*, 962 F.3d at 628 (emphasis added). But whether a party is an individual invoking their injuries directly, or an association invoking its members' injuries, the core requirement under § 1252(e)(3) is the same: the party invoking § 1252(e)(3) must point to a specific *individual's* injuries. *See id.*; *AILA*, 199 F.3d at 1359. Here, the organizational advance a theory of injury premised only on organizational standing under *Havens*, *supra* 15, and so the court lacks jurisdiction under § 1252(e)(3) over their claims.

C. The organizational Plaintiffs are not within the zone of interests and their claims are precluded by the INA

In addition, the organizational Plaintiffs' claims fail because the alleged effect of the Rule and procedures on their expenditures does not fall within the zone of interests of §§ 1158 or 1225, the statutes that Plaintiffs seek to enforce. A plaintiff must be "adversely affected or aggrieved by agency action within the meaning of a relevant statute" to sue under the APA. 5 U.S.C. § 702. And "the interest sought to be protected" must "be arguably within the zone of interests to be protected or regulated by the statute ... in question." *Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 396 (1987). Nothing in the text, structure, or purpose of the INA generally, or §§ 1158 or 1225 specifically, suggests that Congress intended to permit organizations to contest asylum and expedited removal-

related procedures based on attenuated effects on their own spending decisions. Indeed, the judicial review provisions concerning expedited removal explicitly foreclose any cause of action by an organization not invoking the interests of *individuals*. *See supra* 17-19. And § 1158 focuses on the interests of asylum seekers without evincing any desire to protect the interests of organizations that provide legal help to asylum seekers. *See* 8 U.S.C. § 1158(d)(7) ("Nothing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.").

As Justice O'Connor explained in granting the government's stay application in an immigration case involving similar organizational plaintiffs, organizations that "provide legal help to immigrants" do not satisfy the zone-of-interests test. *INS v. Legalization Assistance Project of L.A. Cty. Fed'n of Labor*, 510 U.S. 1301, 1302 (1993) (O'Connor, J., in chambers). Federal immigration law was "clearly meant to protect the interests of undocumented aliens, not the interests of organizations." *Id*. at 1305. The fact that an immigration regulation "may affect the way an organization allocates its resources" for representing noncitizens accordingly does not bring the organization "within the zone of interests" that the asylum statute protects. *Id*.

The organizations' claims are also precluded by the INA. A plaintiff may not seek review under the APA if "statutes preclude judicial review." 5 U.S.C. § 701(a)(1). The Supreme Court has accordingly recognized that, by providing a detailed scheme for administrative and judicial review, Congress can displace the APA's default cause of action. *See, e.g*., *Block v. Cmty. Nutrition Inst*., 467 U.S. 340, 345 (1984). Preclusion of review is determined "not only from [the statute's] express language, but also from the structure of the statutory scheme." *Id*. In particular, Congress may impliedly preclude some parties from seeking judicial review of administrative action by constructing a detailed scheme that provides for review only by other parties. *See id.*

That is the case here. The INA provides for administrative and judicial review at the behest

of *noncitizens*, 8 U.S.C. § 1252(a)(5), (b)(9), (e)(3), but it provides no role for third parties like organizations to play in that process in their own right (rather than as counsel for their clients). As explained, organizations lack any basis to sue on their own behalf with respect to challenges to regulations implementing the expedited removal process. 8 U.S.C. § 1252(a)(2)(A), (e)(3). With respect to individual noncitizens placed in section 1229a removal proceedings, the INA imposes strict limitations on the mechanisms for review. For example, a noncitizen may obtain judicial review of questions arising out of removal proceedings only through a challenge to a final removal order. *Id.*, § 1252(b)(9); *see Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1070 (2020). But that is precisely what the organizations here challenge: the Rule's limitation on asylum eligibility that will determine whether individual noncitizens can secure relief from removal in their removal proceedings and procedures applicable in those proceedings. They thus challenge the "*process* by which removability will be determined," covered by § 1252. *Regents*, 140 S. Ct. at 1907 (emphasis added). Permitting organizations to challenge the Rule through an APA suit would "severely disrupt" the INA's "complex and delicate administrative scheme," including by providing plaintiffs' noncitizen clients "a convenient device for evading the statutory" restrictions on review. *Block*, 467 U.S. at 348; *accord Ayuda, Inc. v. Reno*, 7 F.3d 246, 250 (D.C. Cir. 1993) (holding similar review scheme precludes "organizational plaintiff" from "suing to challenge [] INS policies or statutory interpretations that bear on an alien's" legal claims).

D. The withdrawal and third-country removal claims are not justiciable

1. The withdrawal and third-country removal claims are not redressable

Regardless of whether any Plaintiff, individual or organizational, can demonstrate injury caused by the withdrawal and third-country removal procedures, those injuries would not be redressable by the court. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 105-06 (1998). Neither the withdrawal nor third-country removal procedures implement any guidance that is any

different from the governing statutes. 8 U.S.C. §§ 1225(a)(4) and 1231(b). Although Plaintiffs contend the guidance harms them by requiring CBP officers to skip steps in the statutory framework, that allegation is unsupported by the record and incorrect. *See infra* 45-52. The procedures do no more than provide guidance to CBP officers in executing their already statutorily authorized discretion to permit noncitizens to withdraw their applications for admission or in implementing their statutory obligations to designate a country of removal if a noncitizen's native country will not accept their removal. *Id.* Regardless of whether each procedure is in operation, the governing statute continues to authorize withdrawals and removals to third countries. Plaintiffs thus cannot show any possibility of redress because vacating the two procedures could not in any way prevent the government from continuing to permit withdrawals or removals to third countries. *See Lujan*, 504 U.S. at 561.

Thus, as Justice Gorsuch recently explained in a concurrence on behalf of three justices in *Texas*, redressability is lacking where vacatur "does nothing to change the fact that federal officials possess the same underlying ... discretion," or "require federal officials to change how they exercise" their statutory authority. 143 S. Ct. at 1978-79 (Gorsuch, J., concurring). That is precisely the situation here, as a judicial decree vacating the withdrawal or third-country removal procedures would do nothing to prevent DHS officials from using their withdrawal and third-country removal authorities as they see fit in individual cases generally or with any individual Plaintiff in any future processing should their underlying removal orders be nullified.

2. The withdrawal procedure is not reviewable

Plaintiffs' claims concerning the USCIS withdrawal guidance is moot. On June 11, 2023, USCIS issued superseding guidance on advisals given to noncitizens subject to the covered parole processes. Ex. C ¶¶ 5-6, Exs. 1-2. The guidance, among other things, addresses the various eligibility criteria for the extant parole processes for CHNV nationals, while also specifically

directing relevant officials to inform noncitizens that they may be ineligible for the relevant parole processes based on unlawful crossing of the Mexican or Panamanian border. *Id.* That new guidance moots Plaintiffs' challenge to the prior guidance. *See*, *e.g.*, *Save Our Cumberland Mountains, Inc. v. Clark*, 725 F.2d 1422, 1432 n.27 (D.C. Cir. 1984). Should Plaintiffs suggest the new guidance does not moot their claims because it is essentially the same process, they would be mistaken. The Supreme Court recently rejected such an argument in *Biden v. Texas*, 142 S. Ct. 2528 (2022), holding that an agency memorandum that supersedes the memorandum at issue in a case is distinct final agency action, such that the lower court was wrong to review the earlier memoranda and refuse to acknowledge the effect of the new memoranda on the case. *Id.* at 2546-48.

Nor is it any answer to suggest Plaintiffs can challenge the superseding June 11 guidance concerning withdrawals as applied during credible fear interviews. Any such challenge is jurisdictionally barred as untimely because Plaintiffs have not sought to challenge it within the statutorily mandated 60-day deadline, *see* 8 U.S.C. § 1252(e)(3)(B), and Plaintiffs may not amend their complaint or tie this new claim to any existing claim through any equitable exception, *see M.M.V.*, 1 F.4th at 1109-11 (holding the time-bar is jurisdictional and rejecting any basis to circumvent that limitation on equitable or other grounds, including through amendment, relation back, or estoppel).

Even if otherwise justiciable, judicial review of all claims challenging the withdrawal guidance—as to both CBP and USCIS—is also barred by 8 U.S.C. § 1252(a)(2)(B)(ii). That provision provides that "[n]otwithstanding any other provision of law,"—which includes § 1252(e)—"no court shall have jurisdiction to review ... any other decision or action of the ... [Secretary] the authority for which is specified under this subchapter to be in the discretion of the ... Secretary." This provision applies when the relevant decision is "specified by statute to be in the discretion of the [Secretary]," *Kucana v. Holder*, 558 U.S. 233, 248 (2010), and decisions

concerning withdrawals are specified in § 1225(a)(4) to be "in the discretion of" the Secretary. 8 U.S.C. § 1225(a)(4) ("An alien applying for admission may, in the discretion of the Attorney General and at any time, be permitted to withdraw the application for admission and depart immediately from the United States."); *see also* 8 U.S.C. § 701(a)(1). Because the decision to permit a noncitizen to withdraw an application for admission is committed to the Secretary's discretion, guidance implementing that provision is also necessarily discretionary; the guidance is authorized by § 1225(a)(4).

Even if the guidance were considered to be a decision or action that precedes any withdrawal decision or action under § 1225(a)(4), review would still be foreclosed by § 1252(a)(2)(B)(ii). The Supreme Court recently explained that the neighboring provision § 1252(a)(2)(B)(i), which strips courts of jurisdiction to review "any judgment regarding the granting of relief" under certain INA provisions, bars review of "judgments of whatever kind" covered by the statute, "not just discretionary judgments or the last-in-time judgment." *Patel v. Garland*, 142 S. Ct. 1614, 1622 (2022). This bar to review thus "encompasses not just the granting of relief but also any judgment relating to the granting of relief." *Id*. This reasoning also applies to § 1252(a)(2)(B)(ii). As the Supreme Court explained in *Kucana*, 558 U.S. at 247, "[o]ther decisions specified by statute 'to be in the discretion of the [Secretary],' and therefore shielded from court oversight by § 1252(a)(2)(B)(ii), are of a like kind" to those covered by § 1252(a)(2)(B)(i). Accordingly, § 1252(a)(2)(B)(ii)'s jurisdictional bar extends not just to final decisions or actions, but "any [decision or action] relating to the granting of relief." *Patel*, 142 S. Ct. at 1622.

3. The third-country removal claims are not reviewable

For the same reasons, § 1252(a)(2)(B)(ii) bars review of the third-country removal guidance to the extent it involves removals to countries other than those designated by a covered

noncitizen. Although § 1231(b)(2)(A) permits a noncitizen to designate one country of removal, § 1231(b)(2)(C) provides that in specified circumstances the Secretary "*may* disregard a designation." (Emphasis added). The Supreme Court has explained that the use of the term "may" in that provision "connotes discretion," and that "connotation is particularly apt where, as here, 'may' is used in contraposition to the word 'shall': The [Secretary] 'shall remove' an alien to the designated country, except that the [Secretary] 'may' disregard the designation if any one of four potentially countervailing circumstances arises." *Jama v. ICE*, 543 U.S. 335, 346 (2005). Because the Secretary's discretion is provided for explicitly by statute, § 1252(a)(2)(B)(ii) applies to bar judicial review. *Kucana*, 558 U.S. at 248. And following *Patel*, that limitation of judicial review extends not just to a final decision concerning third-country removals, but any antecedent "[decision or action] relating to" designating a country for removal. 142 S. Ct. at 1622.

Congress also eliminated any cause of action with respect to third-country removals. Section 1231(h) of title 8 provides that "[n]othing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person." The plain terms of that statute bar any claim, regardless of the "party," invoking § 1231(b). Other provisions of the INA may render § 1231(b) judicially enforceable in discrete contexts. *See, e.g.*, 8 U.S.C. § 1252(b)(4) (referencing § 1231(b)(3) determinations in the context of judicial review of orders of removal); *id.* § 1252(b)(9) (permitting review of "interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States" in petitions for review in the courts of appeal). But Plaintiffs invoke no such provision. Instead, they invoke § 1231 outside of any permitted context to object to the governments third-country removal guidance. Because Plaintiffs rely on § 1231 to provide the relevant "substantive or procedural right," *id.*, § 1231(h) bars their suit.

E. All individual Plaintiffs lacking injury must be dismissed

Most of the individual Plaintiffs must also be dismissed from this suit with respect to the expedited removal procedures because they have not in fact been harmed by the challenged procedures, and thus lack any "legally and judicially cognizable" injury traceable to the challenged policies that would be redressed by a favorable decision in this case. *Texas*, 143 S. Ct. at 1970. With respect to the procedures, of the 18 named Plaintiffs: two (J.P., E.B.) withdrew their applications for admission, but only under the USCIS guidance, three (R.E., D.M., S.U.) were removed to Mexico under the third-country removal statute, and two (M.P., B.H.) received less than 48 hours—the basis for Plaintiffs allegations of injury as to this guidance—from the time they received a Form M-444 to consult. Ex. B, Decl. Kenneth Blanchard, ¶¶ 4-5; Ex. C, Lynn Decl. ¶ 9; Pls. Statement of Facts, ¶¶ 71-74, 80-82. All other Plaintiffs lack any cognizable injury this Court can redress concerning these procedures, and they must be dismissed from this suit. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) ("plaintiff must demonstrate standing for each claim" and "each form of relief sought"). Furthermore, J.P. and E.B. cannot assert any cognizable injury from their withdrawal. Withdrawal means they have not been subject any adverse consequence, like a finding of inadmissibility or the issuance of a removal order, such that any order setting aside their withdrawal places them in the precise position they are already in. *See Steel Co.*, 523 U.S. at 105-06. And because they were only subject to withdrawal under USCIS guidance, they lack any basis to challenge the CBP guidance.

F. The expedited removal procedures are not "final agency action"

All three procedures are also not reviewable "final" agency action. 5 U.S.C. § 704. Agency action is "final" under the APA only if it both "consummate[es] the agency's decisionmaking process" and also determines "rights or obligations" or produces "legal consequences." *Bennett v. Spear*, 520 U.S. 154, 178 (1997). Here, the withdrawal guidance sets out the general manner in

CBP and USCIS will exercise their discretionary authority to permit withdrawal of an application for admission, codified at 8 U.S.C. § 1225(a)(4). The guidance does not bind DHS employees to any particular course with respect to any individual or class of noncitizens—those decisions continue to be made on an individualized basis by individual officials making decisions concerning particular noncitizens. *See, e.g.*, *Am. Tort Reform Ass'n v. OSHA*, 738 F.3d 387, 395 (D.C. Cir. 2013) (such non-binding guidance are "statements of policy and "generally do not qualify" as final agency action "because they are not finally determinative of the issues or rights to which [they are] addressed"). It is only in making those individual decisions that the agency completes its decision-making process in a way that determines rights and produces legal consequences. *See Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 253 (D.C. Cir. 2014) (Kavanaugh, J.) ("statement of policy" not "final agency action" unless and until it is applied "in a particular situation" to a regulated entity).

Likewise, the third-country removal guidance sets out the general manner in which CBP officials should implement their statutory authority concerning which country to remove a noncitizen to should their home country not accept their removal. That guidance does nothing more than reiterate the government's long-codified authority under § 1231(b). *See infra* 45-50. Agency procedures that do no more than restate the agency's undisputed statutory authority do not create any rights or obligations or produce legal consequences on their own, and so do not constitute final agency action. *See Nat'l Min. Ass'n*, 758 F.3d at 253.

Similarly, the consultation guidance sets out how USCIS will implement its consultation authority. It does not itself affect any Plaintiffs on its own, but only does so contingent on "future administration action." *DRG Funding Corp. v. HUD*, 76 F.3d 1212, 1214 (D.C. Cir. 1996).

That two, three, and two Plaintiffs, respectively, *supra* 26, have been subject to the USCIS (but not CBO) withdrawal, third country removal, or consultation procedures in their expedited removal proceedings does not render the procedures challengeable final agency action. At most it

allows those, and only those, Plaintiffs who have removal orders to challenge their removal order—the relevant final agency action—on that basis. *See id.* But § 1252(a)(2)(A)(iii) unambiguously precludes judicial review concerning "the application of [§ 1225(b)(1)] to individual aliens, including the determination made under section 1225(b)(1)(B)" concerning credible fear, and nothing in § 1252(e) restores jurisdiction over such individual claims. *See* 5 U.S.C. §§ 701(a)(1), 704 (precluding review of final agency action if statute bars judicial review).

II. Plaintiffs' Claims Fail on the Merits Because the CLP Rule Is Authorized by Statute and Reasonably Explained

The Court should grant summary judgment in favor of Defendants on Counts One, Three, and Thirteen[7] (Compl. ¶¶ 136, 138-39, 148-49, 174-76) because the Rule is consistent with the INA and is reasonably explained.

A. The Rule is Consistent with the INA's Credible Fear Provisions

Plaintiffs assert that the Rule is contrary to the INA because it "improperly requires asylum officers to apply factors not relevant to whether a person has a 'credible fear of persecution' and to apply standards other than the 'significant possibility' standard." Compl. ¶ 136. These claims are meritless and are based on Plaintiffs' misunderstanding of the Rule and its application.

First, the Rule does not require AOs to apply irrelevant factors. The Rule added a rebuttable presumption of ineligibility for asylum under 8 U.S.C. § 1158(b)(2)(C) that is appropriately applied during the credible fear process. As discussed, when a noncitizen in expedited removal expresses a fear of persecution or torture, a fear of return to their country, or an intent to seek asylum, they must be referred for a credible fear interview. 8 U.S.C. § 1225(b)(1)(A)(ii). During

[7] Count Three is held in abeyance "insofar as it asserts the arbitrary-and-capricious theories adopted by the district court in *East Bay Sanctuary Covenant v. Biden*, 2023 WL 4729278 at *11-16 (N.D. Cal. July 25, 2023)." Minute Order dated Oct. 4, 2023. Defendants here seek summary judgment on Count Three insofar as it challenges the Rule's credible fear provisions.

the interview, an AO determines whether the noncitizen has a "credible fear of persecution." *Id.* § 1225(b)(1)(B)(ii), (iii). A "'credible fear of persecution' means that there is a significant possibility ... that the alien could establish *eligibility* for asylum." *Id.* § 1225(b)(1)(B)(v) (emphasis added). The statute speaks in terms of "eligibility," and thus allows for consideration of issues bearing on eligibility, including limitations on eligibility adopted by regulation under § 1158(b)(2)(C). *See Kiakombua*, 498 F. Supp. 3d at 42. Because the Departments "by regulation establish[ed] an additional limitation[or] condition[] . . . under which an alien shall be ineligible for asylum," 8 U.S.C. § 1158(b)(2)(C), the Departments are permitted to apply the Rule during credible fear screenings. Plaintiffs are thus incorrect that the Rule requires AOs to apply factors not relevant to whether a noncitizen has a "credible fear of persecution."

Second, contrary to Plaintiffs' allegations, the Rule is consistent with the statutory definition of "credible fear of persecution" because it in fact requires AOs and IJs to apply the "significant possibility" standard when considering the applicability of the rebuttable presumption during credible fear interviews. The Rule explicitly states as much. 88 Fed. Reg. at 31,380 ("the AO will determine whether there is a significant possibility that the noncitizen would be able to show at a full hearing by a preponderance of the evidence that the presumption does not apply or that they meet an exception to or can rebut the presumption"). Even without that explicit statement, the "significant possibility" standard applies by statute, 8 U.S.C. § 1225(b)(1)(B)(v), and the regulation governing the general credible fear process mirrors that statutory language and requires its application in all credible fear interviews, *see* 8 C.F.R. § 208.30(e)(2) ("An alien will be found to have a credible fear of persecution if there is a significant possibility ... that the alien can establish eligibility for asylum ... ."). In other words, the Rule requires that the "significant possibility" standard apply to the rebuttable presumption.

Notably, the provisions added by the Rule mirror the language of prior rules adopting

limitations on asylum eligibility applied during credible fear interviews. *See* 88 Fed. Reg. at 31,380 n.195.[8] The provisions nowhere suggest that the "significant possibility" standard does not apply. Instead, they merely set forth the order of operations and articulate which standard applies to the persecution or torture claims, depending on whether the rebuttable presumption is applicable. Specifically, the provisions first require the adjudicator to consider the applicability of the rebuttable presumption and whether the noncitizen can establish an exception to or can rebut it. The Rule then, depending on the outcome of that threshold inquiry, provides which screening standard shall apply—"significant possibility" if screened for asylum and "reasonable possibility" if not. *See generally* 8 C.F.R. 208.33(b), 1208.33(b). Nothing in those processing provisions displaces the statutory "significant possibility" standard or the general credible fear regulation also requiring its application. The preamble discussion further confirms that:

> When it comes to the rebuttable presumption, the AO will determine whether there is a significant possibility that the noncitizen would be able to show at a full hearing by a preponderance of the evidence that the presumption does not apply or that they meet an exception to or can rebut the presumption.

88 Fed. Reg. at 31,380; *see also id.* at 31,330 ("[T]he Departments note that the overall standard of proof for rebutting or establishing an exception to the presumption of asylum ineligibility during credible fear proceedings remains the 'significant possibility' standard.").

Plaintiffs argue that the Rule's terms explicitly conflict with the statute's requirement that

[8] *See, e.g.*, *Security Bars and Processing*, 85 Fed. Reg. 84,160, 84,175 (Dec. 23, 2020) (explaining that "[t]he rule does not, and could not, alter the standard for demonstrating a credible fear of persecution, which is set by statute"); *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33,829, 33,837 (July 16, 2019) ("If there is a significant possibility that the alien is not subject to the eligibility bar (and the alien otherwise demonstrates that there is a significant possibility that he or she can establish eligibility for asylum), then the alien will have established a credible fear."); *Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 Fed. Reg. 55,934, 55,943 (Nov. 9, 2018) ("If there is a significant possibility that the alien is not subject to the eligibility bar (and the alien otherwise demonstrates sufficient facts pertaining to asylum eligibility), then the alien will have established a credible fear.").

a "significant possibility" standard apply. Mot. 11–15. But Plaintiffs fail to acknowledge the context and purpose of the new channeling provisions, as described above.[9] These provisions do not set forth the screening standard for the rebuttable presumption as that is set by statute and in § 208.30(e). Again, the new provisions merely explain the order of operations—screen for the presumption first—and which standard applies to which forms of relief and protection as a result of that threshold determination. No language in the Rule's provisions override the default—that the "significant possibility" standard applies, as the statute requires.

Third, and finally, although Plaintiffs rely on extra-record (and therefore irrelevant) evidence to argue that the Departments are not applying the "significant possibility" standard, *see* SUF ¶ 186, their evidence shows no such thing. The Rule's implementing training materials and guidance show that AOs are indeed instructed that the "standard of proof for determining if the noncitizen is subject to the [Rule] or if the noncitizen has established an exception or rebutted the presumption depends upon the type of adjudication" and that for credible fear determinations the inquiry is whether there is a "[s]ignificant possibility that the noncitizen could establish that they are not subject to the CLP or that they could establish an exception or rebut the presumption in a full hearing." Ex. C, ¶¶ 4-5, Exs. 1-2.

B. The Rule Is Not Arbitrary and Capricious

"[T]he scope of review under the 'arbitrary and capricious' standard is narrow and a court

[9] Amicus National Citizenship and Immigration Services Council 119 thus incorrectly contend its "members do not understand the Rule to require or allow credible fear adjudicators to determine whether there is a significant possibility that the Rule's eligibility bar applies and no exception can be shown." Amicus Br. at 11. Notably, the amicus does not state its members have been instructed not to apply the "significant possibility" standard or that they are not applying it. Nor could they. USCIS training materials explicitly require AOs to apply the "significant possibility" standard by explaining AOs must ask whether there is a "[s]ignificant possibility that the noncitizen could establish that they are not subject to the [Rule] or that they could establish an exception or rebut the presumption in a full hearing." Ex. C, ¶ 4, Ex. 1.

is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). A reviewing court must be satisfied that the agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Id.* at 43. The agency's decisions are entitled to a "presumption of regularity," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971), and although "inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one," *id.* at 416. At bottom, arbitrary-and-capricious review asks only whether "the agency has acted within a zone of reasonableness." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). And "it is well settled that principles of *Chevron* deference are applicable to the [Secretary's and] Attorney General's interpretation of the INA." *Grace v. Barr*, 965 F.3d 883, 896 (D.C. Cir. 2020).

The Rule easily meets that deferential standard. The Rule was promulgated based on several urgent and compelling considerations, including: (1) an expected increase in migration following the end of the Title 42 Order at a time when encounters at the southwest border were already at historic levels; (2) the significant risk that, in the absence of other incentives, increased irregular migration would overwhelm the Departments' ability to safely, effectively, and humanely enforce and administer U.S. immigration and asylum law; (3) the likelihood that, in the absence of other incentives, migrants would undertake a dangerous journey or rely on dangerous human smuggling networks; and (4) the expansion of lawful, safe, and orderly pathways that noncitizens can pursue to seek entry to the United States. *See generally* 88 Fed. Reg. at 31,314-19. The Rule is reasonably related to those objectives. Without this emergency measure, increased irregular migration "risks overwhelming the Departments' ability to effectively process, detain, and remove, as appropriate, the migrants encountered" and will "put an enormous strain on already strained resources, risk overcrowding in already crowded USBP stations and border [ports of entry] in ways

that pose significant health and safety concerns, and create a situation in which large numbers of migrants—only a small population of whom are likely to be granted asylum—are subject to exploitation and risks to their lives by the networks that support their movements north." *Id.* at 31,316. By coupling an expansion of safe and orderly pathways to enter the United States with a presumption of asylum ineligibility for noncitizens who fail to pursue such avenues for entry or seek protection in other countries, the Rule encourages individuals to raise their asylum or protection claims in other countries through which they travel or to avail themselves of lawful, safe, and orderly pathways for entry into the United States. *See, e.g.*, *id.* at 31,329. And by reducing irregular migration and channeling migrants to orderly pathways, the government will be able to devote more of its limited resources to process migrants more efficiently.

At the same time, the Rule's presumption can be overcome in exceptionally compelling circumstances, including circumstances that are linked to the migrant's need to take immediate action notwithstanding that they did not pursue any specified pathways. The Rule thus ensures that individuals who do not pursue an orderly pathway because they, for example, were experiencing an acute medical emergency, faced an imminent threat to life or safety, or were a "victim of a severe form of trafficking in persons" will not be ineligible for asylum based on the Rule. 88 Fed. Reg. at 31,318. And the Rule is reasonably modeled, in part, on past processes that have successfully reduced unauthorized border crossing by coupling orderly pathways with the imposition of new consequences for those who entered without authorization. *Id.* at 31,316-17.

