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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

L.M.-M., *et al.*, Plaintiffs, v. Kenneth T. Cuccinelli II, *et al.*, Defendants.	Civil Action No. 1:19-cv-02676-RDM

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO THE MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

In response to unprecedented mass migration at the southern border, United States Citizenship and Information Services (USCIS) modified its procedural guidance governing the timing of credible-fear interviews that it undertakes to address asylum and related claims made by aliens subject to expedited removal under 8 U.S.C. § 1225(b)(1)(B). Plaintiffs, seven individuals and one organization, now demand that this Court preliminarily enjoin this policy change nationwide. The Court should deny that extraordinary request.

As an initial matter, this Court lacks jurisdiction over this case. First, this Court lacks jurisdiction to adjudicate claims brought by Plaintiff Refugee and Immigration Center for Education and Legal Services (RAICES). Plaintiffs invoke this Court's jurisdiction solely under 8 U.S.C. § 1252(e)(3), a provision of the Immigration and Nationality Act (INA) that authorizes certain systemic challenges to the expedited removal system. But section 1252(e)(3) allows only individual aliens—not organizations—to bring such challenges. And because this Court lacks jurisdiction to adjudicate RAICES's claims, the scope of relief, if any were warranted, must be limited to the individual Plaintiffs. Yet the individual Plaintiffs also lack Article III standing. They attack the procedures surrounding the timing of the credible-fear interview process. But an injunction addressing those procedures would not redress the harm they claim, which concerns only the merits of the determinations made after those interviews. So the Court cannot entertain this lawsuit at all.

Nor have Plaintiffs established a substantial likelihood of success on the merits. First, the challenged policy changes are fully consistent with the text of all relevant statutes and regulations. Nothing in the expedited removal system—no statute or regulation—bars the new policies adopted by USCIS or requires the procedures that Plaintiffs demand, and Plaintiffs' attempt to import rights

from full removal proceedings into this case should be rejected for the simple reason that the individual Plaintiffs were placed in expedited, not full, removal proceedings. Second, Plaintiffs are wrong that the Acting Director of USCIS was unlawfully appointed. Applied here, the Federal Vacancies Reform Act ("FVRA"), by its plain text, provides as a default that the first assistant to the office of Director shall perform the duties of the office of Director temporarily in an acting capacity when that office is vacant; here, the first assistant was Mr. Cuccinelli. Plaintiffs try to engraft onto the FVRA a condition that the first assistant be in place at the time the vacancy initially occurred, but that condition lacks any textual support in the FVRA and conflicts with other provisions of the statute. Third, the guidance issued by USCIS is reasonable, so Plaintiffs' arbitrary-and-capricious claim fails. USCIS articulated a sound, rational explanation for why it was departing from previous policies, and the record supports that explanation: the crisis on the southern border, the record shows, prompted the policy changes and the policy changes will help address that crisis. Finally, the Rehabilitation Act provides no basis for injunctive relief because there is no evidence that Plaintiffs were denied access to, or excluded from, any services, a threshold prerequisite for any Rehabilitation Act claim.

The remaining injunctive factors also doom Plaintiffs' demand for a preliminary injunction. Injunctive relief would inflict tangible harm on the United States' efforts to combat illegal immigration. Meanwhile, Plaintiffs have not demonstrated a connection between the injunctive relief sought, limited to the procedures surrounding credible-fear interviews, and their complained-of irreparable harm, which depends entirely on a different result in their credible-fear interviews. There is no evidence that even if the individual Plaintiffs received the injunction they seek, the results of their credible-fear interviews would be different. And Plaintiff RAICES' assertions about harm—that it has to divert resources and will suffer economic loss in response to

the policy changes—are the sort of paltry allegations that do not satisfy the exacting irreparable-harm standard.

Finally, if any relief were warranted, it must be limited to the individual Plaintiffs in this case who have demonstrated an entitlement to relief. A nationwide injunction is not warranted—under Article III, principles of equity, the Administrative Procedure Act, or the facts.

Accordingly, this Court should deny Plaintiffs' preliminary injunction motion or grant only limited relief.

BACKGROUND

A. Legal Background.

Expedited Removal. The Executive Branch has broad constitutional power to exclude aliens and secure the border, *Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950), and has for decades exercised that authority through its prosecutorial discretion to prioritize which aliens to remove and what proceedings to initiate against them, including through expedited removal. *See Matter of E-R-M- & L-R-M*, 25 I. & N. Dec. 520, 523 (BIA 2011).

Under the expedited removal procedures, an alien "who is arriving in the United States" who lacks valid entry documentation or makes material misrepresentations shall be "order[ed] . . . removed from the United States without further hearing or review." 8 U.S.C. § 1225(b)(1)(A)(i); *see id*. § 1182(a)(6)(C), (a)(7). Although the statute does not require it, implementing regulations afford procedures to such aliens before an expedited removal is executed. Among other procedures: "[T]he examining immigration officer shall create a record of the facts of the case and statements made by the alien," by means of a "sworn statement." 8 C.F.R. § 235.3(b)(2)(i). The examining officer shall also "advise the alien of the charges against him or her" and provide "an opportunity to respond to those charges in the sworn statement." *Id.* "Interpretative assistance

shall be used if necessary to communicate with the alien." *Id.* And "any removal order" entered under section 1225(b)(1) "must be reviewed and approved by the appropriate supervisor before the order is considered final." *Id.* § 235.3(b)(7).

Expedited removal also addresses the claims of aliens seeking asylum or claiming fear of persecution. If an alien subject to expedited removal "indicates either an intention to apply for asylum under [8 U.S.C. § 1158] or a fear of persecution," the immigration officer inspecting the alien must "refer the alien for" an interview conducted by an asylum officer. *Id.* § 1225(b)(1)(A)(ii). In such an interview, an asylum officer considers relevant facts and assesses whether the alien has a "credible fear of persecution." *Id.* § 1225(b)(1)(A)(ii), (B)(1)(B)(v); *see* 8 C.F.R. § 208.30(d). A "credible fear of persecution" means "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). A credible-fear interview thus assesses whether the alien has a plausible basis to pursue asylum. *See id.*; *id.* § 1158.

The asylum officer "will conduct the interview in a nonadversarial manner, separate and apart from the general public." 8 C.F.R. § 208.30(d). The officer must "create a written record of his or her determination" regarding credible fear, including a "summary of the material facts as stated by the applicant, any additional facts relied on by the officer, and the officer's determination of whether, in light of such facts, the alien has established a credible fear of persecution or torture." 8 C.F.R. § 208.30(e)(1); *see* 8 U.S.C. § 1225(b)(1)(B)(iii)(II). "The alien may consult with a person or persons of the alien's choosing prior to the interview or any review thereof, and may present other evidence, if available. Such 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). Thus, before the

credible-fear interview, an immigration officer "shall provide the alien with a written disclosure" "describing: (A) the purpose of the referral and description of the credible fear interview process; (B) the right to consult with other persons prior to the interview and any review thereof at no expense to the United States Government; (C) the right to request review by an immigration judge of the asylum officer's credible fear determination; and (D) the consequences of failure to establish a credible fear of persecution or torture." 8 C.F.R. § 235.3(b)(4)(i). These written disclosures are provided on a Form M-444, titled "Information About Credible Fear." AR111, AR113. "If the alien is unable to proceed effectively in English, and if the asylum officer is unable to proceed competently in a language chosen by the alien, the asylum officer shall arrange for the assistance of an interpreter in conducting the interview." 8 C.F.R. § 208.30(d)(5). And if an asylum officer "determines" that the alien is unable to "participate effectively in the interview because of illness, fatigue, or other impediments, the officer may reschedule the interview." *Id.* § 208.30(d)(1).

If the interviewing officer determines that the alien "has a credible fear of persecution" (sometimes called a positive credible-fear determination), the officer refers the alien to full removal proceedings under 8 U.S.C. § 1229a. 8 U.S.C. § 1225(b)(1)(B)(ii). Full removal proceedings provide more extensive procedures than those available in expedited removal. *Compare, e.g.*, *id*. § 1229a *with id.* § 1225(b)(1). In full removal proceedings, an alien may apply for asylum or other relief or protection from removal. *Id*. § 1225(b)(1)(B)(ii); 8 C.F.R. § 208.30(f). In full removal proceedings, an alien can also appeal an adverse immigration judge decision to the Board of Immigration Appeals, and can in turn obtain judicial review of an adverse Board decision by filing a petition for review in a court of appeals. 8 U.S.C. § 1252(a)(1).

If, however, the interviewing asylum officer determines that the alien does not have a credible fear (a negative credible-fear determination), the alien is not entitled to be placed into full

removal proceedings. But he may seek review of the credible-fear determination before an immigration judge (IJ). *Id.* § 1225(b)(1)(B)(iii)(I), (III); 8 C.F.R. § 1208.30(g)(2). If an alien requests IJ review, that review is *de novo*. 8 C.F.R. § 1003.42(d). "Such review shall include an opportunity for the alien to be heard and questioned by the immigration judge," 8 U.S.C. § 1225(b)(1)(B)(iii)(III), and the IJ "may receive into evidence any oral or written statement which is material and relevant to any issue in the review," 8 C.F.R. § 1003.42(c). If, after review, the IJ concludes that the alien has established a credible fear, the IJ will vacate the asylum officer's decision and the Department of Homeland Security (DHS) will place the alien in full removal proceedings for adjudication of the alien's asylum claim (and other removal-related claims). *Id.* § 1003.42(f). If the IJ agrees with the asylum officer's decision that the alien lacks a credible fear, however, the alien must be "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 bars further review by the Board or any court of the credible-fear determination. 8 U.S.C. §§ 1225(b)(1)(C), 1252(a)(2)(A)(iii), (e)(2); 8 C.F.R. § 1003.42(f).

The Federal Vacancies Reform Act (FVRA). Since 1792, Congress has provided for the designation of individuals to serve temporarily as acting officers. *See NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 934 (2017). In 1998, Congress enacted the FVRA, 5 U.S.C. §§ 3345-3349d, to govern the designation of acting officials to perform the duties of an executive office for which appointment is subject to Senate confirmation whenever the incumbent officer "dies, resigns, or is otherwise unable to perform the functions and duties of the office." *Id.* § 3345(a). The FVRA provides three principal options. First, absent any presidential designation, the "first assistant" to the vacant office shall perform its functions and duties. *Id.* § 3345(a)(1). Second, the President may depart from that default course by designating another Senate-confirmed official. *Id.*

§ 3345(a)(2). And third, the President may designate an officer or employee within the same agency to perform the vacant office's functions and duties, provided that he or she has been in the agency for at least 90 days in the 365 days preceding the vacancy, in a position for which the rate of pay is equal to or greater than the minimum rate for GS-15 of the General Schedule. *Id.* § 3345(a)(3).

