IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

L.M.-M., et al.,

Plaintiffs,

vs.

KENNETH T. CUCCINELLI II, in his purported official capacity as acting Director of U.S. Citizenship and Immigration Services, et al.,

Defendants.

Case No. 1:19-cv-2676 (RDM)

ORAL ARGUMENT SCHEDULED FOR DECEMBER 3, 2019

REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

The Court should bar the government from using unlawful procedures to send asylum seekers back to face persecution pending final judgment. Defendants' rebuttals ignore the undisputed effects of those policies, established legal principles, and binding precedents.

The Asylum Directives violate the law in at least four ways. By speeding up the asylum process, they nullify asylum seekers' statutory rights. They rest on a view of the law that would confer unbounded power on the President to name acting officials. They were rendered without any consideration of the interests of legal services organizations or asylum seekers, and without any supporting analysis or evidence. And they deprive asylum seekers with disabilities of meaningful access to the asylum process. Defendants fail to rebut any of these arguments.

Otherwise, Defendants have little to say. The Individual Plaintiffs have standing because they were ordered removed to countries they fear pursuant to unlawful procedures. RAICES can sue because, as this Court has held, it has standing to challenge policies that make it harder to represent its clients, and Section 1252 does not impose any barrier. Plaintiffs' injuries are irreparable because the Court cannot turn back time to save asylum seekers from persecution once removed or to allow RAICES to represent them. On the other side of the ledger, Defendants have nothing but unsubstantiated references to border enforcement, which cannot overcome the public's interest in lawful enforcement of the asylum system.

There is only one proper remedy: enjoining the Asylum Directives wherever they are applied. Defendants do not refute that such a remedy is the only way to provide complete relief to RAICES and to similarly situated non-parties, nor do they show how a more limited remedy is consistent with the Administrative Procedure Act or the federal—indeed, Constitutional—interest in a uniform nationwide immigration system. A nationwide injunction is warranted.

ARGUMENT

I. Defendants' threshold objections are meritless.

A. The Individual Plaintiffs have standing.

Defendants cannot dispute that the five Individual Plaintiffs ordered removed will suffer injury-in-fact if they are deported to the place they fled.[1] *See* Mot. at 32-34. Instead, Defendants assert that Plaintiffs have not established causation and redressability because they "have not offered any tangible proof" that the Asylum Directives "had any impact on the outcome of their credible fear interviews." Opp. at 16. But that assertion is wrong on both the law and the facts.

On the law: The D.C. Circuit has long held that "[a] plaintiff who alleges a deprivation of a procedural protection to which he is entitled *never has to prove* that if he had received the procedure the substantive result would have been altered." *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 94 (D.C. Cir. 2002) (emphasis added). All that is necessary is a "causal connection" between the denied procedural right and the underlying substantive injury, *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664 (D.C. Cir. 1996) (en banc)—a link "connecting the omitted [procedural step] to some substantive government decision that may have been wrongly decided," and a link "connecting that substantive decision to the plaintiff's particularized injury," *Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 184 (D.C. Cir. 2017). "Outcome is irrelevant to standing to pursue a claim of inadequate procedural protection." *Hotel & Rest. Empls. Union, Local 25 v. Smith*, 846 F.2d 1499, 1503 (D.C. Cir. 1988).[2]

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[1] Plaintiffs do not seek preliminary relief with respect to S.G.-C. and B.O.-G., and so there is no need to address their standing at this time. *Cf.* Opp. at 11-12.

[2] Defendants' reliance on *Kurtz* is misplaced here, as Defendants have the authority to grant the requested benefit. 829 F.2d 1133, 1145 (D.C. Cir. 1987). Moreover, government benefits cases emphasize that a plaintiff need only show "more than speculation but less than certainty" that they would have received the benefit under lawful procedures; "[t]he standing requirement would be a high wall indeed if a plaintiff could only sue when the defendant was under an

On the facts: Nevertheless, Plaintiffs have presented uncontroverted evidence—"tangible proof"—that the Asylum Directives affected the outcome of their interviews. Specifically, L.M.-M. lacked adequate time to "finish[] discussing her case with the Dilley Pro Bono Project," L.M.-M. Decl. ¶ 8; "was unable to talk about [her] fear of [her] abusive partner," *id.* ¶ 10; "was worn out and tired from the exhaustive intake process" she had to complete during her limited time, *id.*; and would have "understood the process better" with additional time, *id.* ¶ 13. M.A.-H. could not obtain supporting evidence, M.A.-H. Decl. ¶ 24; had no time to speak with the Project, *id.* ¶¶ 25-26; would also have "understood the process better" with more time, *id.* ¶ 26; and would have been able to fully communicate the threats facing her daughter, her sexual abuse, and her memory issues, *id.* Neither received an in-person orientation. *Id.* ¶ 24; L.M.-M. Decl. ¶ 11.

Defendants also have no response to the Cambria, Fluharty, and Meza declarations, which show that "[a]s a result of the Directives, many families have now received negative credible fear determinations that are not warranted," Cambria Decl. ¶ 18; *see also* Fluharty Decl. ¶ 19; Meza Decl. ¶ 25. Nor do Defendants dispute the substance of Plaintiffs' asylum claims, Mot. at 33-34, or the country conditions evidence corroborating Plaintiffs' fears, *id.* at 34 n.8. Thus, as in *Grace*, "[t]here is no question that the challenged policies impacted plaintiffs," and "[t]here is also no question that an order from this Court declaring the policies unlawful and enjoining their use would redress those injuries." 344 F. Supp. 3d 96, 120 (D.D.C. 2018).

Finally, Defendants argue that Plaintiffs "seek review of the expedited removal orders themselves." Opp. at 19. That is incorrect. Plaintiffs do not ask the Court to review the *substance* of those orders, but rather the unlawful procedures by which those orders were issued, which is

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inescapable obligation to act as the plaintiff desired." *Teton Hist. Aviation Found. v. DOD*, 785 F.3d 719, 727 (D.C. Cir. 2015).

the entire focus of Section 1252(e)(3). If Section 1252(e)(3) bars jurisdiction here, it would preclude jurisdiction in any systemic challenge brought by individuals subject to orders of removal—who, Defendants say, are the *only* plaintiffs with standing, Opp. at 12-13. In any event, their argument is in tension with *Grace*, where the court allowed asylum seekers subject to removal orders to challenge the policies by which the orders were issued. 344 F. Supp. 3d at 112.

