IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

RASUL ROE, *et al.*,

Plaintiffs,

v.

ALEJANDRO MAYORKAS, *et al.*,

Defendants.

Case No. 1:22-cv-10808

HON. J. ALLISON D. BURROUGHS

Leave to File Granted On:
October 17, 2023.

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

JOSHUA S. LEVY
Acting United States Attorney

RAYFORD FARQUHAR
Deputy Civil Chief

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
Civil Division

WILLIAM C. PEACHEY
Director
Office of Immigration Litigation
District Court Section

ALEXANDER J. HALASKA
Senior Litigation Counsel

SEAN L. KING
Trial Attorney

/s/ David J. Byerley
DAVID J. BYERLEY
Trial Attorney (DC Bar #1618599)
United States Department of Justice
Civil Division
Office of Immigration Litigation
District Court Section
P.O. Box 868, Benjamin Franklin Station
Washington, D.C. 20044
202-532-4523 | David.Byerley@usdoj.gov

TABLE OF CONTENTS

INTRODUCTION 1
LEGAL BACKGROUND 2
RELEVANT FACTS OF RECORD 3
I. Factual Background 3
II. August 2021: Evacuation from Afghanistan & USCIS's Response 5
III. September-October 2021: Adjustment Post-Evacuation & Deluge in Applications. 6
IV. November-December 2021: More Generous Afghanistan Guidance is Issued. 7
V. January-March 2022: Denials of Afghan Beneficiaries Are Paused Pending Development of Even More Afghan-Friendly Guidance. 10
VI. April 2022: USCIS Relaxes Evidentiary Burdens, Resumes Issuance of Denials 10
COMPLAINT ALLEGATIONS AND PROCEDURAL HISTORY 11
ARGUMENT 15
I. Plaintiffs Are Unlikely to Succeed on the Merits. 16
II. Plaintiffs Cannot Establish Irreparable Harm If The Injunction Is Withheld 21
III. The Balance Of Harms And Public Interest Weigh In Defendants' Favor 24
CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Am. Bd. of Psychiatry & Neurology, Inc. v. Johnson-Powell,
129 F.3d 1 (1st Cir. 1997) 22
Amanullah v. Nelson,
811 F.2d 1 (1st Cir. 1987) 16
ACLU v. NSA,
493 F.3d 644 (6th Cir. 2007).................... 17, 24
Biden v. Texas,
142 S. Ct. 2528 (2022) 17
Braintree Labs., Inc. v. Citigroup Global Mkts. Inc.,
622 F.3d 36 (1st Cir. 2010) 15
Charlesbank Equity Fund II v. Blinds To Go, Inc.,
370 F.3d 151 (1st Cir. 2004) 21, 23
Conn. Bd. of Pardons v. Dumschat,
452 U.S. 458 (1981) 18
Coquico, Inc. v. Rodriguez-Miranda,
562 F.3d 62 (1st Cir. 2009) 15
Everett J. Prescott, Inc. v. Ross,
383 F. Supp. 2d 180 (D. Me. 2005).................... 24
Franklin LLC v. Bos. Water & Sewer Comm'n,
549 F. Supp. 3d 194 (D. Mass. 2021) 15
Garcia-Mir v. Meese,
788 F.2d 1446 (11th Cir. 1986).................... 18
Kleindienst v. Mandel,
408 U.S. 753 (1972) 16, 17
Marblegate Asset Mgmt. v. Educ. Mgmt. Corp.,
75 F. Supp. 3d 592 (S.D.N.Y. 2014).................... 22, 23
Munaf v. Geren,
553 U.S. 674 (2008) 15
Ngure v. Ashcroft,
367 F.3d 975 (8th Cir. 2004).................... 20, 21
Nken v. Holder,
556 U.S. 418 (2009) 15
Ross–Simons of Warwick v. Baccarat, Inc.,
102 F.3d 12 (1st Cir. 1996) 22
S.A. v. Trump,
363 F. Supp. 3d 1048 (N.D. Cal. 2018) 18
United States v. Texas,
143 S. Ct. 1964 (2023) 24
Winter v. NRDC, Inc.,
555 U.S. 7 (2008) 15

Statutes

5 U.S.C. § 701(a)(1) 11
8 U.S.C. § 1182(d)(5)(A) .... passim
8 U.S.C. § 1182(d)(5)(B) 23
8 U.S.C. § 1252(a)(2)(B)(ii) 11

Regulations

8 C.F.R. § 212.5 2

INTRODUCTION

In their Motion for a Preliminary Injunction (ECF Nos. 101-102), Plaintiffs seek the ultimate relief in this case for the Court to: (1) set aside the purported U.S. Citizenship and Immigration Services (USCIS) policy of denying all parole applications for Afghan beneficiaries in Afghanistan; (2) revert USCIS back to a purported policy or practice of approving most, if not all, Afghan parole applications; and (3) ordering USCIS to re-open and re-adjudicate the Noes' and Boes' Form I-131 parole applications.