The DHS organic statute creates the office of Director of USCIS. 6 U.S.C. § 113(a)(1)(E). The hierarchy of leadership within USCIS is not otherwise specified by statute. *See* 6 U.S.C. § 271 (establishing certain subordinate offices within USCIS without providing a specific leadership structure). No office-specific vacancy statute defines the first assistant to that office or otherwise governs the designation of an Acting Director in the event of a vacancy.

B. Factual Background.

Pre-July 2 Policies governing "consultation" and "continuances." Before July 2, 2019, USCIS policy was that an asylum seeker receive "at least 48 hours after arrival at the detention facility in order to seek and receive" the consultation described in 8 U.S.C. § 1225(b)(1)(B)(iv) "before the interview [took] place." AR113. At the Family Residential Centers (FRCs), the alien was given 72 hours after arrival at the facility and re-orientation by USCIS to seek and receive consultation and the credible-fear interview was scheduled after this period. *Id.* In addition, if an alien requested a continuance of his or her credible-fear interview, that continuance request was assessed on a case-by-case basis. For example, any rescheduling requests were considered by the Supervisory Asylum Pre-Screening Officer (SAPSO) pursuant to policies developed at the local asylum office. AR27. In practice, before July 2 of this year USCIS also conducted a "re-orientation" in FRCs where they confirmed that family units had received and signed the Form M-444 and received a list of relevant pro bono legal providers prior to undergoing credible-fear

interviews. AR66-67.

July 2 Memorandum. On July 2, 2019, USCIS issued a Guidance memorandum (the "Memo") entitled "Reduction of Credible Fear Consultation Period." AR113. The Memo observed that asylum seekers have a statutory and regulatory right to consult with persons of their choosing prior to a credible-fear interview, so long as such consultation does not "unreasonably delay the process." *Id.*; *see* 8 U.S.C. § l225(b)(1)(B)(iv); 8 C.F.R. § 208.30(d)(4). The Memo also recognized that under prior policy, an asylum seeker received "at least 48 hours after arrival at the detention facility in order to seek and receive consultation before the interview [took] place," in the case of non-FRC detention centers, and "72 hours" "to seek and receive consultation" if the asylum seeker was detained at a FRC. *Id*. The Memo reduced the minimum consultation period from 48 hours to "one full calendar day from the date of arrival at a detention facility." AR114 ("Reduced Consultation Period Guidance"). In practice, however, "given USCIS business hours[,]" aliens will "have longer than 24 hours to consult, depending on when they arrive at the facility." AR115. "[F]or example, if an alien arrives at a facility at 11 AM on a Tuesday, USCIS would not conduct the [credible-fear] interview on the Tuesday or Wednesday (the full calendar day), but USCIS could proceed to scheduling the alien for [a credible-fear] interview as early as any available interview time on that Thursday." *Id.* The impetus behind the changes was "to ensure the processing of aliens is not unduly delayed in light of the situation at the Southwest Border. Given this critical need, coupled with the improvements made to the M-444 form" "using plain language principles in order to provide greater clarity," the timeframe for consultation was reduced "to one full calendar day." AR113-14.

The Memo also changed the standard that applies to requests to postpone a credible-fear interview. Before July 2, USCIS considered continuance requests on a case-by-case basis so long

as they did not unreasonably delay the credible-fear process. AR117. Under the new policy, USCIS "require[s] extraordinary circumstances warranting approval of a request to reschedule so that USCIS can ensure, consistent with the statute, that the consultation period does not unreasonably delay the overall process." AR114 ("Continuance Guidance"). The Memo's implementation date was July 8. *See* AR113.

The Appointment of the Current Acting Director of USCIS. On June 1, 2019, then-Director of USCIS, L. Francis Cissna, resigned from his office. Pursuant to DHS Delegation No. 0106, *DHS Orders of Succession and Delegations of Authority for Named Positions* (Dec. 15, 2016), Deputy Director of USCIS Mark Koumans began performing the functions and duties of the office of Director in an acting capacity upon the former Director's resignation. *See* Declaration of Paul Johnson, Ex. 1 Annex D (attached as Ex. B). Shortly thereafter, Kenneth T. Cuccinelli received a noncareer Senior Executive Service appointment as Principal Deputy Director of USCIS, *see* Declaration of Michelle Monroe, Ex. 1 (attached as Ex. C), and subsequently received an appointment to that position from Acting Secretary McAleenan, *see* Declaration of Juliana Blackwell, Ex. 1 (attached as Ex. D). On June 10, 2019, the Acting Secretary exercised his authority under Paragraph II.K of DHS Delegation No. 0106 to amend the line of succession for the office of Director and designate the Principal Deputy Director of USCIS as the "First Assistant and most senior successor to the Director of USCIS in such order of succession." *See id.*, Ex. 2; *see also* Johnson Decl., Ex. 1 ¶ II.K. As first assistant to the office of Director of USCIS, Mr. Cuccinelli became Acting Director by operation of the Federal Vacancies Reform Act ("FVRA"), 5 U.S.C. § 3345(a)(1), upon the amendment of the order of succession.

This Lawsuit. On September 6, an advocacy organization (RAICES) and seven individuals filed this suit for injunctive relief. Each individual Plaintiff attempted to enter the United States

without proper documentation and was placed in expedited removal proceedings. Compl., ¶¶ 172, 175, 178. None of the Plaintiffs challenges his or her placement in expedited removal proceedings.

Each individual Plaintiff received a credible-fear interview. Before their credible-fear interviews, Plaintiffs were able to consult with persons of their choosing. Compl. ¶¶ 174, 176; Dkt. 12-3, ¶ 8; Dkt. 12-4, ¶¶ 24-25. At the conclusion of their interviews, each of the individual Plaintiffs received a negative credible-fear determination. Compl. ¶¶ 173, 177, 180. Each Plaintiff sought IJ review of the determinations, and IJs affirmed those determinations for five of the individual Plaintiffs. Compl. ¶¶ 173, 177. For Plaintiffs S.G.-C. and B.O.-G., an IJ vacated the negative credible-fear determinations, and both were placed in full removal proceedings. Mot. 8-9 n.1. The remaining five individual Plaintiffs are subject to final expedited removal orders. *See id.* at 8.

Plaintiffs bring eight claims. Five claims challenge the Guidance arising from the July 2 Memorandum (the "Memo").[1] Plaintiffs allege that the Guidance: (1) is inconsistent with 8 U.S.C. § 1225 and its implementing regulations, 8 C.F.R. §§ 208.30, 235.3 (Count I), Compl. ¶¶ 194-99; (2) is arbitrary and capricious under the Administrative Procedure Act (APA) because USCIS "failed to consider or address asylum seekers' legitimate need and right to meaningfully consult with persons of their choosing," (Count II) *id.*, ¶ 200; (3) is unlawful under the APA because USCIS issued the Guidance without using notice-and-comment procedures (Count III), *id.*, ¶¶ 206-08; (4) violates the Rehabilitation Act because it discriminates against disabled persons (Count IV), *id.*, ¶¶ 209-218; and (5) violate RAICES's First Amendment right "to communicate and

[1] As discussed, the Memo directed only two things: (1) that the consultation period be reduced to one calendar day; and (2) that continuances be granted only in extraordinary circumstances. Plaintiffs also challenge that USCIS no longer provides legal-rights presentations in person at Dilley Detention Center. They refer to this change as the "No Legal Orientation Directive."

associate with its clients and prospective clients" (Count V). *Id.*, ¶ 220-21. Plaintiffs also challenge USCIS Acting Director Kenneth Cuccinelli's authority to issue the Guidance. In Counts VI through VIII they allege that the appointment of Mr. Cuccinelli violates the FVRA, the Appointments Clause of the Constitution, and is *ultra vires*. Compl., ¶¶ 224-236.

On September 27, Plaintiffs moved for a preliminary injunction on Counts I, II, IV, and VI, seeking to enjoin the Guidance issued by USCIS nationwide. *See* Mot. 2.

LEGAL STANDARD

"A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011). A plaintiff must show a "substantial likelihood of success on the merits," *Elec. Privacy Info. Ctr. v. U.S. Dep't of Commerce*, 928 F.3d 95, 104 (D.C. Cir. 2019), and the plaintiff carries the burden of demonstrating the need for the "extraordinary remedy" of a preliminary injunction. *Winter v. NRDC*, 555 U.S. 7, 23-24 (2008).

ARGUMENT

I. This Court Lacks Jurisdiction Over Plaintiffs' Claims.

A. Plaintiffs' S.G.-C. and B.O.-G.'s Claims are Moot.

As Plaintiffs note, two Plaintiffs, S.G.-C. and B.O.-G., had their negative credible-fear determinations overturned, and a result, both Plaintiffs were placed in full removal proceedings. Mot. 8-9 n.1; 8 U.S.C. § 1225(b)(1)(B)(ii). These Plaintiffs are thus entitled to utilize the full panoply of procedural protections full removal proceedings entail to demonstrate their entitlement to asylum, *id*. § 1225(b)(1)(B)(ii), 8 C.F.R. § 208.30(f), and as a result, the credible-fear interview features that form the basis of Plaintiffs' complaint will not affect them. Both Plaintiffs' claims

are thus moot, because the preliminary injunctive relief sought "will neither presently affect" their rights "nor have a more-than-speculative chance of affecting them in the future." *Am. Bar Ass'n v. F.T.C.*, 636 F.3d 641, 645 (D.C. Cir. 2011).

B. The Court Lacks Jurisdiction to Adjudicate RAICES's Claims.

Plaintiffs claim jurisdiction only under 28 U.S.C. § 1252(e)(3). Compl., ¶ 9. They are right that only section 1252(e)(3) could conceivably supply jurisdiction. But that fact forecloses Plaintiff RAICES from seeking relief in this lawsuit.