The Departments also reasonably decided to apply the rebuttable presumption during credible fear screenings, reasoning that noncitizens who receive a positive determination are able to remain in the United States for many years, which may be an incentive for noncitizens to make potentially meritless claims. 88 Fed. Reg. at 11,716; 88 Fed. Reg. at 31,337. In order to disincentivize irregular entry, the Departments determined that it was necessary to implement the

rebuttable presumption during credible fear screenings so that those subject to the presumption and who could not avoid its application or make the higher showing for statutory withholding or CAT protection would be removed expeditiously. 88 Fed. Reg. at 31,337-38. This approach follows the model of the successful CHNV parole processes, which paired lawful pathways with speedy returns for those who did not use them, *id.* at 31,316-17. Such application is consistent with the INA and is supported by the facts leading the Departments to take action. Plaintiffs' contrary arguments (Mot. 16-30), are without merit.

1. The Rule Applies the "Significant Possibility" Standard

Plaintiffs first repackage their statutory argument, asserting the Rule is arbitrary and capricious because the Departments either departed from the statutory "significant possibility" standard or failed to adequately explain how the regulatory text ensures that it will be applied. Mot. 16–17. As discussed above, *supra* 28-31, it is clear from the text and context of the Rule that the "significant possibility" standard applies.

Plaintiffs argue that language in the NPRM undercuts the Rule's statement that the "significant possibility" standard applies because the NPRM states that "[i]f 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." Mot. 16 (quoting 88 Fed. Reg. at 11,742). Plaintiffs' belief that this language shows the Departments understood the "significant possibility" standard would not be applied is wrong. Commenters raised this exact concern, *see* 88 Fed. Reg. at 31,379-80, and in response the Departments clarified those statements in the NPRM by plainly stating that "[w]hen it comes to the rebuttable presumption, the AO will determine whether there is a significant possibility that the noncitizen would be able to show at a full hearing by a preponderance of the evidence that the presumption does not apply or that they meet an exception

to or can rebut the presumption." *Id.* at 31,380. In other words, the notice and comment process played out as intended—commenters raised this concern, and the final rule addressed it. *Id.* To the extent Plaintiffs assert the Departments' response was insufficient because the regulatory text was not changed, Plaintiffs are incorrect. *See* Mot. 17. The Departments explained that the "significant possibility" standard applies by statute and cannot be changed by regulation and noted that the language used in the regulatory text had been used in other recent rules applying limitations on eligibility during credible fear screenings. 88 Fed. Reg. at 31,380 & n.195. Plaintiffs' disagreement with the response does not mean that the Departments failed to respond or that the decision the Departments made was arbitrary and capricious. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2571 (2019) ("It is not for us to ask whether [Secretary's] decision was the best one possible or even whether it was better than the alternatives.").

2. The Rule Reasonably Applies the Rule During Credible Fear Screenings

Plaintiffs next assert the Departments failed to adequately explain why they departed from their decision not to apply statutory bars to asylum during credible fear screenings in the interim final rule (IFR), *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) (Asylum Processing IFR). Mot. 17-22. Plaintiffs are mistaken.

Historically, AOs and IJs did not apply bars to asylum during credible fear screenings. 88 Fed. Reg. at 11,744. That changed in 2018 when the Departments issued a rule that created a new bar to asylum eligibility and applied that bar during credible fear screenings. *See Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 Fed. Reg. 55,934, 55,939, 55,943 (Nov. 9, 2018). The Departments later decided to apply all statutory bars to asylum during credible fear screenings in the rule *Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review*, 85 Fed. Reg. 80,274,

80,391, 80,39380,399 (Dec. 11, 2020) ("Global Asylum Rule"). The Global Asylum Rule was preliminarily enjoined before becoming effective by *Pangea Legal Servs. v. DHS*, 512 F. Supp. 3d 966, 977 (N.D. Cal. 2021) (finding that former Acting DHS Secretary Chad Wolf likely did not have authority to sign the rule), and remains enjoined. Thereafter, in the Asylum Processing IFR, the Departments superseded the Global Asylum Rule's provisions requiring the consideration of all statutory bars to asylum during credible fear interviews and returned to the pre-Global Asylum Rule practice of issuing a positive credible fear determination even when a noncitizen appears subject to a statutory bar. *See* 87 Fed. Reg. at 18,219; 8 C.F.R. § 208.30(e)(5)(i). Then, in the Lawful Pathways Rule at issue here, the Departments determined that under the circumstances, applying the rebuttable presumption during credible fear interviews was warranted. *See* 88 Fed. Reg. at 11,742-45. In doing so, they acknowledged the change in policy and provided a reasonable explanation for it. *See id.* at 11,744-45. Plaintiffs' claims to the contrary are incorrect.

First, the Departments complied with the well-established procedure for changing policy. An agency is not required to justify a change in policy by reasons more substantial than those required to adopt the policy in the first instance. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-15 (2009). Rather, "an agency provide[s] reasoned explanation for its action" when it "display[s] awareness that it is changing position." *Id.* at 515. The Departments made it clear that they were departing from the Asylum Processing IFR's approach in several respects and provided significant explanation why it made sense to do so under the circumstances. 88 Fed. Reg. at 11,742 ("The Departments acknowledge that this approach would differ from that articulated in the Asylum Processing IFR issued in March 2022, but as further discussed below assess that, to respond to the current and impending exigent circumstances, the interests balance differently and warrant a different approach from the one generally applied in credible fear screenings."); 88 Fed. Reg. at 11,744-45 (explaining decision to apply rebuttable presumption during credible fear

screenings specifically).

In choosing to apply the Rule's presumption during credible fear screenings, the Departments addressed the reasons the Asylum Processing IFR gave for declining to do the same for then-existing statutory bars. The Asylum Processing IFR reasoned that, in the circumstances then facing the Departments, applying the bars during credible fear was inefficient, especially given the bars' complexity, and that in order to develop the record sufficiently to make decisions about those bars, the interview would go beyond its screening purpose. 87 Fed. Reg. at 18,093. In the Lawful Pathways NPRM, the Departments explicitly addressed these considerations, reasoning that, although the Departments continued at that time to believe that inquiring into other statutory bars was not a preferable use of the Departments' resources, for various reasons the Departments believed it prudent to apply the Rule's presumption during credible fear interviews. *See* 88 Fed. Reg. at 11,744–45. At bottom, the Departments recognized that applying the presumption during credible fear interviews would require greater resources than not doing so but

> believe[d] that under the circumstances, the interests in ensuring lawful, safe, and order processing and overall system inefficiencies—including screening out and removing those with non-meritorious claims more quickly—outweigh any costs resulting from increasing the length of some credible fear screening interviews, and expanding the operation of the credible fear screening program.

88 Fed. Reg. at 11,745. Such explanation is sufficient under *Fox Television*.

Second, Plaintiffs' claim that the Departments failed to address the fairness concerns the Departments previously identified in the Asylum Processing IFR fails for similar reasons. *See* Mot. 21–22. It is correct that, in the circumstances then present, in the Asylum Processing IFR the Departments reasoned 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 18,094. The Departments further reasoned that

> due to the intricacies of the fact-finding and legal analysis often required to

> apply mandatory bars, the Departments now believe that individuals found to have a credible fear of persecution generally should be afforded the additional time, procedural protections, and opportunity to further consult with counsel that the Asylum Merits process or section 240 removal proceedings provide.

Id. at 18,095. The Departments addressed these prior findings when they determined that in comparison with the statutory bars at 8 U.S.C. § 1158(a)(2) and (b)(2), the Rule's presumption would be more straightforward to apply, *see* 88 Fed. Reg. at 31,380, and that in general the relevant facts would be available to the noncitizen at the time of the interview, *id.*

Plaintiffs suggest otherwise by pointing to one of the statutory eligibility bars—the firm resettlement bar. Mot. 21. But whether one statutory bar is more or less complex is irrelevant because, as discussed below, the Departments acknowledged that application of the presumption would not be simple in all cases and could extend the length of credible fear interviews but nevertheless determined that the interest in orderly processing outweighed the increased resource cost. 88 Fed. Reg. at 11,745. Furthermore, the Departments provided significant discussion regarding the due process concerns raised and the fairness of applying the Rule's rebuttable presumption during credible fear screenings. *See* 88 Fed. Reg. at 31,353-63 (responses to comments regarding due process and procedural fairness concerns). Accordingly, Plaintiffs' argument that the Departments did not consider such concerns fails.

Third, the majority of Plaintiffs' arguments stem from their apparent assumption that when the Departments referred to the Rule's rebuttable presumption as "simpler" than the statutory bars and described it as "involv[ing] a straightforward analysis," this meant that the Departments believed applying the rebuttable presumption would be easy in all cases. 88 Fed. Reg. at 11,744; Mot. 18 (quoting 88 Fed. Reg. at 31,390, 31,393). But that is not the Departments' position. The Lawful Pathways NPRM explained that many aspects of the presumption will be fairly straightforward to apply. For example, because of how the presumption applies, AOs know at the

outset of the interview whether to inquire about the presumption or not depending on how and where a noncitizen entered the United States. 88 Fed. Reg. at 11,744. And inquiring into the exceptions and potential grounds for rebuttal will in many cases require merely asking questions about the conditions surrounding the noncitizen's entry. For example, determining whether the noncitizen presented at a port of entry with a pre-scheduled appointment will be generally straightforward. But contrary to Plaintiffs' assertion, the Departments never suggested that applying the presumption would be easy in all cases. Indeed, the Departments noted that applying the presumption during credible fear may at times require "significant additional time" but nevertheless determined that under the circumstances the orderly processing and expedited rejection of nonmeritorious claims provided by taking this approach in this particular case outweighed the efficiency concerns. *Id.* The Departments thus recognized the costs and benefits and made a policy choice, which agencies are allowed to do. Plaintiffs' disagreement with that choice does not render it arbitrary and capricious.

Fourth, Plaintiffs' claim (Mot. 19-20) that applying the presumption in conjunction with the "significant possibility" standard is too complex for a credible fear interview ignores the nature of the interview. AOs and IJs apply the "significant possibility" standard in conjunction with complex factual and legal issues on a daily basis and in credible fear interviews. For example, to determine whether a noncitizen has a significant possibility of establishing eligibility for asylum, an adjudicator must inquire into whether the noncitizen is credible and has a significant possibility of establishing in a full hearing: (1) the applicability of a protected ground, such as the undefined "membership in a particular social group" ground; (2) that they have experienced or have a well-founded fear of harm constituting persecution, which requires that the harm be severe and be at the hands of the government or a private actor that the government is unable or unwilling to control; and (3) that the harm experienced or feared was or will be on account of the protected

ground. *Grace*, 965 F.3d at 888-89. Each one of these inquiries may involve complex issues, the analysis of which differs across the circuits, but adjudicators consider them daily. Plaintiffs do not explain why applying the presumption is any more complex or is any less suitable for credible fear interviews, let alone provide any basis to ignore the government's conclusions on this score.

3. The Rule Reasonably Applies the "Reasonable Possibility" Standard Where Noncitizens Do Not Establish Significant Possibility of Asylum Eligibility

Plaintiffs assert that in adopting the "reasonable possibility" standard for statutory withholding and CAT protection for those who are subject to the presumption and cannot meet an exception or rebut it, the Departments relied on a flawed analogy to reasonable fear screenings. Mot. 22-25. Plaintiffs' argument is based on faulty assumptions and otherwise fails.

First, Plaintiffs' suggestion (Mot. 23) that in the Asylum Processing IFR the Departments found the "reasonable fear" standard insufficient to protect against refoulement is incorrect. Nowhere in the Asylum Processing IFR did the Departments suggest that applying the "reasonable possibility" standard is insufficient for complying with the United States' nonrefoulement obligations. Rather, the Departments merely stated that they did not find that the higher standard was more successful overall.

Second, Plaintiffs' assertion (Mot. 22-25) that the Departments failed to consider the differences between reasonable fear and credible fear screenings is also incorrect. At the outset, Plaintiffs make unsupported generalizations about the population to whom reasonable fear proceedings apply. Although it is correct that most noncitizens who receive reasonable fear screenings are subject to reinstated orders, it is not the case that all such noncitizens have strong connections to the United States. *See* Mot. 24-25. To be subject to reinstatement, a noncitizen must have a prior removal order and then reenter the United States unlawfully. *See* 8 U.S.C. § 1231(a)(5). The underlying removal order could be any type of removal order, including an

expedited removal order. And that removal order could be reinstated immediately after re-apprehension at the border. In other words, it is not the case that all noncitizens subject to reinstated orders have significant ties to the United States or have significant time to prepare for reasonable fear screenings, as Plaintiffs suggest.

Plaintiffs next assert that the Departments should have, but failed to, consider that those who are subject to the reasonable fear process are able to obtain judicial review of negative reasonable fear determinations, unlike those who receive credible fear screenings. *See* Mot. 24. But Plaintiffs do not identify a single comment that raised this issue, *see generally* Mot., and Defendants have found none. The argument is thus unexhausted and should not be considered. *See, e.g.*, *Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 562 (D.C. Cir. 2002) ("It is well established that issues not raised in comments before the agency are waived and [courts] will not consider them.").

Furthermore, when adopting the reasonable fear process for reinstated orders under 8 U.S.C. § 1231(a)(5) or removal orders under 8 U.S.C. § 1228(b) by regulation, DOJ modeled it after the statutorily created credible fear process and applied the higher "reasonable possibility" screening standard without considering whether or not judicial review would be available. Rather, DOJ concluded that the higher standard made sense given that the standard for withholding and CAT is higher than the standard for asylum. *See Regulations Concerning the Convention Against Torture*, 64 Fed. Reg. 8,474, 8,485 (Feb. 19, 1999). The absence of discussion in the Rule of Plaintiffs' newly asserted argument regarding judicial review does not render the Departments' reasoning arbitrary or capricious. *See* 5 U.S.C. § 706 (in reviewing agency actions "due account shall be taken of the rule of prejudicial error"); *Prohibition Juice Co. v. U.S. Food and Drug Admin.*, 45 F.4th 8, 18-19 (D.C. Cir. 2022) (the "burden of showing that an error is harmful normally falls upon the party attacking the agency's determination" when determining whether an

agency has failed "to consider an important aspect of the problem").

4. The Rule Did Not Fail to Consider Interrelated Policies

Plaintiffs next assert that the Departments failed to consider what Plaintiffs refer to as interrelated policies—specifically, the policies allowing for third-country removal to Mexico, withdrawal of applications for admission, and conducting credible fear interviews in CBP custody. Mot. 25-28. As explained below, however, the Rule discusses and addresses relevant policy changes. *See, e.g.*, 88 Fed. Reg. at 31,317-18, 31,317 & n.21 (discussing policies over the prior two years as well as new efforts announced on April 27, 2023). And Plaintiffs do not articulate what they believe the Departments failed to consider about each policy but rather set forth a summary or their disagreements with those policies. *See Prohibition Juice Co.*, 45 F.4th at 18-19.

As the Rule explains, changes to the location and timing of credible fear interviews are beyond the scope of the Rule. 88 Fed. Reg. at 31,363. The Rule adopts a substantive change to asylum eligibility, which is implemented in credible fear proceedings. The procedural aspects of such proceedings are based on separate policies involving different considerations. *See id.* ("Any decision to conduct credible fear interviews while the noncitizen is in CBP custody will take into account a range of factors, including operational limitations associated with the facility, staffing, and throughput."); *see also Las Americas Immigrant Advoc. Ctr. v. Wolf*, 507 F. Supp. 3d 1, 19, 29–32 (D.D.C. 2020) (under the INA, credible fear interviews may be implemented differently depending on where an individual is detained).

Plaintiffs also claim that the Rule does not consider that the "third-country removal policy further depresses credible fear passage rates." Mot. 27. This is both incorrect and misplaced. The Rule does in fact consider its interaction with the decision to remove noncitizens from some countries to Mexico rather than their country of origin. *See, e.g.*, 88 Fed. Reg. at 11,705-06; AR2489 (including "CHNV Returns to Mexico" in modeling impact of the Rule). Indeed, one of

the key premises of the Rule was data showing that imposing consequences on CHNV nationals—who generally cannot be removed to their home countries—was critical to lowering irregular encounters from nationals of those countries, which were at all-time highs and driving record border encounters. *See, e.g.*, 88 Fed. Reg. at 31,315. And the Rule discusses at length the importance of being able to return or remove such nationals to Mexico, *see id.* at 31,317, 31,325, 31.337; 88 Fed. Reg. at 11,706, 11,712, and how, once the Title 42 Order ends, the government would be unable to expel nationals of those countries, and would instead rely, if Mexico agreed, on returning or removing such nationals to Mexico instead of their home countries, *see* 88 Fed. Reg. at 31,316-17 & n.21; 88 Fed. Reg. at 11,712.

Finally, Plaintiffs note the withdrawal policy and include a cross-reference to where they challenge it more fully but do not explain what they believe the Departments should have but failed to consider about the policy. *See* Mot. 27. The statute clearly allows for the withdrawal of applications for admission. 8 U.S.C. § 1225(a)(4). Plaintiffs do not explain how the Departments' decision to begin advising noncitizens of this should have been considered in the Rule.

5. The Rule Did Not Rely on Impermissible Factors

Finally, Plaintiffs allege that the Rule is arbitrary and capricious because it relies on disagreement with Congress's choice to adopt a "low" credible fear screening standard. Mot. 28-30. But that assertion misunderstands what the Rule does. The Rule does not displace the "significant possibility" standard; it simply exercises the discretion granted under the INA to impose a new regulatory limitation on asylum.

The statute does two things of import here: (1) it defines "credible fear of persecution" as a "significant possibility ... that the alien could establish *eligibility* for asylum," 8 U.S.C. 1225(b)(1)(B)(v) (emphasis added); and (2) it explicitly allows the Secretary and Attorney General to "by regulation establish additional limitations and conditions ... under which an alien shall be

ineligible for asylum," 8 U.S.C. 1158(b)(2)(C) (emphasis added). Congress could have permitted the Executive only to establish conditions on the exercise of officials' discretionary judgment whether asylum is warranted in individual cases, which would not be applicable during credible fear. *See Kiakombua*, 498 F. Supp. 3d at 42 ("This Court agrees with Plaintiffs that, insofar as the Lesson Plan requires AOs to consider these kinds of discretionary factors at the credible fear stage of the asylum eligibility process, it plainly subverts the INA's two-stage asylum scheme."). Congress instead chose to allow the Secretary and Attorney General to establish by regulation conditions on eligibility, which can be applicable during credible fear screenings.

A pervasive theme in IIRIRA's legislative history is that Congress was concerned that large numbers of noncitizens who arrived irregularly could remain in the United States for years while their asylum proceedings were pending.[10] Congress's findings on the need for expedited removal are notably stark. As of 1995, "thousands of aliens arrive in the U.S. at airports each year without valid documents and attempt to illegally enter the U.S." H.R. Rep. No. 104-469(1) at 158. Congress was also concerned with the "[t]housands of smuggled aliens [who] arrive in the United States each year with no valid entry documents and declare asylum immediately upon arrival" who "[b]ecause of the lack of detention space and overcrowded immigration court dockets," "have been released into the general population" without "return[ing] for their hearings." *Id.* at 117. Likewise, "[d]ue to the huge backlog in asylum cases, and the inability of the INS to detain failed asylum applicants who are deportable from the United States, these aliens could reasonably expect that the filing of an asylum application would allow them to remain indefinitely in the United States,"

[10] *E.g.*, H.R. Rep. No. 104-469, at 158 (according to the House Report, "[t]he credible-fear standard [wa]s designed to weed out nonmeritorious cases so that only applicants with a likelihood of success will proceed to the regular asylum process"); 142 Cong. Rec. 5240, 5295 (1996) (providing key recommendations from the Congressional Task Force on Immigration Reform as "[p]rovid[ing] procedures for expedited exclusion of persons claiming asylum [and] [s]treamlin[ing] present exclusion procedures and decreas[ing] length of asylum process").

providing further incentive for illegal entry. *Id.* at 117-18. Congress also sought to deter noncitizens from making the dangerous journey to the United States. *Id.* Given this background, if legislative history is relevant, the Lawful Pathways Rule and its application in credible fear screenings is fully consistent with it.

III. The remaining guidance is lawful

Plaintiffs additionally contend that three procedures the agencies implement during expedited removal proceedings are unlawful. These procedures include: (1) the removal of third-country nationals to Mexico rather than their country of nationality or citizenship (Mot. 31-37); (2) the implementation of a 24-hour minimum waiting period before a noncitizen's credible fear interview (*id.* at 37-40); and (3) the allowance for voluntary withdrawal of an application for admission for nationals of certain countries with extant parole processes (*id.* at 40-42). To the extent that any of these claims are justiciable, *see supra* 13-27, they are premised on fundamental misunderstandings of the procedures at issue. The Court should thus grant summary judgment to Defendants on these claims (Claims 5-10 and part of 13).

A. The third-country removals guidance is consistent with the statute and not arbitrary and capricious

In enacting the Rule, the Departments noted that "the United States faces constraints in removing [CHNV nationals] to their home countries. With limited exceptions, such nationals can only be removed to a third country as a result." 88 Fed. Reg. at 31,444.[11]

In recognition of the limitations on removal of certain noncitizens, DHS issued a memorandum on designating third countries as country of removal, *see* AR (CBP Removals) 321-

[11] *See Implementation of a Change to the Parole Process for Cubans*, 88 Fed. Reg. 1,266, 1,270-71 (Jan. 9, 2023) (limitations on removals for Cubans); *Implementation of a Parole Process for Nicaraguans*, 88 Fed. Reg. 1,255, 1,259 (Jan. 9, 2023) (Nicaraguans); *Implementation of a Parole Process for Haitians*, 88 Fed. Reg. 1,243, 1,247 (Jan. 9, 2023) (Haitians); *Implementation of a Parole Process for Venezuelans*, 87 Fed. Reg. 63,507, 63,509 (Oct. 19, 2022) (Venezuelans).

25, and CBP prepared a worksheet to implement the memorandum, *id.* at 22-24. Both are consistent with the statute in all respects. The memorandum tracks the statute's creation of a hierarchy of considerations to govern designation of a country of removal. First, the default country of removal is the country that the noncitizen designates. *Compare* 8 U.S.C. § 1231(b)(2)(A) (establishing designated country as the primary option for removal) *with* AR (CBP Removals) 322 (the noncitizen's designated country of removal is the first option). Second, the designated country may be disregarded by DHS in circumstances where, for instance, that country is unwilling to accept the noncitizen. *Compare* 8 U.S.C. § 1231(b)(2)(C)(iii) (statutory basis for disregarding the designation) *with* AR (CBP Removals) 322 (noting this basis for disregarding the noncitizen's designation). Third, if these circumstances apply, DHS should remove the noncitizen to his or her country of citizenship or nationality, *unless* that country, too, is unwilling to accept the noncitizen. *Compare* 8 U.S.C. § 1231(b)(2)(D) (providing these countries as a secondary option for removal and providing exceptions to designating one of these countries for removal purposes) *with* AR (CBP Removals) 322 (tracking the statutory directive, as well as the exception to designating the country of citizenship or nationality for removal). Fourth, DHS should consider alternative third countries of removal, consistent with those options included in the statute. *Compare* 8 U.S.C. § 1231(b)(2)(E)(i)-(vi) (listing additional countries to which a noncitizen may be removed) *with* AR (CBP Removals) 322 (directing consideration of same). Finally, if removal to a statutory alternative country is "impracticable, inadvisable, or impossible," DHS may remove the noncitizen to any country that will accept him or her. *Compare* 8 U.S.C. § 1231(b)(2)(E)(vii) (directing removal in this fashion) *with* AR (CBP Removals) 322 (noting removal to a third country if removal to a statutorily designated country is not possible).[12]

[12] As set forth in the guidance, before a CHNV national can be removed to a third country, the

CBP's worksheet also exactly tracks the statute. In undertaking the steps to designate a country of removal, CBP first asks the noncitizen "to which country would you like to be removed," AR (CBP Removals) 22, and gives absolute effect to that designation *unless* that country is "on the current list of countries that do not accept or place limits on the acceptance of its citizens," *id.* (designating the noncitizen's chosen country of removal unless the "unwilling to accept" exception applies); *see* 8 U.S.C. § 1231(b)(2)(A), (C)(iii). If the noncitizen's designated country is on that list, CBP then proceeds to designate the country of nationality or citizenship and will designate that country as the country of removal *unless* that country, too, is on the "list of countries that do not accept its citizens." AR (CBP Removals) 23 (designating country of citizenship or nationality unless the "unwilling to accept" exception applies); *see* 8 U.S.C. § 1231(b)(2)(D). Finally, CBP addresses each of the alternative countries of removal contemplated by the statute, designating Mexico as the country of removal *only* where none of the statutory countries is a possibility for removal. AR (CBP Removals) 23; *see* 8 U.S.C. § 1231(b)(2)(E).

The memorandum and worksheet are consistent with the statute, tracking, as they do, the statutory framework precisely. The process undertaken by DHS gives priority to the country the noncitizen designates for removal, just as the statute does, *see* AR (CBP Removals) 3-5, 22, 322; 8 U.S.C. § 1231(b)(2)(A), and proceeds to the consideration of alternative countries only in circumstances contemplated by the statute itself, *i.e.*, where removal to the designated country, country of nationality or citizenship, and any conceivable third country to which the noncitizen has a connection is not possible, *see* AR (CBP Removals) 3-5, 22-23, 322.

Plaintiffs' arguments all misapprehend and misstate how the guidance operates. Plaintiffs principally argue (Mot. 31-33) that the guidance is inconsistent with the statute because it applies

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number of CHNV nationals referred to ICE-ERO for removal to their country of origin must exceed monthly flight removal capacity to that country. AR (CBP Removals) 322.

the "impracticable, inadvisable, or impossible" standard, 8 U.S.C. § 1231(b)(2)(E)(vii), at the threshold to eliminate removal to other countries, including the country designated by the noncitizen and the country of nationality or citizenship. Plaintiffs cite nothing to support this contention, and in fact, the memorandum and worksheet belie the argument that DHS is applying this standard in an improper manner. The memorandum and worksheet exactly track the statutory framework, giving primacy to the country designated by the noncitizen, *see* AR (CBP Removals) 22, 322; 8 U.S.C. § 1231(b)(2)(A), secondary consideration to the country of citizenship or nationality, *see* AR (CBP Removals) 22, 322; 8 U.S.C. § 1231(b)(2)(D), and tertiary consideration to possible alternative countries, *see* AR (CBP Removals) 23, 322; 8 U.S.C. § 1231(b)(2)(E), and then directing removal to Mexico only once all other possibilities have been exhausted based on the unwillingness of those countries to accept the return of their citizens or nationals, *see* AR (CBP Removals) 23, 322; 8 U.S.C. § 1231(b)(2)(C), (D), (E)(vii). Far from being applied at the threshold as Plaintiffs erroneously suggest, Mot. 31-33, the "impracticable, inadvisable, or impossible" standard is applied as a last resort by DHS, exactly as contemplated by the statute. *See* AR (CBP Removals) 3-5, 321-22. Plaintiffs thus erect and attack a strawman; the procedure DHS actually implemented has no resemblance to the construction given by Plaintiffs, and in fact is entirely consistent with how Plaintiffs argue the statute should be applied. *Compare* Mot. 31 (recounting statutory framework), *with* AR (CBP Removals) 22-23 (designation worksheet tracking statute), 321-22 (memorandum providing the identical guidance regarding application of the statute).

