IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

RASUL ROE, *et al.*, Plaintiffs, v. ALEJANDRO N. MAYORKAS, *et al.* Defendants.	No. 22-cv-10808-ADB

PLAINTIFFS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION

Dated: October 3, 2023

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INTRODUCTION

In this challenge to the Defendants' change to the standards for adjudicating the humanitarian parole ("HP") applications of Afghans fleeing the Taliban in the fall of 2021, the parties have a pending dispute regarding the sufficiency of the administrative record. Two plaintiff families, the "Noes" and the "Boes," now move for preliminary injunctive relief. Both families' HP applications were denied while they were still in Afghanistan, under the USCIS policy that, since November 2021, gave those who had remained in that country no chance at an HP approval. The families' increasingly desperate situations cannot await a final judgment in this case. *See, e.g.*, Noe Decl. ¶¶ 16-42; Boe Decl. ¶¶ 4-17. While the administrative record produced by Defendants is inadequate, the limited materials produced thus far are nonetheless sufficient to demonstrate that USCIS changed its policy in the manner plaintiffs' Complaint alleged, and to show a likelihood of success on the merits of Plaintiffs' claims that the change was both "not in accordance with law" and "arbitrary and capricious," in violation of the Administrative Procedure Act.

Even from the incomplete administrative record produced to date, it is clear that there *was* a new policy, promulgated in late 2021 in writing and implemented in practice, that prevented Afghan nationals in Afghanistan from obtaining HP. The centerpiece of this new policy was a November 2021 memorandum that, for the first time, provided HP adjudication standards specific to Afghan applicants. Record Appendix ("Appx.") USCIS-00000031.[1]

The available record supports a likelihood of success on the merits of Plaintiffs' claim that this change violated the APA. The November 2021 policy was *not in accordance with law* because, by not allowing adjudicators to grant HP to beneficiaries in Afghanistan, the policy violated the statutory requirement of case-by-case adjudication (Count II). And the policy was *arbitrary and*

[1] All portions of the government-produced Administrative Record cited in this brief are included in the Record Appendix filed herewith.

capricious because, in adopting it, USCIS failed to satisfy the APA's requirements for reasoned decision-making (Count I). The moving Plaintiffs will suffer irreparable harm and satisfy the other preliminary injunction factors. They seek preliminary injunctive relief that—as to their families only—sets aside the November 2021 change in policy, restores the standards in effect on August 31, 2021, and orders USCIS to adjudicate their parole applications under those standards.

FACTUAL BACKGROUND

I. Amidst crisis in Afghanistan in August 2021, USCIS expedited Afghan humanitarian parole applications and granted nearly all cases.

As the Taliban came to power in August 2021, USCIS began expediting the HP applications filed on behalf of Afghans desperately attempting to flee for their lives. Recognizing the danger these applicants faced, USCIS's case-by-case adjudication under its existing standards resulted in a grant rate of approximately 95%.

The Department of Homeland Security ("DHS") is authorized "to parole any [noncitizen] into the United States temporarily under such conditions as [the Secretary of Homeland Security] may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A). "Humanitarian parole" may be granted by DHS sub-agencies, including Customs and Border Protection ("CBP"), which can grant HP in person at U.S. ports of entry, and U.S. Citizenship and Immigration Services ("USCIS"), which adjudicates HP requests from noncitizens overseas through its Humanitarian Affairs Branch ("HAB"). *See* ECF Nos. 1 & 75 at ¶¶ 36, 39.

Parole has been used historically to facilitate entry into the United States of noncitizens made vulnerable by sudden geopolitical upheavals, such as the fall of a government friendly to the

United States.[2] In August 2021, such an upheaval occurred in Afghanistan, where the U.S.-allied government was overtaken by the Taliban. In an August 23, 2021 Memorandum, DHS Secretary Alejandro Mayorkas authorized CBP to grant parole under § 1182(d)(5)(A) to Afghans who reached U.S. ports of entry. Quill Decl. ¶ 25. Under that authorization, CBP exercised its discretion to parole over 70,000 Afghans who were flown to the United States after having been airlifted from Kabul airport by the U.S. military in August 2021. *See* ECF Nos. 1 & 75 at ¶ 36.

But many Afghans did not get out in the airlift. Plaintiff Nahid Noe and her family, for example, reached the Kabul airport but turned back after a deadly bombing. Noe Decl., ¶ 3. And when the family made it onto a flight list, they were intercepted by the Taliban on the way back to the airport. *Id.* ¶ 4; *see also* Thrasher Decl., ¶ 9. Instead of flying out and being paroled by CBP, the Noes remained in danger. Like thousands of others, their only chance for HP lay with USCIS.

Fortunately, by mid-August 2021, USCIS had begun expediting Afghan HP applications. *See* Stock Decl., ¶¶ 21-23. On August 13, adjudicators "were instructed to drop everything, and focus on completing all Afghan parole cases" in light of the "crucial life and death situation for the parole beneficiaries in Afghanistan." Appx. USCIS-000000973 at 973-74. These instructions prioritized Afghan cases, but provided no new substantive guidance beyond the standards adjudicators generally used in HP cases. Necessarily, by recognizing the importance of "completing all Afghan parole cases," the agency acknowledged that many Afghan cases would

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[2] *See* David J. Bier, *126 Parole Orders over 7 Decades: A Historical Review of Immigration Parole Orders*, Cato Institute: Cato Inst. Blog (July 17, 2023, 4:43 PM), cato.org/blog/126-parole-orders-over-7-decades-historical-review-immigration-parole-orders#:~:text=From%201975%20to%20the%20middle,paroled%20into%20the%20United%20States.

merit approval under existing standards, such that completing the cases would have the potential to help beneficiaries facing a "life and death situation." *Id.*; *see* Stock Decl., ¶ 29.[3]