RAICES, as an organization, is not subject to expedited removal procedures under section 1225(b)(1), and so cannot seek relief under section 1252(e)(3). Section 1252(e)(3), titled "[c]hallenges on [the] validity of the system," authorizes review of "implementation" of certain expedited removal procedures only by those who are subject to "determinations under section 1225(b) of this title." The triggering provision's reference to "[d]eterminations under section 1225(b)" requires just that—a "determination." That is confirmed by the fact that section 1252(e)(3) appears in a section titled "[j]udicial review of orders under section 1225(b)(1)." Accordingly, section 1252(e)(3) grants jurisdiction only if there is in fact a reviewable "determination[]" or "order[]" "under section 1225(b)." *Id.* § 1252(e)(3)(A). Thus, as the D.C. Circuit has already held, these provisions, combined with others in section 1252, mean that challenges to new expedited removal procedures may be brought "by, and only by, *aliens against whom the new procedures had been applied*." *Am. Immigration Lawyers Ass'n v. Reno* ("*AILA*"), 199 F.3d 1352, 1360 (D.C. Cir. 2000) (emphasis added) (reversing holding by district court that organizations purporting to speak on behalf of aliens who *could* be subject to expedited removal may invoke section 1252(e)(3)); *see id.* at 1358 ("We cannot see anything in these provisions allowing litigants . . . to raise claims on behalf of those *not party to the lawsuit*.") (emphasis

added)). Under *AILA*, organizations like RAICES may not invoke section 1252(e)(3): RAICES has not been the subject of an admissibility determination, 8 U.S.C. § 1225(b)(1)(A), or a credible-fear determination, 8 U.S.C. § 1225(b)(1)(B), as section 1252(e)(3) demands.[2]

Even if this Court possessed subject-matter jurisdiction to adjudicate RAICES' claims, RAICES is not within the zone of interests of section 1225(b)(1) and therefore lacks a statutory cause of action to vindicate in this lawsuit. Plaintiffs must demonstrate that their "interests fall within the zone of interests protected by the law invoked." *Gunpowder Riverkeeper v. FERC*, 807 F.3d 267, 273 (D.C. Cir. 2015). RAICES cannot make that showing because the expedited removal statute makes clear that "Congress meant to allow litigation challenging the new system by, and only by, *aliens against whom the new procedures had been applied*." *AILA*, 199 F.3d at 1360 (emphasis added). Cases addressing other immigration provisions fortify the conclusion that RAICES is not within the statutory zone of interests. *See INS v. Legalization Assistance Project of LA Cnty. Federation of Labor*, 510 U.S. 1301, 1305 (1993) ("[The statute] was clearly meant to protect the interests of undocumented aliens, not the interests of organizations such as respondents . . . . The fact that the INS regulation may affect the way an organization allocates its resources . . . does not give standing to an entity which is not within the zone of interests the statute meant to protect."); *N.W. Immigrant Rights Project v. USCIS*, 325 F.R.D. 671, 688 (W.D. Wash. 2016) ("[T]he text of the relevant provisions [cannot] be fairly read to implicate Organizational Plaintiffs' interest in the efficient use of resources."). Accordingly, RAICES cannot show that it is within the zone of interests protected by section 1225(b)(1) because "an organization must show more

[2] The Government respectfully disagrees with the contrary conclusion reached in *Make the Road New York v. McAleenan*, No. 19-cv-2369 (KBJ), 2019 WL 4738070, at *18 (D.D.C. Sept. 27, 2019), as the court there concluded that *AILA* was limited to the "third-party standing" context. *AILA*'s reasoning is clear that the D.C. Circuit's holding regarding what section 1252(e)(3) permits is not limited to issues of third-party standing.

than a general corporate purpose to promote the interests to which the statute is addressed. Rather it must show a congressional intent to benefit the organization," *Animal Legal Defense Fund, Inc. v. Espy*, 23 F.3d 496, 503 (D.C. Cir. 1994), yet the "congressional intent," *id.*, underpinning section 1252(e)(3) evinces the exact opposite, namely an intent to *preclude* organizations from challenging section 1225(b)(1).

C. The Court Lacks Jurisdiction to Review USCIS's Decision to Discontinue Legal-Rights Presentations at Dilley Detention Center.

Section 1252(e)(3) further limits the Court's jurisdiction over Plaintiffs' claims for a second and independent reason. Section 1252(e)(3) provides the sole basis for jurisdiction to review "procedures and policies adopted" "to implement the provisions of section 1225(b)(1)." 8 U.S.C. § 1252(a)(2)(A); Compl. ¶ 195. And section 1252(e)(3)(A) authorizes a court to review, as relevant here, only "a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General [or the Secretary of Homeland Security to implement [section 1225(b)]." This provision "bar[s] the unwritten actions of the agency from judicial review." *Khan v. Holder*, 608 F.3d 325, 331 (7th Cir. 2010); *Am. Immigration Lawyers Ass'n v. Reno* (*AILA II*), 18 F. Supp. 2d 38, 58 (D.D.C. 1998) ("[B]ased on the clear language of the jurisdictional provision of [section 1252(e)(3)(A)(ii)], this Court cannot review unwritten policies or practices."). The decision to discontinue legal-rights presentations does not appear in a written policy directive, guideline, or procedure, and so section 1252(e)(3) does not authorize this Court to address it.

The July 2 Memo directed two changes to USCIS policy: that the credible-fear consultation period be reduced to a full calendar day, and that continuance requests be granted only in extraordinary circumstances. The Memo did not direct that USCIS discontinue its legal-rights presentations at the Dilley Detention Center, however, and "USCIS has not promulgated,

authorized, or implemented any written policy that there shall not be an in person legal orientation for individuals seeking asylum at the Dilley Family Residential Center or any other location." Ex. A, ¶ 4. Accordingly, Plaintiffs have not demonstrated that the decision to discontinue legal-wrights presentations is "a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General [or the Secretary of Homeland Security] to implement [section 1225(b)]." 8 U.S.C. § 1252(e)(3)(A). Indeed, Congress emphasized the "written" requirement because it sought to shield such *ad hoc* implementation decisions from judicial review. *See AILA*, 199 F.3d at 1354, 1356 ("affirm[ing]" the district court's decision that "there was no jurisdiction to challenge the particular practices of immigration officials"); *AILA II*, 18 F. Supp. 2d at 58 (noting that "discretion[ary] [decisions] placed in the hands of individual INS agents" are not subject to judicial review under section 1252(e)(3)).

D. The Plaintiffs Lack Article III Standing.

Article III standing has three components: (1) "injury in fact," (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). "The key word is 'likely,' and thus, 'the prospect of obtaining relief from the injury as a result of a favorable ruling' cannot be 'too speculative.'" *Abulhawa v. United States Dep't of the Treasury*, 239 F. Supp. 3d 24, 36 (D.D.C. 2017) (quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984)). Thus, if "the challenged conduct is at best an indirect or contributing cause of the plaintiff's injury," "the plaintiff faces an uphill climb in pleading and proving redressability." *West v. Lynch*, 845 F.3d 1228, 1236 (D.C. Cir. 2017). Here, Plaintiffs must demonstrate "a substantial likelihood of standing"; otherwise, they are "not entitled to a preliminary injunction." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015). Plaintiff cannot rest on "mere allegations" but must instead "set forth[,]

by affidavit or other evidence[,] specific facts" that "demonstrate a substantial likelihood of standing." *Elec. Privacy Information Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 377 (D.C. Cir. 2017).

Plaintiffs have fallen far short of showing the requisite substantial likelihood of standing. As Plaintiffs note, this lawsuit is confined to challenging changes to alleged "procedural safeguards" in the timing of credible-fear interviews. Mot. 5. But none of Plaintiffs' alleged injuries stem from these changes. Instead, the alleged injury that the Individual Plaintiffs repeatedly emphasize is the *results* of their expedited removal proceedings, *i.e.*, the ultimate finding that Plaintiffs did not establish a credible fear of persecution based on a protected characteristic or torture and were thus subject to a final order of expedited removal. *See* Mot. 2 ("The Individual Plaintiffs, who were ordered to be removed in proceedings under the Asylum Directives, face irreparable injury if they are deported to their home countries, where they will face persecution and violence."); *id.* at 32 ("It is well-established that asylum seekers suffer irreparable harm when they are forced to return to countries where they fear persecution."). Plaintiffs, however, have not offered any tangible proof that the July 2 changes to the consultation period and the standard governing continuances would have had any impact on the outcome of their credible-fear interviews. So even if Plaintiffs obtained the relief they seek in this lawsuit, such relief would not (so far as Plaintiffs have shown) ameliorate their stated injury, because there is no basis in the present record to believe that any of the individual Plaintiffs would receive a positive credible-fear finding necessary to avoid being summarily removed. Plaintiffs thus cannot satisfy the traceability or redressability requirements of standing. *See Elec. Privacy Information Ctr.*, 878 F.3d at 380 ("[H]alting collection of voter data would not 'likely' redress any informational or organizational injury, even had [Plaintiff] suffered one."); *see also Am. West*

Airlines, Inc. v. Burnley, 838 F.2d 1343, 1344 (D.C. Cir. 1988) ("[E]ven if the merger were overturned by this Court, America West would be no better of."); *Microwave Acquisition Corp. v. F.C.C.*, 145 F.3d 1410, 1413 (D.C. Cir. 1998) (same). The individual Plaintiffs have likewise failed to show a "substantial likelihood" of meeting either the fairly traceable or redressability requirements. *Food & Water Watch, Inc.*, 808 F.3d at 913. Instead, the most the individual Plaintiffs allege is that if given "more time to prepare for the interview" they "would have understood the process better." Dkt. 12-3, ¶ 13; Dkt. 12-4, ¶ 26. Such "could have" allegations fail to provide the necessary missing link between the procedural requirements that form the basis of this lawsuit and the ultimate result that none of the individual Plaintiffs demonstrated a credible fear of persecution based on a protected characteristic or torture. *See Kurtz v. Baker*, 829 F.2d 1133, 1145 (D.C. Cir. 1987) ("[A] plaintiff challenging a government official's refusal to grant him a benefit must credibly allege that the defendant could have granted the benefit but for unlawful conduct").