Plaintiffs also contend the guidance is arbitrary and capricious, but these arguments are either premised on the same misunderstandings that foreclose Plaintiffs' statutory argument or simply lack merit. Plaintiffs argue, for instance, that the guidance is arbitrary and capricious because DHS failed to explain how it is consistent with the statutory framework. *See* Mot. 33. Yet as exhaustively documented *supra*, the memorandum, relevant CBP guidance, and designation-of-

country worksheet all track the statute exactly and contemplate removal to a third country only if all other options have been exhausted in a manner consistent with the statutory directives. *See* AR (CBP Removals) 3-5, 22-23, 321-25; *see generally* 8 U.S.C. § 1231(b)(2).

Plaintiffs also argue (Mot. 33-36) that noncitizens will have inadequate notice and time to present a persecution or torture claim for the actual country of removal. Yet the guidance specifically instructs CBP immigration officers to conduct the appropriate analysis of the country to which the noncitizen may be removed, inform the noncitizen of the country of removal if not the one designated by the noncitizen, and ask whether the noncitizen has a fear of persecution or torture in the country finally designated by CBP. *See* AR (CBP Removals) 4; 8 U.S.C. §§ 1225(b)(1)(A)(i), (ii); 8 C.F.R. § 235.3(b)(4); *see generally* 8 C.F.R. § 208.30. The designation-of-country worksheet additionally directs the immigration officer, as a final step after designation of the country of removal, to "ask whether the individual has a fear of return to the country of designation," and to "[r]efer the noncitizen who says yes to a fear of removal to the country designated to USCIS." AR (CBP Removals) 23-24. Any indication of fear by the noncitizen during this process thus results in referral for a credible fear interview, during which, as provided for by statute and implementing regulations, the noncitizen is questioned about their fear in the country of removal, whether that is the country the noncitizen designated or, in appropriate circumstances, a third country. *See* 8 U.S.C. § 1225(b)(1)(A)(i) (directing expedited removal, unless the noncitizen expresses a fear of persecution), (ii) (directing referral to an AO when a noncitizen expresses a fear of persecution); *see generally* 8 C.F.R. § 208.30 (procedures and standards governing credible fear interviews before the AO). Noncitizens amenable to removal to a third country will have the same opportunity and notice as any other noncitizen to claim a fear of persecution or torture and have that claim fully and fairly adjudicated.

Plaintiffs also argue that DHS failed to consider the possibility of so-called "chain

refoulement," the subsequent removal of a noncitizen to their country of nationality from the country to which they are removed by the United States. *See* Mot. 36-37. The INA expressly contemplates removal of noncitizens to third countries, *see* 8 U.S.C. § 1231(b)(1)-(2), provided that such removal may proceed consistent with the withholding of removal provisions in 8 U.S.C. § 1231(b)(3) (and the CAT regulations). The statute accordingly requires consideration of possible persecution only in the country of removal. *See* 8 U.S.C. § 1231(b)(3)(A) (prohibiting removal "to a country" if the noncitizen's "life or freedom would be threatened *in that country*" because of a protected ground) (emphasis added). Had Congress intended to require consideration of potential indirect refoulement, it could have done so explicitly, as it did in the provision relating to removal to third countries under certain bilateral and multilateral agreements. *See* 8 U.S.C. § 1158(a)(2)(A) (requiring the Secretary to determine whether the third country allows for access to a full and fair procedure for asylum or protection claims).

Plaintiffs rely on improper, non-binding, extra-record evidence in the form of an advisory opinion by the Office of the United Nations High Commissioner for Refugees (UNHCR) to claim that the possibility of "chain refoulement" "is an important consideration." Mot. 36. But this advisory opinion is irrelevant for two reasons. First, the portion of the opinion Plaintiffs cite interprets language in Article 33(1) of the 1951 Convention that prohibits refoulement "in any manner whatsoever."[13] Although the United States is a party to the 1967 Protocol, which adopted Article 33 of the 1951 Convention, and although the INA's withholding provision generally "parallels" Article 33, *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999), Congress nevertheless chose to implement Article 33 with the country-specific language at 8 U.S.C. § 1231(b)(3)(A)—

[13] UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, at ¶ 7. https://www.unhcr.org/us/media/advisory-opinion-extraterritorial-application-non-refoulement-obligations-under-1951-0 (last visited Oct. 19. 2023).

"in that country"—rather than the language the UNHCR opinion construes—"in any manner whatsoever." Second, although the Supreme Court has found the 1979 UNHCR Handbook as helpful nonbinding "guidance in construing the provisions added to the INA by the Refugee Act" of 1980, *Aguirre-Aguirre*, 526 U.S. at 426-27, a 2007 advisory opinion by UNHCR construing different text cannot provide such guidance.[14]

B. The withdrawal guidance is lawful

DHS's subcomponents, CBP and USCIS, issued guidance concerning their discretionary authority under § 1225(a)(4), permitting noncitizens from CHNV countries to withdraw their applications for admission and voluntarily return to Mexico either during inspection before CBP or during credible fear interviews before USCIS. *See* AR (CBP Withdrawals) 3-6, 12-21; AR (USCIS Withdrawals) 3-4. This guidance instructs CBP and USCIS officials, when exercising their discretion to permit withdrawals, to inform CHNV nationals that they may be eligible to request advance authorization to travel to the United States to seek parole consistent with relevant CHNV parole processes if outside of the Unite States, and that withdrawal may allow them to apply for parole under such processes. *See* AR (CBP Withdrawals) 6; AR (USCIS Withdrawals) 3. The statute and regulations specifically permit voluntary withdrawal of an application for admission in the discretion of the government, *see* 8 U.S.C. § 1225(a)(4); 8 C.F.R. § 235.4, and Plaintiffs do not challenge the legal authority of DHS to implement this guidance, *see* Mot. 40. Instead, Plaintiffs contend that the advisal provided pursuant to this guidance is misleading because it encourages noncitizens to accept voluntary withdrawal in exchange for remaining

[14] Even assuming that there is an implicit obligation to consider the potential for indirect refoulement, Mexico is a party to both the 1951 Refugee Convention and the 1967 Refugee Protocol and is thus bound by the same nonrefoulement provisions of those instruments as the United States. UNHCR, *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*, https://www.unhcr.org/us/media/states-parties-1951-convention-and-its-1967-protocol (last visited Oct. 19, 2023).

eligible for parole processes that they may actually be barred from pursuing. *Id.* at 40-41. Because the guidance is operating under this guise, according to Plaintiffs, any withdrawal cannot be voluntary, and so the guidance is arbitrary and capricious. *Id.*

As explained, Plaintiffs' argument with respect to USCIS is premised on initial guidance promulgated in May 2023, and is moot,[15] given the superseding guidance issued June 11, 2023, and any challenge to that guidance is now time-barred. *Supra* 23. Even if the revised June 2023 guidance were properly before the Court, Plaintiffs' argument would lack merit. That guidance addresses the various eligibility criteria for the extant parole processes for CHNV nationals, while also specifically directing relevant officials to inform noncitizens that they may be ineligible for the relevant parole processes based on unlawful crossing of the Mexican or Panamanian border, *see* Ex. __, ¶ 5, Ex. 2 (Venezuelans ineligible if unlawfully crossed either border after October 19, 2022); *id.* (Cubans, Haitians, and Nicaraguans ineligible if unlawfully crossed either border after January 9, 2023), or because of interdiction at sea after April 27, 2023, *see id.* (relating to interdiction of Cubans and Haitians). The guidance goes on to note that a CHNV national may accept voluntary withdrawal only once in order to maintain eligibility for the parole processes, and additionally advises that the noncitizen may schedule an appointment through the CBP One app

[15] Plaintiffs' argument also lacks merit as to the CBP and superseded USCIS guidance. Although the advisals provided to the noncitizen did not exhaustively address the eligibility criteria and the grounds on which a noncitizen could be barred from pursuing a parole process, *see* AR (CBP Withdrawals) 6, the Notice of Rights and Advisals on the Form 826 that the noncitizen was required to sign did warn that by accepting voluntary withdrawal a noncitizen could be giving up the opportunity to pursue certain immigration benefits or forms of relief. *See id.* at 334. And the advisal provided states that individuals "may," if they depart the United States, "still be eligible for the parole process," without indicating certainty. *Id.* at 4 (CBP). Regardless, only two Plaintiffs, J.P. and E.B., were withdrawal guidance, specifically USCIS's, so even if meritorious, relief must be limited to them and that guidance alone. Moreover, as they concede, both withdrew under the USCIS guidance, so neither can challenge the CBP guidance. ECF 37-1, ¶¶ 71-74, 80-82. And neither J.P. nor E.B. in fact alleges, let alone demonstrates with evidence as required on summary judgment, that they would have been ineligible for CHNV parole programs, let alone misunderstood their eligibility, so even as to them the withdrawals were voluntary.

to present at a U.S. port following withdrawal and voluntarily returning to Mexico instead of seeking to enter via a parole process. *Id.* Any noncitizen who accepts withdrawal based on their ability to pursue a parole process thus does so with full knowledge of any potential ineligibility based on his or her travel to the United States border. Accordingly, that withdrawal *is* voluntary, *see* 8 C.F.R. § 235.4, and the intervening guidance fully redresses all concerns raised by Plaintiffs under USCIS's prior advisals. *See*, *e.g.*, *Moran v. Burbine*, 475 U.S. 412, 421 (1986) (waiver voluntary if "it was the product of a free and deliberate choice rather than intimidation, coercion, or deception," and "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it").[16]

C. The 24-hour consultation guidance is consistent with relevant statutes and regulations and not arbitrary and capricious

In order to expeditiously conduct expedited removal proceedings for noncitizens arriving at the border without authorization, DHS issued guidance setting a 24-hour minimum wait period from the noncitizen's acknowledgment of receipt of the Form M-444, Information about Credible Fear Interview, which explains the credible fear process, and a credible fear interview. *See* AR (Waiting Period) 1-3. Plaintiffs argue the guidance is inconsistent with the statute and regulation. Mot. 37-40. This guidance is, however, statutorily authorized and reasonably explained.

The minimum 24-hour waiting period from the acknowledgment of receipt of the Form M-444 is fully consistent with DHS's statutory and regulatory authority. The INA delegates to the Secretary or his designees broad authority to promulgate regulations relating to the administration

[16] Plaintiffs suggest withdrawal cannot be voluntary because DHS must ask, and noncitizens must affirm, that they do not fear return to Mexico as part of their withdrawal. Mot. 42. Plaintiffs offer no explanation how the government's complying with its nonrefoulement obligations somehow renders withdrawal non-voluntary. Indeed, the "Notice of Rights and Advisals" allows noncitizens to indicate they "believe [they] face harm if [they] return to Mexico," and notifies them what will happen if they do or do not so indicate. AR (CBP Withdrawals) 334. No more is required.

and enforcement of the immigration laws, *see* 8 U.S.C. § 1103(a)(3), as well as "the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of" noncitizens, *see id.*, § 1103(a)(5). As part of that authority, Congress delegated to DHS the authority to promulgate regulations concerning consultation: Under the expedited removal statute, "[a]n alien who is eligible for" a credible-fear interview "may consult with a person or persons of the alien's choosing prior to the interview or any review thereof, *according to regulations prescribed by the [Secretary]*. Such consultation ... shall not unreasonably delay the process." 8 U.S.C. § 1225(b)(1)(B)(iv) (emphasis added). The implementing regulations, in turn, provide that "[s]uch consultation shall be made available in accordance with the policies and procedures of the detention facility where the alien is detained, shall be at no expense to the government, and shall not unreasonably delay the process." 8 C.F.R. § 235.3(b)(4)(ii). Neither the statute nor the regulation, however, prescribes a specific minimum time period in which the consultation must occur, and the term "unreasonable delay" is left undefined by statute. Further, the regulation specifically notes that the consultation right depends on the "policies and procedures of the detention facility where the alien is detained." 8 C.F.R. § 235.3(b)(4)(ii).

The guidance reasonably implements the statute and regulations. The guidance explains that it is setting a 24-hour waiting period to "enable the United States to more expeditiously process and remove individuals who arrive at the Southwest border" with no "basis to remain in the United States." AR (Waiting Period) at 3. The guidance invokes the statutory requirement to not "unreasonably delay" proceedings in implementing this change. *Id.* at 1. The statutes and regulations neither prohibit that nor define "unreasonable delay" with any fixed, static meaning. *Cf. Nat. Res. Def. Council v. EPA*, 571 F.3d 1245, 1253 (D.C. Cir. 2009) (the term "reasonably available" was ambiguous). Instead, given Congress's decision to leave it to the agency to define ambiguous statutory terms, *see* 8 U.S.C. § 1103(a)(1), (3), and delegating to DHS authority to

implement the consultation provision, *id.*, § 1225(b)(1)(B)(iv), DHS is entitled to some deference in how it construes the consultation provision. *See AILA v. Reno*, 18 F. Supp. 2d 38, 53-55 (D.D.C. 1998) (deferring to the agency's construction of the consultation provision through implementing guidance and noting "Congress has not 'spoken directly' to this precise question"), *aff'd*, 199 F.3d at 1357; *see also Las Americas Immigrant Advoc. Ctr. v. Wolf*, 507 F. Supp. 3d 1, 29 (D.D.C. 2020) (in 1252(e)(3) case, concluding agency guidance documents entitled to deference in such circumstances); *Grace v. Whitaker*, 344 F. Supp. 3d. 96, 140 (D.D.C. 2018) (same).

The 24-hour guidance is reasonable under these standards. Neither the statute nor the regulations defines the term "unreasonably delay" or places a floor on the length of time the government must provide between processing a noncitizen for expedited removal and referring for a credible fear interview and conducting the credible fear interview. *See* 8 U.S.C. § 1225(b)(1)(B)(iv); 8 C.F.R. § 235.3(b)(4)(ii). There is thus nothing in the statute or regulation, much less a compelling indication, that the guidance at issue here is "wrong" or impermissible. *See Nat. Res. Def. Council*, 666 F.2d at 603-04. Indeed, although governing a different part of the credible fear process, a companion provision provides that IJ review of the AO's determination should "be concluded as expeditiously as possible, to the maximum extent practicable within 24 hours[.]" 8 U.S.C. § 1225(b)(1)(B)(iii)(III). As Congress directed the agency to act expeditiously in its review of AO determinations, to the extent practicable within 24 hours of that determination, there is no basis in the statute to read a requirement that USCIS provide for more than 24 hours into the statute.

DHS also reasonably balanced the competing interests inherent in the statutory and regulatory language: assuring the noncitizen has an opportunity to consult with an individual of the noncitizen's choosing while preventing "unreasonably delay" of the credible fear proceedings. *See* 8 U.S.C. § 1225(b)(1)(B)(iv); 8 C.F.R. § 235.3(b)(4)(ii). The memorandum notes that DHS

will give all noncitizens "a full and fair opportunity to have their claims for protection or fear of return heard by a fully trained USCIS officer," while minimizing the wait time before the credible fear interview in order 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." AR (Waiting Period) 3. Accordingly, the new guidance is fully consistent with, and a reasonable interpretation of, both the statute and implementing regulations. *See AILA*, 18 F. Supp. 2d at 56 ("the [Secretary]'s determination" concerning the consultation right "was eminently reasonable ... . Plaintiffs cannot impose upon the [Secretary] any obligation to afford more procedures than the governing statute explicitly requires or that she has chosen to afford in her discretion").

Plaintiffs nonetheless argue that the statute and regulations "impose a limit on how short the agency can lawfully cut the consultation period," and assert that "[t]his policy falls on the wrong end of that line." Mot. 38. Plaintiffs offer no support for this claim. Nothing in the statutory or regulatory text supports it, *supra* 53-55, it is contrary to the more rigorously expedited time frame Congress enacted for purposes of IJ review of credible fear determinations, *supra* 55, and it fails to address the practical reality that noncitizens "will have longer than 24 hours to consult" in many cases, while always being provided "a full and fair opportunity to have their claims for protection or fear" heard, AR (Waiting Period) 3.

Plaintiffs also contend that, even if the guidance is statutorily permitted, it is arbitrary and capricious. Mot. 38-40. Plaintiffs argue, for instance, that the Department failed to consider "the fairness considerations that the consultation period is meant to protect." Mot. 38. Yet the memorandum explicitly seeks to balance the fairness considerations of consultation, including consideration of extensions of time in appropriate cases, with the need to expeditiously resolve the cases of noncitizens with no lawful basis to remain in the United States. AR (Waiting Period) 3; *see id.* ("USCIS is also taking all necessary steps to ensure that noncitizens understand the credible

fear process ... and are given a full and fair opportunity to have their claims for protection or fear heard by a fully trained USCIS officer."). For similar reasons, Plaintiffs' contention that DHS offered no explanation for *how* the shortened period balances with other interests is incorrect; DHS explained that the shortened period will more expeditiously resolve meritless claims while still serving to support a full and fair opportunity for meritorious claims to be heard and resolved. *Id.* Finally, Plaintiffs argue that, to the extent DHS did present a rationale related to more expeditious resolution of claims, it nonetheless failed to offer evidence or support that a shortened time period would result in quicker negative determinations for meritless claims or quicker positive determinations for meritorious claims. *Id.* at 39-40. Shortening the minimum waiting period will, however, logically and necessarily have the intended effect of shortening the overall credible fear process; if the process before the AO is concluded more quickly, all other steps occur on a faster timeline as well, resulting in both faster negative determinations *and* positive determinations. Nothing in the APA requires the detailed statistical analysis Plaintiffs appear to demand. *Prometheus Radio Project*, 141 S. Ct. at 1158.

IV. Relief Must Be Sharply Limited

Under settled constitutional and equitable principles, the Court may not issue relief that is broader than necessary to remedy actual harm shown by specific Plaintiffs. *Gill*, 138 S. Ct. at 1934. "[S]tanding is not dispensed in gross," *Lewis v. Casey*, 518 U.S. 343, 358 n.5 (1996), and Plaintiffs bear the burden to "demonstrate standing separately for each form of relief sought," *Cuno*, 547 U.S. at 352. A valid Article III remedy thus "operate[s] with respect to *specific parties*," not with respect to a law "in the abstract." *California v. Texas*, 141 S. Ct. 2104, 2115 (2021). As demonstrated earlier, no relief may issue with respect to the organizational Plaintiffs, or with respect to the superseded withdrawal guidance. And because Plaintiffs expressly disclaim litigating the Rule's application other than in expedited removal proceedings, the Court may not

invalidate the Rule's application outside of expedited removal proceedings. *See* Dkt. 38 (abeyance stipulation); *see also Wheeler*, 955 F.3d at 81-82 (explaining that "a court may invalidate only some applications" of a regulation"). In addition, only those individual Plaintiffs who have had the Rule or specific procedures applied to them would be entitled to any relief concerning their application and those procedures. *Gill*, 138 S. Ct. at 1934.

Even if any relief were warranted, it must be strictly limited. *First*, the court lacks jurisdiction to enjoin or vacate the Rule or challenged procedures under 8 U.S.C. § 1252(f)(1). That provision strips any court other than the Supreme Court of "jurisdiction or authority to enjoin or restrain the operation of" specified provisions of the INA, "other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated." 8 U.S.C. § 1252(f)(1). As the Supreme Court has explained, § 1252(f)(1)'s reference to "the operation of the relevant statutes"—which include §§ 1225 and 1231, the provisions governing expedited removal, withdrawal of admission, and removal to third countries—"is best understood to refer to the Government's efforts to enforce or implement" those statutes. *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057, 2064 (2022) (quotation omitted). Thus, § 1252(f)(1) generally prohibits courts other than the Supreme Court from "order[ing] federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out the specified statutory provisions." *Id.* at 2065. That is exactly what Plaintiffs ask this Court to do in vacating the Rule and procedures. As explained, asylum claims are frequently raised defensively in connection with expedited removal and removal proceedings. As a result, Plaintiffs' proposed relief directs government officials implementing §§ 1225 and 1229a to apply a different substantive rule of decision when asylum claims are raised in the proceedings governed by those provisions. And Plaintiffs' proposed relief likewise directs government officials implementing the withdrawal and third-country removal authorities to refrain for taking actions the government

maintains the statute allows them to take. The vacatur thus contravenes § 1252(f)(1) because it "order[s]" federal officials "to refrain from" applying the Rule's standards or the guidance documents in "implement[ing]" and "otherwise carry[ing] out" the specified statutory provisions. *Aleman Gonzalez*, 142 S. Ct. at 2065.

Nor does it matter that Plaintiffs seek vacatur rather than an injunction. Like an injunction, vacatur "restrict[s] or stop[s] official action," *Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1, 13 (2015), by prohibiting officials from relying on the agency action under review. A vacatur is practically equivalent to an injunction compelling the Departments to rescind or stop implementing the Rule and challenged procedures and therefore possesses the hallmark of the relief barred by § 1252(f)(1).

Consistent with that functional approach, the Supreme Court has repeatedly given a broad interpretation to terms such as "injunction" in other statutes. For example, the Court interpreted a statute conferring jurisdiction over appeals from "injunction[s]" in certain civil actions to apply to orders with a "coercive" effect. *Aberdeen & Rockfish R.R. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 422 U.S. 289, 307 (1975). The Court commented that it had "repeatedly exercised jurisdiction under [the provision] over appeals from orders" that were "not cast in injunctive language but which by their terms simply 'set aside' or declined to 'set aside' orders of the [agency]." *Id*. at 308 n.11 (quotation omitted). Here, too, vacating the Rule or procedures qualifies as an injunction barred by § 1252(f)(1).

In any event, § 1252(f)(1) is not limited to injunctions. Instead, it prohibits lower-court orders that "enjoin *or restrain*" the Executive Branch's operation of the covered provisions. 8 U.S.C. § 1252(f)(1) (emphasis added). The common denominator of those terms is that they involve coercion. *See* Black's Law Dictionary 529 (6th ed. 1990) ("[e]njoin" means to "require," "command," or "positively direct" (emphasis omitted)); id. at 1314 ("[r]estrain" means to "limit"

or "put compulsion upon" (emphasis omitted)). Together, they indicate that a court may not impose coercive relief that "interfere[s] with the Government's efforts to operate" the covered provisions in a particular way. *Aleman Gonzalez*, 142 S. Ct. at 2065. That meaning easily encompasses judicial vacatur. Indeed, it is precisely what Congress intended in codifying § 1252(f) and limiting such remedial authority to the Supreme Court. *See* H.R. Rep. No. 104-469, pt. 1, at 161 (Conference Report) ("These limitations do not preclude challenges to the new procedures, but the procedures will remain in force while such lawsuits are pending.").

Second, the INA bars requests for relief seeking vacatur of "any negative credible determinations" or to "bring back into the United States any plaintiff who is outside the United States ... and parole them into the United states ...." Dkt. 37-5, ¶¶ 6-7. The first request is foreclosed by § 1252(a)(2)(A)(iii), which provides that "no court shall have jurisdiction to review" "the determination made under section 1225(b)(1)(B) of this title," including credible fear determinations. Unlike the other provisions of § 1252(a)(2)(A), romanette (iii) does not include an exception for review under § 1252(e), and so the Court lacks any authority to set aside individual credible fear determinations through § 1252(e). *Make the Road*, 962 F.3d at 626 (romanette (iii) does not "expressly reserve jurisdiction 'as provided in subsection (e)'").

The request for parole into the country is barred by § 1252(a)(2)(B)(ii), which precludes any orders concerning "decision[s] or action [s] of the Attorney General or the Secretary ... the authority for which is specified under this subchapter to be in the[ir] discretion." Parole is governed by § 1182(d)(5) which provides that the Secretary may parole applicants for admission into the United States "in his *discretion* ... temporarily *under such conditions as he may prescribe*." (Emphasis added). The plain text thus specifies that parole decisions, including whether to grant parole at all, are "to be in the discretion" of the Secretary and are thus subject to § 1252(a)(2)(B)(ii). *Kucana v. Holder*, 558 U.S. 233, 239 (2010); *see Giammarco v. Kerlikowske*, 665 F. App'x 24, 26

(2d Cir. 2016) (given § 1252(a)(2)(B)(ii), court may not order government to parole individual); *Samirah v. O'Connell*, 335 F.3d 545, 549 (7th Cir. 2003) (similar); *see generally Kiyemba v. Obama*, 555 F.3d 1022, 1028 (D.C. Cir. 2009) (courts may not "compel[] the Executive to release [noncitizens] into the United States outside the framework of the immigration laws").[17]

Third, even if the provisions of § 1252 do not apply, the universal vacatur of the Rule and expedited removal procedures Plaintiffs request is contrary to constitutional and equitable principles and limitations in the INA that allow at most an award of party-specific relief. Although D.C. Circuit precedent identifies vacatur as an available remedy for a successful APA challenge to a regulation, *see, e.g.*, *Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998), the APA itself does not reference vacatur, instead limiting plaintiffs to traditional equitable remedies like injunctions, 5 U.S.C. § 703. There is no indication that Congress intended to create a new and radically different remedy in providing that courts reviewing agency action should "set aside" agency "action, findings, and conclusions." *Id*. § 706(2); *see Texas*, 143 S. Ct. at 1980-85 (Gorsuch, J., concurring in the judgment) (detailing "serious" arguments that "warrant careful consideration" as to whether the APA "empowers courts to vacate agency action").

In any event, the D.C. Circuit has treated universal vacatur of agency action as a discretionary equitable remedy—not a remedy that is automatic or compelled. *See, e.g.*, *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993) (allowing remand without vacatur and noting that an "inadequately supported rule, however, need not necessarily be vacated"). Indeed, the APA is explicit that its provisions do not affect "the power or duty of the

[17] R.E., D.M., S.U., who were removed to Mexico under the third-country removal statute, have no basis to demand return to the United States in any event. They do not challenge the validity of their removal orders. Instead they challenge their removal to Mexico, rather than elsewhere. But even assuming that removal was unlawful and otherwise reviewable, it would not entitle them to entry to this Country. At most it would entitle them to redetention pending removal to another country. *See* 8 U.S.C. § 1225(b)(1)(B)(iii)(IV), 1231(a)(1)(A). Plaintiffs do not ask for such relief.

court" to "deny relief on" any "equitable ground," 5 U.S.C. § 702(1), and equitable relief does not "automatically follow[] a determination" that a defendant acted illegally, *see eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 392-93 (2006).