Approvals flowed quickly. One lawyer filed 17 applications for one Afghan family around August 23, 2021, and received approvals four days later. Stock Decl., ¶¶ 26-27; *see also* Thrasher Decl., ¶¶ 4, 10. Indeed, while HAB's approval rate for parole applications from all countries was about 36%, and its general approval rate for cases based on "purely protection needs (refugee like cases)"[4] was about 13%, *see* Appx. USCIS-00000613 at 614, the approval rate for Afghans in August 2021 was between 93% and 95%. *See* Quill Decl., ¶¶ 32, 37.[5]

The closure of the U.S. embassy in Kabul on August 15 did not stop USCIS from continuing to grant HP to Afghans in and out of Afghanistan. *See* Stock Decl. Exs. 1 & 2; Thrasher

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[3] USCIS also adjusted passport requirements and sent emails to attorneys, rather than formal Requests for Evidence, to obtain information more quickly. Appx. USCIS-00000718. In a draft document written after the airlift, HAB Chief John Bird remarked that certain evidentiary standards and factors had been adjusted in deference to the airlift, including "[w]aiving the requirement that parole not circumvent normal immigration processing," "not requiring third party evidence be submitted to determine whether protection [needs were present], and not requiring that beneficiaries avail themselves of refugee protection where available." *Id.* But the Chief of the International and Refugee Affairs Division (within which HAB sits) disagreed, noting that country of origin ("COI") information "was pretty strong to support evidence of risk" and "no refugee protection was available"—meaning that the evidentiary requirements for protection cases had been satisfied rather than waived. *Id.*

[4] USCIS categorizes HP applications into certain common categories, such as cases based on protection needs, medical treatment, family unification, and adoption, among others. *See Guidance on Evidence for Certain Types of Humanitarian or Significant Public Benefit Parole Requests*, USCIS (updated June 23, 2022), uscis.gov/humanitarian/humanitarian-parole/guidance-on-evidence-for-certain-types-of-humanitarian-or-significant-public-benefit-parole-requests (identifying "common types of parole requests").

[5] To be sure, one document in the record characterizes these approval statistics as potentially "misleading" because, with the airlift underway, agency staff "were focusing on just **getting the approvals** out in the hopes of the beneficiaries getting on an evacuation flight." Appx. USCIS-00000725 at 726. But nothing indicates that adjudicators set aside large numbers of cases in order to pick approvable needles out of a haystack. To the contrary, they worked to complete "all Afghan cases." Appx. USCIS-000000973 (Aug. 14, 2021).

Decl. Ex. 1. The agency updated approval notices to note the embassy's closure, while still informing beneficiaries of the need to complete consular processing. *Id.*[6] The notices now instructed that, if the beneficiaries arrived in a country with a U.S. consulate, they should notify USCIS "immediately" in order to continue processing. Stock Decl., Ex. 2; Thrasher Decl., Ex. 1.

As USCIS worked to approve meritorious cases, it also updated its website to assist Afghans seeking HP. On August 26, USCIS rolled out a webpage titled "Information for Afghan Nationals on Parole Into the United States." Quill Decl., Ex. 1. The webpage informed Afghans that, "Individuals who are outside of the United States may request parole into the United States based on urgent humanitarian or significant public benefit reasons for a temporary period, on a case-by-case basis." *Id.* The webpage noted that "[a]nyone" could use a form to apply for parole for themselves or another person. *Id.* It instructed applicants to "[w]rite 'Afghanistan Humanitarian Parole' on the mailing envelope," and "[f]or expedited processing, write the word EXPEDITE in the top right corner of the application in black ink." *Id.* That same day, USCIS also modified its general HP webpage by adding a banner that directed Afghan nationals to the agency's new Afghan-specific webpage. ECF. Nos. 1 & 75 at 42-46.

II. In September 2021, USCIS abruptly suspended Afghan HP adjudications.

In early September 2021 USCIS stopped categorically expediting Afghan HP applications, and then stopped adjudicating them altogether. Even as the airlift was ending, some at USCIS were uneasy about the growing numbers of applications. *See, e.g.*, Appx. USCIS-00000961 at 962 (expressing concern upon learning that a law firm was participating in preparing more than 700

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[6] The new notices were "Conditional Approval" rather than "Approval" notices. *Compare* Stock Decl., Ex. 1 *to* Stock Decl., Ex. 2 *and* Thrasher Decl., Ex. 1. That change was likely for clarity, as approval was already conditioned on the completion of consular processing. *See*, *e.g.*, ECF No. 75 at ¶ 40 (all USCIS HP approvals prior to consular processing are conditional); Stock Decl., Ex. 1 at 1 (calling approval "conditional" in text).

HP cases). By September 1, USCIS had received over 1000 Afghan HP requests. Appx. USCIS-00000725.

Although nothing in the record suggests that Afghans ceased facing the "crucial life and death" circumstances that USCIS had identified, Appx. USCIS-000000973 at 974, the agency changed course. First, on August 31, 2021, USCIS stopped categorically expediting all Afghan cases. Appx. USCIS-00000740.

USCIS continued adjudicating—and approving—cases for Afghans both inside and outside of Afghanistan at least until September 3, 2021. *See* Thrasher Decl., ¶ 7, 10, & Ex. 1. But on September 7, in an email marked "URGENT," adjudicators were instructed to "HOLD DECISIONS on AFGHAN CASES." Appx. USCIS-00000713 at 713-14. The e-mail specifically noted that "[t]his hold only applies to Afghan cases." *Id.*

III. In a new policy, USCIS barred the approval of any HP applications for Afghan nationals still in Afghanistan and brought the approval rate for Afghan HP to less than 2%.

The pause in adjudications gave USCIS time to create a new, Afghan-specific policy. *See* Appx. USCIS-00000956 at 957-58. By October 26, 2021, as the new policy documents moved through a formal clearance process, HAB prepared to lift the hold and "begin to deny cases" that it now deemed ineligible for HP. Appx. USCIS-00000952. When the final policy was rolled out on November 5, it barred approving the cases of those still in Afghanistan. The policy ushered in about 7,300 denials in an eight-month period in which there were just 79 conditional approvals of Afghan applications. Quill Decl. ¶ 37.