B. The Court has jurisdiction to adjudicate RAICES's claims.

1. Section 1252(e)(3) does not deprive this Court of jurisdiction.

Defendants argue that "only Section 1252(e)(3) could conceivably supply jurisdiction" for Plaintiffs' claims. Opp. at 12. In fact, the Complaint invokes federal question jurisdiction under 28 U.S.C. § 1331, Compl. ¶ 9, which remains available "for a federal court to consider challenges to agency action such as the APA claims that Plaintiffs bring here." *Make the Road v. McAleenan*, --- F. Supp. 3d ---, 2019 WL 4738070, at *16 (D.D.C. 2019). Regardless, Section 1252(e)(3) does not bar RAICES's claims. Defendants assert that 1252(e)(3) only permits review of removal determinations, which RAICES, by definition, cannot receive. But this argument has been rejected *twice*, including by this Court. "The language of § 1252(e)(3) is plain: it applies to both 'judicial review of determinations' made under the expedited removal provision *and* to judicial review of the 'implementation' of that provision." *O.A. v. Trump*, 2019 WL 3536334, at *19 (D.D.C. 2019). Thus, whether a plaintiff will ever "be subject to a 'determination' under the expedited removal provision" has no bearing on the Court's jurisdiction. *Id.* at *18; *accord Make the Road*, 2019 WL 4738070, at *17.

"Nor can Defendants rely on [*AILA*] *v. Reno* … to propel this jurisdictional argument forward." *Make the Road*, 2019 WL 4738070, at *18. *AILA* held only that "the plaintiff organizations in that case could [not] assert *third-party standing* on behalf of 'unnamed aliens who were or might be subject to [expedited removal][.]'" *Id.* (quoting *AILA v. Reno*, 199 F.3d

1352, 1357 (D.C. Cir. 2000). "Thus, *AILA* does not speak to the question before *this* Court, which is whether the provision of the INA that authorizes challenges to the validity of the expedited removal system permits [the Court] to exercise jurisdiction over challenges … even if the plaintiff has not been placed in expedited removal proceedings." *Id.* While Defendants "disagree" with that conclusion, Opp. at 13 n.2, they provide no basis for calling it into question.

2. RAICES has organizational standing.

The Supreme Court "has made plain that a 'concrete and demonstrable injury to [an] organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests' and thus suffices for standing." *PETA v. USDA*, 797 F.3d 1087, 1093 (D.C. Cir. 2015) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). Defendants do not dispute that RAICES has had to divert resources, so the only question is whether RAICES's operations have been "perceptibly impaired," *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015).

They have. The Directives prevent RAICES from "fulfill[ing] its commitment to its core mission—universal representation at Karnes," Meza Decl. ¶ 28, because, in relevant part, "the Directives obligate [it] to operate on a triage model that allows less time for individual client meetings," *id.* ¶ 10. Thus, "RAICES has been able to represent fewer clients at their credible fear interviews," *id.* ¶ 14; has been "frequently unable to make contact with asylum seekers prior to their credible fear interviews," *id.* ¶ 15; and has been forced to "significantly revise the manner in which [it] handle[s] negative determinations," *id.* ¶ 26. Tellingly, Defendants do not even attempt to distinguish *O.A.*, in which the Court held that RAICES had standing based on what Defendants characterize as "similar allegations," Opp. at 43, or *CREW*. Mot. at 38.

Instead, Defendants rely on the fact that RAICES still represents clients and tries to prepare them for their interviews. But the test is whether RAICES's operations have been

impaired, not whether they have ground to a halt. *Food & Water Watch*, 808 F.3d at 919; *see also League of Women Voters v. Newby*, 838 F. 3d 1, 9 (D.C. Cir. 2016) ("obstacles" that made it "*more difficult* for the Leagues to accomplish their primary mission" constituted injury) (emphasis added). Indeed, the Court in *O.A.* found standing because RAICES was "unable to represent the *same number* of clients." 2019 WL 3536334, at *21 (emphasis added). The *CREW* court found that RAICES had standing because the challenged policy "impair[ed] RAICES's ability to provide advice to and consult with its clients." 387 F. Supp. 3d 33, 45 (D.D.C. 2019). Defendants are imposing an *absolute* impairment requirement with no basis in the law.

Defendants also dispute whether RAICES's injuries satisfy the prudential zone-of-interests test. Opp. at 13-14. As *O.A.* explained, however, RAICES's "interest in providing legal assistance to as many asylum seekers as they can is consistent with the INA's purpose to 'establish[] … [the] statutory procedure for granting asylum to refugees'"; indeed, it "furthers the purposes of the INA." 2019 WL 3536334, at *22 (quotation omitted). Moreover, the statute here expressly affords asylum seekers the right to consult with RAICES. Defendants again rely on *AILA*, but the D.C. Circuit left undisturbed the district court's conclusion that the plaintiffs satisfied the zone-of-interests test. 199 F.3d at 1357. The other cases upon which Defendants rely are also irrelevant: "Justice O'Connor's in chambers opinion in [*Legalization Assistance Project*] reflects the views of a single Justice relating to a different statute," *O.A.*, 2019 WL 3536334, at *22 n.14, *Northwest Immigrant Rights Project* simply relied on that opinion, and *Animal Legal Defense Fund* dealt with informational injury, which "can surmount the zone of interests threshold only in very special statutory contexts," 23 F.3d 496, 502 (D.C. Cir. 1994).