The problems caused by universal remedies are well catalogued. Such remedies conflict with Article III's requirement that "[a] plaintiff's remedy must be tailored to redress the *plaintiff's* particular injury," *Gill*, 138 S. Ct. at 1934 (emphasis added), and the rule in equity that relief "be no more burdensome to the defendant than necessary to provide complete relief to the *plaintiffs*." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (emphasis added). Such remedies also circumvent Rule 23's class-action requirements, "incentivize forum shopping," "short-circuit the decisionmaking benefits of having different courts weigh in on vexing questions of law," and overburden courts' "emergency dockets." *See*, *e.g.*, *Arizona v. Biden*, 40 F.4th 375, 395-98 (6th Cir. 2022) (Sutton, C.J., concurring). And those concerns apply equally to universal vacatur. *Texas*, 143 S. Ct. at 1985-86 (Gorsuch, J., concurring). Universal vacatur of a rule, if authorized at all, thus should be reserved for "truly extraordinary circumstances," *id.*, which do not exist here.

These problems are substantially magnified in the expedited removal context. "[N]o court may ... enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title *except as specifically authorized in a subsequent paragraph of this subsection*." 8 U.S.C. § 1252(e)(1)(A). Moreover, no court may "certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection." *Id.* § 1252(e)(1)(B). These limitations apply "[w]ithout regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action." *Id.* § 1252(e)(1). And, as explained, the organizational Plaintiffs' claims are barred by § 1252(e)(3). Universal vacatur is inconsistent with these limitations, which foreclose such relief other than for individuals.

Fourth, even if vacatur were an available remedy, with respect to the claims not foreclosed by Article III or § 1252, the circumstances of this case would warrant remand without vacatur. As explained, the decision to order relief under the APA must be exercised in conformity with equitable principles. *See Allied-Signal*, 988 F.2d at 150; *see also Advocs. for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1151 (D.C. Cir. 2005) (vacatur a question of the court's remedial "discretion"). In this Circuit, that equitable balance is assessed by looking to "the seriousness of the order's deficiency ... and the disruptive consequences of an interim change that may itself be changed." *Allied–Signal*, 988 F.2d at 150–51. Applying this balance here, if the Court were to find the Rule or procedures invalid, it should remand without vacatur. The asserted defects that Plaintiffs identify could be remedied through additional explanation. *See, e.g.*, *id.* at 151 (remand without vacatur appropriate where agency can "explain" on remand issues found arbitrary and capricious). And even if this Court believes that the Rule or procedures are contrary to law, the agency may well be able to address the serious problems that the Rule and procedures mitigate while comporting with this Court's construction of the statute. *See, e.g.*, *Air Transp. Ass'n of Am., Inc. v. U.S. DOA*, 317 F. Supp. 3d 385, 391 (D.D.C. 2018) (remand without vacatur appropriate where "conceivable that on remand it can develop a reasoned explanation of its statutory authority"). Thus, vacatur is unwarranted.

On the other side of the balance, vacatur would have seriously disruptive consequences, frustrating the "public interest in effective measures to prevent the entry of" noncitizens at the Nation's borders. *United States v. Cortez*, 449 U.S. 411, 421 n.4 (1981). Here, the Executive predicted an imminent increase in encounters at the southwest border—noncitizens seeking to enter our country without authorization or documentation, overwhelming the immigration system, incentivizing human trafficking, and risking lives—and the government took targeted measures to prevent that increase. Ex. A, ¶¶ 3-14, 17-32, 33-41. But for those measures, which depend on a

balance of both consequences and incentives, encounters and overcrowding in CBP facilities would have been higher, potentially overwhelming border enforcement resources at great risk to the public, migrants, and DHS officers. *Id.*, ¶¶ 6-32. Indeed, in the run-up to the Title 42 Order's end, encounters rose to record levels, averaging up to 10,000 per day, causing extreme, dangerous overcrowding and overwhelming limited CBP and ICE resources. *Id.*, ¶ 30.

The Rule and procedures have been remarkably effective in preventing this. Since they have gone into effect, and through September 30, encounters between ports of entry at the southwest border decreased by 49 percent from their peak of 9,741 in the week prior to Title 42 expiring, to an average of 4,946 a day. *Id.*. The Rule and procedures also allow DHS to utilize expedited removal more effectively, meaning that DHS is able to repatriate more individuals, process more credible fear cases, and adjudicate claims—both positive and negative—more quickly. *Id.*, ¶¶ 6-7, 14-32 Similarly, noncitizens' use of the CBP One app to schedule an appointment to present at a port of entry, as encouraged under the Rule, has allowed CBP to process more than 160,000 individuals. *Id.*, ¶ 17. Likewise, the CHNV processes have allowed 120,000 individuals to lawfully enter the United States. *Id.* And both, coupled with withdrawal allow more noncitizens to use lawful, safe, and orderly pathways for entering the United States. *Id.*, ¶ 26 The Rule and procedures are therefore encouraging many migrants to use orderly migration pathways, without taxing limited border resources. *Id.*, ¶¶ 3-4, 11-13, 40-43

Vacatur could erase that success and exacerbate the very problems the Rule and procedures address. If the Rule and procedures are unavailable, the government expects that encounters will increase even beyond peak levels and that foreign partners will be less inclined to assist in combatting irregular migration. *Id.*, ¶¶ 8, 13, 30-32, 39-45, *see* 88 Fed. Reg. at 31,446. That is because, in the absence of the Rule and procedures, noncitizens who successfully establish a credible fear of persecution would not be expeditiously removed and thus could remain in the

United States while their asylum claims were adjudicated, even if—as will be the case for many such noncitizens—their asylum claims were ultimately denied. *See* 88 Fed. Reg. at 31,363. Without the Rule and procedures, expedited removal becomes largely impractical for DHS to apply to key nationalities encountered at the border, causing the very problems the Rule and procedures help solve. Ex. A, ¶¶ 15-32, 40-45. And our foreign partners, who have cooperated in migration initiatives and agreed to take actions beneficial to the United States' foreign policy goal, including accepting removals and withdrawals of certain nationals, would be less likely to cooperate with the government's goals in the future, undermining the regional approach that has been carefully developed through intense diplomatic effort. *Id.*, ¶¶ 26, 3-41

Conversely, the individual Plaintiffs themselves will not suffer substantial harm from continued enforcement of the Rule and procedures as to others, and their own injuries, if any, can be cured by relief specific to them if otherwise permitted by the INA. As to the organizations, the Rule and procedures do not directly regulate them, and the only asserted effect of the Rule and procedures relates to their decision to reallocate resources to assist clients. As explained, *supra* 13-21, that alleged harm is not a cognizable injury supporting the organization's standing or an APA action. But even if it were, an organization's marginal reallocation of its resources cannot outweigh the substantial harms to the government and the public described above.

At a minimum, given the impact on circumstances at the border any vacatur would have, the Court should stay any order it issues for fourteen days to allow for orderly review in the court of appeals. *See E. Bay Sanctuary Covenant v. Biden*, No. 18-CV-06810-JST, 2023 WL 4729278, at *19 (N.D. Cal. July 25, 2023) (issuing 14 day stay of order vacating the Rule).

CONCLUSION

For these reasons, the Court should grant the government summary judgment.

Respectfully submitted,

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Dated: October 27, 2023

CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2023, I electronically filed the foregoing document with the Clerk of the Court for the United States Court District Court for the District of Columbia by using the CM/ECF system. Counsel in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

By: */s/ Erez Reuveni*
EREZ REUVENI
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Civil Division

Ex. A

(Declaration of Blas Nuñez-Neto)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

M.A., *et al*, Plaintiff, v. ALEJANDRO MAYORKAS, Secretary Homeland Security, in his official capacity, *et al*., Defendants.	Case No. 23-cv-01843-TSC

DECLARATION OF BLAS NUÑEZ-NETO

I, Blas Nuñez-Neto, pursuant to 28 U.S.C. § 1746, and based upon my personal knowledge and documents and information made known or available to me from official records and reasonably relied upon in the course of my employment, hereby declare as follows:

1. I am the Assistant Secretary for Border and Immigration Policy for the U.S. Department of Homeland Security (DHS) and have served in this role since March 26, 2023. I am also the Acting Assistant Secretary for International Affairs and have served in this role since June 26, 2023. I previously served as the Acting Assistant Secretary for Border and Immigration Policy since October 1, 2021. Prior to this acting role, I served as the Chief Operating Officer for U.S. Customs and Border Protection (CBP), a DHS component, since March 5, 2021. In a prior administration, I served DHS as Senior Advisor to then-CBP Commissioner Richard Gil Kerlikowske, from January 12, 2015 to January 16, 2017.

The challenged rule and border management procedures are critical to DHS's plan to effectively manage irregular migration.

2. Over the past three years, migration around the world has reached levels not seen since World War II. The Western Hemisphere is no exception and has been facing historic levels of migration that have severely strained the immigration systems of countries throughout the region. There is a growing consensus within the region that this shared challenge cannot be solved without collective action—a consensus reflected by the 22 countries that have signed the Los Angeles Declaration on Migration and Protection, which proposes a comprehensive approach to managing migration throughout the region.

3. As part of these efforts, the United States and its foreign partners, through a variety of actions, are seeking to incentivize noncitizens to use lawful, safe, and orderly pathways and to disincentivize irregular migration. The Circumvention of Lawful Pathways rule and the complementary border management procedures that have strengthened the consequences in place at the border for those who cross unlawfully are critical components of the United States' regional strategy. The rule and the complementary procedures do not operate in a vacuum. They have been accompanied by a concerted effort by the United States and its foreign partners to increase access to lawful pathways and processes for noncitizens to come to the United States in a safe and orderly manner. These measures, taken together, form a comprehensive framework for managing migratory flows to our border—one that seeks to disincentivize noncitizens from putting their lives in the hands of callous smugglers by crossing the Southwest Border (SWB) unlawfully between ports of entry or presenting without documents

sufficient for admission at ports of entry and to incentivize them to use lawful, safe, and orderly pathways and processes instead.[1]

4. It is important to note that the rule is a temporary measure intended to respond to a time of heightened irregular migration throughout the Western Hemisphere. The rule does so by imposing strengthened consequences on noncitizens who: (1) do not avail themselves of a wide range of safe, orderly, and lawful processes and pathways the U.S. Government has made available for entering the United States; (2) do not seek protection from countries they travel through; and (3) do not establish an exception or otherwise rebut the rule's presumption of asylum ineligibility. The rule is designed to incentivize noncitizens to use new and existing lawful, safe, and orderly pathways and processes that DHS has established and expanded, and to disincentivize dangerous and irregular border crossings by placing a condition on asylum eligibility for those noncitizens who fail to do so, and who do not otherwise qualify for an exception.

5. DHS also implemented additional but separate procedures that enable it to process noncitizens subject to the rule through expedited removal in greater numbers, and more quickly, than ever before. Those procedures, described in greater detail below, include the following: (1) holding certain noncitizens processed for expedited removal in CBP short-term holding facilities for the pendency of their credible fear interviews; (2) changing the credible fear consultation period such that credible fear interviews take place no earlier than 24 hours after the noncitizen's acknowledgment of receipt of information explaining the credible fear process; (3) following the Government of Mexico's independent decision to continue to accept the return of certain third-

[1] U.S. Dep't of Homeland Sec., *Fact Sheet: Department of State and Department of Homeland Security Announce Additional Sweeping Measures to Humanely Manage Border through Deterrence, Enforcement, and Diplomacy* (May 10, 2023), https://www.dhs.gov/news/2023/05/10/fact-sheet-additional-sweeping-measures-humanely-manage-border.

country nationals, exercising DHS's authority under the Immigration and Nationality Act to remove certain third-country noncitizens to Mexico and permit certain third-country noncitizens to withdraw their application for admission and voluntarily return to Mexico; and (4) increasing U.S. Citizenship and Immigration Services' (USCIS) capacity to train and prepare additional staff temporarily detailed as asylum officers to conduct credible fear interviews. Along with the rule, these procedures are also being challenged in the above-captioned litigation.

6. The rule, and the complementary procedures described above, have worked together to increase the number of noncitizens encountered at the border who can be processed under expedited removal and to move them through the process more quickly than ever before, while strengthening consequences at the border for noncitizens who do not avail themselves of expanded lawful pathways. This has, in turn, allowed DHS to significantly enhance its ability to remove noncitizens who do not establish a basis to legally remain in the United States while reducing the time noncitizens who receive a positive credible fear determinations remain in DHS custody.

7. These measures are working as intended. As described in more detail below, since May 12, 2023, we have seen continued use of the expanded lawful pathways as well as:

- Record numbers of noncitizens going through the expedited removal process and receiving credible fear interviews;
- A significant decrease in the credible fear screen-in rate[2] for noncitizens processed under the rule;

[2] The screen-in rate refers to the percentage of cases with a positive fear determination calculated by dividing the number of cases that receive a positive fear determination by the total number of determinations made (i.e. positive and negative fear determinations).

- Record numbers of removals of noncitizens processed under expedited removal who are found not to have a fear during their credible fear interview, and of non-Mexican nationals undergoing expedited removal; and
- A substantial decline in average daily encounters at the SWB from their pre-May 12, 2023 peak.

8. By contrast, DHS planning models prepared during the rulemaking process suggested that, in the absence of the rule, encounters at the SWB could have met or exceeded the levels experienced in the days leading up to the end of the Centers for Disease Control and Prevention's Title 42 public health Order on May 12, 2023. These levels of irregular migration, sustained over an extended period, would have severely stressed DHS and DOJ's continued ability to safely, effectively, and humanely enforce and administer U.S. immigration law, including the asylum system. Thus, the rule has proved critical in reducing levels of encounters that would quickly overwhelm shelter capacity in SWB communities and interior cities.

9. DHS recognizes that, despite the success of these measures, the underlying factors in our hemisphere driving unprecedented movement of people continue to persist—including the lingering economic devastation wrought by the COVID-19 pandemic, failing authoritarian regimes in key countries, and the increasing impact of climate change. Migratory flows remain dynamic, which has led in recent months to periodic increases in SWB encounters—particularly of Venezuelan nationals. This is why DHS continues to strengthen the consequences for unlawful or unauthorized entry at the border even as it continues to expand lawful pathways for noncitizens in the region. For example, in early October 2023 that the United States would begin direct repatriations of Venezuelan nationals to Venezuela, which was quickly followed by the

first two repatriation flights of noncitizens processed under the rule who did not establish a legal basis to remain in the United States.

10. The rule and complementary border management measures have significantly enhanced DHS's ability to quickly apply consequences at the SWB. This is critical as the United States seeks to inform intending migrants in the hemisphere about the measures that are in place at the border. In implementing and modifying border management procedures, DHS must contend with callous human smuggling networks that weaponize misinformation and look for any opportunity to put the lives of intending migrants at risk for profit. These criminal organizations intentionally twist information about U.S. immigration policy for the express purposes of encouraging would-be migrants to use their services—services that regularly result in tragedy. Because profit is the motivating factor, criminal organizations have no qualms when it comes to exploiting migrants through false promises—particularly when there are changes in the United States' immigration policy or border operations. This familiar pattern was seen in the weeks leading up to the end of the Title 42 public health Order.

11. DHS's approach to border and migration management is composed of more than just consequences for those who irregularly migrate to the United States. The United States has undertaken a historic expansion of lawful pathways and processes that work in tandem with the rule to incentivize noncitizens to use safe, orderly, and lawful means to come to the United States. This effort includes the Safe Mobility initiative announced in a number of countries in our region, where noncitizens from certain nationalities can be processed by international organizations for a number of lawful pathways, including expanded refugee processing in the region. It also includes establishing parole processes for Cuban, Haitian, Nicaraguan, and Venezuelan nationals, expanding labor pathways and dedicating a set number of visas to

nationals of countries in the hemisphere, and announcing and implementing new and modified family reunification parole (FRP) processes for certain countries in the region. As a result, over 260,000 noncitizens have elected to come to the United States lawfully through these pathways.

12. Importantly, the rule's presumption is not applicable to noncitizens who avail themselves of one of many available lawful pathways, such as being screened for refugee status, obtaining appropriate authorization to travel to the United States to seek parole, or presenting at a port of entry pursuant to a pre-scheduled time and place. As such, application of the rule and additional procedures do not foreclose the ability of noncitizens with a legal basis to enter and remain in the United States; rather, these procedures incentivize the use of lawful, safe, and orderly processes.

13. These efforts have worked. Despite fluctuations in encounters of noncitizens between SWB ports of entry over the past five months, the average daily encounter rate since May 12, 2023 remains well below the high encounter numbers that immediately preceded the end of the Title 42 public health Order.[3] This benefits communities throughout the United States, but particularly those along the SWB that have most acutely felt the strain of these periodic surges in migration.

14. Finally, DHS's ability to implement the rule and additional procedures is important to achieving key foreign policy goals in the region, including those related to migration management, and to maintaining partnership and credibility with foreign governments in the hemisphere. As detailed further below, partner countries in the region have followed our

[3] Irregular migration is volatile and caused by a variety of factors, many of which are outside of the U.S. Government's influence and control. As of August 2023, more than 7.7 million Venezuelans have left their home country, driven by ongoing political and social turmoil. The majority of these displaced Venezuelans are in Colombia and Peru, but many have made their way to the United States and DHS's encounter numbers reflect an increased number of Venezuelans traveling without authorization to the United States.

lead and announced a number of policy actions, including enforcement mechanisms and expanded lawful pathways, ultimately reducing the number of people arriving at the U.S. SWB. Our inability to implement the rule would call into question the United States' commitment to a shared approach to migration management and could induce other countries to drop or scale back their own efforts to address irregular migration throughout the hemisphere.

The rule and border management procedures are having the effect intended by DHS.

15. The rule has clearly strengthened the consequences for noncitizens who fail to avail themselves of available lawful, safe, and orderly pathways. As intended, the rule has significantly reduced credible fear screen-in rates for noncitizens encountered along the SWB. Overall, from May 12 to September 30, 2023, 59 percent of noncitizens processed under the rule[4] making fear claims have been screened-in,[5] compared to an approximately 85 percent credible fear screen-in rate in the pre-pandemic period of 2014 to 2019. The decline in screen-in rates allows DHS to more quickly remove noncitizens who do not establish a legal basis to remain in the United States (detailed further below), which in turn reduces encounters at the SWB between ports of entry.

16. Between May 12 and September 30, 2023, USCIS interviewed approximately 57,700 noncitizens[6] who were subject to the rule, roughly double the previous peak volume of credible fear cases processed. Out of these noncitizens, approximately 2,200 (4 percent) were

[4] This includes categories of noncitizens processed for expedited removal and referred to USCIS under the rule, including those who establish an exception or rebut the presumption during the credible fear process. This does not, however, include those who are excepted from the presumption because they present at a port of entry with a CBP One appointment and are not processed for expedited removal. Nor does this number include noncitizens who avail themselves of DHS parole processes and, accordingly, travel to interior ports of entry to seek parole, except in the very rare instances that they are placed in expedited removal.

[5] The USCIS screen-in rate refers to the percentage of cases with a positive fear determination calculated by dividing the number of cases that receive a positive fear determination by the total number of determinations made (i.e., positive and negative fear determinations).

[6] *See* footnote 8.

able to establish an exception to the rule; approximately 6,700 (12 percent) were able to rebut the presumption; and approximately 48,700 (84 percent) were subject to the presumption. Of the noncitizens who were able to establish an exception to the rule, approximately 1,800 (79 percent) were able to establish a credible fear of persecution or torture under the "significant possibility" standard. Of the noncitizens who were able to rebut the presumption, approximately 5,800 (86 percent) were able to establish a credible fear of persecution or torture under the "significant possibility" standard. Of the noncitizens who were subject to the rule's presumption, approximately 25,900 (53 percent) were able to establish a credible fear of persecution or torture under the "reasonable possibility" standard. Accordingly, of the noncitizens subject to the rule and processed by USCIS during this period, approximately 23,700 were subject to removal because they did not meet an exception, rebut the presumption, or satisfy the "reasonable possibility" standard.[7]

17. Importantly, during this same period hundreds of thousands of noncitizens availed themselves of lawful pathways and were thus not subject to the rule's presumption, including more than 160,000 noncitizens processed at SWB ports of entry with CBP One appointments and more than 120,000 noncitizens granted parole after an individualized, case-by-case determination under the CHNV processes.

18. The rebuttable presumption established by the rule has also allowed DHS to significantly increase its use of expedited removal, including by applying it to more nationalities than it otherwise would have. This is because, prior to the rule's implementation, the screen-in rates for noncitizens from some key countries—including Venezuela, Cuba, and Nicaragua—were sufficiently high as to make it ineffective to refer nationals of those countries into expedited

[7] An additional approximately 500 noncitizens processed under the rule had their credible fear cases administratively closed; most of them were placed in section 240 removal proceedings.

removal, given the significant, multiagency resources required to process them. In the nearly five-month period (May 12 to September 30, 2023) immediately following implementation of the rule, the screen-in rates for noncitizens from Venezuela, Cuba, and Nicaragua have substantially decreased, and DHS has increased the application of expedited removal to noncitizens from these countries.[8]

19. As discussed above, the ability to use swift and efficient removal as a consequence is critical to DHS's border management strategy. Indeed, DHS specifically designed and implemented a number of additional procedures to streamline the expedited removal process—the main immigration consequence available under Title 8 processing. These measures allow DHS to refer more noncitizens into expedited removal and bring their cases to conclusion faster than ever before.

20. In April 2023, U.S. Border Patrol (USBP), a subcomponent of CBP, began holding a small number of single adult noncitizens being processed via expedited removal—noncitizens who could be removed to their home countries—in its facilities for the pendency of their credible fear interviews. After the end of the Title 42 public health Order, this was expanded to include noncitizens who could be quickly removed to Mexico. The goal of this processing change was to increase referrals of eligible noncitizens to expedited removal by increasing DHS capacity to process noncitizens for expedited removal while also reducing the amount of time noncitizens spend in DHS custody.

[8] A comparison of credible fear determinations for January 1 to May 11, 2023 and for May 12 to September 30, 2023 shows that screen-in rates for Venezuelans fell from 81 percent to 62 percent, rates for Cubans fell from 86 percent to 82 percent, and rates for Nicaraguans fell from 78 percent to 61 percent. Screen-in rates for Haitians increased from 54 percent to 63 percent during the same periods. For all nationalities together, screen-in rates fell from 74 percent to 60 percent during these periods.

21. DHS is committed to providing noncitizens in expedited removal with an opportunity to consult with any person(s) of their choosing prior to their credible fear interview. To allow for this consultation, but not unreasonably delay the expedited removal process in CBP custody, DHS changed the credible fear consultation period such that credible fear interviews take place no earlier than 24 hours after the noncitizen receives information explaining the credible fear process. CBP also added hundreds of private interview spaces in its facilities—with more than 580 currently deployed—that have significantly increased noncitizens' ability to consult with counsel or another individual of their choosing during their time in CBP custody.

22. USCIS trained all of its asylum officer corps on the rule and its new requirements to ensure asylum officers were ready to fairly, and efficiently, process these cases. Additional USCIS staff from across the agency were also trained in asylum processing—to serve temporarily on detail as asylum officers. As a result of these efforts, USCIS has conducted a record number of credible fear interviews since May 12. Between May 12 and September 30, 2023, USCIS completed more than 65,000 credible fear interviews resulting from SWB expedited removal cases—this is almost as many interviews in the span of four and half months as the 75,000 interviews USCIS averaged each year from FY 2014 to FY 2019. On average, since May 12, 2023, USCIS has completed almost 3,600 cases each week, more than double its average weekly completed cases from FY 2014 to FY 2019.

23. Additionally, DHS is processing more expedited removal cases than ever before and moving noncitizens through this process faster than ever before. This has significantly reduced the median time to process credible fear cases. Since May 12, 2023, the median time to refer noncitizens claiming a fear for credible fear interviews decreased by 58 percent from its historical average, from 12 days in the FY 201 to FY 2019 pre-pandemic period to 5 days

currently. DHS has shortened the time it takes to move noncitizens from encounter to credible fear referral to a credible fear determination, from 21 days in the pre-pandemic period to 13 days, a drop of 38 percent. Meanwhile, the median time to remove noncitizens following a negative fear determination has decreased 14 percent, from 22 days in the pre-pandemic period to 19 days currently; and the overall median time from encounter to removal for negative fear cases has been reduced 45 percent, from 73 days in the pre-pandemic period to 40 days since May 12.[9]

24. While the rule and additional procedures have enabled DHS to more quickly remove noncitizens who do not establish a legal basis to remain in the United States, they have also reduced the time that individuals who are screened in and are released pending 240 proceedings spend in DHS custody. Since May 12, 2023, DHS has shortened the time it takes to move noncitizens from encounter to credible fear referral to a credible fear determination from 21 days in the pre-pandemic period to 13 days, a drop of 38 percent. Minimizing the time that individuals spend in DHS custody—including those who are found to have a credible fear—is a benefit not just to the government, but also to the noncitizens we encounter.

25. These process enhancements, the rule, and the other challenged procedures work together to more quickly, and effectively, impose consequences on those who do not establish a legal basis to remain in the United States, while reducing time in custody for noncitizens who establish a lawful basis to remain. The rule allows DHS to place more noncitizens into expedited

[9] Processing times to remove people with negative fear determinations are based on the date that DOJ's Executive Office for Immigration Review (EOIR) upholds a negative fear determination for noncitizens who request IJ review of their initial negative fear determinations. Overall encounter-to-removal processing times include noncitizens with negative fear determinations and administrative case closures that are not referred to section 240 proceedings. Processing times are based on Office of Homeland Security Statistics (OHSS) Enforcement Lifecycle data as of June 30, 2023. Post-May 12 processing times cover encounters between May 12 and September 30, 2023, including unresolved cases but excluding cases that have been reprocessed out of expedited removal. Post-May 12 estimates based on OHSS analysis of operational CBP, ICE, USCIS, and DOJ/EOIR data as of October 15, 2023 downloaded from CBP's Unified Data Portal on October 17, 2023. Comparisons to the pandemic period are not relevant because many noncitizens who normally would be referred for expedited removal processing were instead expelled under Title 42 authority.

removal, and the process enhancements support effective consequence delivery by ensuring that the increased use of expedited removal does not result in unhelpful backlogs or increased holding times.