Plaintiffs argue that because they have established "irreparable harm" "each has also suffered injury for purposes of Article III standing." Mot. 32, n.6. As shown in Section III, *infra*, though, Plaintiffs' assertions of irreparable harm are unavailing. In any event, the cases Plaintiffs cite only discuss injury-in-fact generally, and neither case discusses the traceability or redressability requirements of standing. *See League of Women Voters v. Newby*, 838 F.3d 1, 9 (D.C. Cir. 2016); *In re Navy Chaplaincy*, 516 F. Supp. 2d 119, 125 (D.D.C. 2007), *aff'd* 534 F.3d 756 (D.C. Cir. 2008). And it is on those requirements that the individual Plaintiffs fall short.

RAICES, for its part, cannot show that it has either third-party standing on behalf "of its asylum seeking clients," Compl. ¶ 192, or organizational standing. *AILA* dooms any third-party standing claim. RAICES alleges that its clients and prospective clients, none of whom is part of

this lawsuit, "face hindrances in asserting their claims, given their vulnerable immigration status, language and competency issues, detention, and the complexity of the credible fear process." Compl. ¶ 192. But these alleged hindrances are not the type of "genuine obstacle" or "hindrance" that provide a basis for third-party standing. *AILA*, 199 F.3d at 1362–63. Indeed, in *AILA*, the D.C. Circuit held that the plaintiff immigrant-rights organizations lacked third-party standing to sue on behalf of individual aliens precisely because these hindrances "[were] either imposed by Congress or result[ed] from the normal burdens of litigation." *Id.* at 1363–64; s*ee also Kowalski v. Tesmer*, 543 U.S. 125, 134 (2004)) ("[W]e hold that the attorneys do not have third-party standing to assert the rights of Michigan indigent defendants denied appellate counsel.).

RAICES also cannot establish organizational standing. Organizational standing demands a "concrete and demonstrable injury" to the organization's "activities" and the conduct of the defendant must cause an "inhibition of [the organization's] daily operations." *Food & Water Watch*, 808 F.3d at 380. Expending additional "resources" is not enough unless it is coupled with a showing that the "organizational activities have been perceptibly impaired." *Id.* at 382. RAICES has proffered evidence showing that, at most, it may have to modify its daily activities and "divert scarce resources . . . to compensate for the additional time, procedures, and staff required to continue serving clients," Dkt. 12-5, ¶ 14, but the submitted declaration shows that even after the implementation of the procedural changes at the heart of this lawsuit, RAICES is still able to, and clearly does, represent asylum seekers. *See id.* ¶¶ 14-27. And critically, RAICEs is still able to "prepare detainees for their interviews." *Id.*, ¶ 20. So RAICES has not established that its activities have been "perceptibly impaired." *Food & Water Watch*, 808 F.3d at 380; *Cigar Assoc. of Am. v. FDA*, 323 F.R.D. 54, 62-63 (D.D.C. 20187) ("Each organization does no more than assert that it will have to expend some undefined amount of additional resources . . . . Such a generalized

harm . . . amounts to no more than an abstract injury to its interests.").[3]

At bottom, the only relief that would rectify Plaintiffs' claimed injuries appears to be based on the results of their credible-fear determinations, meaning that Plaintiffs seek review of the expedited removal orders themselves on the basis that the credible-fear findings should be reversed. *See* Mot. 33 ("These Individual Plaintiffs . . . have each presented significant evidence that they will face persecution upon their return."). But the INA bars review of such expedited removal orders. The only available means of judicial review of individual determinations under section 1225(b)(1), including credible-fear determinations, is through 8 U.S.C. § 1252(e)(2). Section 1252(e)(2) permits review only on the issues of whether the petitioner is an alien, whether the petitioner was actually ordered removed, or whether the petitioner can prove that he or she was lawfully admitted as a permanent resident, refugee, or asylee. *See* 8 U.S.C. § 1252(e)(2). The statute does not authorize review of a credible-fear determination once an order of expedited removal has issued. For this additional reason, Plaintiffs' claims are not redressable, and therefore Plaintiffs lack standing.

II. Plaintiffs Have Not Demonstrated a Substantial Likelihood of Success on the Merits.

A. The Guidance Issued by USCIS Does Not Violate Any Statutory or Regulatory Provisions.

Plaintiffs' first claim, that the Guidance "violate[s] the statutes and regulations that govern the credible fear process," Mot. 11, fails because each component of the Guidance satisfies the relevant provisions.

[3] RAICES does not appear to make an associational standing claim, but such a claim would fail. The threshold requirement for applying the associational standing test "is that the organization has actual members or indicia of membership." *AILA*, 18 F. Supp. 2d at 50 n.12; *see Fund Democracy LLC v. SEC*, 278 F.3d 21, 25 (D.C. Cir. 2002). No evidence has been provided that RAICES is a traditional membership organization.

Reduced Consultation Period Guidance. Under 8 U.S.C. § 1225(b)(1)(B)(iv), "[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 Attorney General. Such consultation shall be at no expense to the Government and shall not unreasonably delay the process." 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. Here, it is uncontroverted that each of the Plaintiffs were informed of their consultation rights and were able to consult with an attorney of their choosing. Compl. ¶¶ 173-176, 178. So all relevant statutory and regulatory obligations were discharged. It is accordingly of no moment that the time period for consultation was reduced "as a matter of policy." AR113. The statutes and regulations do not prohibit that, and 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) (emphasis added). In this case, USCIS made a policy decision to alter the time for consultation prior to credible-fear interviews, a decision that still conforms to all statutory and regulatory obligations, and one that reasonably construes the term "unreasonable delay" in 8 U.S.C. § 1225(b)(1)(B)(iv).

Indeed, neither the statute nor the regulation specify that "unreasonable delay" must be given a fixed, static meaning, and the policy reasonably implements the statutory consultation requirement. *Cf. Nat. Res. Def. Council v. E.P.A.*, 571 F.3d 1245, 1253 (D.C. Cir. 2009) (the term

"reasonably available" was ambiguous). When a court reviews an agency's interpretation of a statute that it administers, the ultimate question "is always, simply, whether the agency has stayed within the bounds of its statutory authority." *District of Columbia v. Dep't of Labor*, 819 F.3d 444, 459 (D.C. Cir. 2016). When the "statute alone does not resolve the case," courts "look first to the agency regulations, which are entitled to deference if they resolve the ambiguity in a reasonable manner." *Coeur Alaska, Inc. v. S.E. Alaska Conservation Council*, 557 U.S. 261, 278 (2009). If the regulations, in turn, are ambiguous as well, courts then turn "to the agencies' subsequent interpretation of those regulations," and uphold the interpretation so long as it "is not plainly erroneous or inconsistent with the regulations." *Id.* Applying that methodology here, neither the statute nor the regulation defines the term "unreasonably delay," and the policy decision enshrined in the Memo is consistent with the regulatory obligation to allow consultation prior to a credible-fear interview while simultaneously avoiding unreasonable delay. Accordingly, the Reduced Consultation Period Guidance is fully consistent with both statute and regulation. *See Kisor v. Wilkie*, 134 S. Ct. 2400, 2408 (2019) ("[Such] deference retains an important role in construing agency regulations."); *Decker v. NW Env. Defense Ctr.*, 568 U.S. 597, 613 (2013) ("It is well established that an agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail. When an agency interprets its own regulation, the Court, as a general rule, defers to it unless that interpretation is plainly erroneous or inconsistent with the regulation."); *AILA II*, 18 F. Supp. 2d at 56 ("Here, the Attorney General's determination was eminently reasonable . . . . Plaintiffs cannot impose upon the Attorney General any obligation to afford more procedures than the governing statute explicitly requires or that she has chosen to afford in her discretion.").

Plaintiffs argue that the "statutes and regulations . . . bind Defendants to provide sufficient time for asylum seekers to consult with third parties" because "courts have interpreted these statutory and regulatory requirements to impose a right to *counsel*." Mot. 12 (emphasis in original). Plaintiffs are wrong. Each case that they rely on discusses the right to counsel in *full removal proceedings*, not *expedited removal proceedings*. *See* Mot. 13 ("In the context of removal proceedings under Section 240 of the INA . . . ."); *id.* ("[A]uthorities in Section 240 proceedings . . . ."). No such right to counsel exists in expedited removal proceedings. *See United States v. Quinteros Guzman*, No. 3:18-cr-00031-001, 2019 WL 3220576, at *9 (W.D. Va. July 17, 2019) ("[T]he implementing regulations demonstrate that the opportunity to respond did not imply a right to counsel. First, no such right is specified in the expedited removal proceedings statute or implementing regulations."); *see also United States v. Barajas-Alvarado*, 655 F.3d 1077, 1088 (9th Cir. 2011) ("Barajas-Alvarado's claim that he was denied his right to counsel, is meritless on its face. Barajas-Alvarado himself identifies no legal basis for his claim that non-admitted aliens who have not entered the United States have a right to representation, and we are aware of no applicable statute or regulation indicating that such aliens have any such right."). There is therefore no statutory or regulatory basis for Plaintiffs' assertion that they are entitled to a right to counsel that includes "enough time to meaningfully consult with third parties," Mot. 13, and Plaintiffs are making a false equivalence that because a right to counsel exists in full removal proceedings—which include more procedural safeguards than expedited removal proceedings—that such a right can simply be superimposed into expedited removal proceedings. Instead, Plaintiffs are entitled only to the consultation rights set out in 8 U.S.C. § 1225(b)(1)(B)(iv), and because those consultation rights were provided in this case, they cannot complain. The statutory provision that Plaintiffs cite, 8 U.S.C. § 1362, buttresses this conclusion. It provides a right to

counsel only in "removal proceedings before an immigration judge." Expedited removal proceedings are not removal proceedings before an immigration judge.

Moreover, the cases Plaintiffs rely on, Mot. 13-14, assessed the right to counsel in the context of claims asserted under the Due Process Clause. *See Biwot v. Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005) ("The right to counsel in immigration proceedings is rooted in the Due Process Clause."); *Castaneda-Delgado v. INS*, 525 F.2d 1295, 1300 (7th Cir. 1975) ("[T]he immigration judge denied the Castanedas procedural due process by depriving them of their right to counsel."); *Chlomos v. INS*, 516 F.2d 310, 313 (3d Cir. 1975) ("An alien subjected to deportation proceedings is entitled to due process of law."). Plaintiffs make no due process claim. And even if such a claim were properly asserted, which it is not, it would fail because it is "well settled that aliens seeking admission to the United States cannot demand that their application for entry be determined in a particular manner or by use of a particular type of proceedings. *For those aliens, the procedure fixed by Congress is deemed to be due process of law*." *Rafeedie v. INS*, 880 F.2d 506, 512-13 (D.C. Cir. 1989) (emphasis in original); *see also id.* ("[A]liens seeking admission to the United States . . . have no constitutional rights to any prescribed process."). Thus, Plaintiffs are limited to the rights conferred by statute, and because they have not demonstrated that any part of their statutory consultation right was impinged upon, Plaintiffs cannot show a substantial likelihood of success on the merits with respect to this claim.