This Court should deny the Motion in its entirety. Plaintiffs' claims lack support in the Certified Administrative Record (CAR), they cannot establish irreparable harm if the injunction is withheld, and the public interest weighs against the injunction. The CAR establishes that in August 2021, USCIS's Humanitarian Affairs Branch (HAB)[1]—the sub-office tasked with adjudicating parole requests submitted via Form I-131, Application for Travel Document— responded to a rapidly evolving U.S. withdrawal in Afghanistan by waiving certain procedural steps and exercising its discretion to give certain factors discussed in the HAB Procedures Manual and Parole Training Modules more or less weight. This included "heavily" weighting the availability of U.S. evacuation flights and the significant public benefit of helping to facilitate the ongoing U.S. evacuation from Afghanistan as a factors for favorably exercising its discretionary parole authority. As a result of HAB's effort to "just get[] approvals out in hopes of the beneficiaries getting on an evacuation flight," HAB approved 72 out of 76 Form I-131 humanitarian parole applications between August 14 and 30, 2021. Once the U.S. withdrawal ended, and the U.S. Embassy in Kabul suspended its operations, USCIS adapted to the evolving situation, including by issuing Afghan-specific guidance for analyzing the exponential influx of parole applications.

---

[1] HAB has since been renamed Parole Operations due to an internal restructuring. References to "HAB" have been retained throughout based on the name at the relevant time periods discussed herein.

Plaintiffs attempt to recharacterize USCIS's August 2021 efforts to address a limited number of applications under extraordinary circumstances as a binding "policy" by which the Government exercised, and must continue to exercise, its discretionary parole authority in perpetuity. However, Plaintiffs' claims are without legal or factual support in the record, and they cannot establish the necessary factors for a mandatory injunction. Ultimately, the Noes' and Boes' parole applications were not adjudicated under a blanket denial policy. Rather, even under the Afghan-specific guidance, they did not demonstrate parole was warranted. Therefore, the Court should deny Plaintiffs' motion.

LEGAL BACKGROUND

Plaintiffs challenge the policies, procedures, delays, and outcomes related to "humanitarian parole," which is a colloquial term for certain uses the parole authority vested with the Secretary of Homeland Security under 8 U.S.C. § 1182(d)(5)(A).[2] This section provides that "[t]he Attorney General may . . . in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States . . . ." 8 U.S.C. § 1182(d)(5)(A); *see also* 8 C.F.R. § 212.5 (implementing regulation). Parole allows a noncitizen to enter and remain in the United States for a set period but does not confer immigration status. 8 U.S.C. § 1182(d)(5)(A). No rule defines § 1182(d)(5)(A)'s reference to "urgent humanitarian reasons" or "significant public benefit." *See id*. The Department of Homeland Security and its components, including USCIS, have virtually plenary discretion in determining whether a parole application meets those criteria.

[2] Although the statute refers to the Attorney General, in 2002, Congress transferred enforcement of immigration laws to the Secretary of Homeland Security (Secretary) under the Homeland Security Act of 2002, Pub. L. No. 107-296, § 402, 116 Stat. 2135, 2178 (2002).

RELEVANT FACTS OF RECORD

I. Factual Background

USCIS's HAB is a small office that adjudicates certain types of requests for parole submitted via the Form I-131, Application for Travel Document, on behalf of an individual outside the United States. HAB considers each request and any supporting evidence on a "case-by-case" basis to determine if parole is statutorily available and appropriate in the totality of the circumstances. USCIS-369, 400.[3] USCIS allows anyone to apply for parole into the United States on behalf of themselves or another individual by filing a Form I-131. USCIS-56.

Across the board, HAB's procedure manuals and adjudication guidance clearly state that parole is an "extraordinary measure used sparingly." USCIS-54, 357. The decision-making process is generally the same in every case, and HAB adjudicators apply a two-step analysis: first, they analyze factors relevant to urgent humanitarian reasons or significant public benefit; and second, if urgent humanitarian reasons or significant public benefit are established, adjudicators analyze the factors relevant to whether the applicant warrants a favorable exercise of discretion. USCIS-369. Following these analyses, HAB determines whether to approve or deny the parole request. *Id.*

For protection-based parole requests (the sub-category of requests at issue),[4] HAB's guidance dictates that "parole is generally not used for protection reasons," because refugee processing is the ordinary channel for such requests, and because HAB, as a U.S.-based entity, has no

---

[3] Defendants cite the corrected programmatic CAR and individual CARs previously filed with the Court under seal and served on Plaintiffs. *See* ECF Nos. 79, 85.