26. DHS's implementation of the rule, and the other challenged procedures that have significantly expanded its ability to process noncitizens through expedited removal, has generated widespread understanding that there are strengthened consequences at the U.S. border for those who enter without authorization. As part of these efforts, DHS expanded its ability to remove certain noncitizens processed under expedited removal whose countries are either unwilling to accept their repatriation or accept repatriations on a very limited basis. In the weeks leading up to end of the Title 42 public health Order, the Government of Mexico made an independent decision to accept the removal or return of noncitizens processed under Title 8 authorities from certain third countries at the land border—the first time in the United States' bilateral history with the Government of Mexico that the Government of Mexico has accepted the return at scale of third-country nationals under Title 8 authorities. Mexico's independent decision also enabled DHS to offer certain non-Mexican noncitizens who entered between ports of entry the opportunity to withdraw their application for admission and voluntarily return to Mexico. This is key because a withdrawal affords noncitizens the opportunity to avail themselves of lawful, safe, and orderly pathways for entering the United States for which they are otherwise eligible following their withdrawal.

27. These consequences are real and having their intended effect. As a result of the rule and its complementary procedures, between May 12 and September 30, 2023, DHS has repatriated approximately 294,000 noncitizens, including single adults and family units, to more than 100 countries under Title 8 authorities. This includes about 21,000 third-country nationals

who were removed or withdrew and returned to Mexico under Title 8 authorities during this time frame, including 8,200 noncitizens from Cuba, Haiti, Nicaragua, and Venezuela.

28. Since May 12, DHS has removed record numbers of non-Mexicans in expedited removal who are not found to have a credible fear: 6,800/month, compared to 3,600/month pre-pandemic.[10] At the same time, an additional 1,700 other-than-Mexican nationals per month are returning to Mexico after withdrawing their applications for admission.

29. DHS has also removed record numbers of family unit individuals through expedited removal due to the rule and the additional border management procedures that were implemented. Since May 12, 2023, DHS has removed an average of 1,800 family unit individuals per month via expedited removal, a nine-fold increase over the pre-pandemic average of 200 such removals per month.[11]

30. This comprehensive framework, which includes the disincentives to irregular migration put in place through the new rule, has significantly reduced average daily encounters at the SWB since May 12 compared to their peak just before the end of the Title 42 public health Order. After peaking at 9,741 per day in the seven days just before the end of the Title 42 public health Order, daily SWB encounters between ports decreased by 49 percent to an average of 4,946 per day for the period from May 12 to September 30, 2023.

[10] Data in this paragraph are limited to SWB encounters of other-than-Mexican nationals. During the pre-pandemic period, an average of 2,700 non-Mexican nationals per month were removed via expedited removal without claiming fear and 800/month were removed following negative credible fear determinations. Since May 12, an average of 2,600/month have been removed without claiming fear and with improved credible fear processing times an average of 4,200/month have been removed following negative fear determinations. Data for the pre-pandemic period is based on OHSS Enforcement Lifecycle data as of June 30, 2023. Post-May 12 data cover encounters between May 12 and September 30, 2023 based on OHSS analysis of operational CBP, ICE, USCIS, and DOJ/EOIR data as of October 15, 2023 downloaded from CBP Unified Data Portal on October 17, 2023.

[11] Data for the pre-pandemic period is based on OHSS Enforcement Lifecycle data as of June 30, 2023. Post-May 12 data cover encounters between May 12 and September 30, 2023 based on OHSS analysis of operational CBP, ICE, USCIS, and DOJ/EOIR data as of October 15, 2023 downloaded from CBP Unified Data Portal on October 17, 2023.

31. As noted above, migratory flows in the region continue to fluctuate and the underlying conditions that are spurring the movement of people remain. As a result, DHS experienced an increase in encounters in August and September, that was primarily driven by Venezuelan nationals, with encounters between ports of entry climbing to a post-May 12 high of 7,292 per day in September. Since then, however, encounters declined to an average of about 5,400 per day by mid-October.[12] The timing coincided with the October 5, 2023 announcement that the United States was starting direct repatriation flights to Venezuela, suggesting that this new consequence may be discouraging intending migrants from making the journey to the SWB. It is too soon, however, to draw any definitive conclusions given the underlying factors that continue to drive migration throughout the region.[13] It is also important to note that the resumption of repatriations to Venezuela is directly tied to the rule's effectiveness: the rule, which, as noted above, allows DHS to process nationalities into expedited removal that it otherwise likely would not be able to given high screen in rates, including of Venezuelans.

32. Although migration throughout the Western Hemisphere remains dynamic, particularly in the case of nationals of Venezuela, it is clear that the rule's implementation, combined with the complementary procedures, have reduced encounters at the border. By contrast, DHS anticipates that in the absence of these measures encounters at the border would be substantially higher than they are today.

[12] September data is based on OHSS Persist data through September 30, 2023; October data for October 14-20, 2023 is based on preliminary data pulled from operational records.

[13] U.S. Dep't of Homeland Sec., *United States to Resume Removals of Venezuelans Who Do Not Have a Legal Basis to Remain in the United States to Venezuela* (Oct. 5, 2023), https://www.dhs.gov/news/2023/10/05/us-resume-removals-venezuelans-who-do-not-have-legal-basis-remain.

Impact on relationships with foreign partners.

33. The United States' border management strategy is predicated on the belief that migration is a shared responsibility among all countries in the region—a fact that is reflected in the intensive and concerted diplomatic outreach DHS and the Department of State have been making on migration issues with partners throughout the Western Hemisphere. DHS relies on and works closely with its foreign partners to manage migration throughout the region.[14] Regional partner countries have encouraged and supported DHS's approach to address irregular migration by disincentivizing unlawful entry through increased enforcement and consequences, as well as its efforts to channel intending migrants into expanded lawful pathways and processes, including the refugee program, innovative parole processes, and labor migration. For example, following the development of the parole process for Venezuelans announced in October 2022—an approach that was subsequently expanded to include processes for Cuban, Haitian, and Nicaraguan nationals in January 2023—regional partners urged the United States to continue building on this approach, which couples lawful processes for noncitizens to seek protection in the region or travel directly to the United States with consequences for those who do not avail themselves of these processes.[15]

34. Prior to the end of the Title 42 public health Order, regional partners expressed great concern that, without specific action from the United States to combat the misperception that the end of the Order would mean an open U.S. border, a surge of irregular migration would

[14] *See, e.g.*, *Creating a Comprehensive Regional Framework to Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border*, Exec. Order 14,010, 86 Fed. Reg. 8,267, 8,270 (Feb. 2, 2021); The White House, *Los Angeles Declaration on Migration and Protection* (June 10, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/10/los-angeles-declaration-on-migration-and-protection/.

[15] Following the announcement of the Venezuela parole process in October 2022 and the subsequent announcement of the Cuba, Haiti, and Nicaragua parole processes in January 2023, migration flows through the region, and at the U.S.-Mexico border slowed.

flow through their countries as migrants sought to enter the United States. One foreign partner, for example, noted that it believed the formation of caravans during the spring of 2022 were spurred by rumors—and the subsequent official announcement—of the anticipated end of the Title 42 public health Order. This view is consistent with other regional partner countries that have repeatedly expressed concerns about the ways in which changes in migratory flows challenge their local communities and immigration infrastructure and have regularly highlighted how policy announcements have a direct and immediate impact on migratory flows through their countries.

35. DHS has worked closely with the Department of State to engage foreign partners in the region to help manage this unprecedented movement of people in the hemisphere. In these diplomatic engagements, DHS and State noted the steps the U.S. government was taking and, based on the principles of co-responsibility and joint migration management, encouraged other countries to take their own actions.

36. This approach worked. A number of foreign partners, including Mexico, Panama, and Colombia, announced significantly enhanced efforts to enforce their borders in the days leading up to the end of the Title 42 public health Order.[16] These governments recognized that the United States was taking new measures to strengthen enforcement of its border, in large part through the application of the rule, and committed to taking their own actions to impact irregular migratory flows in the region. Additionally, as noted above, immediately prior to the transition from DHS processing under the Title 42 public health Order to processing under Title 8

[16] Martínez, Kathia, *US, Panama and Colombia Aim to Stop Darien Gap Migration*, AP News (Apr. 11, 2023), https://apnews.com/article/darien-gap-panama-colombia-us-migrants-cf0cd1e9de2119208c9af186e53e09b7; Montoya-Galvez, Camilo, *Mexico Will Increase Efforts to Stop U.S.-Bound Migrants as Title 42 Ends, U.S. Officials Say*, CBS News (May 10, 2023), https://www.cbsnews.com/news/title-42-end-border-mexico-efforts-us-bound-migrants/.

authorities, the Government of Mexico announced that it would continue to accept of the return into Mexico of nationals from CHNV countries under Title 8 processes. This decision was premised on the success of the CHNV framework under Title 42, which combined the existence of lawful pathways and processes for nationals of these countries combined with a meaningful consequence framework and reduced irregular border crossings.

37. Continuing to build on this approach is critical to the United States' ongoing engagements on migration management with regional partners. Since May 12, the U.S. Government has continued to work closely with regional partners to build on the successes of the rule and address new and ongoing challenges driving irregular migration throughout the Western Hemisphere. As part of these efforts, the United States has continued to build on the historic expansion of lawful pathways and processes, which include the parole processes for Cuban, Haitian, Nicaraguan, and Venezuelan nationals, efforts to expand labor pathways and dedicate a set number of visas to nationals of countries in the hemisphere, and the implementation of new family reunification parole (FRP) processes for certain nationals of Colombia, El Salvador, Guatemala, and Honduras,[17] the modernization of FRP processes for nationals of Cuba and Haiti,[18] and the announcement of a new FRP for certain nationals of Ecuador.[19] As part of this

[17] U.S. Dep't of Homeland Sec., *DHS Announces Family Reunification Parole Processes for Colombia, El Salvador, Guatemala, and Honduras* (July 7, 2023), https://www.dhs.gov/news/2023/07/07/dhs-announces-family-reunification-parole-processes-colombia-el-salvador-guatemala.
[18] U.S. Dep't of Homeland Sec., *DHS Modernizes Cuban and Haitian Family Reunification Parole Processes* (Aug. 10, 2023), https://www.dhs.gov/news/2023/08/10/dhs-modernizes-cuban-and-haitian-family-reunification-parole-processes.
[19] U.S. Dep't of Homeland Sec., *DHS Announces Family Reunification Parole Process for Ecuador* (Oct. 18, 2023), https://www.dhs.gov/news/2023/10/18/dhs-announces-family-reunification-parole-process-ecuador.

comprehensive effort to expand lawful pathways and processes, more than 260,000 noncitizens have come to the United States lawfully.

38. These ongoing efforts also include the Safe Mobility initiative, in which we have partnered with Colombia, Costa Rica, Guatemala, and Ecuador to establish locations in those countries where international organizations screen individuals and refer them to lawful pathways to the United States and other participating countries, including expedited refugee processing and various other options. It also includes the recent decision by Venezuelan authorities to accept the return of Venezuelan nationals, which serves to strengthen the consequences in place at the border for individuals processed under the rule. These measures demonstrate DHS's commitment to continuing to work with our foreign partners to expand access to lawful pathways and processes even as we continue to strengthen consequences at the border for those who enter without authorization.

39. DHS assesses that, in the absence of the rule and additional challenged procedures, there will be an increase in migratory flows throughout the region that would strain enforcement and migration management resources throughout the hemisphere, contribute to the ongoing humanitarian emergency in the Darién region of Panama, and adversely impact the United States' credibility as it seeks to engage partner countries' governments to reduce irregular migration. Already, officials from a number of countries, including Mexico, have expressed grave concerns about the impacts that another significant increase in migrants will have on their communities and government agencies.

40. Ultimately, the rule's implementation is central to achieving the key foreign policy goal of managing migration on a regional or hemispheric basis. The strengthened consequences under the rule for those who fail to use lawful pathways is responsive to the

concerns raised by regional partner countries, several of whom have previously criticized the United States for maintaining procedures that they believe create a pull factor throughout the region. Conversely, eliminating the visible consequences for irregular migrants that are a core component of the rule would likely spur increases in encounters at the SWB—especially given how smugglers have previously weaponized similar changes in policy to drive migration. This would directly undermine the effectiveness of increased enforcement procedures currently underway in partner countries—for example, the current unprecedented campaign by Colombia and Panama to attack smuggling networks operating in the Darién, and Mexico's historic deployments of law enforcement and military personnel to conduct enforcement along its southern border and transit routes. These enforcement campaigns were implemented at substantial cost for those governments, and a change in U.S. policy that renders them less effective could lead to reduced support in the future for U.S.-led efforts to manage migratory flows throughout the region.

41. In short, the rule is a substantive demonstration of the U.S. Government's partnership and commitment to the shared goal of stabilizing migratory populations and addressing migration collectively as a region, both of which are critical to maintaining strong bilateral and multilateral relationships. If the rule is enjoined, it could undermine the regional approach that has been carefully developed through thoughtful and intensive diplomatic effort.

Conclusion

42. The rule and the other border management procedures are foundational components of the comprehensive, all-of-government approach that DHS implemented to prepare for the end of the Title 42 public health Order and respond to the unprecedented movement of people in our hemisphere. This approach incentivizes intending migrants to use

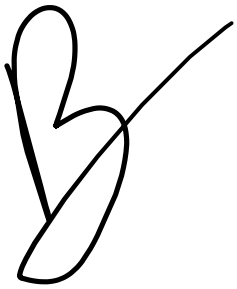
expanded safe, orderly, and lawful pathways and processes. It also disincentivizes unlawful and unauthorized entry at the border by allowing DHS to more quickly and effectively deliver consequences to those who do not establish a legal basis to remain in the United States.

43. The rule, along with the procedures that complement it, are critical components of a measured and thoughtful approach to managing migratory flows. Taken together, these measures help the U.S. impose strengthened consequences on unlawful entry, disincentivizing migrants from putting their lives in the hands of smugglers, even as we continue to expand the safe, orderly, and lawful options for those who are willing to wait.

44. This approach is working as intended. It has allowed us to deliver consequences—in the form of removals—to record numbers of individuals, reducing encounters at the border, even as we have provided record numbers of noncitizens with access to lawful pathways and processes to seek protection in the region or come to the United States.

45. Should the rule and the other procedures no longer be in effect, DHS anticipates a return to elevated encounter levels that would place significant strain on DHS components, border communities, and interior cities, despite the careful planning and significant investments that have been made. Border communities, and the NGOs that support them, will once again receive large-scale releases of noncitizens that will overwhelm their ability to coordinate safe temporary shelter and quick onward transportation. And interior destination cities will, once again, see their resources strained. This is not speculation—this is something that we just experienced in May, and could experience again.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief. Executed on this 27th day of October, 2023.



Blas Nuñez-Neto
Assistant Secretary
Border and Immigration Policy
U.S. Department of Homeland Security

Ex. B

(Declaration of Kenneth Blanchard)

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 KENNETH BLANCHARD

I, Kenneth Blanchard, pursuant to 28 U.S.C. § 1746, and based upon my personal knowledge and documents and information made known or available to me from official records and reasonably relied upon in the course of my employment, hereby declare as follows:

1. I am the Deputy Directorate Chief, Strategic Planning and Analysis Directorate (SPAD), U.S. Border Patrol (USBP), U.S. Customs and Border Protection (CBP). I have served in this role since July 15, 2023. Prior to this role, I was Acting Deputy of the USBP Law Enforcement Operations Directorate in 2020 and 2021, and the Deputy Chief Patrol Agent at the Blaine, Washington USBP Sector from July of 2021 until my assignment at SPAD.

2. Within USBP, SPAD is responsible for several Divisions, including Enforcement Systems, Policy and Compliance, Advanced Analytics, Enterprise Requirements, Doctrine, Labor and Settlements, Innovation and Integration, and Performance Reporting and Evaluation. Within SPAD, the Systems Division is responsible for developing and implementing various technological tools to assist in the execution of USBP's mission, and for maintaining and upgrading USBP electronic systems of record. In particular, the Systems Division manages USBP's e3 database. The e3 system is the primary system of records used by USBP to record encounters with individuals encountered between ports of entry, including biographical and biometric information about encountered individuals, relevant immigration processing forms,

and the results of records checks, among other information. Thus, it is possible to search the e3 database for information about particular individuals to research their immigration history.

3. In July 2023, USBP searched the e3 system for information about individuals I understand to be named plaintiffs named in the above-captioned case.

4. The records indicate that two of these plaintiffs – J.P. and E.B. – voluntarily withdrew their applications for admission and returned to Mexico, both on June 3, 2023. These plaintiffs had not previously been permitted to withdraw to Mexico, nor did they have any prior orders of removal. Additionally, the records reflect that, at the time that these plaintiffs withdrew, they had not previously been encountered or processed by CBP after October 19, 2022. The records indicated that no other plaintiffs voluntarily withdrew their applications for admission and returned to Mexico.

5. The records indicate that three of these plaintiffs – R.E., S.U., and D.M. – were removed to Mexico. The records indicate that no other plaintiffs were removed by USBP.

6. The records indicate that plaintiff J.P. re-entered the United States on August 10, 2023, at which point he was issued a Notice to Appear. The records also indicate that plaintiff S.U. re-entered the United States on September 12, 2023, at which point he was processed for expedited removal/ credible fear. Lastly, the records indicate that plaintiff D.M re-entered the United States on July 27, 2023, at which point he was processed for expedited removal/ credible fear.

7. Lastly, the records indicate the dates and times when the individual plaintiffs were booked into USBP custody. For context, an individual is documented as "booked in" when that individual's encounter is recorded into the USBP system of record, e3. This "book in" takes place when an individual enters a USBP processing facility. The book in dates for the plaintiffs are reflected in the following chart:

Plaintiff	*Book-In Time*
M.A.	05/14/2023, 8:46 PM
R.S.	05/20/2023, 12:03 AM
M.P.	06/04/2023, 11:34 PM
J.P.	05/12/2023, 8:13 AM

E.B.	05/23/2023, 1:15 AM
M.N.	05/15/2023, 9:01 PM
K.R.	05/19/2023, 11:21 AM
M.R.	05/27/2023, 2:13 AM
B.H.	05/25/2023, 1:47 AM
L.A.	06/09/2023, 7:46 PM
R.V.	05/25/2023, 7:58 PM
Y.F.	05/25/2023, 8:40 PM
M.S.	05/12/2023, 11:16 PM
F.C.	5/28/2023, 12:11 PM
R.E.	6/10/2023, 7:25 AM
S.U.	06/09/2023, 8:59 AM
D.M.	05/27/2023, 11:35 AM
J.S.	05/15/2023, 1:53 PM

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on this 26th day of October 2023.

Kenneth Blanchard
Deputy Directorate Chief
Strategic Planning and Analysis Directorate
U.S. Border Patrol
U.S. Customs and Border Protection

Ex. C

(Declaration of Mallory Lynn)

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CHRISTINA P. GREER
Senior Litigation Counsel

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

M.A., *et al.*, Plaintiffs, v. Alejandro Mayorkas, *et al.*, Defendants.	Civil Action No. 1:23-cv-01843-TSC

DECLARATION OF MALLORY LYNN

1. I am an Asylum Officer within the Operations Branch at Asylum Division Headquarters within U.S. Citizenship and Immigration Services (USCIS), U.S. Department of Homeland Security (DHS). I have held this position since September 10, 2021. In this capacity, my duties include oversight of credible fear operations at USCIS's Asylum Division and I have knowledge of credible fear processes, policies, and operations. Prior to entering on duty, I worked in various capacities within the USCIS Asylum Division including work as a line-level asylum officer, supervisory asylum officer, acting supervisory chief of staff, and section chief at the Los Angeles Asylum Office. I have also served as acting special assistant to the Asylum Chief.

2. I make this declaration based on my personal knowledge and my review of official documents, electronic information systems, and records maintained by USCIS.

3. Over the past few months, DHS and USCIS have implemented new guidance and additional procedures in expedited removal proceedings to manage the significant increase in noncitizens seeking to enter the United States at the southwest border following the expiration of the Title 42 public health Order.

4. On June 26, 2023, USCIS issued updated training guidance to asylum officers and asylum staff outlining the provisions of the *Circumvention of Lawful Pathways*, 88 Fed. Reg. 31,314 (May 16, 2023) ("the Rule") and instructing officers on the screening processes for noncitizens referred for credible fear screening under the Rule. A true and accurate copy of the training is attached as Exhibit 1.

5. On June 11, 2023, USCIS issued updated guidance on the Rule and processes for noncitizens who are nationals of Cuba, Haiti, Nicaragua, and Venezuela in U.S. Customs and Border Protection (CBP) custody who are subject to expedited removal and receiving a credible fear interview. A true and accurate copy of the guidance is attached as Exhibit 2.

6. On June 11, 2023, USCIS also issued an updated advisal for USCIS asylum officers to provide to noncitizens in U.S. Customs and Border Protection (CBP) custody who are nationals of Cuba, Haiti, Nicaragua, and Venezuela. A true and accurate copy of the advisal is attached as Exhibit 3.

7. The expedited removal statute notes that a noncitizen in the credible fear process "may consult

with a person or persons of the alien's choosing prior to the interview or any review thereof, according to regulations prescribed by the Attorney General." 8 U.S.C. § 1225(b)(1)(B)(iv). 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).

8. Under the current guidance, credible fear interviews take place at least 24 hours after the time of the noncitizen's acknowledgement and signature of the Form M-444, unless the noncitizen specifically requests to be interviewed more quickly.

9. USCIS electronic information systems and records reflect that the individual plaintiffs in this case acknowledged receipt of the Form-M-444, Information About Credible Fear Interview, and received a credible fear interview on the dates set forth below:

(a) Plaintiff M.A. was provided a Form M-444 on May 19, 2023 and acknowledged receipt by refusing to sign. M.A.'s credible fear interview was completed on May 24, 2023.

(b) Plaintiff R.S. was provided a Form M-444 on May 21, 2023 and acknowledged receipt by refusing to sign. R.S.'s credible fear interview was completed on May 30, 2023.

(c) Plaintiff M.P. signed and acknowledged receipt of Form M-444 on June 6, 2023. M.P.'s credible fear interview was completed on June 7, 2023.

(d) Plaintiff J.P. was provided a Form M-444 on May 19, 2023 and acknowledged receipt by refusing to sign. J.P.'s credible fear interview was scheduled on May 21, 2023, but J.P. elected to voluntarily withdraw their application for admission.

(e) Plaintiff E.B. was provided a Form M-444 on May 24, 2023 and acknowledged receipt by refusing to sign. E.B.'s credible fear interview was scheduled on May 25, 2023, but E.B. elected to voluntarily withdraw their application for admission.

(f) Plaintiff M.N. was provided a Form M-444 on May 19, 2023 and acknowledged receipt by refusing to sign. M.N.'s credible fear interview was completed on June 3, 2023.

(g) Plaintiff K.R. was provided a Form M-444 on May 21, 2023 and acknowledged receipt by

refusing to sign. K.R.'s credible fear interview was completed on May 30, 2023.

(h) Plaintiff M.R. was provided a Form M-444 on May 28, 2023 and acknowledged receipt by refusing to sign. M.R.'s credible fear interview was completed on June 1, 2023.

(i) Plaintiff B.H. was provided a Form M-444 on May 26, 2023 and acknowledged receipt by refusing to sign. B.H's credible fear interview was completed on May 27, 2023.

(j) Plaintiff L.A. was provided a Form M-444 on June 14, 2023 and acknowledged receipt by refusing to sign. L.A.'s credible fear interview was completed on June 16, 2023. A follow-up interview was conducted and completed on June 18, 2023.

(k) Plaintiff R.V. was provided a Form M-444 on May 27, 2023 and acknowledged receipt by refusing to sign. R.V.'s credible fear interview was completed on June 3, 2023.

(l) Plaintiff Y.F. was provided a Form M-444 on May 27, 2023 and acknowledged receipt by refusing to sign. Y.F.'s credible fear interview was completed on May 29, 2023.

(m) Plaintiff M.S. was provided a Form M-444 on May 17, 2023 and acknowledged receipt by refusing to sign. M.S.'s credible fear interview was completed on May 23, 2023.

(n) Plaintiff F.C. was provided a Form M-444 on June 4, 2023 and acknowledged receipt by refusing to sign. F.C.'s credible fear interview was completed on June 11, 2023.

(o) Plaintiff R.E. signed and acknowledged receipt of Form M-444 on June 12, 2023. R.E.'s credible fear interview was completed on June 14, 2023.

(p) Plaintiff S.U. signed and acknowledged receipt of Form M-444 on June 13, 2023. S.U.'s credible fear interview was completed on June 15, 2023. A follow-up interview was conducted and completed on June 22, 2023. S.U. was removed after an immigration judge affirmed the negative credible fear determination. S.U. subsequently re-entered the U.S. and was referred again to USCIS for a credible fear interview, which was completed on October 13, 2023. S.U. was served a positive credible fear determination on October 17, 2023.

(q) Plaintiff D.M. was provided a Form M-444 on May 29, 2023 and acknowledged receipt by refusing to sign. D.M.'s credible fear interview was completed on June 4, 2023. A

follow-up interview was conducted and completed on June 6, 2023. D.M was removed after an immigration judge affirmed the negative credible fear determination. D.M. subsequently re-entered the U.S. and was referred again to USCIS for a credible fear interview, which was completed on August 5, 2023. D.M. was served a positive credible fear determination on August 9, 2023.

(r) Plaintiff J.S. signed and acknowledged receipt of Form M-444 on May 17, 2023. J.S.'s credible fear interview was completed on May 25, 2023.

Pursuant to 28 U.S.C. § 1746, I declare, under penalty of perjury that the foregoing is true and correct.

Executed on: 10/26/2023

MALLORY L LYNN

Digitally signed by MALLORY L LYNN
Date: 2023.10.26 15:02:19 -07'00'

Mallory Lynn
Asylum Officer, Operations Branch
Asylum Division, USCIS
U.S. Department of Homeland Security

Ex. 1

(Circumvention of Lawful Pathways (CLP) Rule, Guidance for Asylum Officers and Asylum Office Staff)

U.S. Citizenship and Immigration Services

Circumvention of Lawful Pathways (CLP) Rule

Guidance for Asylum Officers and Asylum Office Staff

05/09/2023 (Last revised 6/26/2023)

Roadmap

U.S. Citizenship and Immigration Services

- Background/Legal Framework
- Overview of Presumption
- Exceptions to Presumption
- Rebutting the Presumption
- CLP Screening Process for Noncitizen Referred for Credible Fear
- Case Processing after CLP Screening Determination

Background/Legal Framework

U.S. Citizenship and Immigration Services

8 CFR § 208.33(a)(1) – "A rebuttable presumption of ineligibility for asylum applies to an alien who enters the United States from Mexico at the southwest land border or adjacent coastal borders without documents sufficient for lawful admission as described in section 212(a)(7) of the Act and whose entry was:

(i) between May 11, 2023 and May 11, 2025,

(ii) subsequent to the end of implementation of the Title 42 public health Order issued on August 2, 2021 (86 FR 42828), and related prior orders issued pursuant to the authorities in sections 362 and 365 of the Public Health Service Act (42 U.S.C. 265, 268) and the implementing regulation at 42 CFR 71.40, **and**

3. after the alien traveled through a country other than the alien's country of citizenship, nationality, or, if stateless, last habitual residence, that is a party to the 1951 United Nations Convention relating to the Status of Refugees or the 1967 Protocol relating to the Status of Refugees."