USCIS's November 5, 2021 policy provided, for the first time, mandatory "eligibility considerations that are specific to parole of Afghan nationals." Appx. USCIS-00000030; USCIS-00000031. The considerations partly reflected "U.S. policy interests" with regard to Afghans. Appx. USCIS-00000031. For Afghans both in and outside of Afghanistan, the November Policy

listed certain categories of Afghans that were considered an interagency priority for relocation to the United States, such as immediate relatives of U.S. citizens or the spouses or minor children of people relocated during the airlift. *Id.* at USCIS-00000032. It defined being in one of those categories as a "strong positive factor" in an individual's HP application. *Id.*[7]

But for Afghans stranded in Afghanistan, the November Policy categorically prohibited the approval of *any* HP application, no matter how worthy of consideration and relief, and notwithstanding the presence of any positive factors. *See id.* at USCIS-0000033. The bar on approvals purported to be based on the absence of a consulate in Afghanistan. *See id*. And it was adopted despite the fact that USCIS was aware that the "vast majority" of pending HP applications were for Afghans who were still in Afghanistan, *see* Appx. USCIS-00000725 at 726 (Sept. 1, 2021); USCIS-00000956 at 957 (October 15, 2021); *see also* Appx. USCIS-00000743 at 745 (April 2022, noting about 75% of Afghan HP requests were for people in Afghanistan).

The bar on approvals for in-country cases had two elements:

First, the November 2021 Policy instructed USCIS adjudicators that "parole requests based on protection needs, without other factors, such as the beneficiary's falling into one of the categories of Afghan nationals prioritized by the interagency, family reunification, or urgent medical needs, *generally* ***will be denied***." Appx. USCIS-0000031 at 33 (emphasis added).

[7] Another interagency priority category noted as a "strong positive factor" were applicants for Special Immigrant Visas ("SIV") who had already received "Chief of Mission" ("COM") approval verifying their employment on behalf of the United States. Appx. USCIS-00000031 at 32. For individuals who, like Baktash Boe, are still awaiting COM approval, the November 2021 policy required "third party, credible evidence of their work for the U.S. government . . . as well as evidence of imminent, targeted severe harm or a particular vulnerability . . . to show why they are unable to wait to complete SIV or refugee processing." *Id.*; *see generally* International Refugee Assistance Project, *Processing Delays in the Special Immigrant Visa Program: Findings in* Afghan and Iraqi Allies v. Pompeo, refugeerights.org/wp-content/uploads/2020/05/Processing-Delays-in-the-SIV-Program-Summary.pdf (last visited Sept. 28, 2023) (describing delays with COM approval and remainder of SIV process).

Adjudicators were told that such applicants "should be given denial notices informing them that . . . their parole applications cannot be approved at this time" and recommending that they contact the United Nations High Commissioner for Refugees ("UNHCR"). *Id.* Because USCIS was aware that most of the Afghan cases pending before them were based on protection needs, Appx. USCIS-00000718; USCIS-00000956—rather than falling into certain other HP categories seeking medical treatment, family unification, or other—this guidance meant that Afghans who sought HP because they feared death at the hands of the Taliban would presumptively be denied HP unless they *also* presented an urgent medical need, for example, or fell into one of the interagency priority categories.

Second, the November 2021 Policy instructed USCIS adjudicators that even applications not included in the "generally deny" category (*e.g.*, if the applicant showed the "other factors") could not and would not be approved. Specifically, if an adjudicator determined that a beneficiary residing in Afghanistan was "eligible for parole," the adjudicator could only "issue a Parole Notice (Suspension of Processing) stating that USCIS cannot complete processing of the parole request unless and until the beneficiary informs USCIS that they are able to report to a U.S. embassy or consulate." Appx. USCIS-00000031 at 33. That application, then, would be administratively closed and no longer pending. *Id.* at USCIS-00000039.[8]

For Afghan HP applicants in Afghanistan, therefore, the New Policy precluded any avenue for approval: if an application was based on a need for "protection," it would "generally" be

[8] If noncitizens found initially eligible for HP later made it to a third country within one year and reopened their HP cases, they would then have to persuade USCIS that they were "still eligible" for HP. Appx. USCIS-00000031 at 39. But under the November 2021 Policy, few Afghans in third countries were eligible for HP. The Policy strongly discouraged granting HP to individuals outside of Afghanistan, instructing that "discretion generally will be exercised to deny a request for parole" from a third country and that Afghans "should be directed to contact UNHCR" instead. *Id.* at USCIS-00000033-34.

denied; if the application went beyond that basic need and demonstrated eligibility on the basis of "other factors," it would, at best, be suspended and closed.

The November 2021 Policy had immediate and dramatic effect. Approvals of HP cases fell from 95% in August 2021 to zero in the three months after the policy, according to one set of USCIS documents. *See* Quill Decl. ¶ 35. Data provided by USCIS pursuant to a Freedom of Information Act tell a similar story, reflecting a drop in approvals from 93.3% in August 2021 to 1% in the period between the November 2021 Policy and July 2022. *Id.* ¶ 37. Denials rose from 5% prior to the policy change to 95.6% after it. *Id.* And after the November 2021 Policy, 3.3% of cases were administratively closed.[9]

USCIS did not tell applicants for HP, or the public, about its new standards for Afghan HP or how it was affecting grant rates. One USCIS staffer discussing how to respond to members of Congress acknowledged, "I know in responses provided to the Hill, we've stated that the evidentiary standards have not changed . . . ." Appx. USCIS-00000747 at 750. After receiving Congressional criticism about the denials rate for Afghan HP cases, USCIS compiled data that masked just low its approval rate for Afghans had become. Instead of reporting an approval rate of 95% before the November 2021 change, and less than 2% after it (*see* Quill Decl., ¶ 37), an internal February 2022 document reported a supposed 7% grant rate since July 1, 2021. *See* Appx. USCIS-00000613 at 614. The document also indicated that this claimed 7% approval rate for Afghan HP was similar to HAB's overall 13% approval-rate for protection-based HP requests. *Id.* Specifically, by adding the claimed 7% approval rate to a claimed 5% of cases that had been