[4] Parole requests are categorized according to the primary reason for requesting parole. There are six categories: Medical Reasons; Family Reasons; Protection; Adoption; Participation in Legal Proceedings; and Requests to Return to the United States After Departing without Travel Documentation, with the first three and the last having sub-categories. USCIS-354. Protection-based parole requests are categorized as those that involve "fact patterns of individuals outside the United States, who may genuinely be at risk of harm, even death, but for whom there may be no legal, timely, or accessible pathway to come to the United States." These types of requests are typically predicated on natural disasters, civil conflict, or targeted harm.

operational ability to conduct the interviews to assess an applicant's credibility. USCIS-400. Therefore, where protection is the only basis for a parole request, HAB authorizes parole "only in [] limited circumstances." *Id*. Those circumstances include applications where there is credible, third-party evidence that corroborates the beneficiary's claim that he is individually at risk of imminent and serious harm. USCIS-407-08. In the absence of such evidence, and as a matter of discretion, HAB would generally and historically decline to exercise parole discretion favorably except in extreme cases. USCIS-408. In sum, for protection-based parole requests, "[p]arole is only rarely granted in such circumstances, even if urgent humanitarian reasons have been established." USCIS-561.

For the rare historical cases when USCIS granted the Form I-131, HAB would issue a decision letter to the petitioner and a parole authorization memorandum to the U.S. Embassy or Consulate closest to the beneficiary's current location in their country of residence, and the applicant would be required to complete and submit a visa application to the U.S. Department of State (State), and appear for an appointment with the consular section to verify identity and collect biometrics for additional security vetting. USCIS-64, 368. If no new or derogatory information was identified during vetting, the consulate would issue a boarding foil on behalf of USCIS within 30 days of receipt of the parole authorization memorandum. *Id.* This boarding foil would allow the beneficiary to travel to the United States within 30 days of issuance and to present themselves to U.S. Customs and Border Protection (CBP) for parole into the United States. *Id.*[5]

Prior to Fall 2021, the unavailability of consular services in the beneficiary's country of residence, or the inability of the beneficiary to complete processing, was a discretionary factor that heavily militated towards denial of the application, and USCIS generally would not grant parole

[5] CBP retains its independent discretion to refuse parole at a port-of-entry and makes the ultimate parole decision in all cases. USCIS-64.

in such cases. USCIS-571. Analyzing and vetting applications takes considerable resources, and where there was little likelihood that the beneficiary would ever complete consular processing, resources could be more effectively spent on those able to complete the process. USCIS-605.

Consistent with the above, between Fiscal Years 2015 and 2020, HAB received a yearly average of 1,839 Forms I-131 seeking parole. USCIS-732. Historically, HAB granted approximately only 13% of all protection-based parole requests. USCIS-621 ("While the USCIS approval rate for parole varies year over year, over the past six years, USCIS approved approximately 36% of all initial requests for parole. However, the approval rate based on purely protection needs (refugee-like cases) has been approximately 13% [compared to approval of approximately 47% of requests based on medical needs and 37% of requests based on family unity.]").

II. August 2021: Evacuation from Afghanistan & USCIS's Response

In August 2021, the situation in Afghanistan degraded quickly. Faced with a growing number of Forms I-131 from individual filers and State referrals, HAB "drop[ped] everything" and worked overtime and weekends to address as many I-131s as they could while the U.S. evacuation was ongoing. USCIS-731, 973-74. HAB expedited vetting requests, coordinated with State to locate beneficiaries, and deferred full vetting until the beneficiary had been manifested on a U.S. evacuation flight. USCIS-718, 919. Full vetting, USCIS reasoned, could occur once beneficiaries were at a "lily pad" outside of Afghanistan. USCIS-919. As a result of HAB's efforts, HAB approved all 31 of State's parole referrals and 72 Form I-131s for parole, while denying only 4 Form I-131s. USCIS-731

In aid of the U.S. evacuation, HAB approved applications at an exceptionally high rate. USCIS-731. Multiple internal documents justify the aberrant rate as being "in hopes of the beneficiaries getting on an evacuation flight." *Id.* As HAB Chief John "Wally" Bird explained, HAB was able to issue so many approvals during the evacuation by "[w]aiving the requirement that

parole not circumvent normal immigration processing"; "[w]aiving the need for Afghan passport information when passports were not available, and emailing petitioners and counsel directly to ascertain whether passports were available, in lieu of the traditional RFE process du[e] to time urgency"; "[w]eighing SPBP [significant public benefit] evacuation issues against traditional protection evidentiary requirements, not requiring [credible] third party evidence be submitted to determine whether protection, and not requiring that beneficiaries avail themselves of refugee protection where available." USCIS-718. The evacuation ended on August 31, 2021 and the U.S. Embassy in Kabul suspended operations. U.S. Dep't of State (https://af.usembassy.gov/embassy/).

III. September-October 2021: Adjustment Post-Evacuation & Deluge in Applications.

After the evacuation ended, HAB began receiving thousands of applications for Afghans from all over the world, many of which were "skeletal filings . . . with only an attestation from the petitioner indicating the beneficiary will be killed by the Taliban," and without any "requisite evidence or other compelling factors generally required for approval." USCIS-614. Additionally, many were filed in bulk, as interest groups announced that they would file "700 plus HP cases" at a time for "folks . . . coming through Pakistan to a safe country like South Africa or Brazil." USCIS-718, 964-65. HAB was "not designed or resourced for such largescale processing." USCIS-601.