Overview of Rebuttable Presumption of Ineligibility for Asylum Under CLP

U.S. Citizenship and Immigration Services

Noncitizens who enter the United States from Mexico at the southwest land border or adjacent coastal borders on or after the effective date of the rule and end of the implementation of Title 42 public health order are presumed ineligible for asylum if they traveled through a country that is a signatory to the 1951 Convention Relating to the Status of Refugees or the 1967 Protocol Relating to the Status of Refugees

- ❑ Applies to credible fear determinations and asylum applications (affirmative, defensive, and AMI)
- ❑ Does not modify withholding of removal-only proceedings before EOIR
- ❑ Applies only prospectively to noncitizens who enter the United States **on or after May 12, 2023 at 12:00 AM ET** until May 11, 2025**.**
- ❑ Exceptions are available
- ❑ Presumption of ineligibility for asylum can be rebutted

CLP - Who Is Subject to the Rule

U.S. Citizenship and Immigration Services

Applies to noncitizens who enter the United States from Mexico across the southwest land border or adjacent coastal borders:

- **Southwest Land Border**: the entirety of the U.S. land border with Mexico
- **Adjacent Coastal Borders**: any coastal border at or near the U.S.-Mexico border, reached by an individual who traveled from Mexico and circumvented the land border

If they traveled through a country that is a signatory to the 1951 Convention Relating to the Status of Refugees or the 1967 Protocol Relating to the Status of Refugees

- The definitive list of signatories to the 1951 Convention on the Status of Refugees can be found here, while the list of signatories to the 1967 Protocol can be found here.
- Mexico is a signatory to both the 1951 Convention and 1967 Protocol.

CLP - Who Is Not Subject to the Rule

U.S. Citizenship and Immigration Services

The noncitizen is not subject to the CLP rule if the noncitizen:

- ❑ Entered the United States on or before May 11, 2023 11:59 PM ET.
- ❑ Did not enter the United States from Mexico across the southwest land border or an adjacent coastal border
- ❑ Is a Mexican citizen, national or stateless individual who last habitually resided in Mexico, as they will not have traveled through any country other than Mexico to enter the United States

Burden of Proof

U.S. Citizenship and Immigration Services

Noncitizens have the burden of proof to establish that:

- ❑ They are not subject to the CLP rule,
- ❑ That an exception applies, or
- ❑ That the presumption has been rebutted.

This requires specific and persuasive evidence

- ❑ The exceptions and ways to rebut the presumption are intended to be a fact based inquiry and narrow in scope.

Standard of Proof

U.S. Citizenship and Immigration Services

The standard of proof for determining if the noncitizen is subject to the CLP or if the noncitizen has established an exception or rebutted the presumption depends upon the type of adjudication:

- **Credible Fear:** Significant possibility that the noncitizen could establish that they are not subject to the CLP or that they could establish an exception or rebut the presumption in a full hearing
- **Affirmative and Asylum Merits Interviews:** Preponderance of the Evidence

It's important to remember:

- The burden of proof is always on the noncitizen regardless of the type of adjudication
- The testimony required to meet the burden of proof is similar under both standards of proof

U.S. Citizenship and Immigration Services

Exceptions to the Presumption of Ineligibility for Asylum

Exceptions to the Presumption

U.S. Citizenship and Immigration Services

The presumption of ineligibility for asylum does not apply where the noncitizen, or a family member traveling with the noncitizen as described at 8 CFR 208.30(c), establishes one of the following exceptions:

A. They received appropriate authorization to travel to be paroled into the United States;

B. They presented at a port of entry (POE), pursuant to a pre-scheduled time and place, or presented at a port of entry, without a pre-scheduled time and place, if the noncitizen demonstrates that it was not possible to access or use the DHS scheduling system due to language barrier, significant technical failure, illiteracy, or ongoing and serious obstacle to access;

C. They sought asylum or other protection in at least one country en route to the United States and received final judgment denying protection in such country (not including abandonment of the application); **OR**

D. They met the definition of an "unaccompanied alien child" (UAC) in 6 U.S.C. § 279(g)(2) at time of entry.

Family Member

U.S. Citizenship and Immigration Services

A family member traveling with the noncitizen as described at 8 CFR 208.30(c)

- Per regulation a spouse or child (unmarried and under the age of 21) shall be included in a noncitizens positive CF determination if they arrived concurrently, unless the PA or the spouse or child declines such inclusion.
- USCIS may also, in its discretion, include other accompanying family members. USCIS policy is to, absent circumstances indicating otherwise, exercise its discretion to include the following:
  - If PA is unmarried and under 21, the PA's parents and unmarried siblings who are under 21 and arrived concurrently with the PA.

Exception A: Parole

U.S. Citizenship and Immigration Services

The noncitizen must demonstrate that they, or a family member traveling with them (as described at 8 CFR 208.30(c)), had DHS authorization to travel for parole into the U.S.

- ❑ Parole processes are currently in place for certain eligible nationals of the following populations:
  - Cubans
  - Haitians
  - Venezuelans
  - Nicaraguans
  - Ukrainians

- ❖ Note that this is not an exhaustive list of all nationalities that may have permission to travel to the U.S. to seek parole

Exception B: DHS Scheduling System

U.S. Citizenship and Immigration Services

The presumption does not apply where the noncitizen, or a family member traveling with them (as described at 208.30(c)) scheduled an appointment to present at a POE using a DHS scheduling system or was unable to do so as outlined below:

- ❑ Presented at a POE, pursuant to a pre-scheduled time and place
  - Currently, noncitizens and their family members may use the CBP One app to register in advance and secure a time and date to present at a POE for processing
  - The CBP One app is currently available in English, Spanish, and Haitian Creole

OR

- ❑ Presented at a POE without a pre-scheduled time and place, if the noncitizen demonstrates that it was not possible to access or use the DHS scheduling system due to language barrier, significant technical failure, illiteracy, or other ongoing and serious obstacle to access

Exception C: Sought Protection

U.S. Citizenship and Immigration Services

The noncitizen demonstrates that they or a family member traveling with them (as described at 208.30(c)) sought asylum or other protection as outlined below:

- ❑ They applied for asylum or other protection
- ❑ In at least one country outside of the noncitizen's country of nationality or last habitual residence
- ❑ Through which the noncitizen traveled en route to the U.S.

AND

- ❑ Received a final judgment denying protection in such country

U.S. Citizenship and Immigration Services

Rebutting the Presumption of Ineligibility for Asylum

Rebutting the Presumption of Ineligibility

U.S. Citizenship and Immigration Services

When the presumption of ineligibility for asylum applies, because no exception applies, the noncitizen may rebut the presumption by demonstrating that one of the following exceptionally compelling circumstances exist:

1) At the time of entry, the noncitizen or an accompanying family member faced an **acute medical emergency**;

2) At the time of entry, the noncitizen or an accompanying family member **faced an imminent and extreme threat to life or safety (in Mexico)**;

3) At the time of entry, the noncitizen or an accompanying family member was a **victim of a severe form of trafficking**; OR

4) Other exceptionally compelling circumstances were present.

Rebutting the Presumption of Ineligibility: 1. Medical Emergency

U.S. Citizenship and Immigration Services

The noncitizen demonstrates that, at the time of entry to the U.S., they or an accompanying family member they are traveling with **faced an acute medical emergency**, as outlined below:

- ❑ Acute medical emergencies include situations in which someone faces a life-threatening medical emergency or faces acute and grave medical needs that could not be adequately addressed outside of the United States
- ❑ Credible testimony alone may be sufficient

Rebutting the Presumption of Ineligibility: 2. Threat to Life or Safety

U.S. Citizenship and Immigration Services

The noncitizen demonstrates that, at the time of entry to the U.S., they or an accompanying family member they are traveling with **faced an imminent and extreme threat to their life or safety**, as outlined below:

- ❑ Must show that the noncitizen or their family member's life or safety was in imminent danger *at the time they crossed the border* from Mexico to the United States
- ❑ No nexus or state action requirement
- ❑ Does not include generalized threats of violence
- ❑ Country conditions are not relevant to making this determination as this is a fact specific inquiry for the particular case

Rebutting the Presumption of Ineligibility: 2. Threat to Life or Safety (cont.)

U.S. Citizenship and Immigration Services

Faced an imminent and extreme threat to their life or safety:

- **Imminent:** There must be a threat to life or safety in the very near term
- **Extreme:** The threat must exceed the ordinary or expected threat to life or safety
- **Examples of "imminent and extreme threat to life or safety"** include an imminent threat of rape, kidnapping, torture, or murder in Mexico such that they cannot wait for an opportunity to present at a POE without putting their life or well-being at extreme risk

Rebutting the Presumption of Ineligibility: 3. Trafficking Victims

U.S. Citizenship and Immigration Services

The noncitizen demonstrates that, at the time of entry to the U.S., they or an accompanying family member they are traveling with was a **victim of a "severe form of trafficking in persons"**, as defined at 8 CFR 214.11:

- ❑ A severe form of trafficking in persons is defined as either:

  a) Sex trafficking: the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of inducing a commercial sex act through the use of force, fraud, or coercion. Inducing an individual under 18 years of age to perform a commercial sex act is considered sex trafficking, regardless of the use of force, fraud, or coercion.

  OR

  b) Labor trafficking: the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services through the use of fraud, force, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

Rebutting the Presumption: 4. Other Exceptionally Compelling Circumstances

U.S. Citizenship and Immigration Services

The noncitizen demonstrates that **other exceptionally compelling circumstances exist**, as outlined below:

- ❑ Assess on a case-by-case basis
- ❑ Does not necessarily need to occur at the time of entry
- ❑ Applies to the noncitizen and accompanying family members they are travelling with
- ❑ As a reminder, the other three grounds to rebut the presumption would exist in rare circumstances and this ground should be applied similarly

Rebutting the Presumption:
4. Examples - Exceptionally Compelling Circumstances

U.S. Citizenship and Immigration Services

Examples of "other exceptionally compelling circumstances" could include:

- The noncitizen has a family member who is not a part of their CF determination but the noncitizen is their caretaker and the family member is experiencing an acute medical emergency at the time of entry.
- The noncitizen has an adult special needs child with them.

❖ **Note that having a meritorious asylum claim is not itself an exceptionally compelling circumstance.**

CLP Screening Summary

U.S. Citizenship and Immigration Services

Step 1: Elicit testimony to determine if the noncitizen is subject to the CLP

(If CLP applies, move on to step 2. If CLP does not apply, CLP screening complete.)

- Entered the U.S. at the southwest land border or adjacent costal borders on or after May 12, 2023 at 12:00 AM ET, AND
- Traveled through any country apart from their country of nationality (or last habitual residence) en route to the United States; AND
- At least one of the countries through which the noncitizen **traveled** en route to the United States are signatories to the Refugee Convention or Protocol (e.g., Mexico).

Step 2: Elicit for exceptions to the presumption of asylum ineligibility

(If no exceptions, move on to step 3. If an exception is established, CLP screening complete.)

- Exception A: Parole
- Exception B: DHS Scheduling System
- Exception C: Sought Protection
- Exception D: Unaccompanied Child (UC) [not ER/CF]

Step 3: Elicit for whether the presumption of ineligibility is rebutted

(If not rebutted, the presumption applies. If rebutted, the presumption does not apply. Proceed with your interview accordingly).

- Acute medical emergency at time of entry
- Imminent and extreme threat to life or safety in Mexico at time of entry
- Victim of a severe form of human trafficking at time of entry
- Exceptionally compelling circumstances at or after time of entry

U.S. Citizenship and Immigration Services

CLP Screening Process for Noncitizens Referred to USCIS for Credible Fear Interview/Determination

Credible Fear Process
Application of Presumption of Ineligibility

U.S. Citizenship and Immigration Services

- ❑ Conduct CLP screening interview to determine if the noncitizen is subject to the rule and whether the noncitizen can demonstrate an exception or rebut the presumption of ineligibility for asylum.
- ❑ Complete CLP Presumption Worksheet
  - The CLP Presumption Worksheet does not need to be completed if the noncitizen is **not** subject to the CLP. This includes:
    - Mexican citizens, nationals, and stateless individuals that last habitually resided in Mexico
    - Noncitizens who entered on or before May 11, 2023 at 11:59 PM ET.
    - Noncitizens who did not enter via the southwest land border or adjacent coastal border
  - If the noncitizen's testimony is found not credible relating to an exception or the rebuttal of the CLP, address in the CLP Presumption Worksheet explanation field.

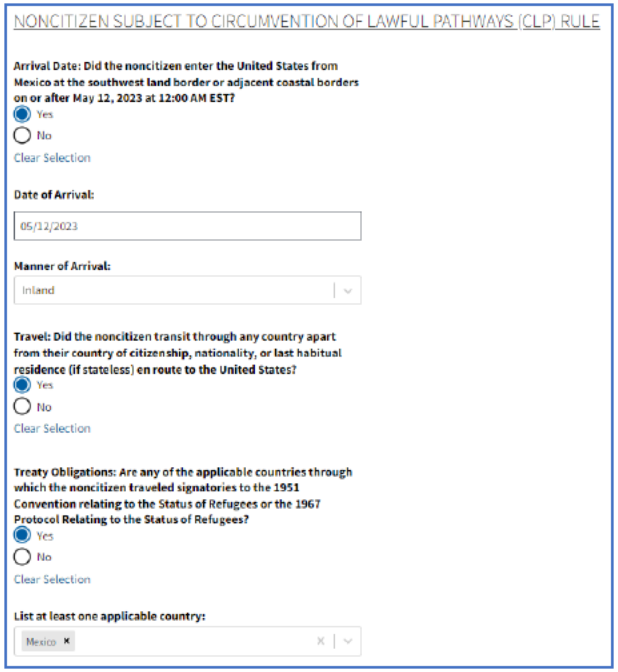
CF Process - CLP Presumption Worksheet
Is the noncitizen subject to the CLP?

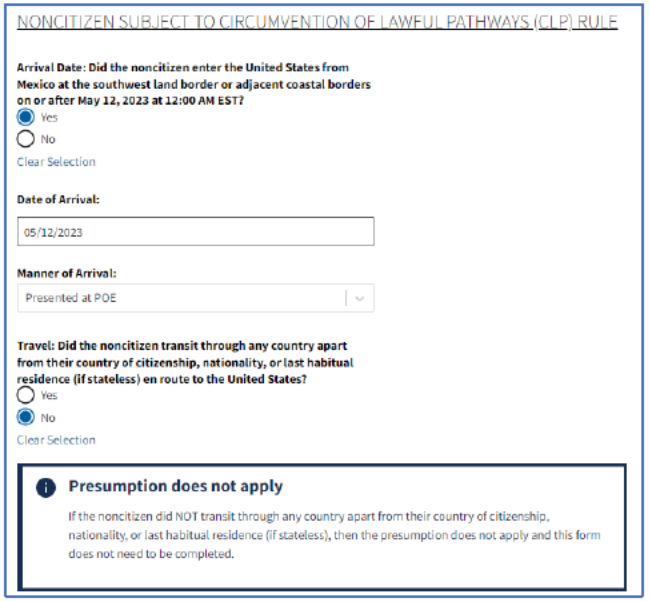
U.S. Citizenship and Immigration Services

- **Arrival Date/Location:** Did the noncitizen enter the United States at the southwest land border or adjacent coastal borders on or after May 12 at 12:00 AM ET?
- **Traveled:** Did the individual travel through any country apart from their country of nationality (or last habitual residence) en route to the United States?
- **Treaty Obligations:** If answer about travel is yes, are any of the countries signatories to the Refugee Convention or Protocol?
- **When is the CLP Presumption Worksheet Not Required:** If the noncitizen is not subject to the presumption, you do not need to complete the CLP presumption worksheet. Continue with a standard credible fear interview.

CF Process - Completing the Worksheet (GINA)
Is the noncitizen subject to the CLP?

U.S. Citizenship and Immigration Services





CF Process - CLP Presumption Worksheet
Does an Exception to the Presumption Apply?

U.S. Citizenship and Immigration Services

Has the noncitizen made a sufficient showing that they, or a family member traveling with them as described in 8 CFR 208.30(c), could establish that:

A. The noncitizen or family member received appropriate authorization to travel to the United States to seek parole, pursuant to a DHS-approved parole process"?

✓ ***If yes → Exception A found***

B. The noncitizen or family member presented at a port of entry, pursuant to a pre-scheduled time and place, or presented at a port of entry, without a pre-scheduled time and place, but has demonstrated that it was not possible to access or use the DHS scheduling system due to language barrier, illiteracy, significant technical failure, or ongoing and serious obstacle to access?

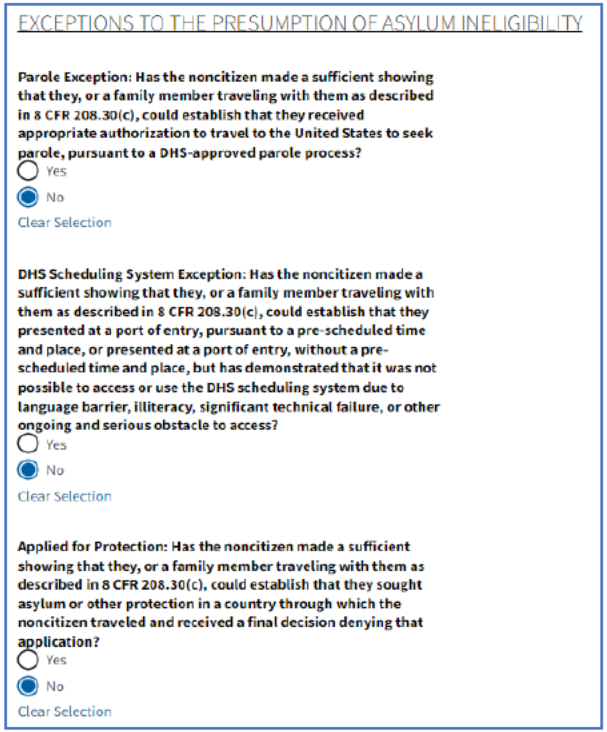
✓ ***If yes → Exception B found***

C. The noncitizen or family member sought asylum or other protection in a country through which the noncitizen traveled, and received a final decision denying that application?

✓ ***If yes → Exception C found***

CF Process – Completing the Worksheet (GINA)
Does an Exception to the Presumption Apply?

U.S. Citizenship and Immigration Services



EXCEPTIONS TO THE PRESUMPTION OF ASYLUM INELIGIBILITY

Parole Exception: Has the noncitizen made a sufficient showing that they, or a family member traveling with them as described in 8 CFR 208.30(c), could establish that they received appropriate authorization to travel to the United States to seek parole, pursuant to a DHS-approved parole process?

- ○ Yes
- ◉ No

Clear Selection

DHS Scheduling System Exception: Has the noncitizen made a sufficient showing that they, or a family member traveling with them as described in 8 CFR 208.30(c), could establish that they presented at a port of entry, pursuant to a pre-scheduled time and place, or presented at a port of entry, without a pre-scheduled time and place, but has demonstrated that it was not possible to access or use the DHS scheduling system due to language barrier, illiteracy, significant technical failure, or other ongoing and serious obstacle to access?

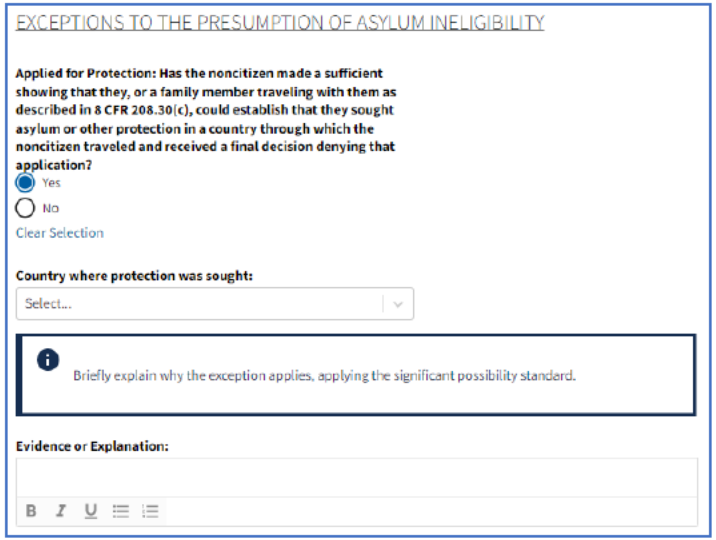
- ○ Yes
- ◉ No

Clear Selection

Applied for Protection: Has the noncitizen made a sufficient showing that they, or a family member traveling with them as described in 8 CFR 208.30(c), could establish that they sought asylum or other protection in a country through which the noncitizen traveled and received a final decision denying that application?

- ○ Yes
- ◉ No

Clear Selection



EXCEPTIONS TO THE PRESUMPTION OF ASYLUM INELIGIBILITY

Applied for Protection: Has the noncitizen made a sufficient showing that they, or a family member traveling with them as described in 8 CFR 208.30(c), could establish that they sought asylum or other protection in a country through which the noncitizen traveled and received a final decision denying that application?

- ◉ Yes
- ○ No

Clear Selection

Country where protection was sought:

Select...

Briefly explain why the exception applies, applying the significant possibility standard.

Evidence or Explanation:

CF Process - CLP Presumption Worksheet Is the Presumption Rebutted?

U.S. Citizenship and Immigration Services

Has the noncitizen made a sufficient showing that they, or a family member traveling with them as described in 8 CFR 208.30(c), could establish that at the time of entry:

1. The noncitizen or family member faced an acute medical emergency?
   - ✓ ***If yes → Presumption Rebutted Under #1***
2. The noncitizen or family member faced an imminent and extreme threat to life or safety?
   - ✓ ***If yes → Presumption Rebutted Under #2***
3. The noncitizen or family member was a victim of a severe form of trafficking in persons?
   - ✓ ***If yes → Presumption Rebutted Under #3***

CF Process - CLP Presumption Worksheet Is the Presumption Rebutted (cont.)?

U.S. Citizenship and Immigration Services

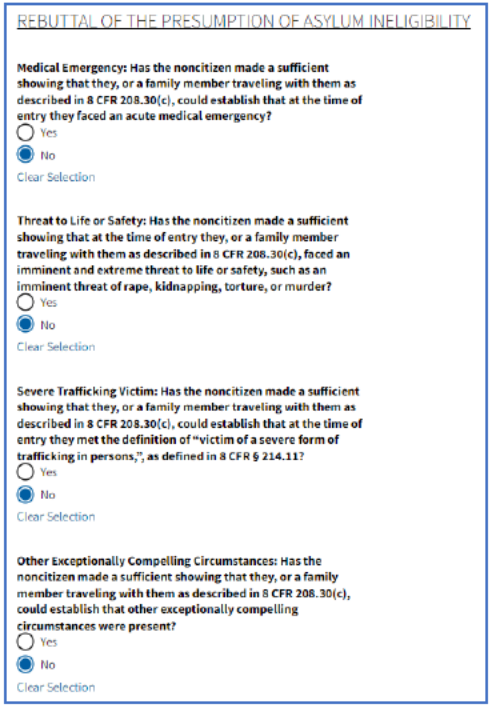
Has the noncitizen made a sufficient showing that they, or a family member traveling with them as described in 8 CFR 208.30(c), could establish that at time of entry to the United States, or after the time of entry (in the United States), that:

4. Other exceptionally compelling circumstances were present?

   ✓ ***If yes → Presumption Rebutted Under #4***

CF Process - Completing the Worksheet (GINA)
Is the Presumption Rebutted?

U.S. Citizenship and Immigration Services



REBUTTAL OF THE PRESUMPTION OF ASYLUM INELIGIBILITY

Medical Emergency: Has the noncitizen made a sufficient showing that they, or a family member traveling with them as described in 8 CFR 208.30(c), could establish that at the time of entry they faced an acute medical emergency?

- ○ Yes
- ◉ No

Clear Selection

Threat to Life or Safety: Has the noncitizen made a sufficient showing that at the time of entry they, or a family member traveling with them as described in 8 CFR 208.30(c), faced an imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder?

- ○ Yes
- ◉ No

Clear Selection

Severe Trafficking Victim: Has the noncitizen made a sufficient showing that they, or a family member traveling with them as described in 8 CFR 208.30(c), could establish that at the time of entry they met the definition of "victim of a severe form of trafficking in persons," as defined in 8 CFR § 214.11?

- ○ Yes
- ◉ No

Clear Selection

Other Exceptionally Compelling Circumstances: Has the noncitizen made a sufficient showing that they, or a family member traveling with them as described in 8 CFR 208.30(c), could establish that other exceptionally compelling circumstances were present?

- ○ Yes
- ◉ No

Clear Selection

REBUTTAL OF THE PRESUMPTION OF ASYLUM INELIGIBILITY

Severe Trafficking Victim: Has the noncitizen made a sufficient showing that they, or a family member traveling with them as described in 8 CFR 208.30(c), could establish that at the time of entry they met the definition of "victim of a severe form of trafficking in persons," as defined in 8 CFR § 214.11?

- ◉ Yes
- ○ No

Clear Selection

A severe form of trafficking in persons is defined as either:

a) Sex trafficking in which a commercial sex act is induced by:

- Force, fraud, or coercion, or
- Person induced is under the age of 18; **or,**

b) Recruiting, harboring, transporting, provisioning, or obtaining a person for labor or services through the use of force, fraud, or coercion for subjection to:

- Involuntary servitude, peonage, debt bondage, or slavery

Briefly explain why the noncitizen or a family member with whom they are traveling rebut the presumption of asylum ineligibility due to the reason you selected above.