C. The Court has jurisdiction to review the No Legal Orientation Directive.

Finally, Defendants claim that the No Legal Orientation Directive does not constitute a "written policy directive" within the scope of Section 1252(e)(3). Opp. at 14. But they admit that

until July 2, USCIS provided an in-person "re-orientation" in family detention centers, *id.* at 7-8, which was described in a document called "Credible Fear Family Processing Procedures." AR66. Defendants appear to concede that these orientations ceased when Mr. Cuccinelli issued his July 2 memorandum. Opp. at 7-8. But, tellingly, Defendants do not explain *how* that decision was made—by word of mouth? Instead, they provide a declaration of an official at USCIS Headquarters, stating that she is unaware of any such directive having been promulgated from USCIS Headquarters. Opp. Ex. A. Given that the July 2 memorandum precipitated this change, it is reasonable to presume that the Directive flowed from its written requirement that officers accelerate the process, even in family detention centers, and rely on the new Form M-444. Moreover, Defendants do not controvert the possibility that the Directive was incorporated in a facility-specific document. Given that the relevant evidence is in Defendants' sole possession, their efforts to hide the ball do not deprive the Court of jurisdiction to review this Directive.

II. Plaintiffs are likely to succeed on the merits.

A. The Asylum Directives violate the statutes and regulations that govern the credible fear process.

To start, the Directives violate asylum seekers' statutory rights, and thereby "risk[] sending individuals who are potentially eligible for asylum to their respective home countries where they face a real threat," as Congress feared. *Grace*, 344 F. Supp. at 96.

1. The Shortened Wait Period Directive

The Shortened Wait Period Directive violates asylum seekers' right to "consult with a person or persons of [their] choosing prior to the [credible fear] interview." 8 U.S.C. § 1225(b)(1)(B)(iv); *see* Mot. at 11-18. Rather than show how the Directive is consistent with that mandate, Defendants play the deference card early and often. *See* Opp. at 20-21, 24. But as a general matter, interpretations that are not the product of notice-and-comment rulemaking, "such

as those in opinion letters[,] … policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). Deference may only be accorded to these less formal interpretations if warranted by "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time." *Barnhart v. Walton*, 535 U.S. 212, 222 (2002).

Defendants make no effort to explain why the Directive satisfies those criteria. The Directive does not indicate any "careful consideration the Agency has given the question over a long period of time." *Barnhart*, 535 U.S. at 222. Rather, it merely recites the statute and states that the timeframes are being changed "as a matter of policy." AR113. Nor does the Directive reflect that the agency has brought its expertise to bear, instead stating perfunctorily that "USCIS must do its part to ensure the processing of aliens is not unduly delayed." AR114. That does not satisfy *Barnhart*. The Directive also is not entitled to deference as an interpretation of the regulations. Setting aside "the limits inherent in the *Auer* doctrine," *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019), "[n]o deference is due" where, as here, the regulation largely "paraphrase[s] the statutory language." *Fogo De Chao (Holdings) Inc. v. DHS*, 769 F.3d 1127, 1135 (D.C. Cir. 2014) (quotation omitted). *AILA* is also inapposite, because the plaintiffs sought "more procedures than the governing statute explicitly requires," 18 F. Supp. 2d 38, 56 (D.D.C. 1998), while Plaintiffs here seek only that which it does require: consultation prior to the interview.

In any case, the Directive is inconsistent with any reasonable interpretation of asylum seekers' statutory right to consult. If that right is to mean anything at all, it has to require that Defendants provide asylum seekers with enough time to *meaningfully* consult with third parties,

including counsel. Multiple cases have treated the consultation right that applies in credible fear proceedings as a *right to counsel*, even though there is no general right to counsel in expedited removal proceedings. Mot. at 12. Defendants are misreading these cases.[3] Plaintiffs are not attempting to "superimpose[]" rights from full removal proceedings, Opp. at 22; the statute *expressly provides* asylum seekers with the right to consult during the credible fear process. Thus, the Court can and should look to cases which have given content to analogous rights.

What do those cases say? Non-citizens must be given "reasonable time … to prepare," *Biwot v. Gonzales*, 403 F.3d 1094, 1098-99 (9th Cir. 2005); "a reasonable … continuance," *Castaneda-Delgado v. INS*, 525 F.2d 1295, 1297-1300 (7th Cir. 1975); and time adequate "to make the services of … chosen counsel available," *Chlomos v. INS*, 516 F.2d 310, 314 (3d Cir. 1975). A day, or less, "makes a mockery of the clear statutory mandate." *Rios-Berrios v. INS*, 776 F.2d 859, 863 (9th Cir. 1985); *see also* Mot. at 13-14. In characterizing these cases as arising solely under the Due Process Clause, Opp. at 23, Defendants are again incorrect: each case found violations of the plaintiffs' *statutory* right to counsel.[4]

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[3] Immediately after quoting the consultation right, the court in *Innovation Law Lab* characterized it as one of the "the INA provisions guaranteeing counsel" that "mak[e] explicit the Fifth Amendment due process guarantee to aliens' counsel of their choice." 342 F. Supp. 3d 1067, 1080 (D. Or. 2018). The Second Circuit in *Arar* referred to "the right to counsel set forth in section 1225(b)(1)(B)(iv)." 532 F.3d 157, 187 (2d Cir. 2008). The court in *Quinteros-Guzman* described the Section 240 right to counsel as "[s]imilar[]" to the right to "consult with a person or persons of the alien's choosing prior to" a credible fear interview. 2019 WL 3220576, at *9 (W.D. Va. 2019). And another court labeled consultation a "substantial procedural safeguard[]." *Innovation Law Lab v. Nielsen*, 366 F. Supp. 3d 1110, 1122 (N.D. Cal. 2019).

[4] Here is the part Defendants left out from *Biwot*: "The right to counsel in immigration proceedings is rooted in the Due Process Clause *and codified at 8 U.S.C. § 1362 and 8 U.S.C. § 1229a(b)(4)(A).*" 403 F.3d at 1098 (emphasis added). From *Castaneda-Delgado*: "By so doing, the immigration judge denied the Castanedas procedural due process by depriving them of their right to counsel *granted by statute and regulation.*" 525 F.2d at 1300 (emphasis added). And while *Chlomos* referenced "due process," the court focused on "the application of the statute" affording the right to counsel. 516 F.2d at 314. Defendants do not mention *Orantes-Hernandez v.*

Plaintiffs have amply demonstrated how the Shortened Wait Period Directive deprives asylum seekers of their statutory consultation right, even assuming that a "full calendar day" generally amounts to 24 hours. Specifically, Plaintiffs provided undisputed declarations from the Individual Plaintiffs, which explain how they were not given adequate time to prepare and consult, as well as undisputed declarations from the organizations operating at the Dilley, Karnes, and Berks centers, which confirm that these problems are widespread. 24 hours simply is not enough time for asylum seekers to meaningfully consult with their attorneys and other third parties and prepare for the most important interviews of their lives. Regardless, the Directive does not, by its terms, *require* USCIS to provide asylum seekers with 24 hours, or anything more than a few minutes. Defendants lambast that prospect as an "imaginative" hypothetical because, "[i]n practice, … individuals will have longer than 24 hours," Opp. at 23-24, but what that subtly omits is that some individuals will have less. Moreover, asylum seekers, like L.M.-M. and M.A.-H., often receive notice the night before their morning interviews, leaving them with just a few hours to consult. In any event, whether the Directive provides a floor of a few minutes or 24 hours, it violates Defendants' statutory duties.