In addition to the deluge of applications, HAB also faced new realities: deferred vetting was no longer possible without evacuation flights to lily pads; and because of the suspension of operations at U.S. Embassy Kabul, there were no longer in-country consular services to issue boarding foils, nor could in-country beneficiaries avail themselves of regular immigration or visa processing. USCIS-711, 718. Thus, on September 3, 2021, HAB asked USCIS's International and Refugee Affairs Division (IRAD) to develop Afghanistan-specific guidance to assist HAB in addressing the mounting number of applications. USCIS-718. Simultaneously, IRAD leadership

recognized that a "significant number" of applications were "general pleas for help to get out of Afghanistan," and therefore would be denied under the existing, generally applicable guidance. USCIS-731. Consequently, on September 7, 2021, IRAD directed HAB to pause all but the most urgent cases pending the development of additional guidance. USCIS-713-14. During this pause, USCIS also called for volunteers to be detailed to HAB to assist with the caseload. USCIS-956, 959. As of October 26, 2021, HAB received most of the detailees it asked for. USCIS-679.

IV. November-December 2021: More Generous Afghanistan Guidance is Issued.

On November 5, 2021, USCIS issued new guidance called *Parole Requests for Afghan Nationals: Interim Policies and Procedures* (Nov. 2021), and fully lifted its pause on adjudications. USCIS-31. The November 2021 guidance was designed to be more generous to Afghan beneficiaries than the baseline guidance in two notable ways. First, the November 2021 guidance identified "strong positive factors" that Afghans (and Afghans alone) could demonstrate. The guidance explained that membership in one of the following groups "should be considered a strong positive factor when assessing urgent humanitarian reasons, significant public benefit, *and* the exercise of discretion" (USCIS-32 (emphasis added)):

- Immediate relatives of a U.S. Citizen (spouse, unmarried children under 21, and parents);
- Immediate relatives of a U.S. Lawful Permanent Resident [LPR] (spouse and unmarried children under 21);
- Locally Employed Staff (LES) of U.S. Embassy Kabul and their immediate family (spouse and unmarried children under 21);
- Special Immigrant Visa (SIV) applicants who have received Chief of Mission (COM) approval and immediate relatives (spouse and unmarried children under 21) included on their case;
- Immediate relatives of Afghan nationals previously relocated to the United States through OAW [Operation Allies Welcome] (spouse, unmarried children under 21, and, in the case of unaccompanied minors relocated as part of OAW,

their primary caregiver, including but not limited to a parent or legal guardian, and the spouse and dependent children under 21 of the primary caregiver);

- Individuals referred to the U.S. Refugee Admissions Program (USRAP) through a P1 embassy referral or P2 group designation referral and in imminent risk of refoulement or serious, targeted harm in the country outside Afghanistan where they are located.

Id. For most parole applicants, merely being an immediate relative of a U.S. citizen or LPR, for example, was not significantly weighted in the determination of whether an applicant for protection-based parole demonstrated "urgent humanitarian reasons" or "significant public benefit," much less as a "strong positive factor" towards those threshold eligibility showings. *Id*. Yet for Afghans, these were considered "strong positive factors." *Compare* USCIS-33-34 *with* USCIS-372 (listing family ties to U.S. citizens as generalized "factors" that could be considered either positively or negatively in the discretionary analysis, after threshold eligibility had been shown).[6]

Second, the November 2021 guidance departed from USCIS's "historic practice" of declining to grant parole to beneficiaries who lacked access to consular services in the country where they were located. USCIS-571, 604-05. As USCIS explained:

> Until the recent situation in Afghanistan, USCIS generally denied all requests for parole for beneficiaries who were in countries with no functioning U.S. embassy or consulate. The rationale is that a conditional approval of parole would not enable the beneficiary to leave the country and enter another country for full processing, and USCIS could not predict how long (months or years) it might take the beneficiary to get to a third country, if at all, and whether the beneficiary would still be eligible for parole at that time.

USCIS-604. However, "[t]his policy was changed in response to the Afghan crisis . . ." *Id*. "Rather than denying all requests for beneficiaries in Afghanistan," USCIS decided it will

[6] Family relationships are not always a "positive factor" under the baseline guidance. For non-Afghans, family ties could be "[a] strong negative discretionary factor when the beneficiary intends to reside permanently in the U.S." and there is no "foreseeable way for the beneficiary to regularize status." USCIS-50. But under the Afghan-specific guidance, family ties are considered positive factors in the threshold eligibility and/or discretionary determinations for Afghans. USCIS-32-36.