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[9] The November 2021 Policy was even applied retroactively to some already-approved cases. For example, on November 18, 2021, USCIS informed the office of U.S. Senator Ed Markey that three HP cases for certain Afghan beneficiaries, *approved on September 3*, had been withdrawn "due to new qualifications[.]" *See* Thrasher Decl., Ex. 5.

administratively closed due to the HAB's bar on approvals for in-country cases, USCIS concluded that it had reached a "*potential approval rate of 12%*." *Id.* In April 2022, in a document containing talking points for Secretary Mayorkas' upcoming congressional hearing, USCIS similarly asserted that the denial rate for Afghan HP applications was "consistent with USCIS historic rates of denial for parole requests based primarily on protection concerns." Appx. USCIS-00000743 at 745. This again failed to reveal the fact that approvals were, in reality, under 2%.

IV. Two updates to the November 2021 policy did not meaningfully change USCIS's treatment of Afghan humanitarian parole cases or increase approvals.

Updates to the November 2021 policy in December 2021 and April 2022 did nothing to stem the tide of denials. The December 17, 2021 memorandum was largely identical to that promulgated in November 2021, with some changes relating to medical screening, new vetting procedures for cases granted in August 2021, and minor tweaks in language. *See* Appx. USCIS-00000503. By April 2022, however, in response to Congressional concern, USCIS had paused denials in order to develop a policy update. Appx. USCIS-00000743 at 745.

The updated memorandum was issued on April 25, 2022, and continued central features of the November 2021 policy. *See* Appx. USCIS-00000003. Under the April 2022 memorandum, USCIS retained the list of "strong positive factor[s]" based on interagency priorities that included the immediate relatives of a U.S. citizen. *Id.* at USCIS-00000004.[10] It retained language generally disfavoring protection-based claims. *Id.* But now that language referred adjudicators to updated guidance on "targeted harm" in the Parole Training Module. *See id.* That guidance, in turn, acknowledged that even without third-party evidence that specific noncitizens are being specifically targeted for harm, noncitizens may demonstrate their membership in a group

[10] The April 2022 policy retained language regarding requirements for SIV applicants who, like Baktash Boe, are awaiting COM approval. *See* Appx. USCIS-00000003 at 4.

experiencing "widespread or pervasive, systematic targeting" and show that they face an "imminent risk of serious harm" as a result. *See* Appx. USCIS-00000281 at 284.

With regard to Afghans "in a location without consular processing"—*i.e.*, generally, those in Afghanistan—the April policy now omitted the "generally deny" language and all substantive adjudication guidance specific to in-country cases. *See* Appx. USCIS-00000003 at 6. But it continued to bar approvals. *Id.* at 6-7. Now instead of a "Suspension of Processing" notice, *see* Appx. USCIS-00000031 at 33, an individual who "initially appears eligible for parole" could receive a "Notice of Continued Parole Processing," Appx. USCIS-00000003 at 6. Despite the change in name, the application remained "eligible for further processing" if, and only if, the applicant arrived in a country in which U.S. "consular processing" services were available. *Id.* Unless and until that happened, USCIS adjudicators would "administratively close the case" in the agency's systems.

USCIS did not inform applicants or the public about the April 2022 memorandum.[11] In talking points prepared in response to congressional concern about the high denial rates for Afghans, USCIS predicted that the change "likely will result in a higher approval rate." Appx. USCIS-00000743 at 745.

The opposite occurred. In the months after the April memorandum was issued, USCIS denied 4,850 Afghan humanitarian parole cases, while granting just 31 and administratively closing just 72—a grant rate of only 0.6%. Quill Decl., ¶ 37.

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[11] The policy was eventually leaked to CBS, which reported on it in July 2022. Camillo Montoya-Galvez, *U.S. expands eligibility for Afghans and other seeking entry on humanitarian grounds*, CBS (July 1, 2022, 8:00 AM), cbsnews.com/news/immigration-us-expands-eligibility-afghans-others-seeking-entry-humanitarian-grounds/.

All told, between August 2021 and July 2022—the period for which data is available—USCIS adjudicated just 12% of HP applications received for Afghans in Afghanistan, and approved less than 2% of them. Quill Decl., ¶ 33. Of 68,000 applications, USCIS adjudicated only 7,673, and approved just 123—with many of these approvals being before September 2021. *Id.* at 37. A mere 79 Afghans were approved for humanitarian parole in the eight months after USCIS decided, in the fall of 2021, to adopt specific changes in policy that would ensure the denial of the vast majority of Afghan humanitarian parole applications. *Id.* In that same time period, 7,294 applications were denied. *Id.*

V. The moving Plaintiffs' applications had no chance of being approved, leaving them in danger.

The moving plaintiffs—the Noe and Boe families—poured their hopes into humanitarian parole applications that, after September 2021, had no chance of being approved. Both families' applications were denied while they remained in Afghanistan, under the November 2021 policy, which prohibited their cases from being approved no matter how meritorious. Specifically, USCIS denied the Noes' applications in February 2022, during a period in which only 1.8% of all Afghan HP applications were granted, under the new policy, and in-country applications could not be approved. USCIS denied the Boes' applications in May and June 2022, during a period in which grant rates dropped to 0.6% under the April 2022 modifications to the November 2021 policy, which continued to bar the approval of in-country cases.[12]

Although USCIS policy favored the approval of humanitarian parole cases only until shortly after the U.S. airlift ended, the same "crucial life and death" circumstances that motivated USCIS to expedite Afghan HP applications in August 2022 continued unabated. *See* Appx.