Defendants' utter lack of concern for asylum seekers' consultation rights is remarkable. Defendants say that the "vulnerable position of many asylum seekers"—those who are scared and confused, have suffered severe trauma and fatigue, possess mental and physical disabilities or language barriers, cannot find counsel or gather facts on their own, and must care for their minor children, Mot. at 15-16—is "immaterial." Opp. at 24. They do not even bother to address the multitude of functions that the consultation right serves, and which cannot take place within

Thornburgh, which expressly stated that the right to counsel is "a right *guaranteed by 8 U.S.C. § 1362* and the due process clause." 919 F.2d 549, 551 (9th Cir. 1990) (emphasis added).

the mere hours that the Directive affords to asylum seekers. Mot. at 16. But these "practical realities," Opp. at 24, provide important context for assessing whether Defendants' policies comply with the statutory requirements. *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("[S]tatutory language cannot be construed in a vacuum.").

Finally, Defendants try to explain away their previous insistence that at least 48 hours is reasonable. Opp. at 24-25. To be sure, agencies can change their policies if they do so lawfully. But the agency's previous position, rendered after "careful[] consider[ation]" of the interests of asylum seekers and the government alike, 62 Fed. Reg. 10,312, 10,318 (Mar. 6, 1997), is powerful evidence that providing at least 48 hours reasonably accommodates asylum seekers' rights and ensures their full participation in their interviews. Conspicuously absent from Defendants' brief is any explanation of how the Directive does so.

2. The Continuance Denial Directive

Defendants do not address how the Continuance Denial Directive "work[s] hand-in-hand with the Shortened Wait Period Directive to deprive asylum seekers of their right to consult with a third party" where consultation would not create "unreasonable delay," and thus violates that right as well. Mot. at 16. But the Directive *also* unlawfully limits asylum officers' discretion to provide continuances under Section 208.30(d)(1). *Id.* at 16-17. Defendants offer two responses.

First, Defendants say that the regulation provides only that continuances "may" be granted, and so leaves the agency with complete discretion to bar continuances, Opp. at 25—presumably, even where there is no question that an asylum seeker "is unable to participate effectively." 8 C.F.R. § 208.30(d)(1). Moreover, under Defendants' reading, they could issue guidance that asylum officers may *never* grant continuances. That position is breathtaking, and wrong. The statute itself requires the agency to grant time for consultation so long as it does not "unreasonably delay" the interview. 8 U.S.C. § 1225(b)(1)(B)(iv). And, leaving aside that "shall

and may are frequently treated as synonyms and their meaning depends on context," *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995) (quotations omitted), Section 208.30(d)(1) provides that the "officer may reschedule the interview," and thus vests discretion in the *officer*, not the agency, to grant a continuance if the section's conditions are met. Officers must also exercise that discretion to facilitate asylum seekers' participation in their interviews. If Defendants wish to impose a higher standard, they must formally amend the regulation, not "ignore [its] plain language." *Clean Air Project v. EPA*, 752 F.3d 999, 1011 (D.C. Cir. 2014).

Second, Defendants suggest that "extraordinary circumstances" simply means "illness, fatigue, or other impediments." Opp. at 26. But the record shows that Defendants actually interpret "extraordinary" to mean circumstances akin to "serious illness" or "facility issues." AR117. In fact, Plaintiffs have shown that Defendants interpret it to mean only three things: hospitalization, a simultaneous proceeding, or that the facility has prevented the asylum seeker from consulting at all. That high bar plainly does not equate to "illness, fatigue, or other impediments" (if it did, Defendants would not need to issue the Directive).

3. The No Legal Orientation Directive

As to the No Legal Orientation Directive, Defendants assert that the law requires nothing more than that asylum seekers be given a short form, one that may not be translated in a language they know, or that they may not be able to read. Opp. at 26. Again, Defendants' position—that the statute requires nothing more than whatever information Defendants deem fit to give, in whatever form they wish to give it—is as striking as it is incorrect. Defendants do not dispute that the information provided to asylum seekers must be sufficient to enable them to participate in and understand the credible fear process. 8 C.F.R. § 208.30(d)(1), (2). Nor do Defendants dispute the many reasons why an in-person orientation is necessary to satisfy those regulatory mandates: many asylum seekers have questions about the process and their rights,

and/or have difficulty reading, possess disabilities, or are children. *See* L.M.-M. Decl. ¶¶ 11, 13; M.A.-H. Decl. ¶¶ 23, 26; Fluharty Decl. ¶ 6. Thus, this Directive cannot be sustained either.

B. Mr. Cuccinelli's appointment violates the Federal Vacancies Reform Act.

The Directives are also unlawful because they were issued by an unlawfully acting official. The jerry-rigged scheme by which Defendants designated Mr. Cuccinelli as Acting USCIS Director violates the FVRA. Mot. at 19-25. Notably, Defendants do not dispute that Acting Secretary McAleenan inexplicably deviated from DHS's order of succession by supplanting the existing first assistant, Deputy Director Koumans, with Mr. Cuccinelli, who had never before served in *any* federal agency, after the vacancy arose. *See* Opp. at 26-35.[5] They only dispute whether the FVRA allows these gimmicks. It does not.