"clos[e]/suspend[] the request for those preliminarily found eligible and will continue to process the request only if notified that the beneficiary is in a third country." *Id.*

This break with historical practice meant that Afghans in Afghanistan who were "initially found eligible" for parole—but who would nevertheless, under past practices, have their application denied due to the lack of in-country U.S. consular services—would now receive a "Parole Notice (Suspension of Processing)" administratively suspending or closing the application until the beneficiary informs USCIS that they are able to report to a U.S. embassy or consulate. USCIS-33, 604. The requirement to submit threshold eligibility and other discretionary factors remained unchanged. *See* USCIS-31. As the November 2021 guidance explained:

> It may be difficult to assess eligibility based purely on protection needs while an individual is still in Afghanistan, as the adjudicator will not know when or how the beneficiary will leave Afghanistan, where the beneficiary will be once outside of Afghanistan, or the protection that may be available to the beneficiary in that location. Therefore, for Afghan nationals in Afghanistan, 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. Such parole beneficiaries should be given denial notices…. USCIS will consider reopening the denied parole application (for no fee) within a year from the denial and may reconsider their request if sufficient additional new evidence is provided.

USCIS-33. The observation in the November 2021 Afghan guidance that "parole requests based on protection needs, without other factors . . . will generally be denied" is the same guidance that applies to all protection-based parole requests under the HAB Procedures Manual and Parole Training Modules, which state that "[p]arole is an extraordinary measure used sparingly" (USCIS-54, 149-50, 357), and "where protection is the only basis for a parole request, [adjudicators] generally may authorize parole only in [] limited circumstances[.]" USCIS-54, 357, 400.

In December 2021, USCIS revised the November 2021 guidance. The December 2021 Afghan guidance was largely similar to the November 2021 Afghan guidance, except that it included updated medical requirements based on CDC guidance and it addressed certain unique

circumstances not addressed in prior iteration. USCIS-19, 481, 505, 759-60. All cases were adjudicated on a case-by-case basis, and USCIS has always been clear that completion of the Form I-131 parole process at an embassy or consulate remains essential. USCIS-481, 755-56, 759-60.

V. January-March 2022: Denials of Afghan Beneficiaries Are Paused Pending Development of Even More Afghan-Friendly Guidance.

As of February 21, 2022, HAB had received a total of 41,524 Forms I-131 seeking parole. USCIS-609. Of Afghan parole requests adjudicated by February 2022, HAB denied 88%, conditionally approved 7% and closed/suspended 5% for a potential approval rate of 12%. USCIS- 614. This rate was consistent with historical approval rates for all protection-based requests (at 13%), as "[m]ost Afghan nationals are submitting parole requests based on protection needs due to risk of harm from the Taliban, without the requisite evidence or other compelling factors generally required for approval. USCIS has seen a large number of skeletal filings submitted on behalf of Afghan nationals or parole requests with only an attestation from the petitioner indicating the beneficiary will be killed by the Taliban." *Id*. Nonetheless, Secretary Mayorkas directed IRAD "to develop a way to better address protection needs of vulnerable Afghans who likely would qualify for protection if we could put them through the USRAP, but for whom there currently is no access to the USRAP . . . [and] to expand the protection space where we can (e.g., more people get protection)." USCIS-631. Thus, HAB paused issuing denials of protection-based parole requests on February 23, 2022. USCIS-475.

VI. April 2022: USCIS Relaxes Evidentiary Burdens, Resumes Issuance of Denials

In April 2022, USCIS again revised its training and Afghan-specific guidance. For example, in cases of targeted harm, USCIS expanded beyond credible third-party evidence of individualized harm, and now also considers evidence of membership in a targeted group where there have been systematic or pervasive efforts to impose serious harm against the group or members of the

group. USCIS-603; *Compare* USCIS-408-09 *with* USCIS-286-87. USCIS also updated the Afghan-specific guidance, explaining in further detail that:

> If an adjudicator finds that a beneficiary residing in a location without consular processing appears otherwise eligible for parole, the adjudicator may issue an Afghanistan Notice of Continued Parole Processing, which states that the beneficiary must arrange their own travel to a location with a U.S. embassy or consulate to complete processing of their parole request.

USCIS-6-7. In tandem with the guidance, USCIS replaced the "Parole Notice (Suspension of Processing)" with the "Notice of Continued Parole Processing" for those who "initially appear eligible" to clarify that USCIS is unable to assist the beneficiary while they remain in a country without consular services. *Compare* USCIS-12 *with* USCIS-28.

COMPLAINT ALLEGATIONS AND PROCEDURAL HISTORY

Eight months after the U.S. withdrawal from Afghanistan, on May 25, 2022, Plaintiffs—a group of U.S. persons ("U.S. Plaintiffs") and Afghans ("Afghan Plaintiffs")—filed a six-count Complaint alleging USCIS implemented a secret categorical denial policy for Afghan parole beneficiaries amidst the largest airlift in human history. *See* Compl.