Stripped of any argument based on statutory or regulatory text, Plaintiffs portray the Reduced Consultation Period Guidance as leading to a parade of horribles because, according to Plaintiffs, this Guidance would sanction holding a credible-fear interview "at 12:01 A.M." after an asylum seeker receive "notice of their interview at 11:59 PM." Mot. 14. Of course, such imaginative hypotheticals cannot override either "the statutory text itself," *Jerman v. Carlisle,*

McNellie, Rini, Kramer & Ulrich LPA, 559 U.S. 573, 588 n.9 (2010), nor the deference this Court owes to USCIS's policy decision implementing the regulations. And Plaintiffs' extreme hypothetical, which is far afield from the facts of this case, is wrong on its own terms. The time period for consultation is "one full calendar day" and "[i]n practice, given USCIS business hours for conducting [credible-fear] interviews, individuals will have longer than 24 hours to consult, depending on when they arrive at the facility." AR115. This case illustrates the point. Plaintiffs M.A.-H- and I.M.-A. received the Form M-444 on August 21 and did not have their credible-fear interview until 8 A.M. on August 23, a time period of more than 24 hours. Compl. ¶ 175. Similarly, Plaintiffs S.G.-C. and B.O.-G. also received the Form M-444 on August 21 and only had their credible-fear interviews at 12:30 P.M. on August 23, a period of time that again exceeds 24 hours. *Id.*, ¶ 175. Finally, Plaintiffs L.M.-M., B.M-M., and V.M.-M. arrived at Dilley Detention Center "on August 13 at 4 P.M.," Mot. 14, Dkt. 12-3, ¶ 5, yet their credible-fear interviews did not occur until August 15 at 10 A.M. Dkt. 12-3, ¶ 9. So Plaintiffs' proclamation that the results of the Reduced Consultation Period Guidance "cannot possibly be consistent with the governing statutes and regulations," Mot. 14, is both unsupported by statutory or regulatory text, and also does not reflect the practical realities of how the Reduced Consultation Period Guidance is implemented in practice, where individuals, like the Plaintiffs, "will have longer than 24 hours to consult." AR115. Similarly immaterial is the "vulnerable position of many asylum seekers," Mot. 15, which cannot, on its own, transmute plain statutory and regulatory text into a construction that Plaintiffs prefer, one that has no basis in statute or regulation.

Finally, Plaintiffs make much of the fact that in 1997, the agency noted that it "intend[ed] that aliens will normally be given 48 hours from the time of arrival at the detention facility, in which to contact . . . representatives." Mot. 12 (emphasis omitted) (citing 62 Fed. Reg. 10,312,

10,318 (Mar. 6, 1997)). As noted, however, this was simply a policy decision that, according to the regulation, could be changed going forward. The Memo confirms as much, noting that the "48-hour consultation timeframe[] [was] established by policy in . . . March 1997." AR113. Because the agency retains the prerogative to alter that policy, a policy decision that is "entitled to deference so long as [it] is reasonably explained," *Covad Comm'cns Co. v. F.C.C.*, 450 F.3d 528, 539 n.6 (D.C. Cir. 2006), the preference of the agency in 1997 has no bearing on whether the statute or regulations are being presently violated. Here, USCIS has explained that it "must do its part to ensure the processing of aliens is not unduly delayed in light of the situation at the Southwest Border," AR114, and this explanation ensures that USCIS's policy change cannot provide a basis to find that the statute or regulations have been violated.

Continuance Guidance. The Guidance on continuances aligns fully with the statute and regulations as well. Indeed, Plaintiffs contend that this Guidance conflicts only with a regulatory provision stating that an asylum officer "may reschedule the interview" if the officer "determines that the alien is unable to participate effectively in the interview because of illness, fatigue, or other impediments." 8 C.F.R. § 208.30(d)(1) (emphasis added); Mot. 16. The word "may" dooms Plaintiffs' contention. Unlike the term "shall," which generally connotes a mandatory obligation, the term "may" is "permissive" and accords "broad agency discretion in selecting the appropriate manner" of implementation. *Professional Drivers Council v. Bureau of Motor Carrier Safety*, 706 F.2d 1216, 1221 (D.C. Cir. 1983); *see also Dickson v. Sec. of Def.*, 68 F.3d 1396, 1401 (D.C. Cir. 1995) ("[A] permissive term such as 'may' . . . suggests that . . . . the agency [has discretion]."). The regulation leaves it entirely to the agency's discretion to grant a continuance *even if* there is a determination that an individual has an illness, fatigue, or other impediments. Requiring "extraordinary circumstances" to grant a continuance, AR114, is consistent with a regulation that

does not require granting continuances ever. Nor have Plaintiffs even endeavored to show that the term "extraordinary circumstances" is inconsistent with the examples adduced in the regulation, namely "illness," "fatigue," "or other impediments" that make it impossible for the alien to "participate effectively in the interview." 8 C.F.R. § 208.30(d)(1); *see* AR117 ("Extraordinary circumstances may include, but are not limited to, serious illness or mental or physical disability.").

Elimination of In-Person Orientation. The changes to providing orientation information also align with the statute and regulations. Under 8 U.S.C. § 1225(b)(1)(B)(iv), information "concerning the asylum interview" "shall" be provided, and pursuant to 8 C.F.R. § 208.30(d), an asylum officer shall "determine that the alien has an understanding of the credible-fear determination process." Neither the statute nor the regulation requires that this information be provided in person, so Plaintiffs are wrong to claim a conflict with these provisions. And Plaintiffs do not assert that they were not provided the requisite information. USCIS modified the form M-444 to provide "the alien information about the credible fear interview process" using "plain language principles in order to provide greater clarity to the alien during the consultation process." AR113-14. And the Plaintiffs were each provided a Form M-444. This satisfies the statutory and regulatory requirement.

B. Mr. Cuccinelli's Service as Acting Director Does Not Violate the FVRA.

Plaintiffs do not dispute that the Acting Secretary was within his authority to create the Principal Deputy Director position or to amend the DHS order of succession to define the Principal Deputy Director as the first assistant to the office of Director. Nor do Plaintiffs dispute that Mr. Cuccinelli was lawfully appointed as Principal Deputy Director or that the default rule under the FVRA is that the first assistant "shall" serve as the acting officer in the event of a vacancy, absent the designation of another person pursuant to subsection (a)(2) or (a)(3). 5 U.S.C. § 3345(a)(1).

Instead, Plaintiffs incorrectly claim that Mr. Cuccinelli—despite his position as first assistant to the office of Director—cannot serve as Acting Director because § 3345(a)(1) requires that the first assistant be in place at the time the vacancy initially arises in order to serve as acting officer under the FVRA's default rule. Mot. 21.[4] That argument, if adopted, would upend the functioning of the Executive Branch, which routinely relies on acting officers who serve in that capacity upon being installed as first assistants after (sometimes long after) the officer position became vacant. This practice is most common at the beginning of a new Administration, which typically fills vacancies in Senate-confirmed positions by appointing first assistants, who then serve in an acting capacity until the Senate confirms the new Administration's nominees. Plaintiffs' construction would outlaw this practice by barring a new Administration from relying upon subsection (a)(1) to fill those vacancies with new appointees. It would, in other words, eliminate subsection (a)(1) as an option for staffing the Executive Branch at the precise time when it is needed most.

Given that Plaintiffs' proposed construction would upend longstanding Executive Branch practice, it is no surprise that it lacks a textual basis. "[T]he interpretation of a statute . . . begins with its plain text." *Labat-Anderson, Inc. v. United States*, 346 F. Supp. 2d 145, 151 (D.D.C. 2004); *accord Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002). Here, Plaintiffs' reading of the FVRA suffers from two basic textual flaws.

First, it lacks any basis in the language of § 3345(a)(1). That provision contains no express condition as to when the first assistant to an office must be in place in order to perform the duties

[4] Although Plaintiffs suggest that former Director Cissna was "forc[ed] out," *id.*, he resigned from his office. But even if Plaintiffs were correct, it has no bearing on the statutory analysis, as the former Director would have been rendered "otherwise unable to perform the functions and duties of the office" for purposes of § 3345(a).

of the vacant office in an acting capacity. To the contrary, the statute "expressly applies to 'the first assistant *to the office* of [the officer who resigned],'" and not the first assistant of the officer. *Designation of Acting Associate Attorney General*, 25 OLC Op. 177, 179 (Aug. 7, 2001) ("2001 OLC Op.") (quoting 5 U.S.C. § 3345(a)(1)) (emphasis added). The natural reading of that phrase is that a person need only be the first assistant to the *office* during a vacancy in order to satisfy § 3345(a)(1), and not that he or she be the first assistant to the particular *officer* who resigned.[5]

As the 2001 OLC Opinion recognizes, reading § 3345(a)(1) to require the first assistant to be in place at the time the vacancy arises "renders the words 'to the office' meaningless." *Id.* at 180; *see also Williams v. Taylor*, 529 U.S. 362, 404 (2000) ("It is . . . a cardinal principle of statutory construction that [a court] must give effect, if possible, to every clause and word of a statute."). Reading the "to the office" phrase out of the statute is particularly problematic because Congress expressly substituted that language for the phrase "to the officer" when it replaced the Vacancies Act of 1868 with the FVRA. *Id.* (citing 144 Cong. Rec. S12,822 (daily ed. Oct. 21, 1998)); *see also Murphy v. Smith*, 138 S. Ct. 784, 789 (2018) (giving effect to Congress's purposeful omission of prior statutory language); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that is has earlier discarded

[5] In guidance to agencies issued shortly after the FVRA's enactment, OLC initially suggested that an individual may need to be the first assistant "when the vacancy occurs" in order to serve as acting officer under § 3345(a)(1). *See Guidance on Application of Federal Vacancies Reform Act of 1998*, 23 OLC Op. 60, 64 (Mar. 22, 1999). However, OLC revised this interpretation in 2001, noting that its initial interpretation was too brief to reflect OLC's thorough consideration of the issue and was offered "without explanation or, more importantly, any analysis of the Act's text or structure." 2001 OLC Op. at 179. And contrary to Plaintiffs' assertion, *see* Mot. 24, in the wake of the 2001 OLC Opinion, the Government Accountability Office reassessed its interpretation of the FVRA and adopted "the position that a person need not have been in the first assistant position before the vacancy occurs in order to serve as acting officer." *See* Letter from Victor S. Rezendes, GAO to Sen. Joseph I. Lieberman, *et al.* (Dec. 7, 2001), https://www.gao.gov/assets/80/75053.pdf.

in favor of other language." (citation omitted)). Plaintiffs suggest the Court should simply ignore that change, as it purportedly was "intended to have little substantive effect," Mot. 23-24 n.3—a suggestion that highlights the weakness of their proposed interpretation.