Before discussing the nuts-and-bolts of the FVRA, however, it is important to refocus on how the statutory scheme, as a whole, is *supposed* to work. To protect the Senate's advice-and-consent power—"a critical structural safeguard [] of the constitutional scheme," *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 935 (2017) (quotation omitted)—Congress imposed "carefully calibrated limits," *English v. Trump*, 279 F. Supp. 3d 307, 312 (D.D.C. 2018), on the President's power to appoint acting officials. Those limits allow the President to deviate from the first-assistant default rule and select another official "*as long as* that person is either a Senate-confirmed appointee … or an employee within the same agency." *Guedes v. ATF*, 920 F.3d 1, 11 (D.C. Cir. 2019) (emphasis added). Permitting the President to instead hand-pick officials of his

[5] Plaintiffs also dispute whether Defendants had the authority to create the office of Principal Deputy Director and whether they lawfully designated it as first assistant. Compl. ¶¶ 227, 232; *see also* Amicus Br. of Morton Rosenberg, ECF No. 13-1; Stephen Migala, *The Vacancies Act and a Post-Vacancy First Assistant of USCIS* (Sept. 9, 2019), https://ssrn.com/abstract=3450843.

choosing creates precisely the "threat to the Senate's advice and consent power" that Congress sought to eliminate. *Southwest General*, 137 S. Ct. at 936.

It is "fundamental" that the provisions of the FVRA "must be read in [this] context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quotation omitted). Under Defendants' reading, however, the President can generally name *anybody* he wants to fill a vacancy, so long as he pauses briefly to name them first assistant. The FVRA's text, read in its proper context, forbids that result.

First, Section 3345(a)(1) provides a "mandatory and self-executing" procedure, *Southwest General*, 137 S. Ct. at 940, under which the first assistant "shall" fill the office at the moment it becomes vacant. According to Defendants, that procedure applies whether "the first assistant is already in place or whether he or she comes aboard after the vacancy." Opp. at 29. But (a)(1) is an *if-x-then-y* provision that in the event of a vacancy "automatically promotes someone (the current first assistant) to be the acting officer without a break in service and without action by the President." *SW Gen., Inc. v. NLRB*, 796 F.3d 67, 76 (D.C. Cir. 2015). In other words, (a)(1) "is triggered automatically once a vacancy is created," *Designation of Acting Assoc. Attorney Gen.*, 25 Op. O.L.C. 177, 178 (2001), and "the first assistant to the office automatically fills the vacancy." *Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 557 (9th Cir. 2016). Subsection (a)(1) does not indefinitely confer power on the President (or his agents) to shuffle first assistants around after the triggering event of the vacancy.

Second, "the statute goes on to provide two ways"—and only two ways—"the President may override the automatic operation of (a)(1)," *Kitsap*, 816 F.3d at 557: he or she can pick another Senate-confirmed official or an experienced career official. 5 U.S.C. § 3345(a)(2), (3). Because very few agency organic statutes constrain who may serve as a first assistant, permitting

post-vacancy first assistants would render meaningless the FVRA's "carefully calibrated limits." *English*, 279 F. Supp. 3d at 312. Defendants try to turn this point on its head, suggesting that because (a)(3) contains a tenure requirement, (a)(1) implicitly lacks one. Opp. at 29. But (a)(3) has such a requirement precisely *because* that provision, not (a)(1), allows the President to select an acting official. It makes no sense to construe a provision to give the President expansive power when an adjacent provision sharply limits that power, especially since the vacancies laws are "generally strictly and narrowly interpreted," *Olympic Fed. Sav. & Loan Ass'n v. Dir., Office of Thrift Supervision*, 732 F. Supp. 1183, 1198 (D.D.C. 1990).

In response, Defendants seize on the statute's use of the language "to the office." Opp. at 28-29. But that phrasing sheds no light on whether post-vacancy first assistants are eligible; because (a)(1) is triggered by the opening of the vacancy, what matters is who is first assistant at that time. Regardless, the legislative history confirms that the change was not intended to have any substantive effect. The Senate Committee Report, which analyzed the bill when it used the phrase "first assistant of such officer," explained that "the practice under current law, which *would be continued by this bill*, is that the first assistant is actually the first assistant to the vacant office." S. Rep. No. 105-250, at 12 (1998) (emphasis added). Similarly, the law's sponsor, Senator Thompson, explained that "to the office" was intended to "depersonalize the first assistant" so that if a designated "acting officer dies or … resigns," the original first assistant, tied not to the departed confirmed officer but instead to the office, would remain eligible to act. 144 Cong. Rec. S12,822 (daily ed. Oct. 21, 1998). Thus, "the change in wording [was] *not intended* to alter case law on the meaning of the term 'first assistant.'" *Id.* (emphasis added).

Defendants also assert that Plaintiffs' reading of (a)(1) renders superfluous (b)(1)(A)(i)'s requirement that a nominated acting official have served as first assistant. Opp. at 30-32. Not so.

As Plaintiffs explained, Defendants' argument has been eliminated by *Southwest General*, which held that (b)(1)(A) also applies to appointees under (a)(2) and (a)(3). 137 S. Ct. at 938. The D.C. Circuit decisively rejected their argument: assuming, as Plaintiffs assert, that "subsection (a)(1) refers to the first assistant at the time of the vacancy," and, as *Southwest General* held, that "subsection (b)(1) applies to all acting officers," "subsection (b)(1)(A)(i) is not superfluous because many PAS officers (subsection (a)(2)) and senior agency employees (subsection (a)(3)) will not have served as the first assistant in the prior year." 796 F.3d at 76.

Far from being superfluous, the provisions serve different purposes. Subsection (a)(1) provides an automatic appointment mechanism, whereas (b)(1)(A)(i) provides a general prohibition on service as an acting officer. Subsection (a)(1) ceases to apply if the President chooses an alternative under (a)(2) or (a)(3), whereas the prohibition of (b)(1)(A)(i) applies to any acting officer, whether they serve under (a)(1), (a)(2), or (a)(3). Defendants object that there could be scenarios in which (b)(1)(A)(i) would have no effect—*e.g.*, where a first assistant takes office under (a)(1) and is not replaced under (a)(2) or (a)(3). Their approach stretches the superfluity canon past its breaking point. The canon seeks to "give effect, if possible, to every clause and word of a statute." *Southwest General*, 137 S. Ct. at 941 (quotation omitted). But Defendants seek to countermand the text of the statute unless every contingency has effect in every hypothetical they can conjure up. Few sections of the Code would withstand such scrutiny.