Relevant here, on April 28, 2023, the Court narrowed the scope of the claims in this suit based on Defendants' motion to dismiss, which it granted in part and denied in part. ECF Nos. 69, 73. After concluding that at least one of the Plaintiffs had standing to pursue their claims, the Court first held that 8 U.S.C. § 1252(a)(2)(B)(ii) and 5 U.S.C. § 701(a)(1), (2) did not preclude judicial review of agency action taken under the parole statute, 8 U.S.C. § 1182(d)(5)(A). ECF No. 73 at 17 ("Plaintiffs have adequately pled policy claims reviewable under the APA with regard to Defendants' adjudication of in-country Afghan applications for humanitarian parole following September 2021 as well as with regard to the unreasonable delay in adjudicating such applications."). In doing so, however, the Court stated that it "will continue to evaluate its own jurisdiction as the

case proceeds," noting that Defendants' challenge to the accuracy of Plaintiffs' allegations was "'inextricably intertwined' with the merits of the case" as a premature factual challenge to jurisdiction. *Id.* at 19, 20 n.5. Likewise, in analyzing under Rule 12(b)(6), the Court held that Defendants' challenges to Plaintiffs' factual assertions for this alleged policy was "not amenable to review without the administrative record." *Id.* at 29-30.

The Court, however, dismissed Plaintiffs' allegation that the agency would grant parole to Afghan beneficiaries located outside Afghanistan only in "extreme cases." *Id.* at 30. Plaintiffs had not alleged facts that would differentiate this purported standard from the "urgent humanitarian reasons or significant public benefit" requirement in § 1182(d)(5)(A). *Id.* The Court also dismissed Plaintiffs' challenge to USCIS's alleged non-issuance of RFEs or NOIDs, and use of "boilerplate" denial letters. *Id.* at 31-32. The Court further dismissed Plaintiffs' notice-and-comment rulemaking claim, concluding that the foreign affairs exception applied because the claim could not be "divorced from [the] broader context" of the withdrawal of U.S. troops and suspension of U.S. embassy operations in Afghanistan. *Id.* at 32-34.

After the motion to dismiss decision, the remaining claims allege that: USCIS violated the APA by allegedly "implement[ing] new standards used to adjudicate requests for humanitarian parole on behalf of Afghans" to arbitrarily and capriciously "mak[e] it all but impossible for Afghan beneficiaries" to be granted parole under the Immigration and Nationality Act (INA) 8 U.S.C. § 1182(d)(5)(A) (Count I), and USCIS is unreasonably delaying decisions, though all Plaintiffs have received an action on their Form I-131s (Counts IV-V).

Former Plaintiff Rasul Roe was a U.S. citizen who filed Form I-131s seeking parole for his immediate relatives. Compl. at 3, 16-21. The Roes were granted parole, following USCIS's issuance of notices of continued parole processing and completion of the process at a consular office.

ECF #64.[7] Malik Moe is a U.S. citizen who petitioned USCIS for humanitarian parole for his family members on September 24, 2021. Compl. at 3. On May 16, 2023, the Moes were issued a "Notice of Continued Parole Processing," meaning that they "initially appear eligible" for parole, but that HAB cannot complete processing until the beneficiaries arrive in a country with consular services. MALIA MOE-136; MARWA MOE-141; MEDINA MOE-127. Diana Doe is a U.S. citizen who filed Form I-131s on August 23, 2021 for Afghan "family friends" and whose applications were denied on December 1, 2021. Compl. at 4, 27-31. In review of the Does' applications, HAB found that the evidence presented did not demonstrate a significant public benefit in or urgent humanitarian reason for paroling the Does into the United States. ABDUL DOE-612; AAZAR DOE-615; AFSHANEH DOE-652; ALI DOE-643; ALIMA DOE-635; AMIR DOE-610; AFSOON DOE-606.

The Noe family are Afghan nationals who have no connection to the United Sates, who do not allege they assisted U.S. or coalition forces at any point, who self-petitioned for parole on September 3, 2021. Compl. at 3, 22-25. After reviewing their applications, HAB determined that the Noes' applications did not demonstrate there would be urgent humanitarian reasons for, or a significant public benefit by, their travel to the United States. NAHID NOE-23; NABI NOE-22-23; NASER NOE-22-23; NAJI NOE-23. Thus, the Noes' Forms I-131 were denied on February 14, 2022. NABI NOE-114; NAHID NOE-110; NAJI NOE-123; NASER NOE-118.

Basel Boe is a U.S. lawful permanent resident who petitioned for his Afghan family members on September 10, 2021. *Id.* at 25. In reviewing their applications, HAB determined that the applications for Badi Boe and Bahar Boe did not demonstrate an urgent humanitarian reason, but Badi and Bahar Boe's applications did demonstrate a "significant public benefit." BADI BOE-

[7] The Roe family voluntarily dismissed their claims on January 2, 2023. ECF No. 64.