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[12] Badi and Bahar Boe received denials despite the fact that, as parents of a U.S. citizen, they nominally should have been considered priorities for relocation and accorded a "strong positive factor" in favor of approval. *See* Appx. USCIS-00000003 at 4.

USCIS-000000973 at 974. After the Taliban returned to power, "approximately 500 former government officials and military personnel were either killed or disappeared within six months. . ."[13] The U.N. High Commissioner for Human Rights confirmed that her office "received multiple allegations of the Taliban conducting house-to-house searches looking for specific government officials and people who cooperated with U.S. security forces and companies [and] [t]hese searches have reportedly taken place throughout [various cities in Afghanistan]."[14] Many Afghans fled to Pakistan, but Pakistani officials have engaged in a nationwide crackdown on Afghans, deporting or detaining scores of Afghans who had fled Taliban rule.[15]

More than two years since their lives were thrust into chaos, the Noe and Boe families continue to face daily the dangers for which they turned to USCIS for protection. See, e.g., Noe Decl. ¶¶ 16-42; Boe Decl. ¶¶ 4-17. Each day that they endure the dire situations in which they have been left—and each day that they must hope to avoid the ongoing threats to their safety—the two families' lives have been transformed by USCIS' decision to stop approving Afghan HP cases in the fall of 2021.

ARGUMENT

Even in the absence of a full record, the available documents make clear that USCIS changed its policy in November 2021 in a manner that was harmful to Afghan beneficiaries of HP applications—including, as relevant here, those who remained in Afghanistan when USCIS

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[13] Barbara Marcolini, et al., *The Taliban Promised Them Amnesty. Then They Executed Them.*, N.Y. Times, (Apr. 12, 2022), nytimes.com/interactive/2022/04/12/opinion/taliban-afghanistan-revenge.html.

[14] *Oral Update on the Situation of Human Rights In Afghanistan*, United Nations: Office of the High Commissioner for Human Rights (Sept. 13, 2021), https://www.ohchr.org/en/2021/09/oral-update-situation-human-rights-afghanistan.

[15] Shah Meer Baloch, *Pakistan crackdown on Afghan refugees leaves 'four dead' and thousands in cells*, The Guardian (Mar. 2, 2023, 7:00 AM), theguardian.com/global-development/2023/mar/02/pakistan-crackdown-on-afghan-refugees-leaves-four-dead-and-thousands-in-cells.

decided their cases. The Noe and Boe plaintiffs were among them. They are entitled to a preliminary injunction because they can demonstrate a likelihood of success on the merits of their claim that the change in policy violated the APA; they are suffering irreparable harm each day that they are denied an opportunity for protection in the United States, *see* Noe Decl. ¶¶ 15-42; Boe Decl. ¶¶ 4-17; and the public interest and balance of the equities support interim relief. *See Me. Forest Prods. Council v. Cormier*, 51 F.4th 1, 5 (1st Cir 2022).

I. The moving Plaintiffs have a likelihood of success on the merits of their claims that the November 2021 policy change cutting off humanitarian parole for Afghans in Afghanistan was both "not in accordance with law" and "arbitrary and capricious."

The APA compels this Court to "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A). Before September 2021, USCIS did not have a policy specific to HP applications from Afghan nationals, and the agency's adjudicators processed these applications by exercising discretion only on the case-by-case basis required by law.[16] USCIS's change in policy for the processing of HP adjudications from Afghanistan, largely embodied in a November 5, 2021 memorandum, effected a "conscious change of course," *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009), in both substance and effect. *See CBS v. United States*, 316 U.S. 407, 416 (1942) (existence of new or changed policy can be inferred from "substance of what the [agency] has purported to do and has done"). Plaintiffs satisfy the first preliminary injunction factor—a likelihood of success on the merits—because the available record demonstrates that USCIS changed its policies with regards to HP requests from Afghanistan in a manner that was both "not in accordance with law" and "arbitrary and capricious," in violation of the APA.

[16] *See, e.g.,* Appx. USCIS-00000347 at 369 ("Each decision you make should be on a case-by-case basis"); *see also id.* at 371 ("Discretion is exercised on a case-by-case basis"); Stock Decl., ¶ 29 (adjudications of Afghan parole applications through August 2021 "reflected a consistent and correct application of the humanitarian parole standard as it has been used over the past decades").

A. USCIS' November 2021 policy was "not in accordance with law" because it did not allow for case-by-case exercise of discretion (Count II)

The moving Plaintiffs are likely to succeed on Count II of their Complaint because the November 2021 Policy's bar to granting HP to those in Afghanistan is not "in accordance with law." 5 U.S.C. § 706(2)(A). USCIS is required both by statute and by its Policy Manual to make parole decisions on a "case-by-case" basis. 8 U.S.C. § 1182(d)(2)(A); USCIS Policy Manual Vol. 3, Part F, Chapter 1.[17] The Policy Manual's provisions for adjudicating discretionary applications further require an officer to "weigh all positive factors present in a particular case against any negative factors in the totality of the record," and employ analysis that is "comprehensive, specific to the case, and based on all relevant facts known at the time of adjudication." USCIS Policy Manual Vol. 1, Part E, Chapter 8. *See also Biden v. Texas*, 142 S.Ct. 2528, 2543 (2022) (with regard to parole, "DHS may exercise its discretion . . . 'only on a case-by-case basis . . .'" and its exercise of discretion within the statutory framework "must be reasonable and reasonably explained").

But in November 2021, USCIS implemented a new policy applicable only to parole requests from Afghanistan that instructed adjudicators to replace the longstanding, statutorily-mandated practice of case-by-case consideration with a policy of (1) "generally" denying applications based on protection needs, and (2) at best administratively closing the applications of beneficiaries in Afghanistan who were "eligible for parole." *See* USCIS-00000031 at 33, 39; *see* ECF No. 69 at 27-28. That "no approvals" policy is inconsistent with the statute and the Policy Manual. Because adjudicators after November 2021 were stripped of their ability to exercise the discretion granted to them by statute, and were prevented from weighing the positive and negative

[17] USCIS Policy Manual, USCIS, uscis.gov/policy-manual.

factors in order to decide whether Afghan cases should be granted, USCIS's bar on approvals after November 2021 is "not in accordance with law." 5 U.S.C. §706(2)(A).