Perhaps recognizing this defect in their position, Defendants argue that the phrase "notwithstanding subsection (a)(1)" means that (b)(1) is "chiefly concerned with limiting the circumstances under which first assistants can continue as acting officers." Opp. at 32. But the "notwithstanding" clause exists to resolve the conflict between the mandate that the first assistant "shall" serve in (a)(1) and the prohibition on service in (b)(1), a conflict that does not exist with

the *options* in (a)(2) and (a)(3). Thus, all the "notwithstanding" clause shows is that "(b)(1) overrides (a)(1), and nothing more," *Southwest General*, 137 S. Ct. at 941; it has "no significance for the ultimate scope of subsection (b)(1)," *Southwest General*, 796 F.3d at 75. In any event, Congress's decision to require nominated first assistants to meet a tenure requirement does not mean that Congress "chose," Opp. at 32, to permit post-vacancy first assistants more generally.

If there is any ambiguity, the legislative history resolves it. The Senate Committee Report repeatedly reflects that Congress thought that (a)(1) would be inapplicable if there were no first assistant at the time of the vacancy. Mot. at 22-23. It also notes that the first assistant "is often a career official with knowledge of the office or a Senate-confirmed individual," so "that *one person*" may serve automatically—thereby "emphasiz[ing] the *limit* on presidential power to select an acting officer." "If there *is no* first assistant," the President may use the FVRA's other mechanisms. S. Rep. No. 105-250, at 12 (emphasis added). Defendants describe these statements as "ambiguous," Opp. at 30, but they would make no sense if the President could name a new first assistant. Defendants also note Congress's fear that the President could nominate "brief-serving" first assistants, *id.* at 33-34, but that is why Congress imposed a tenure requirement.

Ultimately, Defendants make no effort to explain how their reading preserves the Senate's advice-and-consent power. Instead, they assert, without *any* evidence, that requiring pre-vacancy first assistants would "upend the functioning of the Executive Branch." Opp. at 27. But during the 2017 transition, the Administration apparently did not designate a *single* post-vacancy first assistant to fill a cabinet role, relying instead on existing first assistants or other eligible officials.[6] If Defendants' policy concern had any remaining bite, then it would only

[6] Ryan Browne & Wade Payson-Denney, *The People You Don't Know Who Could Be Running the Government on Friday*, CNN (Jan. 19, 2017), https://perma.cc/U5SZ-FQDQ.

support the middle-ground option of requiring that the *office* exist at the time of the vacancy. That reading gives additional flexibility without ignoring the text of (a)(1) or trammeling the Senate's authority. *Cf.* Opp. at 34. There is no need to cast the FVRA aside, as Defendants wish.

C. The Asylum Directives are arbitrary and capricious.

In enacting the Asylum Directives, Defendants arbitrarily disregarded the reliance interests of immigration service providers and the impact on individual asylum seekers. Mot. at 25-28. Defendants again urge deference to the agency. Opp. at 35. But while arbitrary-and-capricious review is generally deferential, the agency must provide "a more detailed justification" if its policy change disrupts "serious reliance interests that must be taken into account." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). As the D.C. Circuit recently confirmed, an agency cannot survive arbitrary and capricious review if the agency fails to "acknowledge[] … the significance of reliance interests as a potential weight against its decision." *Mozilla Corp. v. FCC*, --- F.3d ----, 2019 WL 4777860, at *41 (D.C. Cir. 2019); *see also Am. Bar Ass'n v. Dep't of Educ.*, 370 F. Supp. 3d 1, 33-34 (D.D.C. 2019) (reversing policy change because agency "failed to show that it had considered the relevant reliance interests").

The agency indisputably failed to do so here. Plaintiffs explained at length how RAICES, as well as the organizations that operate at other centers, structured their operations around USCIS's previous policies. Mot. at 26. Mr. Cuccinelli's memorandum did not even mention these significant reliance interests. *See* AR113-14. Defendants now brush them off again, questioning whether they are even "cognizable." Opp. at 36. Specifically, Defendants try to distinguish the multiple cases invalidating immigration policies based on reliance interests, *see* Mot. 26, as involving the reliance interests of individual immigrants, Opp. at 36. But that is hair-splitting: RAICES's reliance interests pertain to how it can best provide its services *to immigrants*. Plus, the Court in *NAACP v. Trump* also found reliance interests in "DACA's

benefits … *to society at large*." 315 F. Supp. 3d 457, 473 (D.D.C. 2018) (emphasis added); *see also Regents of Univ. of Calif. v. DHS*, 279 F. Supp. 3d 1011, 1046 (N.D. Cal. 2018) (finding that "DACA recipients, their employers, their colleges, and their communities all developed" cognizable reliance interests). In contrast, the D.C. Circuit rejected the reliance interests at stake in *American Fuel & Petrochemical Manufacturers* because they were unreasonable. And Defendants' insistence that organizations cannot sue under Section 1252(e)(3) remains incorrect.

Defendants also ignored how the Directives prevent asylum seekers from fully presenting their legitimate asylum claims, merely noting that the Shortened Wait Period Directive "would likely lead to more 'request[s] to reschedule' interviews." Opp. at 37 (quoting AR114). But worrying about additional demands on the agency hardly amounts to considering how the Directives will harm *asylum seekers*. There is no indication in the record that Defendants considered, for example, whether asylum seekers need additional time to consult with third parties, to prepare for interviews, to overcome trauma and exhaustion, to assemble supporting facts, and to understand the process. *See* Mot. at 15-16. Defendants rely on revisions to the Form M-444, Opp. at 36, but a better form cannot give asylum seekers more time to consult or prepare—leaving aside that many asylum seekers also have reading difficulties and disabilities.

These failures doom the agency here. "[A]n agency cannot consider *only* the perceived shiny bright spots of a policy that it is mulling"; it "must *also* attempt to forecast the storm clouds that might be spawned if it adopts the proposed policy, and it must at least acknowledge the potential impact that such dark clouds might actually have on the people and communities the policy would affect." *Make the Road*, 2019 WL 4738070, at *36. Defendants could not promulgate the Directives based on their "potential effects on 'national security and public safety'" without also considering the "*downsides* of adopting such a policy" on immigrants. *Id.*

Given the corroborating evidence, far more than "rank speculation," Opp. 37-38, of animus—including policies "taken for invidious purposes," *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977), and the use of "[r]acially charged code words," *CASA de Maryland, Inc. v. Trump*, 355 F. Supp. 3d 307, 325-26 (D. Md. 2018) (quotation omitted)—it is apparent that the Directives reflect anything but reasoned decisionmaking. Mot. at 27-28.