Evidence or Explanation:

U.S. Citizenship and Immigration Services

Processing the CF Case After CLP Determination is Made

CF Process – Next Steps After CLP Determination

U.S. Citizenship and Immigration Services

- **Processing Scenario 1 – If the noncitizen is not subject to the CLP:**
  - Conduct standard credible fear interview at significant possibility standard
  - Use standard Credible Fear Checklist
- **Processing Scenario 2 – If the noncitizen is subject to the CLP but establishes an exception or rebuts the presumption of asylum ineligibility:**
  - Issue discretionary NTA or conduct a standard credible fear interview at the significant possibility standard (additional guidance forthcoming)
  - Use standard Credible Fear Checklist if conducting credible fear interview
  - Administratively close the case in Global if issuing a discretionary NTA
- **Processing Scenario 3 – If the presumption of ineligibility for asylum is applied because no exception is established and the presumption is not rebutted:**
  - Complete CLP RP Interview Orientation Notification
  - Conduct interview for persecution and torture at the reasonable possibility standard
  - Use CLP Reasonable Possibility Determination Checklist

CF Process – Presumption Applies
CLP RP Interview Orientation Notification

U.S. Citizenship and Immigration Services

- When the AO determines that the presumption applies, the officer must:
  - ✓ Explain to the noncitizen that they will be screened according to the reasonable possibility standard; and
  - ✓ Complete the CLP RP Interview Orientation Notification.
- CLP RP Interview Orientation Notification is **not** required if the presumption is not being applied because the noncitizen:
  - ✓ Is not subject to the CLP;
  - ✓ Established an exception to the presumption of ineligibility; or
  - ✓ Rebutted the presumption of ineligibility

Credible Fear vs Reasonable Possibility CLP Interview Comparison Chart

U.S. Citizenship and Immigration Services

Standard Credible Fear Interview	CLP Reasonable Possibility Interview
Nexus standard is at least "a reason"	Nexus standard is at least "a reason"
Significant possibility the noncitizen can establish eligibility for asylum, withholding of removal, or CAT protection in a full hearing or AMI proceedings	Reasonable possibility of persecution or torture
Past persecution alone results in positive determination	Past persecution alone cannot result in positive determination, (must also establish presumption of persecution has not been rebutted)
Internal relocation is not considered	Internal relocation is considered
Additional nexus questions for other protected grounds not required for positive determinations	Additional nexus questions for other protected grounds not required for positive determinations
If positive determination, elicit for the one claim/decision type that is the basis for positive determination. Not required to fully elicit for all claims or decision types (i.e., past persecution, future persecution or torture).	If positive determination, elicit for the one claim/decision type that is basis for positive determination. Not required to fully elicit for all claims or decision types (i.e., persecution or torture).
If positive determination for PA, may include spouse or children (unmarried, under 21) in claim as dependents, who entered concurrently and are in ER/CF proceedings.	If positive determination for PA, may include spouse or children (unmarried, under 21) in claim as dependents, who entered concurrently and are in ER/CF proceedings.

CF Process – Forms

U.S. Citizenship and Immigration Services

- **Form I-870:** Use the Form I-870 (dated 05.12.23) for **all** cases where the noncitizen was placed in expedited removal on or after June 1st, 2022.
  - On page 5 of the I-870, keep the paragraph under "additional information / continuation" only when the individual is subject to the CLP and has not established an exception or rebutted the presumption.
  - Delete the paragraph under "additional information / continuation" where the noncitizen is not subject to the CLP, an exception was established or the presumption was rebutted.
- **CLP RP Interview Orientation Notification:** Use only where the presumption of ineligibility for asylum under the CLP applies.
- **Form I-869B:** For negative determinations, when the presumption applies, use the Form I-869B instead of the Form I-869.
- **Form I-862:** NTA all positive determinations.

CF Process – Global

U.S. Citizenship and Immigration Services

Enter decision card in Global. In the field labeled **"Circumvention of Lawful Pathways"** select:

- **"Not applicable" –** if the noncitizen was interviewed under the significant possibility standard because the noncitizen is not subject to the CLP
- **"Established exception" -** if the noncitizen was interviewed under the significant possibility standard because the noncitizen established an exception to the presumption
- **"Rebutted Presumption" -** if the noncitizen was interviewed under the significant possibility standard because the noncitizen rebutted the presumption
- **"Presumption of Ineligibility Applies" –** if the noncitizen was interviewed under the reasonable possibility standard because they did not demonstrate that they could establish an exception to or rebut the presumption of ineligibility for asylum

CF Process – Post-Interview and Service

U.S. Citizenship and Immigration Services

- Additional forms required for the service packet for CLP cases include:
  - CLP Presumption Worksheet: if the noncitizen is subject to the CLP, including if an exception is established or the presumption is rebutted.
  - CLP RP Interview Orientation Notification: Only if the presumption applies because an exception is not established or is not rebutted so the reasonable possibility interview is required.
- For Negative Services:
  - Form I-869B: For negative determinations, when the presumption applies, use Form I-869B instead of the Form I-869.
  - Form I-863: Use when the noncitizen request IJ review of a negative determination (or USCIS makes the election on behalf of the noncitizen)
    - Check box 1 for all cases

CLP Family Processing

U.S. Citizenship and Immigration Services

- **Step 1: Complete CLP Screening for PA**
  - If established an exception/rebuts presumption: apply to entire family and proceed to interview at the significant possibility standard
  - If does not establish an exception/rebut the presumption, move to Step 2
- **Step 2: Complete CLP Screening for Spouse** (if no spouse, skip to step 3)
  - If established an exception/rebuts presumption: family will be interviewed at significant possibility standard
  - If does not establish an exception/rebut the presumption, move to Step 2
- **Step 3: Complete CLP Screening for Children** (if
  - If established an exception/rebuts presumption: family will be interviewed at significant possibility standard
  - If does not establish an exception/rebut the presumption, family will need to be interviewed at the reasonable possibility standard

CLP Family Processing - Documents

U.S. Citizenship and Immigration Services

- **CLP Presumption Worksheet**
  - For positives – Only required for PA
  - For negatives – Required for each family member
- **CLP RP Interview Orientation Notification (if applicable)**
  - For positives – Only required for PA
  - For negatives – Required for each family member

Additional Resources

U.S. Citizenship and Immigration Services

- Asylum Knowledge Center (AKC)
- Trafficking Lesson Plan
- RAIO Research Unit Country Pages
- Other Asylum and RAIO Lesson Plans

About this presentation

U.S. Citizenship and Immigration Services

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Ex. 2

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

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

Step 1: Introduction

- Place interpreter under oath
- Confirm identity of the noncitizen (A-number, name, DOB)
- Confirm that noncitizen and interpreter understand each other
- Confirm language noncitizen wishes to proceed in
- Introduce yourself and complete introductory explanation
- Ask consultant/legal representative questions
- Place the noncitizen under oath
- Remind noncitizen of Form M-444 receipt date and provide Form M-444 summary, if needed

Step 2: Voluntary Withdrawal of Admission

Nationals of Cuba, Haiti, Nicaragua, and Venezuela (CHNV) in Border Patrol (BP) custody who entered on or after May 12, 2023 at 12:00 AM ET will be afforded the opportunity to voluntarily withdraw their application for admission. The voluntary withdrawal advisal applies to CHNV nationals regardless of the designated country of removal.

Note that noncitizens may have a designated country of removal listed on a continuation page to the I-213 as "designated likely country of removal." For nationals of Cuba, Nicaragua and Venezuela (not Haitians), the designated country of removal should be Mexico (regardless of whether the noncitizen has status in Mexico), the country of nationality, a country in which the noncitizen has legal status or another country where there are case specific reasons for removal to that country.

Noncitizens other than Cubans, Nicaraguans or Venezuelans should not have a "designated likely country of removal" of Mexico unless they have legal status in Mexico or there is a case specific reason for the designation. This includes Haitians, who may be able to return to Mexico if they withdraw their request for admission but who will typically not be ordered removed to Mexico.

If there is no country of removal designation specified 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, skip to Step 3.

If the noncitizen is a CHNV national in BP custody, provide the following voluntary withdrawal advisal at the beginning of the interview:

> Before we begin your interview today, I want to let you know about some different options that are currently available to Cubans, Haitians, Nicaraguans, and Venezuelans to travel to the United States.
>
> After I explain these options, you will have an opportunity to decide whether you want to withdraw your application for admission to the United States and return to Mexico. Upon your return to Mexico, you may be able to pursue one of those options.
>
> Here is a summary of the options:

There are currently parole processes in place that provide a safe and orderly way for certain Cubans, Haitians, Nicaraguans, and Venezuelans to be considered, on a case-by-case basis, to come to the United States to live and be eligible to work for up to 2 years. To be eligible for one of these parole processes, you must, among other factors, have a financial supporter in the United States, pass background checks, and have a passport that would allow you to board a plane to fly to a city in the United States. There are also certain factors that may make you ineligible for these parole processes. Among other factors, you are not eligible for these processes if you have been ordered removed from the United States within the prior five years or are subject to a bar to admission to the United States based on a prior removal order. You are not eligible for these parole processes if you crossed the Mexican or Panamanian border without authorization after October 19, 2022, if you are Venezuelan, or after January 9, 2023, if you are Cuban, Haitian, or Nicaraguan. You are not eligible for these parole processes if you are a Cuban or Haitian who was interdicted at sea after April 27, 2023.

To access these parole processes, you must be outside of the United States. You may choose to voluntarily withdraw your application for admission and return to Mexico one time and still be eligible for these parole processes. You are being given an opportunity now to withdraw your application for admission to the United States and voluntarily return to Mexico so that you remain eligible to access these parole processes.

Separate from those parole processes, if you voluntarily return to Mexico, you may also choose to use the CBP One mobile app to schedule an appointment to present at a U.S. port of entry. If you use CBP One to present at a port of entry, you may be issued a Notice to Appear for removal proceedings before an immigration judge, and if paroled to attend your removal proceedings, you may be eligible to work during your period of parole.

If you decide to withdraw your application for admission and voluntarily return to Mexico, we will not continue with your interview today. Instead, we will administratively close your case so you can voluntarily return to Mexico and you may remain eligible to access these processes.

If you decide not to withdraw your application for admission, we will continue with your credible fear interview today. After the interview, if you have established fear of persecution or torture under the U.S. legal standards, you will be placed in removal proceedings before an immigration judge, where you can file an application for asylum or seek protection from removal. If you do not establish fear, you will receive a negative determination from the asylum officer and you may request to have that negative determination reviewed by an immigration judge. If the immigration judge agrees with the negative determination or if you do not ask for immigration judge review, you will be ordered removed from the United States. Once you are removed, you will be barred from admission to United States for at least 5 years.

Now that I have explained this to you, would you like to voluntarily withdraw your application for admission so that you can return to Mexico?

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 cannot answer any additional questions about these options or predict what will happen to you. All I can do right now is provide you this explanation and ask if you would like to voluntarily withdraw your application for admission so that you can return to Mexico. 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 Not Requested: If noncitizen does not voluntarily withdraw their application for admission or lacks the capacity to do so, continue to Step 3.

Step 3: Determine Interview Type

Standard CF Interview: Complete a standard CF interview under the significant possibility standard for establishing eligibility for asylum, withholding of removal under INA § 241(b)(3), or protection under the Convention Against Torture (CAT), if the noncitizen is not subject to the Circumvention of Lawful Pathways (CLP) rule. This applies to:

- Noncitizens of any nationality who entered on or before 05/11/23 at 11:59 PM ET
- Mexican nationals
- Noncitizens that did not enter from Mexico at the southwest land border or adjacent coastal borders on or after 5/12/23 at 12:00 AM ET

When entering decisions in Global for cases in which the noncitizen is not subject to the CLP, select "Not Applicable" in the field labeled "Circumvention of Lawful Pathways."

CLP Screening Process: Continue to Step 4 if:

- The noncitizen is Cuban, Haitian, Nicaraguan or Venezuelan and did not voluntarily withdraw their application for admission when provided with the first voluntary withdrawal advisal in Step 2; or
- The noncitizen is of any other nationality (non-CHNV) who entered the United States across the southwest land border or adjacent coastal borders on or after 5/12/23 at 12:00 AM ET

Step 4: I-870 Biographical Information Review

Complete the following steps of the interview:

- Have interpreter read section 1.16 of Form I-870
- Review medical issues
- Complete biographical information section of Form I-870

If at any point during the interview the noncitizen states they wish to dissolve their fear claim, please proceed with the dissolution according to established procedures. If the noncitizen is a CHNV national

in BP custody, please remind them that they may withdraw their application for admission (see Step 2) and proceed accordingly.

Step 5: AOL & ABC Questions

Complete AOL questions and ABC class member questions (if applicable) in accordance with established guidance. If the noncitizen appears to be an AOL or ABC class member, inform your supervisor.

Step 6: CLP Rule

If the noncitizen entered the U.S. from Mexico at the southwest land border or adjacent coastal borders without documents sufficient for lawful admission on or after 05/12/23 at 12:00 AM ET after traveling through at least one country that is a signatory to the 1951 Refugee Convention or 1967 Protocol, they are presumed ineligible for asylum unless they can demonstrate an exception or can rebut the presumption. To confirm that the noncitizen is subject to the CLP presumption:

- If not already clear from the testimony, verify that the noncitizen entered the U.S. on or after 05/12/23 at 12:00 AM ET.
- If not already clear from the testimony, verify the countries through which the noncitizen traveled after leaving their home country and before entering the U.S.

If the noncitizen entered the U.S. on or after 5/12/23 at 12:00 AM ET via the southwest land border or adjacent coastal border without documents sufficient for lawful admission, is not a citizen of Mexico, and traveled through Mexico, then they are subject to the presumption of asylum ineligibility since Mexico is a signatory to both the 1951 Refugee Convention and 1967 Protocol. Please read the paragraph below and then continue to step 7:

> It appears that you are subject to the lawful pathways condition on asylum eligibility because you entered the U.S. on or after 05/12/23 at 12:00 AM ET without documents sufficient for lawful admission, and traveled through at least one country, namely Mexico, that is a signatory to the Refugee Convention. In order to assess whether the condition should apply to you, I will ask you some questions to determine if you qualify for an exception or if you can rebut the presumption that you are ineligible for asylum.

If the noncitizen is not subject to the CLP, continue with a standard CF interview using the significant possibility standard. Do not complete a CLP Presumption Worksheet. Select "Not Applicable" in the field labeled "Circumvention of Lawful Pathways" in Global.

Note that noncitizens interviewed under the significant possibility standard should be screened for all countries of nationality **and** all designated (and alternate) countries of removal and prior to issuing a negative determination. However, if a positive determination is established as to one country, you do not need to continue to interview for the remaining countries.

Step 7: CLP Exceptions

If the noncitizen is subject to the CLP, they can overcome the presumption of ineligibility if they demonstrate a significant possibility that they could establish one of the following exceptions:

A. Did the noncitizen, or a family member traveling with the noncitizen as described in 8 CFR 208.30(c), have DHS authorization to travel for parole into the United States? If yes, an exception applies – see end of Step 7 for additional instructions; if no, continue to Step 7, part B.

To determine if the exception applies, ask the noncitizen:

- Did you or any of the family members you traveled with have authorization to travel to the U.S. to seek parole?

Noncitizens in ER/CF will likely not be authorized for parole into the United States. If the noncitizen answers yes, there should be records available to verify the authorization.

B. Did the noncitizen, or a family member traveling with the noncitizen as described in 8 CFR 208.30(c), enter at a POE and either use CBP One or enter at a POE and show it was not possible for them to use CBP One for a qualifying reason? If yes, an exception applies – see end of Step 7 for additional instructions; if no, continue to Step 7, part C.

If the noncitizen and their family members did not enter at a POE, there is no need to ask the following questions. Only ask the following questions if records show the noncitizen or a family member traveling with them entered at a POE:

- When you entered at [insert name of POE], did you use the CBP One App to enter?
- Did you ever attempt to use the CBP One App?
    - [If yes] What happened when you attempted to use the CBP One App?
    - [If no] Did anything prevent you from using the CBP One App?
        - Note that currently, the CBP One App is only available in English, Spanish, and Haitian Creole, so if the noncitizen does not speak English, Spanish, or Haitian Creole ask the following question:
            - Did you ever request the assistance (or translation services) of someone who speaks English, Spanish, or Haitian Creole? If no, why not?

C. Did the noncitizen, or a family member traveling with the noncitizen as described in 8 CFR 208.30(c), apply for asylum or any other form of protection in a country through which they transited and receive a final denial on the case? If yes, an exception applies – see end of Step 7 for additional instructions; if no, continue to Step 8.

To determine if the exception applies, ask the noncitizen:

- Did you or a family member traveling with you apply for asylum or any other protection in any of the countries through which you traveled on your way from your home country to the U.S.?
    - If no, skip the rest of the questions in this section and continue to Step 8.
    - If yes, continue with the questions below.
        - In which country?
        - What type of protection did you apply for?
        - What was the result of your application?

- Is the result final?
- Did you receive any documents or paperwork relating to your application?
    - If yes, can you explain the documents that you received?
    - Do you have copies of the documents you want to provide? [Note there is no requirement to provide such documentation.]

Exception Applies: If one of the exceptions above apply, there is no need to ask any additional questions. Either proceed with a standard CF interview or issue a discretionary NTA, in accordance with guidance.

- If proceeding with a CF interview, when completing the decision card in Global, select "Established Exception" in the field labeled "Circumvention of Lawful Pathways."

- If issuing a discretionary NTA, no summary of testimony is required. You may end the interview with the following explanation:

    > It appears that there is a significant possibility that in a full hearing you could establish an exception to the lawful pathways condition on asylum eligibility. I am not going to ask you any additional questions about your fear claim today because you appear to have shown that the condition does not apply to you, and you should be able to continue with your application for asylum in the United States. You will not receive your decision documents right now because I have to process them and my supervisor has to review them but once they are ready, you will receive them, and they will explain the next steps in your case.

  Complete and upload the CLP Presumption Worksheet and NTA (following local procedures) along with your notes to Global, and then administratively close the CF case in Global as "Discretionary NTA – CLP Exception."

Exception Does <u>Not</u> Apply: If an exception does not apply, go to Step 8.

Step 8: Rebuttal of the Presumption of Asylum Ineligibility

If the noncitizen has not established an exception, they may still demonstrate that there is a significant possibility that they could rebut the presumption of asylum ineligibility.

A. At the time of entry, did the noncitizen or a family member traveling with the noncitizen, as described in 8 CFR 208.30(C), have an acute medical emergency? If yes, the presumption has been rebutted – see end of Step 8 for additional instructions; if no, continue to Step 8, Part B.

To determine if the rebuttal applies, ask the noncitizen:

- Did you or a family member traveling with you have any medical issues at the time you crossed from Mexico to the US? If no, continue to B; if yes, continue with questions below.
    - Who had the medical issue?

- What was the medical issue?
- When did the medical issue occur?
- How long did the medical issue last?
- Did you consider this medical issue to be an emergency? If yes, please explain why you considered this issue to be an emergency.
- Did this medical issue prevent you from waiting in Mexico to enter the US through a lawful pathway? If yes, please explain.
- Did you (or the family member) go to the doctor or get any other medical attention?
- Did you (or the family member) receive any medication or any medical treatment?
- Would you like to provide any documents relating this medical issue? [Note there is no requirement to provide such documentation]

B. At the time of entry, did the noncitizen or a family member traveling with the noncitizen, as described in 8 CFR 208.30, face an imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder? If yes, the presumption has been rebutted – see end of Step 8 for additional instructions; if no, continue to Part 8 Step C.

To determine if the rebuttal applies, ask the noncitizen:

- When you were in Mexico, were you or a family member you were traveling with threatened or harmed by anyone? If no, continue to C; if yes, continue with questions below.
  - Who was threatened or harmed?
  - What was the threat or harm you (or your family member) experienced?
  - Who threatened or harmed you (or the family member)?
  - What did the (person or group who threatened you) threaten to do to you?
  - Did you think this (person or group) was going to carry out the threat?
  - What made you think the (person or group) would carry out the threat?
  - Had this (person or group) harmed you in any way previously? If yes, how did this (person or group) harm you?
  - Did the harm or the threat(s) impact your decision to leave Mexico and enter the United States? If yes, please explain.
  - What made you leave Mexico at that specific time? Could you have waited?
  - Were you at the risk of harm while crossing the border?
  - What did you fear would happen in Mexico while you were attempting to enter the United States?
  - Would the risk of harm/danger still exist if you attempted entry at another location in Mexico?

C. Is the noncitizen or a family member traveling with the noncitizen, as described in 8 CFR 208.30(c), a victim of a severe form of human trafficking? If yes, the presumption has been rebutted – see end of Step 8 for additional instructions; if no, continue to Step 9 if noncitizen is a CHNV national in BP custody with Mexico as the designated country of removal case or Step 10 if the noncitizen is not a CHNV national in BP custody.

A severe form of trafficking is defined as either:

a) Sex trafficking: the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of inducing a commercial sex act through the use of force, fraud, or coercion. Inducing an individual under 18 years of age to perform a commercial sex act is considered sex trafficking, regardless of the use of force, fraud, or coercion.

OR

a) Labor trafficking: the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services through the use of fraud, force, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

To determine if the noncitizen or an accompanying family member is a victim of a severe form of trafficking, ask the noncitizen:

- Now I am going to ask you a few questions to see if you have ever been a victim of human trafficking – please know that I am only asking you these questions to determine if you meet this definition, not for any other reason. Have you or anyone on your case ever engaged in any commercial sex act through force, fraud, or coercion, or at a time when you were under the age of 18?
- Have you or anyone on your case ever at any time in your life been forced to do labor, engage in a commercial sex act, or made to do work that you did not do willingly?

If no to both questions above, continue to Step 9 if noncitizen is a CHNV national in BP custody (or Step 10 if not); if yes to either, continue with questions below:

- How old were you (or the family member) when this happened?
- Who forced you to do this?
- How did they force you?
- What did they make you do?
- How many times were you (or the family member) forced to do something like this?

D. Were there other exceptionally compelling circumstances present (not necessarily at the time of entry)? If yes, the presumption has been rebutted – see end of Step 8 for additional instructions; if no, skip to D.

To determine if the presumption can be rebutted, ask the noncitizen:

- When you were in Mexico and about to cross into the US, why didn't you try to seek out a lawful pathway to enter the US, such as parole?
- Is there something that prevented you from seeking out a lawful pathway?
- Did you or anyone you were taking care of have any major issues that impacted your ability to seek out a lawful pathway?
  - What were the issues?

- How did this issue impact you?
- How did this issue prevent you from waiting in Mexico for a way to enter the U.S through a lawful pathway?

Presumption of Ineligibility for Asylum Rebutted: If the noncitizen has shown a significant possibility that they could rebut the presumption, there is no need to ask any additional questions. Either proceed with a standard CF interview or issue a discretionary NTA, in accordance with guidance.

- If proceeding with a CF interview, when completing the decision card in Global, select "Rebutted Presumption" in the field labeled "Circumvention of Lawful Pathways."

- If issuing a discretionary NTA, no summary of testimony is required. You may end the interview with the following explanation:

  > It appears that there is a significant possibility you could rebut the presumption that you are ineligible for asylum under the lawful pathways condition on asylum eligibility in a full hearing. I am not going to ask you any additional questions about your fear claim today because you should be able to continue with your application for asylum in the United States. You will not receive your decision documents right now because I have to process them and my supervisor has to review them but once they are ready, you will receive them, and they will explain the next steps in your case.

  Complete and upload the CLP Presumption Worksheet and NTA (following local procedures) along with your interview notes to Global, and then administratively close the CF case in Global as "Discretionary NTA – CLP Rebutted."

Presumption <u>Not</u> Rebutted: If the noncitizen did not demonstrate a significant possibility that they can rebut the presumption, proceed to Step 9 if the noncitizen is a CHNV national in BP custody or Step 10 if the noncitizen is not a CHNV national in BP custody.

Step 9: Voluntary Withdrawal of Admission

If the noncitizen is not a CHNV national in BP custody, skip to Step 10.

For noncitizens who are CHNV nationals in BP custody, provide a second voluntary withdrawal advisal**:**

> Thank you for answering my questions. Based on your testimony so far, you may be ineligible for asylum. I am now going to ask you questions about your fear of returning to [designated country of removal OR country of nationality/citizenship if no designated country of removal.] If you fail to establish a fear, you will be removed from the United States, ineligible for the parole processes I described at the beginning of our interview, and you will be barred from admission to United States for at least 5 years upon removal.
>
> 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 requests repetition of the explanation]: There are currently parole processes in place that provide a safe and orderly way for certain Cubans, Haitians, Nicaraguans, and Venezuelans to be considered, on a case-by-case basis, to come to the United States to live and be eligible to work for up to 2 years. To be eligible for one of these parole processes, you must, among other factors, have a financial supporter in the United States, pass background checks, and have a passport that would allow you to board a plane to fly to a city in the United States. There are also certain factors that may make you ineligible for these parole processes. Among other factors, you are not eligible for these processes if you have been ordered removed from the United States within the prior five years or are subject to a bar to admission to the United States based on a prior removal order. You are not eligible for these parole processes if you crossed the Mexican or Panamanian border without authorization after October 19, 2022, if you are Venezuelan, or after January 9, 2023, if you are Cuban, Haitian, or Nicaraguan. You are not eligible for these parole processes if you are a Cuban or Haitian who was interdicted at sea after April 27, 2023.

To access these parole processes, you must be outside of the United States. You may choose to voluntarily return to Mexico one time and still be eligible for these parole processes. You are being given an opportunity now to withdraw your application for admission to the United States and voluntarily return to Mexico so that you remain eligible to access these parole processes.

Separate from those parole processes, if you voluntarily return to Mexico, you may also choose to use the CBP One mobile app to schedule an appointment to present at a U.S. port of entry. If you use CBP One to present at a port of entry, you may be issued a Notice to Appear for removal proceedings before an immigration judge, and if paroled to attend your removal proceedings, you may be eligible to work during your period of parole.

If you decide to withdraw your application for admission, we will not continue with your interview today. Instead, we will administratively close your case so you can voluntarily return to Mexico and you may remain eligible for these processes.

If you decide not to withdraw your application for admission, we will continue with your credible fear interview today. As I mentioned before, after the interview, if you establish fear of persecution or torture, you will be placed in removal proceedings before an immigration judge. If you do not establish fear, you will be ordered removed from the United States. Once you are removed, you will be barred from admission to United States for at least 5 years.

Would you like to voluntarily withdraw your application for admission so that you can return to Mexico?

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 Not Requested: If noncitizen does not volunteer to withdraw, continue to Step 10.

Step 10: CLP RP Interview Orientation Notification and Screening Interview

When the presumption of ineligibility for asylum applies and the noncitizen has not established an exception, rebutted the presumption, or requested voluntary withdrawal (for CHNV nationals in BP custody), follow the below steps:

Continue to the instructions for CLP RP Interview Orientation Notification and read the noncitizen the paragraph in the memo included below:

> The purpose of the remainder of the interview is to determine if you can establish a reasonable possibility of persecution on account of a protected ground or torture in the country to which you will be ordered removed. If it is determined that you have established a reasonable possibility of being persecuted on account of a protected ground or tortured in that country, you will receive a Notice to Appear for a hearing in immigration court for further consideration of your protection claims. If it is determined that you have not established a reasonable possibility of being persecuted on account of a protected ground or tortured, you may ask to have an immigration judge review that decision. During that immigration judge review, you may also request review of the determination that you do not have a credible fear of persecution because you are subject to the condition on asylum eligibility under 8 CFR § 208.33(a).