Further, the absence of any express tenure requirement in subsection (a)(1) contrasts with the FVRA's treatment of Presidential designations of agency officers or employees under subsection (a)(3). The latter provision explicitly makes certain employees eligible for presidential designation as acting officers only if those employees held certain positions in the agency "for not less than 90 days" during the 365-day period prior to the vacancy arising. Subsection (a)(1) contains no such requirement.

Plaintiffs argue that because § 3345(a)(1) provides that "the first assistant *shall* perform" the duties of the office in an acting capacity, 5 U.S.C. § 3345(a)(1) (emphasis added), it creates an automatic "procedure for immediately filling a vacancy with the first assistant at the moment the office becomes vacant." Mot. 21. Plaintiffs read too much into the word "shall." Section 3345(a)(1) undoubtedly creates a default rule that the first assistant automatically serve as the acting officer, but that is true whether the first assistant is already in place or whether he or she comes aboard after the vacancy. Thus, § 3345(a)(1)'s default rule provides for Mr. Cuccinelli's service as Acting Director because he, and not the Deputy Director, is the first assistant to the office of the Director. Plaintiffs' reliance on the definite article in § 3345(a)(1)'s reference to "*the* first assistant," Mot. 21 (emphasis added), is similarly unavailing. That phrase means that there can be only one first assistant to an office at a time—in this case, the Principal Deputy Director—but says nothing as to when the first assistant must be in place.

Plaintiffs next point to a few stray statements in the Senate Committee Report accompanying the bill that was the basis for the FVRA. However, the text and structure of the

FVRA refute Plaintiffs' interpretation, so resorting to legislative history is unnecessary. *See CREW v. FEC*, 904 F.3d 1014, 1018 (D.C. Cir. 2018) ("[W]here . . . the text alone is enough to resolve the case, we will not resort to legislative history to cloud a statutory text that is clear." (citations omitted)). In any event, the legislative statements on which Plaintiffs rely, *see* Mot. 22-23, are ambiguous and/or taken out of context. *See* S. Rep. 105-250 at 7 (discussing holding of *Doolin Sec. Savings Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203 (D.C. Cir. 1998), that time limit for acting service under former Vacancies Act did not run on date of vacancy but rather on date Vacancies Act was invoked by President); *id.* at 13 (discussing limitation on acting service after submission of nomination to serve as permanent officer); *id.* at 14 (explaining that time limit for acting service runs from original vacancy and does not reset upon change in acting officer); *id.* at 15 (discussing provision resetting time limit for acting service upon return, rejection, or withdrawal of nomination). They shed no light on the issue of *when* an individual must be serving as first assistant in order to serve as an acting officer under § 3345(a)(1). *See, e.g.*, *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1814 ("[E]ven those of us who believe that clear legislative history can 'illuminate ambiguous text' won't allow 'ambiguous legislative history to muddy clear statutory language.'" (quoting *Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011))).

Second, Plaintiffs' atextual reading of § 3345(a)(1) conflicts with § 3345(b)(1). Under certain circumstances, the latter provision prevents an acting officer from continuing to serve in that capacity if the President submits his or her nomination for appointment to the office on a permanent basis. In particular, "[n]otwithstanding subsection (a)(1)," a person who has been nominated to the position cannot continue serving as the acting officer if, in the 365 days preceding the vacancy, the person "did not serve in the position of first assistant to the office of such officer," *id.* § 3345(b)(1)(A)(i), or served as first assistant for fewer than 90 days, *id.* § 3345(b)(1)(A)(ii).

If Plaintiffs' reading of § 3345(a)(1) were correct, then § 3345(b)(1)(A)(i) would be superfluous. If, as Plaintiffs suggest, § 3345(a)(1) categorically prohibits a first assistant from serving in an acting capacity if that person were not *already* the first assistant when the vacancy first occurred, Congress would have had no need to extend § 3345(b)(1)'s restriction on acting service to individuals who "did not serve in the position of first assistant" in the "365-day period" preceding the vacancy arising. Such individuals would already be ineligible under § 3345(a)(1), as Plaintiffs interpret it.

Plaintiffs respond by noting that the Supreme Court held in *Southwest General*, 137 S. Ct. at 939-41, that subsection (b)(1) applies not only to first assistants serving as acting officers under § 3345(a)(1), but also to persons designated by the President as acting officers under subsections (a)(2) and (a)(3). *See* Mot. 23-24 n.3. Thus, they argue, § 3345(b)(1)(A)(i) retains meaning under their proposed interpretation because it still applies to designees under subsections (a)(2) and (a)(3). *Id.* This argument distorts both the text of § 3345(b)(1) and the rationale of *Southwest General*. It is undisputed that, under Plaintiffs' proposed interpretation, § 3345(b)(1)(A)(i)'s reference to individuals who "did not serve" as first assistant in the 365 days preceding the vacancy is meaningless in the context of first assistants serving as acting officers under § 3345(a)(1). Yet, § 3345(b)(1) expressly states that it applies "notwithstanding subsection (a)(1)." The Court in *Southwest General* understood the "notwithstanding" clause as reflecting Congress's intent to make clear that § 3345(b)(1) "applies even when it conflicts with the default rule that the first assistant shall perform acting duties[.]" 137 S. Ct. at 939; *see also id.* at 940 (suggesting Congress included the phrase because it "thought the conflict [between the provisions] was particularly difficult to resolve, or was quite likely to arise"). Given that the "notwithstanding" clause was specifically designed to govern the intersection of § 3345(b)(1) and § 3345(a)(1), it makes little

sense to read § 3345(a)(1) in a manner that renders half of § 3345(b)(1) meaningless whenever those statutes actually intersect.

Plaintiffs may suggest in response that § 3345(b)(1) reflects an intention to create two non-overlapping restrictions on post-nomination service as acting officer. First, § 3345(b)(1)(A)(i), which disqualifies those who "did not serve in the position of first assistant" in the 365 days prior to the vacancy arising, applies only to persons designated as acting officers under § 3345(a)(2) and (a)(3). Second, § 3345(b)(1)(A)(ii), which disqualifies those who served as first assistant for fewer than 90 days prior to the vacancy arising, applies only to individuals serving as acting officers under § 3345(a)(1). But if that were correct, then the "notwithstanding subsection (a)(1)" language would not, as it currently does, apply to *both* § 3345(b)(1)(A)(i) *and* § 3345(b)(1)(A)(ii); rather, it would appear solely in § 3345(b)(1)(A)(ii), which, under this potential construction, is the only one of the two subsections that applies to people who are serving as acting officers via their status as first assistants under (a)(1). Nor in this construction would Congress have limited the "notwithstanding" language to (a)(1); as Plaintiffs read the statute, § 3345(b)(1) is equally concerned with all three subparts of § 3345(a) and the "notwithstanding" phrase would have accordingly referenced (a)(1)-(3). The far better reading of this provision is therefore that it is chiefly concerned with limiting the circumstances under which first assistants can continue as acting officers—*i.e.*, as applying "notwithstanding subsection (a)(1)."

Further, even if § 3345(b)(1)(A)(i) does retain some meaning under Plaintiffs' interpretation, that provision demonstrates that Congress was keenly aware of the possibility that a person could be appointed as first assistant after a vacancy occurred. It chose to address that possibility, not by explicitly requiring the first assistant to be serving at the time of the vacancy—as it expressly did with the tenure requirement in (a)(3)—but rather by providing that, in such

situations, the acting officer could not continue to serve in that capacity if his or her nomination was submitted to the Senate. 5 U.S.C. § 3345(b)(1). That is compelling evidence that Congress did not intend in § 3345(a)(1) to categorically exclude first assistants who are not in place at the time the vacancy occurs. *See, e.g.*, *Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997) ("[T]he mention of one thing implies the exclusion of another thing" (citation omitted)); *EchoStar Satellite L.L.C. v. F.C.C.*, 704 F.3d 992, 999 (D.C. Cir. 2013) ("[A]pplication of the *expressio unius est exclusio alterius* canon . . . is appropriate when one can be confident that a normal draftsman when he expressed 'the one thing' would have likely considered the alternatives that are arguably precluded." (citation omitted)); 2A Sutherland Statutory Construction § 47:23 (7th ed.) (canon is based on "common-sense premise that when people say one thing, they do not mean something else"); *see also Knight v. Comm'r*, 552 U.S. 181, 188 (2008) ("fact that [Congress] did not adopt [a] readily available and apparent alternative" word "strongly supports" concluding it did not intend to adopt that alternative).

This conclusion is apparent from the text, thus rendering any resort to legislative history unnecessary. But the Senate Committee Report bolsters it, too. The Committee acknowledged the potential for "manipulation of first assistants to include persons highly unlikely to be career officials" through the appointment of "brief-serving first assistants." S. Rep. 105-250 at 13. Its response to that concern was to propose a "length of service" requirement for an acting officer to continue to serve post-nomination, which it intended to be "sufficiently long to prevent [such] manipulation." *Id.* In the final version of the FVRA, Congress added to this length of service provision the restriction on post-nomination service by persons who "did not serve in the position of first assistant" found in § 3345(b)(1)(A)(i). That history is consistent with the clear implication

of the text—that Congress chose to address the concern of post-vacancy first assistants by restricting their post-nomination service, not by excluding them from § 3345(a)(1) entirely.