Regardless, the agency's explanation fails on its own terms. The crux of Mr. Cuccinelli's reasoning is an ominous, and ambiguous, reference to the "situation at the Southwest Border." AR114; Opp. at 36. Presumably, Defendants mean that border crossings have imposed demands on USCIS. But the administrative record, which amounts to a paltry 141 pages, is bereft of *anything* to support these (presumed) conclusions, like statistics concerning present and historical border crossings and backlogs, analyses of USCIS's prior policies, or estimates of the effects of the Directives. The record also contains no indication whatsoever that the previous policies were causing unreasonable delays. Indeed, the only record evidence that Defendants cite is Mr. Cuccinelli's two-page memorandum, which itself cites to nothing. Opp. at 36 (citing AR113-14). The Court cannot defer to such "conclusory or unsupported suppositions," *United Techs. Corp. v. DOD*, 601 F.3d 557, 562 (D.C. Cir. 2010) (quotation omitted), especially where the agency failed "to point … to any data of the sort it would have considered if it had considered [the issue] in any meaningful way." *Nat'l Treasury Emps. Union v. Horner*, 854 F.2d 490, 499 (D.C. Cir. 1988). Incanting the phrase "Southwest Border" is not enough.

D. The Asylum Directives violate the Rehabilitation Act.

As to the Rehabilitation Act, Defendants neglect several critical points. Defendants do not dispute that many asylum seekers suffer from recognized disabilities. Mot. at 29-30. Nor do they dispute that the Asylum Directives make it harder for asylum seekers with disabilities to understand the credible fear process and participate in their interviews, *id.* at 30-31, or that courts

have required the government to modify its procedures to provide accommodations to immigrants with disabilities. *See, e.g.*, *Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034, 1054, 1058 (C.D. Cal. 2010); *Palamaryuk v. Duke*, 306 F. Supp. 3d 1294, 1301 (W.D. Wash. 2018).

Defendants instead make two responses. ***First***, they suggest that Plaintiffs do not have disabilities. Opp. at 38-39. But, as Defendants acknowledge, Plaintiffs presented considerable evidence, including a psychological evaluation, that M.A.-H. does have disabilities: she "ha[s] trouble sleeping," "frequently [has] nightmares," and has difficulty "concentra[ting]" and "remembering details and following a conversation," M.A.-H. Decl. ¶ 28, which are "consistent with … Post-traumatic stress disorder" and "require appropriate trauma-informed accommodations," Ravi Decl. ¶ 25. Moreover, organizations like RAICES fall within the zone of interests of "the Rehabilitation Act because the services they provide are a critical component of the mandates and benefits established by those laws." *Oster v. Lightbourne*, 2012 WL 691833, at *11 (N.D. Cal. 2012). Defendants do not dispute that many of RAICES's clients have disabilities, Meza Decl. ¶¶ 24-25, and RAICES may sue to protect its interest in serving them.

Second, Defendants assert that Plaintiffs (or RAICES's clients) were not prevented from consulting or participating in their interviews. Opp. at 39-40. That is factually incorrect; M.A.-H. was essentially unable to consult at all, M.A.-H. Decl. ¶¶ 24-25, and RAICES frequently cannot make contact with clients until after their interviews, Meza Decl. ¶ 15. In any event, "meaningful access"—not just "denial of service"—is the standard by which Rehabilitation Act claims are judged. Mot. at 29. The cases Defendants cite are inapposite: *Colbert* and *Muhammad* involved claims for substantively different services, while *Bannister* found that the requested accommodation was unreasonable. And Defendants' attempts to distinguish *Franco-Gonzales*

and *Palmaryuk* rest on the same flawed assumption that denial of service is required. None of these arguments controvert Plaintiffs' showing that the Directives prevent meaningful access.

III. Plaintiffs' injuries are irreparable.

On irreparable injury, Defendants just rehash their standing arguments. As to the Individual Plaintiffs, Defendants again claim that their injuries stem from their removal orders, not Defendants' unlawful policies. Opp. at 41-42. But that frames the question incorrectly. With respect to irreparable injury, causation asks whether the plaintiffs' harm "will directly result from the action which the movant seeks to enjoin." *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)—*i.e.*, whether *removing Plaintiffs* will result in injury. As to *that* question, Plaintiffs produced undisputed evidence that they will face persecution if removed. Regardless, Plaintiffs have also shown through substantial, undisputed evidence why "additional consultation time," Opp. at 42, would have led to a different result: Plaintiffs could not understand the process, communicate their fears of persecution, or obtain pertinent evidence, preventing them from fully presenting their claims. Thus, because Plaintiffs have shown that Defendants' unlawful policies subject them to risks like "rape, pervasive domestic violence, beatings, shootings, and death," they have established irreparable injury. *Grace*, 344 F. Supp. 3d at 146.

Similarly, Defendants reiterate their view that RAICES's harms "do not even rise to the level of injury in fact." Opp. at 42. This time, Defendants cite *Center for Responsible Science*, where the Court held that an organization lacked standing because it failed to establish impairment in addition to diversion of resources, and *AILA*, which reached the same conclusion.[7]

[7] Unlike in *AILA*, RAICES's lost clients are far from speculative; RAICES is the "primary non-profit legal services provider at Karnes," and has already been prevented from forming relationships with prospective clients. Meza Decl. ¶¶ 6-7, 15-19. RAICES's lost clients also do not constitute "economic loss"; RAICES represents clients at Karnes pro bono.

Defendants' standing arguments fail for the reasons already explained; indeed, Defendants now seem to accept this Court's holding in *O.A.* that RAICES had standing. Opp. at 43. Aside from relitigating standing, Defendants vaguely assert that Plaintiffs' injuries are "not enough." But Defendants do nothing to contest RAICES's showing that its injuries are significant and irreparable: RAICES cannot represent clients who have already been removed from the country. In that sense, there "can be no do over and no redress." *League of Women Voters*, 838 F.3d at 9. Whether or not RAICES can represent *other* clients, on the same rushed timetable, is irrelevant.