Proceed with the screening at the **reasonable possibility standard**. Remember, for reasonable possibility interviews you are only screening for return to the designated country of removal (or if an alternate country of removal is also listed, screening for all designated countries of removal). If a removal country has not been designated, screen for the country of nationality (or countries of nationality in the case of dual nationals). Note that the noncitizen should not be screened for the country of nationality unless there is no designated country of removal.

Once interview is complete, move to Step 11.

Step 11: Screening Determination

Complete the following forms and upload into Global along with the interview notes (in accordance with local procedures):

- Form I-870 (dated 5.12.23)
- CLP RP Interview Orientation Notification
- CLP Presumption Worksheet
- CLP Reasonable Possibility Determination Checklist
- Form I-862 (NTA), if positive
- Forms I-869B and I-863, if negative
- Any other documents as required by local office policy.

Complete the decision card in Global. In the field labeled “Circumvention of Lawful Pathways,” select “Presumption of Ineligibility Applies.”

Ex. 3

(Voluntary Withdrawal of Admission Script)

Script for Voluntary Withdrawal of Application for Admission Advisal #1

There are currently parole processes in place that provide a safe and orderly way for certain Cubans, Haitians, Nicaraguans, and Venezuelans to be considered, on a case-by-case basis, to come to the United States to live and be eligible to work for up to 2 years. To be eligible for one of these parole processes, you must, among other factors, have a financial supporter in the United States, pass background checks, and have a passport that would allow you to board a plane to fly to a city in the United States. There are also certain factors that may make you ineligible for these parole processes. Among other factors, you are not eligible for these processes if you have been ordered removed from the United States within the prior five years or are subject to a bar to admission to the United States based on a prior removal order. You are not eligible for these parole processes if you crossed the Mexican or Panamanian border without authorization after October 19, 2022, if you are Venezuelan, or after January 9, 2023, if you are Cuban, Haitian, or Nicaraguan. You are not eligible for these parole processes if you are a Cuban or Haitian who was interdicted at sea after April 27, 2023.

To access these parole processes, you must be outside of the United States. You may choose to voluntarily withdraw your application for admission and return to Mexico one time and still be eligible for these parole processes. You are being given an opportunity now to withdraw your application for admission to the United States and voluntarily return to Mexico so that you remain eligible to access these parole processes.

Separate from those parole processes, if you voluntarily return to Mexico, you may also choose to use the CBP One mobile app to schedule an appointment to present at a U.S. port of entry. If you use CBP One to present at a port of entry, you may be issued a Notice to Appear for removal proceedings before an immigration judge, and if paroled to attend your removal proceedings, you may be eligible to work during your period of parole.

If you decide to withdraw your application for admission and voluntarily return to Mexico, we will not continue with your interview today. Instead, we will administratively close your case so you can voluntarily return to Mexico and you may remain eligible to access these processes.

If you decide not to withdraw your application for admission, we will continue with your credible fear interview today. After the interview, if you have established fear of persecution or torture under the U.S. legal standards, you will be placed in removal proceedings before an immigration judge, where you can file an application for asylum or seek protection from removal. If you do not establish fear, you will receive a negative determination from the asylum officer and you may request to have that negative determination reviewed by an immigration judge. If the immigration judge agrees with the negative determination or if you do not ask for immigration judge review, you will be ordered removed from the United States. Once you are removed, you will be barred from admission to United States for at least 5 years.

Now that I have explained this to you, would you like to voluntarily withdraw your application for admission so that you can return to Mexico?

Script for Voluntary Withdrawal of Application for Admission Advisal #2

Thank you for answering my questions. Based on your testimony so far, you may be ineligible for asylum. I am now going to ask you questions about your fear of returning to [designated country of removal OR country of nationality/citizenship if no designated country of removal.] If you fail to establish a fear, you will be removed from the United States, ineligible for the parole processes I described at the beginning of our interview, and you will be barred from admission to United States for at least 5 years upon removal.

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 requests repetition of the explanation**]: There are currently parole processes in place that provide a safe and orderly way for certain Cubans, Haitians, Nicaraguans, and Venezuelans to be considered, on a case-by-case basis, to come to the United States to live and be eligible to work for up to 2 years. To be eligible for one of these parole processes, you must, among other factors, have a financial supporter in the United States, pass background checks, and have a passport that would allow you to board a plane to fly to a city in the United States. There are also certain factors that may make you ineligible for these parole processes. Among other factors, you are <u>not</u> eligible for these processes if you have been ordered removed from the United States within the prior five years or are subject to a bar to admission to the United States based on a prior removal order. You are <u>not</u> eligible for these parole processes if you crossed the Mexican or Panamanian border without authorization after October 19, 2022, if you are Venezuelan, or after January 9, 2023, if you are Cuban, Haitian, or Nicaraguan. You are not eligible for these parole processes if you are a Cuban or Haitian who was interdicted at sea after April 27, 2023.
>
> To access these parole processes, you must be outside of the United States. You may choose to voluntarily return to Mexico one time and still be eligible for these parole processes. You are being given an opportunity now to withdraw your application for admission to the United States and voluntarily return to Mexico so that you remain eligible to access these parole processes.
>
> Separate from those parole processes, if you voluntarily return to Mexico, you may also choose to use the CBP One mobile app to schedule an appointment to present at a U.S. port of entry. If you use CBP One to present at a port of entry, you may be issued a Notice to Appear for removal proceedings before an immigration judge, and if paroled to attend your removal proceedings, you may be eligible to work during your period of parole.
>
> If you decide to withdraw your application for admission, we will not continue with your interview today. Instead, we will administratively close your case so you can voluntarily return to Mexico and you may remain eligible for these processes.
>
> If you decide <u>not</u> to withdraw your application for admission, we will continue with your credible fear interview today. As I mentioned before, after the interview, if you establish fear of persecution or torture, you will be placed in removal proceedings before an immigration judge.

If you do not establish fear, you will be ordered removed from the United States. Once you are removed, you will be barred from admission to United States for at least 5 years.

Would you like to voluntarily withdraw your application for admission so that you can return to Mexico?

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
WILLIAM C. PEACHEY
Director
EREZ REUVENI
Assistant Director
Office of Immigration Litigation
U.S. Department of Justice, Civil Division
P.O. Box 868, Ben Franklin Station
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PATRICK GLEN
CHRISTINA P. GREER
Senior Litigation Counsel

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

M.A., *et al.*, Plaintiffs, v. Alejandro Mayorkas, *et al.*, Defendants.	Civil Action No. 1:23-cv-01843-TSC

DEFENDANTS' CERTIFIED INDICES OF THE CONTENTS OF THE ADMINISTRATIVE RECORDS

Pursuant to Local Rule 7(n)(1), Defendants submit the attached certified indexes of the contents of the administrative records in this case. Defendants have produced to Plaintiffs five separate administrative records. Attached are certified indexes for:

1. Customs and Border Protection (CBP) Withdrawal Guidance, CBP_Withdrawals_AR001-342.

2. CBP Third-Country Removal Guidance, CBP_Removals_AR001-344.
3. U.S. Citizenship and Immigration Services (USCIS) Withdrawal Guidance, USCIS_Withdrawals_AR_001-040.
4. USCIS 24-hour Waiting Period for Credible Fear Interview Guidance, USCIS_24-Hour_001-080.

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

WILLIAM C. PEACHEY
Director

By: /s/ *Erez Reuveni*
EREZ REUVENI
Assistant Director
Office of Immigration Litigation
U.S. Department of Justice, Civil Division
P.O. Box 868, Ben Franklin Station
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Tel: (202) 307-4293
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PATRICK GLEN
CHRISTINA P. GREER
Senior Litigation Counsel

Attorneys for Defendants

Dated: October 27, 2023

CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2023, I electronically filed the foregoing document with the Clerk of the Court for the United States Court District Court for the District of Columbia by using the CM/ECF system. Counsel in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

By: */s/ Erez Reuveni*
EREZ REUVENI
Assistant Director
United States Department of Justice
Civil Division

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

M.A., *et al*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 1:23-cv-01843-TSC
Alejandro Mayorkas, *et al*,	)	
Defendants.	)	

WITHDRAWALS ADMINISTRATIVE RECORD
FROM U.S. CUSTOMS AND BORDER PROTECTION (CBP)

_M.A._ (CBP Withdrawals)
Certified Administrative Record Index

	Records	Starting Bates Number
1.	Email from U.S. Border Patrol Headquarters, Post T42 Priority Processing and Current Updates (May 11, 2023, 4:43 PM).	CBP_Withdrawals_AR_000001
2.	Email attachment, U.S. Border Patrol Headquarters, Updated Guidance (May 10, 2023).	CBP_Withdrawals_AR_000003
3.	Email from U.S. Border Patrol Headquarters, Reminder Post 42 Processing Pathways (May 11, 2023, 12:45 PM).	CBP_Withdrawals_AR_000007
4.	Email attachment, U.S. Border Patrol Headquarters, Title 42 Processing Pathways signed (Dec. 20, 2022).	CBP_Withdrawals_AR_000008
5.	Email from U.S. Border Patrol Headquarters, T42 of Venezuelans (Oct. 12, 2022, 7:04 PM).	CBP_Withdrawals_AR_000029
6.	Ministry of Foreign Relations, México coordina con EE.UU. Neuvo enfoque para una migración ordenada, segura, regular y humana en la región, Goberino de México (Mex.), Oct. 12, 2022.	CBP_Withdrawals_AR_000033
7.	Email from U.S. Border Patrol Headquarters, Urgent – SWB OPS/ T42 CVNH (Jan. 5, 2023, 12:31 PM).	CBP_Withdrawals_AR_000037
8.	Email from U.S. Border Patrol Headquarters, Privacy booths RFI #3 – Naming convention/spreadsheet RGV LRT DRT (Dec. 21, 2022, 10:49 AM).	CBP_Withdrawals_AR_000041
9.	Spreadsheet from U.S. Border Patrol Headquarters, DRT SSPF Firefly – Booths (Dec. 21, 2022, 10:49 AM).	CBP_Withdrawals_AR_000045
10.	Spreadsheet from U.S. Border Patrol Headquarters, LRT Ops. East Sectors – Privacy Booth Information (Dec. 21, 2022, 10:49 AM).	CBP_Withdrawals_AR_000049
11.	Spreadsheet from U.S. Border Patrol Headquarters, Ops. East Sectors Privacy Booth Information (Dec. 21, 2022, 10:49 AM).	CBP_Withdrawals_AR_000052
12.	Spreadsheet from U.S. Border Patrol Headquarters, Copy of 20220112 CBP-ERO Flow and Resource – ER-CF Efficiencies (Dec. 21, 2022, 10:49 AM).	CBP_Withdrawals_AR_000059
13.	Court Opinion and Order from the *State of Florida v. United States of America, et. al.*, No. 23-11644 (N.D. Fla. Mar 8, 2023).	CBP_Withdrawals_AR_000069
14.	U.S., Dep't of Homeland Sec., U.S. Customs & Border Prot., U.S. Border Patrol Headquarters, *Post T42*	CBP_Withdrawals_AR_0

	Book.	00178
15.	Email from U.S. Border Patrol Chief San Diego Sector, URGENT – Must Read (Aug. 19, 2015, 12;57 PM).	CBP_Withdrawals_AR_000321
16.	Memorandum from Michael J. Fisher, Chief, U.S., Dep't of Homeland Sec., U.S. Customs & Border Prot., U.S. Border Patrol Headquarters, Phased Implementation of the Lopez-Venegas Settlement Agreement (April 10, 2015).	CBP_Withdrawals_AR_000324
17.	Memorandum Attachment from Chief Patrol Agent, U.S., Dep't of Homeland Sec., U.S. Customs & Border Prot., U.S. Border Patrol San Diego Sector, Phased Implementation of the Lopez-Venegas Settlement Agreement (May 5, 2015).	CBP_Withdrawals_AR_000327
18.	Memorandum Attachment from Acting Chief Patrol Agent, U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., U.S. Border Patrol San Diego Sector, Retention/Maintenance of Signed Documents Related to the Lopez-Venegas Settlement Agreement (Dec 02, 2014).	CBP_Withdrawals_AR_000329
19.	Memorandum from Chief Patrol Agent, U.S., Dep't of Homeland Sec., U.S. Customs & Border Prot., U.S. Border Patrol San Diego Sector, Mandatory Use of I-826 Supplemental Advisal (Sep 18, 2014).	CBP_Withdrawals_AR_000330
20.	Email from U.S. Border Patrol Headquarters, Amended I-826 (May 18, 2023, 12:10 PM).	CBP_Withdrawals_AR_000333
21.	U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., U.S. Border Patrol, DHS Form I-826 (Mexico)	CBP_Withdrawals_AR_000334
22.	8 U.S.C. § 1225.	CBP_Withdrawals_AR_000335
23.	8 C.F.R. § 235.4 (2000).	CBP_Withdrawals_AR_000342

CERTIFICATION OF ADMINISTRATIVE RECORD

My name is David S. BeMiller. I am the Chief of the Law Enforcement Operations Directorate (LEOD) within U.S. Customs and Border Protection (CBP), U.S. Department of Homeland Security (DHS). I have held this position from October 4, 2022 to present. I was in this position on May 12, 2023, when CBP began permitting certain noncitizens of certain nationalities to voluntarily withdraw their application for admission and return to Mexico.

I certify that, to the best of my personal knowledge, information, and belief, the documents listed in the attached index are contained in the administrative record. I further certify that, to the best of my personal knowledge, information, and belief, the documents listed in the attached index constitute a true, correct, and complete copy of the whole record of non-privileged documents that were before the relevant decisionmaker(s), including all documents and materials considered directly or indirectly, in issuing guidance on the decision to begin permitting certain noncitizens of certain nationalities to voluntarily withdraw their application for admission and return to Mexico.

Executed this 8th day of September, 2023 in Washington, D.C.

David S. BeMiller,
Chief, LEOD
U.S. Customs and Border Protection.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

M.A., *et al*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 1:23-cv-01843-TSC
Alejandro Mayorkas, *et al*,	)	
Defendants.	)	

REMOVALS ADMINISTRATIVE RECORD
FROM U.S. CUSTOMS AND BORDER PROTECTION (CBP)

_M.A._ (CBP Removals)
Certified Administrative Record Index

	Records	Starting Bates Number
1.	Email from U.S. Border Patrol Headquarters, Post T42 Priority Processing and Current Updates (May 11, 2023, 4:43 PM).	CBP_Removals_AR_ 000001
2.	Email attachment, U.S. Border Patrol Headquarters, Updated Guidance (May 10, 2023).	CBP_Removals_AR_ 000003
3.	Email from U.S. Border Patrol Headquarters, Reminder Post 42 Processing Pathways (May 11, 2023, 12:45 PM).	CBP_Removals_AR_ 000007
4.	Email attachment, U.S. Border Patrol Headquarters, Title 42 Processing Pathways signed (Dec. 12, 2022).	CBP_Removals_AR_ 000008
5.	Email from U.S. Border Patrol Headquarters, T42 of Venezuelans (Oct. 12, 2022, 7:04 PM).	CBP_Removals_AR_ 000029
6.	Ministry of Foreign Relations, México coordina con EE.UU. Neuvo enfoque para una migración ordenada, segura, regular y humana en la región, Goberino de México (Mex.), Oct. 12, 2022.	CBP_Removals_AR_ 000033
7.	Email from U.S. Border Patrol Headquarters, Urgent – SWB OPS/ T42 CVNH (Jan. 5, 2023, 12:31 PM).	CBP_Removals_AR_ 000037
8.	U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., U.S. Border Patrol Headquarters, Venezuela Parole Process.	CBP_Removals_AR_ 000038
9.	Email from U.S. Border Patrol Headquarters, Privacy booths RFI #3 – Naming convention/spreadsheet RGV LRT DRT (Dec. 21, 2022, 10:49 AM).	CBP_Removals_AR_ 000041
10.	Spreadsheet from U.S. Border Patrol Headquarters, DRT SSPF Firefly – Booths (Dec. 21, 2022, 10:49 AM).	CBP_Removals_AR_ 000045
11.	Spreadsheet from U.S. Border Patrol Headquarters, LRT Ops. East Sectors – Privacy Booth Information (Dec. 21, 2022, 10:49 AM).	CBP_Removals_AR_ 000049
12.	Spreadsheet from U.S. Border Patrol Headquarters, Ops. East Sectors Privacy Booth Information (Dec. 21, 2022, 10:49 AM).	CBP_Removals_AR_ 000053
13.	Spreadsheet from U.S. Border Patrol Headquarters, Copy of 20220112 CBP-ERO Flow and Resource – ER-	CBP_Removals_AR_

	CF Efficiencies (Dec. 21, 2022, 10:49 AM).	000059
14.	Court opinion and Order from the *State of Florida v. United States of America, et. al.*, No. 23-11644 (N.D. Fla. Mar 8, 2023).	CBP_Removals_AR_ 000069
15.	U.S., Dep't of Homeland Sec., U.S. Customs & Border Prot., U.S. Border Patrol Headquarters, *Post T42 Book*.	CBP_Removals_AR_ 000178
16.	Memorandum from Blas Nunez-Neto, Assistant Sec'y for Border and Immigration Office of Strategy, Policy, and Plans, Process for Determining Country of Removal for Nationals of Cuba, Haiti, Nicaragua, and Venezuela (May 10, 2023).	CBP_Removals_AR_ 000321
17.	8 U.S.C. § 1231.	CBP_Removals_AR_ 000326
18.	8 C.F.R. § 241.15 (2005).	CBP_Removals_AR_ 000343

CERTIFICATION OF ADMINISTRATIVE RECORD

My name is David S. BeMiller. I am the Chief of the Law Enforcement Operations Directorate (LEOD) within U.S. Customs and Border Protection (CBP), U.S. Department of Homeland Security (DHS). I have held this position from October 4, 2022 to present. I was in this position on May 12, 2023, when CBP began designating Mexico as a country of removal for certain non-Mexican nationals.

I certify that, to the best of my personal knowledge, information, and belief, the documents listed in the attached index are contained in the administrative record. I further certify that, to the best of my personal knowledge, information, and belief, the documents listed in the attached index constitute a true, correct, and complete copy of the whole record of non-privileged documents that were before the relevant decisionmaker(s), including all documents and materials considered directly or indirectly, in issuing guidance on the decision to begin designating Mexico as a country of removal for certain non-Mexican nationals.

Executed this 8th day of September, 2023 in Washington, D.C.

David S. BeMiller,
Chief, LEOD
U.S. Customs and Border Protection.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

M.A., *et al*, Plaintiffs, v. Alejandro Mayorkas, *et al*, Defendants.	Civil Action No. 1:23-cv-01843-TSC

VOLUNTARY WITHDRAWAL OF APPLICATION FOR ADMISSION
ADMINISTRATIVE RECORD
FROM USCIS

Voluntary Withdrawal of Application of Admission:
USCIS Administrative Record Index

	Records	Starting Bates Number
1.	U.S. Citizenship and Immigration Services, *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*, May 12, 2023 (on file with agency).	USCIS_Withdrawals_AR_000001
2.	8 U.S.C. § 1103	USCIS_Withdrawals_AR_000009
3.	8 U.S.C. § 1225	USCIS_Withdrawals_AR_000031
4.	8 C.F.R. § 235.4	USCIS_Withdrawals_AR_000038
5.	U.S. Dep't of Homeland Sec., *Delegation To Director Of U.S. Citizenship And Immigration Services To Permit Withdrawal Of Applications For Admission*, Delegation No. 15005 (Dec.15, 2022) (on file with agency).	USCIS_Withdrawals_AR_000039

CERTIFICATION OF ADMINISTRATIVE RECORD

My name is John L. Lafferty. I am the Chief of the Asylum Division within U.S. Citizenship and Immigration Services (USCIS), U.S. Department of Homeland Security (DHS). I have held this position in the Asylum Division since from June 30, 2013 until September 9, 2019 and again from November 6, 2022 to present. I was in this position on May 12, 2023, when USCIS implemented the voluntary withdrawal of applications for admission for certain nationalities.

I certify that, to the best of my personal knowledge, information, and belief, the documents listed in the attached index are contained in the administrative record. I further certify that, to the best of my personal knowledge, information, and belief, the documents listed in the attached index constitute a true, correct, and complete copy of the whole record of non-privileged documents that were before the relevant decisionmaker(s), including all documents and materials considered directly or indirectly, in issuing guidance on the voluntary withdrawal of applications for admission for certain nationalities.

Executed this 9th day of September, 2023 in Camp Springs, MD.

JOHN L LAFFERTY

Digitally signed by JOHN L LAFFERTY
Date: 2023.09.08 16:36:21 -04'00'

John L. Lafferty,
Chief, Asylum Division
U.S. Citizenship and Immigration Services.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

M.A., *et al*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 1:23-cv-01843-TSC
Alejandro Mayorkas, *et al*,	)	
Defendants.	)	

24-HOUR WAITING PERIOD FOR CREDIBLE FEAR INTERVIEWS
ADMINISTRATIVE RECORD
FROM USCIS

24-hour Waiting Period For Credible Fear Interviews:
USCIS Certified Administrative Record Index

	Records	Starting Bates Number
1.	Memorandum from John L. Lafferty, Asylum Div. Chief, U.S. Citizenship and Immigration Servs., through Ted H. Kim, Associate Dir., Refugee, Asylum and Int'l Operations Directorate, U.S. Citizenship and Immigration Servs., to Andrew Davidson, Acting Deputy Dir., U.S. Citizenship and Immigration Servs., *Scheduling of Credible Fear Interviews* (May 10, 2023) (on file with agency).	USCIS_24-Hour_AR_000001
2.	8 U.S.C. § 1225	USCIS_24-Hour_AR_000004
3.	8 C.F.R. § 208.30	USCIS_24-Hour_AR_000011
4.	8 C.F.R. § 235.3	USCIS_24-Hour_AR_000021
5.	Email from John L. Lafferty, Asylum Div. Chief, U.S. Citizenship and Immigration Servs., *Updated Guidance on Consultation Period and Reschedules - CFPM III.D.1.a. and III.E.4.b.* (May 10, 2023, 3:28 PM PST) (on file with agency).	USCIS_24-Hour_AR_000026
6.	Email from John L. Lafferty, Asylum Div. Chief, U.S. Citizenship and Immigration Servs., *Preparation Strategies for Return to Title 8 Processing* (May 10, 2023, 2:47 PM PST) (on file with agency).	USCIS_24-Hour_AR_000027
7.	Email from John L. Lafferty, Asylum Div. Chief, U.S. Citizenship and Immigration Servs. *Immediate Implementation: Timing of the CF interview after arrival at a detention facility + Handling of requests to reschedule CF interviews*, (July 8, 2019, 6:37 EDT) (on file with agency)	USCIS_24-Hour_AR_000029
8.	*L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1(D.D.C. 2020).	USCIS_24-Hour_AR_000031
9.	Memorandum from Ken Cuccinelli II, Dir., U.S. Citizenship and Immigration Servs., to the Acting Sec'y of the U.S. Dep't of Homeland Sec., *Reduction of the Credible Fear Consultation Period* (July 2, 2019) (on file with agency).	USCIS_24-Hour_AR_000055
10.	U.S. Citizenship and Immigration Servs, *Credible Fear Procedures Manual*, § III.D, 7-8 (last updated Apr. 6, 2023) (on file with agency).	USCIS_24-Hour_AR_000057
11.	U.S. Citizenship and Immigration Servs, *Updated Credible Fear Procedures Manual*, § III.D.1, III.E.4 (last updated May 10, 2023) (on file with agency).	USCIS_24-Hour_AR_000059
12.	U.S. Citizenship and Immigration Servs., Form M-444, *Information About Credible Fear Interview* (last updated May 31, 2022) (on file with agency).	USCIS_24-Hour_AR_000061
13.	U.S. Citizenship and Immigration Servs, Form M-444, *Information About Credible Fear Interview* (last updated May 10, 2023) (on file with agency).	USCIS_24-Hour_AR_000065
14.	U.S. Citizenship and Immigration Servs, *Waiver of the Consultation Period: Declaration of Noncitizen* (last updated May 10, 2023) (on file with agency).	USCIS_24-Hour_AR_000069

15.	U.S. Dep't of Homeland Sec., *Fact Sheet: U.S. Government Announces Sweeping New Actions to Manage Regional Migration* (Apr. 27, 2023) https://www.dhs.gov/news/2023/04/27/fact-sheet-us-government-announces-sweeping-new-actions-manage-regional-migration.	USCIS_24-Hour_AR_000070
16.	U.S. Dep't of Homeland Sec., *Secretary Mayorkas and Secretary of State Blinken Remarks at a Press Conference on New Regional Migration Management Measures* (Apr. 28, 2023) https://www.dhs.gov/news/2023/04/28/secretary-mayorkas-and-secretary-state-blinken-remarks-press-conference-april-17.	USCIS_24-Hour_AR_000074

CERTIFICATION OF ADMINISTRATIVE RECORD

My name is John L. Lafferty. I am the Chief of the Asylum Division within U.S. Citizenship and Immigration Services (USCIS), U.S. Department of Homeland Security (DHS). I have held this position in the Asylum Division since from June 30, 2013 until September 9, 2019 and again from November 6, 2022 to present. I was in this position on May 10, 2023, when USCIS implemented a 24-hour minimum period between the acknowledgment made on a Form M-444, Information about Credible Fear Interview, and a credible fear interview.

I certify that, to the best of my personal knowledge, information, and belief, the documents listed in the attached index are contained in the administrative record. I further certify that, to the best of my personal knowledge, information, and belief, the documents listed in the attached index constitute a true, correct, and complete copy of the whole record of non-privileged documents that were before the relevant decisionmaker(s), including all documents and materials considered directly or indirectly, in issuing guidance on a 24-minimum period between the acknowledgment made on a Form M-444, Information about Credible Fear Interview, and a credible fear interview.

Executed this 9th day of September, 2023 in Camp Springs, MD.

JOHN L LAFFERTY

Digitally signed by JOHN L LAFFERTY
Date: 2023.09.08 16:37:37 -04'00'

John L. Lafferty,
Chief, Asylum Division
U.S. Citizenship and Immigration Services.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

M.A., *et al.*,

Plaintiffs,

v.

Alejandro Mayorkas, *et al.*,

Defendants.

Civil Action No. 1:23-cv-01843-TSC

[PROPOSED] ORDER GRANTING DEFENDANTS MOTION FOR SUMMARY JUDGMENT

Before the Court are the parties' cross-motions Defendants motion for summary judgment. Having considered the motions, the memoranda in support, the administrative record, and other materials in support, the court **GRANTS** Defendants' motion and **DENIES** Plaintiffs' motion.

Dated: _____

_____
Hon. Tanya S. Chutkan
United States District Court Judge