028; BAHAR BOE-028. However, HAB ultimately did not find that an exercise of parole discretion was warranted under the circumstances. *See id*. As to Baharak and Barakat Boe, HAB found that their applications demonstrated neither a significant public benefit nor an urgent humanitarian reason. BAHARAK BOE-028; BARAKAT BOE-028. Accordingly, on May 27, 2022, Basel Boe's Forms I-131 were denied. BADI BOE-185; BAHAR BOE-172; BAHARAK BOE-169; BARAKAT BOE-158.

Baddar Boe is a U.S. citizen who petitioned for his Afghan family members on September 10, 2021. On July 7, 2022, Baddar Boe's Forms I-131 were denied, as HAB found the applications did not demonstrate there would be urgent humanitarian reasons for, or a significant public benefit by, their travel to the United States. BAKTASH BOE-124; BASIM BOE-144; BASIR BOE-121; BENESH BOE-142; BURHAN BOE-127. *Id.* at 4, 25-27.

On October 3, 2023, the Boe and Noe family Plaintiffs filed the instant Motion for a Preliminary Injunction, asking the Court to:

> (1) set[] aside the new policy for adjudicating humanitarian parole applications of Afghan nationals, implemented in November 2021, and restore[] the last uncontested status which preceded the pending controversy, *i.e.*, the adjudication standards in effect on August 31, 2021, and (2) order[] the agency to adjudicate the parole applications of the Moving Plaintiffs under the reinstated status quo.

ECF No. 101 at 1. This is effectively the same relief Plaintiffs seek following final judgment. *Cf.* Compl. at 36-37. Plaintiffs argue that USCIS's November 2021 guidance violates the APA because it did not allow for case-by-case exercise of discretion, and that USCIS failed to provide a reasoned explanation for the alleged policy change, and did not consider alternatives or reliance interests. ECF No. 102 at 14-20. Plaintiffs assert that they suffer irreparable harm based on lack of protection, and that the balance of harms and public interest weight in their favor. *Id.* at 21-25.

ARGUMENT

This Court should deny Plaintiffs' Motion in its entirety. "A preliminary injunction is an 'extraordinary and drastic remedy'" that "is never awarded as of right." *Munaf v. Geren,* 553 U.S. 674, 689-90 (2008) (citation omitted). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). The balance of harms and public interest factors "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). The likelihood of success on the merits "normally weighs heaviest in the decisional scales." *22 Franklin LLC v. Bos. Water & Sewer Comm'n,* 549 F. Supp. 3d 194, 197 (D. Mass. 2021) (citing *Coquico, Inc. v. Rodriguez-Miranda*, 562 F.3d 62, 66 (1st Cir. 2009)). "The moving party has a greater burden when it seeks a 'mandatory' preliminary injunction that would compel the non-moving party to perform an affirmative act rather than a 'negative' injunction that would prevent the non-moving party from engaging in a certain activity for the period before trial." *Id.* (citing *Braintree Labs., Inc. v. Citigroup Global Mkts. Inc.*, 622 F.3d 36, 40-41 (1st Cir. 2010)). "Because a mandatory preliminary injunction alters rather than preserves the status quo, it normally should be granted only in those circumstances when the exigencies of the situation demand such relief." *Braintree*, 622 F.3d at 41 (citation and internal quotations omitted).[8]

[8] The First Circuit has explained that the "the status quo may be determined by looking at 'the last uncontested status which preceded the pending controversy.'" *Braintree*, 622 F.3d at 41 n.5 (citation omitted). Plaintiffs seem to suggest that the preliminary injunction is not a mandatory injunction because it allegedly "restores the last uncontested status which preceded the pending controversy, *i.e.*, the adjudication standards in effect on August 31, 2021." ECF No. 101. But they seek affirmative action to set aside agency guidance, to reinstate prior guidance, and to compel re-opening and re-adjudication of their applications. Moreover, the status quo in this case is that the agencies have been adjudicating I-131 applications under evolving guidance for the last two years. Defendants contest that USCIS's actions in August 2021 created a challengeable policy. Thus, Plaintiffs cannot lower their heavy bar to obtain a mandatory injunction by suggesting that the Court could apply the traditional preliminary injunction analysis in preserving the "status quo."

I. Plaintiffs Are Unlikely to Succeed on the Merits.

The CAR is unambiguous that USCIS implemented the Afghan-specific guidance to expand parole for Afghans. Plaintiffs nonetheless demand that the Boes' and Noes' previously-denied applications should be reopened and readjudicated without the benefit of that guidance. Plaintiffs further argue that this guidance—which benefitted the Roes and Moes—should be set aside. ECF No. 101. Plaintiffs present seemingly three different arguments to challenge the purported policy: (1) the fact that HAB approved 72 of 76 Form I-131s in the midst of an evacuation between August 14-30, 2021 either reflected or constituted a permanent and binding "policy"—not a wartime exigency—which now requires approval of all of Plaintiffs' Forms I-131; (2) that HAB approved 72 of 76 Form I-131s during the midst of an evacuation reflects a "case-by-case" determination process, and therefore, anything less than a 95% approval rate is proof of an "impermissible" blanket denial policy; and (3) the November 2021 guidance establishes a blanket denial policy because it predicts that applications based on a certain set of facts (i.e., purely protection-based claims for Afghans still located in Afghanistan) will "generally be denied" due to existing guidance and prevailing policy considerations. These arguments are unlikely to succeed.