B. The change in policy was arbitrary and capricious because USCIS failed to provide a reasoned explanation, consider alternatives, or consider reliance interests (Count I).

Even if the November 2021 Policy were perfectly consistent with statutory authority and the Policy Manual—though it is not—it must still be set aside as arbitrary and capricious if USCIS did not adopt the Policy through a reasoned decision-making process in which, among other things, it considered reliance interests and other relevant factors, acknowledge a change was being made, and provided a reasonable explanation. *See FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021) (stating that agency action must "be reasonable and reasonably explained"); *Michigan v. EPA*, 576 U.S. 743, 750 (2015); ECF No. 69 at 23. The available record demonstrates that the Plaintiffs are likely to succeed in showing that USCIS failed to comply with these requirements.

The reasoned decision-making requirements of the APA apply whenever an agency adopts a new policy or departs from prior policy or practice. *Fox Television Stations*, 556 U.S. 502. "The task of a court reviewing agency action under the APA's 'arbitrary and capricious' standard is to determine whether the agency has examined the pertinent evidence, considered the relevant factors, *and articulated a satisfactory explanation* for its action . . . ." *Akebia Therapeutics, Inc. v. Azar*, 443 F. Supp. 3d 219, 227 (D. Mass. 2020) (citations and quotation marks omitted) (emphasis added). Consequently, "[o]ne basic procedural requirement of administrative rulemaking is that an agency must give adequate reasons for its decisions." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 212 (2016). When changing its position, the reasoned-explanation standard requires the agency first to "display awareness that it *is* changing position," and then to "show that there are good reasons for the new policy." *Fox Television Stations*, 556 U.S. at 515 (emphasis in original); *R.F.M. v. Nielsen*, 365 F. Supp. 3d 350, 375 (S.D.N.Y. 2019). In other words, in order to "articulate

a satisfactory explanation for its action," *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), the agency must state its reasoning in enough detail to enable the Court to do its own job of determining "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974).

USCIS violated the APA's reasoned decision-making requirement in three ways, each of which is a sufficient and independent basis for this Court to set aside the November 2021 change in policy. First, USCIS failed to provide a reasoned explanation for the new policy, or even to consistently demonstrate that it understood it had made such a change. Second, USCIS did not consider reasonable alternatives to barring the granting of HP for those in Afghanistan. Third, USCIS failed to acknowledge and account for the reliance interests of thousands of Afghan beneficiaries.

1. USCIS did not provide a reasoned explanation for the new policy, or even demonstrate awareness that it had changed its position.

The Administrative Record in this case does not contain a "reasoned explanation" for USCIS's sharp departure from prior practice with respect to HP applications from Afghan nationals. Indeed, the Government failed even to cross the threshold of the reasoned-explanation requirement, *i.e.*, to display an "awareness" that it had changed its position on Afghan parole requests in the latter half of 2021. *Fox Television Stations*, 556 U.S. at 515. USCIS implemented the November 2021 Policy internally, and has now acknowledged at least that aspects of the policy "had no precedent in any pre-existing generally-applicable guidance document[.]" ECF No. 94 at 6. But even as it implemented the policy—to the detriment of thousands of Afghans who had accepted the agency's invitation to use HP as "the pathway" to safety—USCIS said nothing *publicly* about its drastic course change, told members of Congress that it has made no change,

and compiled statistics in a manner designed to disguise the dramatic drop in approvals that the November Policy had brought on. *See* USCIS-00000613 at 614; USCIS-00000743 at 745. Even in this litigation, the Government has taken the remarkable position, belied by the Administrative Record, that there was no policy change in late 2021. *See, e.g.,* ECF No. 41 at 2 ("Plaintiffs' allegations of 'new standards' applied by Defendants to parole decisions merely describe existing standards, not new ones, and thus raise no legal claim").[18/]

Consequently, the record contains barely any contemporaneous explanation for the November Policy.[19] This omission alone makes the New Policy arbitrary and capricious. *See State Far*, 463 U.S. at 48 (even when carrying out a legislative grant of discretion, the "agency must cogently explain *why* it has exercised its discretion in a given manner" (emphasis added)); *Citizens Awareness Network v. U.S. Nuclear Regulatory Comm'n*, 59 F.3d 284, 291 (1st Cir. 1995) (unexplained change of agency policy was arbitrary and capricious because "any such alteration or reversal must be accompanied by *some* reasoning") (emphasis added)); *see also Encino Motorcars, LLC*, 579 U.S. at 222 (an "[u]nexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice") (quotation marks omitted). Because USCIS failed to "articulate[] a satisfactory explanation for its action," *Akebia Therapeutics*, 443 F. Supp. at 227 (citations and quotation marks omitted), its change in policy toward HP applications from Afghanistan was arbitrary and capricious.

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[18] *See also* ECF No. 52 at 10 ("the same standards that applied in July 2021 are the same standards that apply today"); Aug. 2, 2022 Tr. at 6:14-15 ("there has been no policy change").

[19] Neither USCIS nor Government counsel can fill that hole by offering post hoc rationalizations. "It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself" at the time, *State Farm*, 463 U.S. at 50, and that a reviewing court may not accept *post hoc* rationalizations for agency action, whether offered by counsel or by the agency itself. *Dep't of Homeland Sec. v. Regents of the Univ. of Calif.*, 140 S.Ct. 1891, 1909 (2020).