The *amicus curiae* suggests that permitting an agency to install a first assistant after a vacancy where, like here, a prior first assistant had already assumed service as the acting officer would violate Congress's intent to limit the displacement of first assistants to Presidential designations under § 3345(a)(2) and (a)(3). *See* Amicus Br. at 8-9, 14-15, ECF No. 15. That may be so for offices where Congress has specified the first assistant. *See, e.g.*, 7 U.S.C. § 2211 ("The Deputy Secretary of Agriculture is authorized to exercise the functions and perform the duties of the first assistant of the Secretary of Agriculture within the meaning of [the FVRA] . . . . "); 28 U.S.C. § 508 ("[F]or purposes of [the FVRA], the Deputy Attorney General is the first assistant to the Attorney General). But it is not so here, where Congress chose not to define a first assistant to the office of Director of USCIS. Instead, it left it up to the agency to do so. *See* 2001 OLC Op. (noting that "if an agency's governing statute does not [designate a first assistant]" an agency may do so "by regulation"); *accord* S. Rep. 105-250 at 12 (recognizing that "departments and agencies have established first assistants by regulation"). If, as the *amicus* concedes, Amicus Br. at 8, an agency-defined first assistant is consistent with the FVRA, the text of the statute offers no justification for why an agency's redefinition of the first assistant would violate the FVRA.

Finally, as a fallback, Plaintiffs suggest that even if § 3345(a)(1) does not require a first assistant be in place prior to the vacancy, "the *office* in which that individual serves must have existed at the time of the vacancy." Mot. 24. Plaintiffs do not even attempt to ground their supposition in the text of the FVRA. And where "[t]he text is clear," a court "need not consider . . . extra-textual evidence." *Sw. Gen.*, 137 S. Ct. at 942.

Accordingly, Mr. Cuccinelli's service as Acting Director of USCIS by dint of his appointment as Principal Deputy Director accords with the plain language of the FVRA. Plaintiffs' effort to add an atextual condition to § 3345(a)(1) finds no purchase in the FVRA's text or structure.

C. The Guidance Is Neither Arbitrary Nor Capricious.

Plaintiffs also contend that USCIS issued the Guidance "in an arbitrary and capricious manner." Mot. 25-28. They are wrong.

If agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," it shall be "set aside." 5 U.S.C. § 706(2)(A). But an agency is accorded extensive latitude in making policy choices. "[T]he arbitrary and capricious standard is highly deferential and presumes agency action to be valid." *Am. Trucking Assocs., Inc. v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 314 (D.C. Cir. 2013). The scope of arbitrary-and-capricious review "is narrow," and courts are prohibited from "substitut[ing] [their] judgment for that of the agency." *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1036 (D.C. Cir. 2012). To withstand arbitrary-and-capricious review, the agency need only elucidate "a rational connection between the facts found and the choice made." *Id.*

Plaintiffs fail to show that any of USCIS's actions are arbitrary and capricious. Plaintiffs' primary argument is that the Guidance is arbitrary and capricious because it fails to account for "serious reliance interests" possessed by "organizations" that provide legal services to asylum seekers. Mot. 25-26. In support of their argument, Plaintiffs allude to cases that have purportedly "struck down changes in immigration policies where agencies failed to consider" reliance interests. *Id*. at 26. As an initial matter, the "immigration policies" Plaintiffs allude to all involved reliance interests of the aliens being affected, including an "unaccompanied alien child" and "recipients of

the" Deferred Action for Childhood Arrivals program. Mot. 26. But none of these cases involved organizations unaffected by the actual policy changes in question and, since organizations are precluded from challenging expedited removal procedures under section 1252(e)(3), it is dubious whether organizations' reliance interests in this context would even suffice to provide the basis for an APA challenge. *See Am. Fuel & Petrochemical Manufacturers v. EPA*, 937 F.3d 559, 577 (D.C. Cir. 2019) ("[I]t is far from obvious that renewable fuel producers possess the sort of reliance interests that merit special consideration.").

Even assuming that such reliance interests are cognizable, the Guidance documents readily withstand arbitrary-and-capricious review because the agency clearly articulated the reason it was changing its policies. Specifically, the agency highlighted the "situation at the Southwest Border" which necessitated the need to avoid "undu[e] delay[]" and "[g]iven this critical need," the agency "decided to reduce the timeframe for consultation to one full calendar day." AR114. "Given this critical need, coupled with the improvements made to the Form M-444, which makes the process easier for aliens to understand," the decision was made to reduce the consultation time period. *Id.* Similarly, the agency's decision to require "extraordinary circumstances" for continuances was grounded in a rational justification, namely to "ensure" "that the consultation period does not unreasonably delay the overall process." Having explained why the agency was departing from its prior policy, an explanation that is certainly rational and is due deference, "[n]o further explanation was required." *Am. Fuel & Petrochemical Manufacturers*, 937 F.3d at 577.

Plaintiffs next contend that the agency provided "virtually no public explanation" regarding the motivation behind the guidance and that the agency failed to consider the impact of the guidance "on asylum seekers." Mot. 26-27. Both claims are meritless. As noted above, the agency set forth its reasons for changing the policy, and in so doing, explicitly considered that the change

in policy would likely lead to more "request[s] to reschedule" interviews but that such requests should only be granted in "extraordinary circumstances" to avoid "unreasonable[] delay." AR114. Thus, the agency considered the impact of the policy change on asylum seekers, and Plaintiffs simply disagree with the outcome the agency reached. Plaintiffs are seeking to encroach on the province of the agency, but once, as here, the agency has set forth its justification for a policy change, courts are barred from "substitut[ing] [their] judgment for that of the agency." *Am. Bankers Ass'n v. Nat'l Credit Union Administration*, 934 F.3d 649, 663 (D.C. Cir. 2019). Relatedly, Plaintiffs claim that there is no evidence that the guidance issued by USCIS will help alleviate "bottlenecking," Mot. 28, yet the agency explained that making the process "more expeditious" in view of developments on the southern border would reduce "bottlenecking" and allow additional interviews to be "process[ed]." Dkt. 12-6 at 20. And the record supports this justification. *See* AR113-14. To the extent that Plaintiffs attempt to rely on extra-record evidence to make their claim, *see* Mot. 28, such reliance is impermissible as it is a "widely accepted principle of administrative law that courts base their review of an agency's actions on the materials that were before the agency at the time its decision was made." *IMS, P.C. v. Alvarez*, 129 F.3d 618, 623 (D.C. Cir. 1997).

Finally, Plaintiffs claim that they are "likely to prove that a motivation behind the Asylum Directives is Defendants' animus toward asylum seekers." Mot. 27. Plaintiffs' claim rests exclusively on statements made by the President and the Acting Director "[a]part from the Directives." *Id.* This is nothing more than rank speculation, yet the party "challenging an agency's action as arbitrary and capricious bears the burden of proof . . . to demonstrate that the agency's ultimate conclusions are unreasonable." *George v. Bay Area Rapid Transit*, 577 F.3d 1005, 1011 (9th Cir. 2009). Plaintiffs' conjecture that animus motivated the guidance is the antithesis of a

demonstration that agency action was arbitrary or capricious, especially because the entire basis for Plaintiffs' claims is general public statements made "[a]part from" this lawsuit," Mot. 27, bolstering the conclusion that Plaintiffs have offered no tangible evidence that the Guidance documents underpinning *this lawsuit* were motivated by animus. And Plaintiffs have certainly not demonstrated that such a claim is likely to succeed given the applicable highly deferential "rational basis" standard of review. There is no evidence that the guidance lacks "any purpose" "other than a bare desire to harm an unpopular group." *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018); *see also Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019) ("[A] court may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons. Relatedly, a court may not set aside an agency's policymaking decision solely because it might have been influenced by political considerations or prompted by an Administration's priorities.").

D. The Guidance Does Not Violate the Rehabilitation Act.

Finally, Plaintiffs contend that the Guidance has "denied asylum seekers with disabilities adequate time to prepare for their interviews" and "by extension, ha[s] excluded them from obtaining protections for which they would otherwise qualify." Mot. 28-31. But because Plaintiffs were able to consult with their attorneys prior to their credible-fear interviews, they cannot make out a viable Rehabilitation Act claim.

As a threshold matter, although Plaintiffs discuss the disabilities that "asylum seekers" writ large purportedly have, Mot. 29-30, none of those asylum seekers is before this Court. The only individual Plaintiff whom Plaintiffs even endeavor to show has a cognizable disability under the Rehabilitation Act is Plaintiff M.A.-H-. *See* Mot. 30. And the "severe toothache" suffered by Plaintiff L.M.-M. does not constitute a disability within the meaning of the Rehabilitation Act

because there is no evidence that this impairment "restricts the individual from doing activities that are of central importance to most people's daily lives" with a "permanent or long-term" impact. *Marshall v. Potter*, 634 F. Supp. 2d 66, 71 (D.D.C. 2009).

In addition, as Plaintiffs note, an element of every Rehabilitation Act claim is a showing that Plaintiffs "were excluded from, denied the benefit of, or subject to discrimination under a program or activity." Mot. 29. Allegations like those here—that "services provided were deficient"—fail to state a Rehabilitation Act claim because such allegations do not amount to a "denial of service" and are not "the sort of harm the Rehabilitation Act was intended to redress." *Colbert v. District of Columbia*, 110 F. Supp. 3d 251, 257 (D.D.C. 2015); *Muhammad v. United States*, 300 F. Supp. 2d 257, 266 (D.D.C. 2018) ("Nor does Muhammad allege that the USPS . . . has denied them access to services it offers to nondisabled people."). The Rehabilitation Act seeks to promote the goal that an "otherwise qualified handicapped individual . . . be provided with meaningful access to the benefit." *Bannister v. U.S. Parole Comm'n*, No. 18-cv-01397 (APM), 2019 WL 1330636, at *4 (D.D.C. Mar. 25, 2019). That goal was met here: Plaintiffs were able to consult with attorneys prior to their credible-fear interviews, so they were neither excluded from nor denied the benefit of any program or activity. At bottom, Plaintiffs' claim that they did not have "adequate time to prepare for their interviews," Mot. 30, is no different than asserting that services provided were deficient, but such a claim cannot be brought under the Rehabilitation Act.