IV. The balance of equities and the public interest favor Plaintiffs.

Plaintiffs need not linger here long. Defendants do not dispute the public interests in holding agencies to the law and in preventing asylum seekers from being deported to countries where they face harm. Mot. at 40-41. All Defendants say is that "[a]n injunction would inflict profound harm on the government" because it would hamper their efforts at the Southern Border. Opp. at 40-41. Tellingly, however, Defendants again find no support for that assertion in the administrative record, and instead reach for the assertions presented in their July 23 notice expanding expedited removal, 84 Fed. Reg. 35,409 (2019). That extraneous notice—which issued *after* the Directives and has *itself* been enjoined, *see Make the Road*, 2019 WL 4738070—cannot show that *these* Directives are necessary. Besides, Defendants' interest in controlling immigration does not "permit[] an agency to fail to comply with its own binding policies impacting the rights of individuals." *Aracely v. Nielsen*, 319 F. Supp. 3d 110, 157 (D.D.C. 2018).

V. The Court should enjoin the Asylum Directives on a nationwide basis.

Defendants' Asylum Directives are unlawful in four ways and are being used to send individuals back to persecution and violence. The proper remedy is a nationwide injunction.

Defendants object that preliminary relief must "be no broader than necessary to redress the Plaintiffs' injuries." Opp. at 43. But that narrow formulation of the "complete relief"

principle also supports a nationwide injunction because Defendants do not dispute that RAICES's harms are nationwide in scope: it provides services at other centers and its clients have been transferred to those centers. Mot. at 42. Thus, "potential over-inclusiveness is the more prudent route." *Pennsylvania v. Trump*, 351 F. Supp. 3d 791, 834 (E.D. Pa. 2019). Moreover, nationwide relief is necessary to vindicate the "[P]laintiffs' (and the public's) entitlement to non-arbitrary decision making," and thus "to provide the relief that any APA plaintiff is entitled to receive." *Make the Road*, 2019 WL 4738070, at *49.

In any event, Defendants' cramped understanding of the Court's authority is wrong. Both this Court and the D.C. Circuit have recognized that a court may issue injunctive relief to protect the interests of similarly situated non-parties. Mot. at 43.[8] Plaintiffs have provided abundant evidence of such harms at all three family detention centers—none of which Defendants address *at all*. *Id.* at 43-44. Nor do Defendants address the paradoxical result that a limited-scope injunction would yield, given that Section 1252(e)(3) bars future suits challenging the Directives. *Id.* at 44. Instead, Defendants cite snippets from inapposite cases. *Gill* and *Madsen* dealt with the *substance* of injunctions, not their scope, and *Monsanto*, considering a hypothetical in dicta, posited that the plaintiffs could not enjoin an order based on "harm to other parties" because they would be unable to show injury as to themselves, 561 U.S. 139, 163 (2010).

Moreover, Plaintiffs' claims *mandate* nationwide relief. As the D.C. Circuit explained in *National Mining Association*, the "ordinary" response to unlawful regulations is that "the rules are vacated—not that their application to the individual petitioners is proscribed." 145 F.3d 1399,

[8] *See also, e.g.*, *New York v. DHS*, 2019 WL 5100372, at *11 (S.D.N.Y. 2019); *Roe v. Shanahan*, 359 F. Supp. 3d 382, 422 (E.D. Va. 2019); *S.C. Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959, 968 (D.S.C. 2018); *Santa Clara v. Trump*, 250 F. Supp. 3d 497, 539 (N.D. Cal. 2017); *Texas v. United States*, 2016 WL 7852331, at *2 (N.D. Tex. 2016); *Am. Min. Cong. v. Army Corps of Eng'rs*, 962 F. Supp. 2, 5 (D.D.C. 1997).

1409 (D.C. Cir. 1998) (quotation omitted); *see O.A.*, 2019 WL 3536334, at *29. Thus, "both Congress and the D.C. Circuit have spoken directly to the 'sharply limited' injunctive remedy that DHS pushes in this context, and a good faith reading of the pronouncements of these binding legal authorities establishes, indisputably, that DHS's limited-injunction argument is foreclosed." *Make the Road*, 2019 WL 4738070, at *45. Defendants respond that a regulation can be "set aside on its *face* or *as applied* to the challenger," Opp. at 44-45, but Plaintiffs "are clearly making a facial challenge" to the Directives that argues that they are "infirm regardless of how [they are] applied." *Doe 2 v. Mattis*, 344 F. Supp. 3d 16, 25 (D.D.C. 2018). Defendants also do not address the need for a uniform national immigration policy. Mot. at 45.

Defendants close by invoking Section 1252's bars on injunctive relief, Opp. at 45, which Plaintiffs already addressed, Mot. at 42 n.9. Section 1252(e)(1) does not preclude an injunction because "[a]n action brought pursuant to section 1252(e)(3) is an action that is 'specifically authorized in a subsequent paragraph' of 1252(e)." *Grace*, 344 F. Supp. 3d at 143. It makes no difference that Plaintiffs seek preliminary relief because the question is whether Plaintiffs' *action*, "not the type of relief," is authorized. *Id.* at 142. And 1252(f)(1) does not require the Court to limit any relief to "individual alien[s]" because Plaintiffs do not seek "to enjoin or restrain the operation" of the statute, but rather "conduct that violates the immigration laws." *Id.* at 143-44; *accord, e.g.*, *Make the Road*, 2019 WL 4738070, at *45 n.37; *Damus v. Nielsen*, 313 F. Supp. 3d 317, 328 (D.D.C. 2018). "[S]eek[ing] to subvert the Secretary's policy determination," Opp. at 45—Plaintiffs assume Defendants mean Mr. Cuccinelli, who is not lawfully acting as USCIS Director, let alone DHS Secretary—does not amount to enjoining the statute. These provisions provide no barrier to the relief Plaintiffs seek.

CONCLUSION

Plaintiffs' motion for a preliminary injunction should be granted.

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Respectfully submitted,

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