2. USCIS did not consider reasonable alternatives before implementing the New Policy.

USCIS's November 2021 change in policy is also arbitrary and capricious because the agency failed to consider reasonable alternatives for its decision to bar approvals of HP applications for beneficiaries in Afghanistan. When an agency rescinds or replaces "a prior policy its reasoned analysis *must* consider the 'alternative[s]' that are 'within the ambit of the existing [policy].'" *Regents,* 140 S.Ct. at 1913 (quoting *State Farm*, 463 U.S. at 51) (emphasis added). If an agency changes course without doing such an analysis, it has "entirely failed to consider [that] important aspect of the problem," *id.*, and its action is arbitrary and capricious. *Id.*

The government has contended in this litigation that any changes resulted from the closure of the embassy in Kabul. ECF No. 69 at 25-26. But faced with this closure, the available record indicates that USCIS did not consider any alternatives prior to barring all approvals in the fall of 2021.

One alternative would have been not to enact any change in policy at all—*i.e.*, to continue considering HP applications on a case-by-case basis, including issuing conditional approval notices that notified applicants that final processing would have to occur at a U.S. embassy in a third country. This would have been a reasonable alternative, at least because it would comply with USCIS' statutory obligations under the INA. *See, e.g.*, *Regent*, 140 S.Ct. at 1913 (rescission of DACA program was arbitrary and capricious where agency failed to consider option retaining an element that was "centerpiece" of existing policy). USCIS's existing policy had allowed the agency to issue conditional approvals in dozens of cases in August 2021, into early September 2021, despite the closure of the embassy in Kabul in mid-August. Stock Decl. ¶¶ 27-28, 35; Thrasher Decl. ¶¶ 7, 10-15; Quill Decl. ¶¶ 25-26. USCIS simply notified beneficiaries that they would have to complete the process at a U.S. embassy in a third country. *See* Stock Decl. Ex. 2;

Thrasher Decl. Ex. 1. And by October 2021, USCIS had before it evidence that many beneficiaries—at least 19 of them—were able to travel to Pakistan after receiving conditional approval notices promising that travel documents would issue so long as no new information altering their eligibility was uncovered. Stock Decl. ¶¶ 28, 37; Thrasher Decl. ¶¶ 16-17.

Alternatively, if USCIS determined that a temporary switch to a more categorical approach were logistically required, it might have considered a policy for Afghans like that which was later implemented for Ukrainians. That approach, the "Uniting for Ukraine" program, has granted parole to well over 100,000 Ukrainians to date–without requiring access to a U.S. consular facility. Quill Decl., ¶¶ 23-24; *see also* Stock Decl. ¶ 36. The agency's failure to even consider such alternatives before implementing a categorical bar on HP approvals for Afghans who remained in Afghanistan was arbitrary and capricious.

3. USCIS did not take competing reliance interests into account.

USCIS also "failed to consider an important aspect of the problem," *State Farm*, 463 U.S. at 43, in another way. The Administrative Record shows that the agency's prior policies engendered significant reliance interests among Afghan applicants, and USCIS failed to account for those interests in implementing the November 2021 Policy.

The impact of policy changes on reliance interests is so important that the Supreme Court has required that agencies look for reliance *before* making any change. Agencies must "assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." *Regents*, 140 S. Ct. at 1915. If the agency's assessment indicates that "prior policy has engendered serious reliance interests that must be taken into account," the agency's reasoned explanation for the policy change must "provide a more detailed justification than what would suffice for a new policy created on a blank slate." *Fox Television Stations*, 556 U.S. at 515.

Thus, USCIS could not legally change its policies related to Afghan parole requests without first: (1) "assess[ing] whether there were reliance interests" at play, (2) determining their absolute and relative significance, weighing them against competing considerations, and (3) providing a "detailed justification" for the balance the agency sought to strike. Here, the November 2021 change in policy reflects none of those steps. *See* Appx. USCIS-00000031. This delinquency was certainly not inconsequential. USCIS' actions under its prior policy—including the favorable outcomes of Afghan applications, and the factsheet that the agency knew was "a signal that HP is the pathway"—had engendered significant and serious reliance interests among thousands of applicants who had applied under a belief that their cases would be adjudicated under the standards existing in August 2021.[20] The Noe family, for example, waited in hiding for their HP applications to be adjudicated, believing that they would receive timely and fair consideration. Noe Decl. ¶¶ 5-6. Because USCIS failed to weigh applicants' reliance interests, or provide the detailed contemporaneous explanation required in the face of such interests, its November 2021 policy change is arbitrary and capricious.[21]

II. The moving Plaintiffs suffer irreparable harm each day that they are denied an opportunity to seek protection.

Courts in this Circuit measure irreparable harm on "a sliding scale, working in conjunction with a moving party's likelihood of success on the merits." *Vaqueria tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464, 485 (1st Cir. 2009). Thus, "[t]he strength of the showing necessary on irreparable harm depends in part on the degree of likelihood of success shown." *Mass. Coalition of Citizens*

[20] Some applicants even received approvals under the old policy, creating a clear reliance interest, only to have them stripped when the agency changed course. Thrasher Decl. ¶ 29 & Ex. 5.

[21] USCIS gave a nod to one aspect of applicants' reliance interests when, in March 2022, it considered refunding millions of dollars in fees paid by Afghans who believed that HP could provide them with a meaningful pathway to safety. Appx. USCIS-00000601. But the agency neither offered refunds nor provided applicants with the chance to obtain the protection they had sought.

with Disabilities v. Civil Defense Agency & Off. of Emergency Preparedness, 649 F.2d 71, 75 (1st Cir. 1981). Here, with a high likelihood of success demonstrated—even on the incomplete record produced so far—a lesser showing of harm would suffice. But the risk of irreparable harm is equally strong in this case. For purposes of an injunction, "[d]eath is an 'irremediable and unfathomable' harm . . . , and bodily injury is not far behind." *Garcia v. Google, Inc.*, 766 F.3d 929, 939 (9th Cir. 2014) (quoting *Ford v. Wainwright*, 477 U.S. 399, 411 (1986)).[22]

With this filing, members of the Noe and Boe families submit declarations demonstrating the ongoing irreparable harm that they suffer each day—and have suffered for the past two years since they first went into hiding from the Taliban. Noe Decl. ¶¶ 3-42; Boe Decl. ¶¶ 3-17. Each of their families has already been targeted for retaliation, and faced the Taliban's ruthlessness toward its internal enemies. *See* Noe Decl. ¶¶ 7-8; Boe Decl. ¶ 3, 9. And each of these Plaintiffs has been left to live day-to-day in fear of exposure and reprisal—only a random sighting or targeted betrayal keeps them from detention, torture, and/or execution.