Plaintiffs argue that they were "excluded from obtaining protections for which they would otherwise qualify." Mot. 30. But Plaintiffs have made no showing that they were prevented from putting forth evidence they thought satisfied the requirements for obtaining asylum and withholding of removal. In fact, the complaint reflects the exact opposite. *See* Compl. ¶¶ 173, 177, 180 (noting that Plaintiffs "informed the asylum officer that [they] feared retaliation by the

Honduran government for . . . political beliefs" and that they were "previously attacked" "because of race and skin color"). Simply because they did not prevail does not mean that their alleged disability played any role in the ultimate negative credible-fear determinations especially because the Rehabilitation Act does not guarantee "equal results." *Bannister*, 2019 WL 1330636, at *4.

The cases that Plaintiffs invoke do not help them. In *Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034 (C.D. Cal. 2010), the prima facie case under the Rehabilitation Act was not "challenge[d]," *id.* at 1052, unlike this case, and the court found that because two "mentally incompetent aliens" were not provided "even the most minimal of existing safeguards," including an attorney, during their immigration proceedings, a Rehabilitation Act claim was stated. *Id.* at 1053-54. Here, by contrast, Plaintiffs were able to consult with counsel, and simply assert that the consultation was not sufficient. Similarly inapposite is *Palmaryuk by and through Palmaryuk v. Duke*, 360 F. Supp. 2d 1294, 1302 (W.D. Wash. 2018), as there, the issue presented was the "transfer" of an alien "away from his attorney" which operated to deny him the benefit of counsel.

III. The Other Preliminary Injunction Factors Foreclose Injunctive Relief

A preliminary injunction would irreparably harm the United States and the public. It is always in the public interest to protect the country's borders and enforce its immigration laws. *See Landon v. Plasencia*, 459 U.S. 21, 34 (1982); *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 510 (9th Cir. 2019). An injunction would inflict profound harm on the government, and specifically, the allocation of "limited government resources" to deal with "increasing number of aliens . . . apprehended within the United States." 84 Fed. Reg. 35409, 35411 (July 23, 2019). An injunction would thus frustrate the Government's ability to "use more effectively and efficiently its limited resources" "in light of the ongoing crisis at the southern border, the large number of aliens who entered illegally and were apprehended and detained within the interior of

the United States, and DHS's insufficient detention capacity." *Id.* Indeed, USCIS emphasized the burgeoning crisis at the border as the predicate for the policy changes so that it could "ensure the processing of aliens is not unduly delayed in light of the situation at the Southwest Border." AR114.

Against this backdrop, "the basis of injunctive relief in the federal courts has always been irreparable harm." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). In this case, however, neither the individual Plaintiffs nor RAICES have shown irreparable harm. Plaintiffs only even attempt to show irreparable harm for "[f]ive of the [i]ndividual [p]laintiffs," Mot. 32, underscoring that Plaintiffs' S.G.-C. and B.O.-G.'s claims are moot. And the remaining individual Plaintiffs have not shown irreparable harm for the same reason they lack standing: there is no causal nexus between the relief sought and the alleged harm.

The D.C. Circuit has "has set a high standard for irreparable injury. First, the injury must be both certain and great; it must be actual and not theoretical." *Chaplaincy*, 454 F.3d at 297. "The moving party must show" that the "injury complained of is of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *Id.* "Second, the injury must be beyond remediation"; "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended . . . are not enough." *Id.* In addition, the moving party "must show that the alleged harm will directly result from the action which the movant seeks to enjoin." *Wisc. Gas. Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). This last prerequisite is fatal to the individual Plaintiffs' efforts to show that they have suffered irreparable harm, which rises and falls entirely with the "persecution" they will face "upon their return." Mot. 33-34. As noted, those ultimate return decisions are a consequence of the *results* of the individual Plaintiffs' credible-fear determinations, not the specific procedures that were employed during the determinations. And

the Plaintiffs do not ever explain why, if they were to prevail, that receiving additional consultation time to prepare for their credible-fear interviews would lead to different credible-fear determinations. They have thus failed to show "causation" with respect to their claim of irreparable harm because there is no direct link between the procedures Plaintiffs seek to enjoin and the results of their credible-fear interviews. *12 Percent Logistics, Inc. v. Unified Carrier Registration Plan Bd.*, 280 F. Supp. 3d 118, 122 (D.D.C. 2017).

Plaintiffs next contend that they have been "denied their legal rights to seek asylum." Mot. 35-36. The facts alleged in the complaint belie that assertion, as each of the Plaintiffs was not denied access to the credible-fear process, but, to the contrary, received credible-fear interviews and were able to seek IJ review of negative credible-fear determinations. And indeed, two Plaintiffs, as a result of such review, are in full removal proceedings with an opportunity to demonstrate eligibility for asylum. Thus, this cannot be a basis for irreparable harm either.

RAICES's asserted injury is not irreparable either. RAICES contends that the Guidance will undermine its "core mission" and that it will be forced to divert "resources" and will suffer economic loss. Mot. 36-38. But "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended . . . are not enough." *Chaplaincy*, 454 F.3d at 297; *Ctr. for Responsible Science v. Gottileb*, 346 F. Supp. 3d 29, 42 (D.D.C. 2018) ("District courts in this Circuit have similarly and repeatedly concluded that a mere diversion of resources to advance the advocacy mission of an organization is insufficient."). Irreparable harm is a far "higher threshold" than injury in fact for Article III standing. *Newby*, 838 F.3d at 8. Yet the harms RAICES alleges do not even rise to the level of injury in fact. As the district court put the point in *AILA*: "With respect to the organizational plaintiffs' argument that they will be deprived of clients, . . . there is no way to know whether aliens who are denied the opportunity to consult with counsel would have

chosen to consult with the plaintiffs had they had the opportunity to do so. Moreover, . . . nothing . . . prevents the organizational plaintiffs from practicing their professions or fulfilling their missions." 18 F. Supp. 2d at 49-50.

RAICES also argues that the Directives will lead to lost customers, but "economic loss does not, in and of itself, constitute irreparable harm." *Wisc. Gas Co.*, 758 F.2d at 674. RAICES further relies on the fact that similar allegations it made were enough for "standing" in *O.A. v. Trump*, No. 18-2718 & 2838 (RDM), 2019 WL 3536334, at *12 (D.D.C. 2019), Mot. 38, but, as noted, because the showing for irreparable harm is more stringent, whether RAICES had standing in *O.A.* is of no moment.[6]

IV. Any Interim Relief Must Be Sharply Limited.

Even if Plaintiffs were entitled to any relief, it would need to be strictly limited to the five individual Plaintiffs whose claims are not moot.

First, Article III and equitable principles require that relief be no broader than necessary to redress the Plaintiffs' injuries. Under Article III, "[a] plaintiff's remedy must be tailored to redress the *plaintiff's* particular injury," *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018) (emphasis added), and the rule in equity is that injunctions "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). Plaintiffs bear the burden of showing that something short of the nationwide injunction they seek will not fully redress their particular injuries, given that it is their burden to demonstrate their entitlement to an injunction. *See Winter*, 555 U.S. at 20. They have

[6] Plaintiffs cite *Newby*, *see* Mot. 38-39, but that case addressed the unique situation of irreparable harm based on expenditure of resources because in registering voters in time for an election, there "can be no do over and no redress." 838 F.3d at 9. The same is not true here. RAICES can still represent clients, cultivate new relationships, and act in furtherance of its mission.

not made the requisite showing here. Plaintiffs' justification for a nationwide injunction is that future, unidentified clients of RAICES who are not part of this lawsuit "may" "similarly be impacted by the Asylum Directives." Mot. 42-44. But nationwide injunctive relief is not appropriate on the basis that it is necessary to avoid "harm to other parties." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 163-64 (2010). Similarly, there is no basis to extend an injunction to non-parties that RAICES might serve in the future. And though Plaintiffs allude to harm to "non-parties situated identically to the Plaintiffs here," Mot. 43, Plaintiffs fail to explain why such harm is relevant to assessing whether a nationwide injunction is necessary to afford "complete relief" to the plaintiffs in *this case*. *Madsen*, 512 U.S. at 765. The circumstances of this case starkly illustrate the impropriety of nationwide relief. Despite the fact that only five individuals have even alleged irreparable harm as a result of the Guidance, Plaintiffs persist in demanding that the Guidance documents be enjoined "wherever else they may be applied." Mot. 42. Such a breathtaking demand is baseless.

Second, quite apart from Article III and equity, the presence of an APA claim does not, as Plaintiffs contend, demand nationwide injunctive relief. *See* Mot. 44-45. The APA provides only that a court may "hold unlawful and set aside agency action." 5 U.S.C. § 706(2). But no part of that text specifies whether any rule, if found invalid, should be set aside on its *face* or *as applied* to the challenger. In the absence of a clear statement to the contrary, this Court should adopt the reasonable—rather than sweeping—reading of the "set aside" language. *See Va. Society for Human Life v. Fed. Election Comm'n*, 263 F.3d 379, 393 (4th Cir. 2001) ("Nothing in the language of the APA, however, requires us to exercise such far-reaching power."). Indeed, the APA itself provides that absent a statutory review provision, the proper "form of proceeding" is a traditional suit for declaratory or injunctive relief that is subject to the rules constraining equitable relief as

being limited to determining the rights of the parties before the court. 5 U.S.C. § 703. Instead, this Court should, consistent with the APA, limit such interim relief to the parties before it. *See* 5 U.S.C. § 705.

Third, the INA prohibits the injunction Plaintiffs seek. Section 1252(e)(1) provides that "no court may—(A) 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." As to section 1252(e)(3), the sole remedy authorized is a "determination[]" on the *merits* of "whether [section 1225(b)], or any regulation issued to implement such section, is constitutional" or "whether such a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General [or Secretary] to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law." Section 1252(e)(3) does not provide for any *interim* relief premised on such a determination. Instead, the only authority for such relief is found at section 1252(f), which provides that "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions part IV of this subchapter [*i.e.* 8 U.S.C. §§ 1221-32] other than with respect to the *application of such provisions to an individual alien against whom proceedings under such part have been initiated*." (Emphasis added.) The proposed injunction runs afoul of this prohibition because it would enjoin the "operation" of section 1225(b)(1)(A)(B)(iv) because the injunction Plaintiffs seek would subvert the Secretary's policy determination as to what constitutes unreasonable delay.

CONCLUSION

For these reasons, the Court should deny the motion for a preliminary injunction.

Respectfully submitted,

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Dated: October 21, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2019, 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.

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