The U.S. government has repeatedly acknowledged these dangers. Just days ago, DHS recognized human rights in Afghanistan are a "worsening crisis"—including due to "summary killings, disappearances, information blackouts, and physical abuse," and "human rights abuses against women and girls, members of minority groups, and perceived opponents of the Taliban"—and that the country faces "one of the world's worst humanitarian disasters."[23] The State

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[22] It likewise "goes without saying that persecution and torture are irreparable harm . . . ." *Carmona-Gonzalez v. Garland*, 2023 U.S. App. LEXIS 11826, at *6 (6th Cir. May 12, 2023). So is the risk of indefinite detention by a foreign government, *Omar v. Harvey*, 2006 U.S. Dist. LEXIS 7228, at *2 (D.D.C. Feb. 3, 2006), especially by a government that is unlikely to provide detainees with access to "redress to assess its legality." *Abdah v. Bush,* 2005 U.S. Dist. LEXIS 4144, at *14 (D.D.C. Mar. 12, 2005).

[23] DHS, *Extension and Redesignation of Afghanistan for Temporary Protected Status*, 88 Fed. Reg. 65728, 65731-32 (Sept. 25, 2023); *see also* DHS, Employment Authorization for Afghan F-

Department's most recent country report on human rights practices in Afghanistan describes "arbitrary and unlawful killings" by the Taliban and its allies, "many as reprisals against officials associated with the pre-August 2021 government."[24] Between August 2021 and June 2022, the Human Rights Service of the United Nations Assistance Mission in Afghanistan ("UNAMA") was able to record "160 targeted killings, 178 arbitrary arrests and detentions, 23 instances of incommunicado detentions, and 56 instances of torture and mistreatment of former security and pre-August 2021 government officials. . . ." Country Report at 3-4. Between June and December 2022, UNAMA documented at least 55 additional targeted killings, 102 arbitrary arrests and detentions, and 20 cases of torture and mistreatment. *Id.* at 4.

Had USCIS adjudicated the Noes' and Boes' HP applications under the standards it employed in August 2021, its officers would likely have agreed that they were facing the kind of "crucial life and death situation" for which HP was an appropriate recourse. *See* Appx. USCIS-00000973 at 974. Instead, USCIS's decision to pull the plug on granting humanitarian parole applications filed by Afghans seeking safety from the Taliban—first by pausing adjudications, and then by implementing a policy under which the Noes and Boes had no chance of approval—changed the course of these families lives. That policy change forced them to spend the past two years simply trying to stay alive. Without preliminary injunctive relief providing these families with the opportunity for a fair adjudication of their cases under a lawful agency policy, they will

1 Nonimmigrant Students Experiencing Severe Economic Hardship as a Direct Result of the Current Armed Conflict and Current Humanitarian Crisis in Afghanistan, 88 Fed. Reg. 65721 (Sept. 25, 2023).

[24] U.S. Dep't of State, 2022 Country Reports on Human Rights Practices: Afghanistan ("Country Report") at 3, https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/afghanistan/.

continue to suffer under conditions that severely jeopardize their well-being and put them at continual risk of detention and death.

III. The balance of harms and public interest favor a preliminary injunction.

The remaining two preliminary injunction factors—"the balance of relative hardships" and "the effect, if any, that either a preliminary injunction or the absence of one will have on the public interest," *Me. Forest Prods. Council*, 51 F.4th at 5 (quoting *Ryan v. ICE*, 974 F.3d 9, 18 (1st Cir. 2020))—strongly favor the relief sought in this case. These factors "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009).

The relief sought here would give two families a fair chance, under a lawful adjudication standard, to receive protection that could very well save their lives, while doing no harm to the interests of the U.S. government. The adjudication of a handful of applications under a previous framework is not unduly burdensome to an agency that processes HP applications regularly. And the Government's interest in the enforcement of the immigration laws will not be adversely affected: USCIS does not have a valid stake in the enforcement of a policy that violates federal law. *J.L. v. Cissna*, 341 F. Supp. 3d 1048, 1070 (N.D. Cal. 2018). Nor could it.

There is likewise "no public interest in the perpetuation of unlawful agency action." *League of Women Voters of the U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016). "To the contrary, there is a substantial public interest 'in having governmental agencies abide by the federal laws that govern their existence and operations.'" *Id.* (quoting *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994)). And there is also a significant public interest in ensuring that the families of those who risked their lives in service to the United States, and other U.S. allies, have fair access to procedures by which they can seek safety, including the HP process. The moving Plaintiffs are therefore entitled to preliminary injunctive relief setting aside the November 2021 policy changes, with respect to them, during the pendency of this lawsuit, and instructing the Defendants to reprocess

their HP applications in accordance with pre-existing agency policy in effect on August 31, 2021, before USCIS arbitrarily and capriciously decided to stop granting HP applications from Afghanistan.

CONCLUSION

Plaintiffs respectfully request that this Court grant preliminary injunctive relief requiring USCIS to re-adjudicate their HP cases under the standard in effect on August 31, 2021. Plaintiffs also respectfully request that after any grant of preliminary injunction relief, they receive an opportunity to supplement their applications for humanitarian parole, and after such supplement, Defendants be required to adjudicate their applications within 14 days.

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Respectfully submitted,

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