First, as a threshold matter, "Congress has delegated remarkably broad discretion to executive officials under the [Immigration and Nationality Act], and these grants of statutory authority are particularly sweeping in the context of parole." *Amanullah v. Nelson*, 811 F.2d 1, 6 (1st Cir. 1987). "The scope of the parole authority is close to plenary." *Id.* at 5. Accordingly, the Secretary has discretion to expand or contract the use of parole as the Secretary finds is necessary. *See id.* at 10 (citing *Kleindienst v. Mandel*, 408 U.S. 753, 769-70 (1972) ("In summary, plenary congressional power to make policies and rules for exclusion of aliens has long been firmly established….")). Parole decisions—whether individually or generally—regarding the use of parole would be reviewed under the facially-legitimate and *bona fide* standard because they are decisions

fundamentally about the entry or exclusion of foreign noncitizens. *Id*. ("The [*Mandel*] Court held that when 'the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it. . . .' Other courts of appeal have likewise applied the 'facially legitimate and bona fide reason' benchmark when reviewing exercises of the Attorney General's discretion to grant or deny parole. This is the standard constituted by *Kleindienst* and we follow it." (citations removed)). However, after *Amanullah*, Congress enacted 8 U.S.C. § 1252(a)(2)(B)(ii), which foreclosed judicial review over exercises of parole discretion. Although the Court addressed jurisdiction and *Amanullah* without the benefit of the records, the Court should assess its jurisdiction at this stage of the case, *see* ECF No. 73 at 19, 20 n.5—particularly now that Plaintiffs' motion makes clear that they seek an intrusive reshaping of the Secretary's discretionary parole authority for Afghan applicants.

But even assuming such conduct is reviewable at all, HAB's conduct in approving 72 Forms I-131 within a highly unusual two-week period does not establish the existence of a policy nor does it compel the Government to exercise its discretion to approve all Form I-131 applications for Afghan beneficiaries in Afghanistan in perpetuity going forward, notwithstanding the different factual circumstances presented by such cases pre- and post-evacuation. Courts consistently reject conduct-as-policy challenges as unreviewable under the APA. *ACLU v. NSA*, 493 F.3d 644, 678 (6th Cir. 2007) ("The plaintiffs challenge the NSA's warrantless interception of overseas communications, . . . failure to comply with FISA's warrant requirements, and . . . presumed failure to comply with FISA's minimization procedures. This is conduct, not 'agency action.'"); *see also Biden v. Texas*, 142 S. Ct. 2528, 2545 (2022) (courts cannot "postulat[e] the existence of an agency decision wholly apart from any 'agency statement of general or particular applicability . . . designed to implement' that decision."). Courts have likewise held that prior liberal grants of parole

do not create a legal entitlement in parole in the future. In *S.A. v. Trump*, the Northern District of California squarely confronted the argument that a prior 99% parole rate in the past created an entitlement to parole going forward, and rejected it where "USCIS told participants that applications would be considered for parole 'on a case-by-case basis,' and nothing in the [] Parole Program materials suggested that parole was guaranteed." *S.A. v. Trump*, 363 F. Supp. 3d 1048, 1086 (N.D. Cal. 2018). The concept that a prior grant of a discretionary benefit to some does not legally entitle others to the same discretionary benefit is neither new nor novel. *See Garcia-Mir v. Meese*, 788 F.2d 1446, 1451 (11th Cir. 1986) (prior generous use of parole does not create an entitlement to further parole generosity (citing *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981) ("No matter how frequently a particular form of clemency has been granted, the statistical probabilities standing alone generate no constitutional protections.")). Plaintiffs' first argument is unlikely to succeed for these reasons.

Second, the Court should reject Plaintiffs' argument that the 95% parole approval rate during the hurried U.S. evacuation reflects a case-by-case determination method, but that a high denial rate is irrefutable proof that cases are not decided individually. *See* ECF No. 102 at 2, 9-10. The CAR shows that the approval rate was so high during the evacuation because HAB waived many of its traditional procedural requirements as a matter of policy and weighed the existence of an ongoing evacuation and the significant public benefit of helping to facilitate the evacuation "heavily" in its discretionary analysis, in order to get vulnerable Afghans in Afghanistan on U.S. evacuation flights. USCIS-718, 731. Likewise, the CAR shows that post-evacuation, the approval rate returned to historical norms because "[m]ost Afghan nationals are submitting parole requests based on protection needs due to risk of harm from the Taliban, without the requisite evidence or other compelling factors generally required for approval. USCIS has seen a large number of skeletal

filings submitted on behalf of Afghan nationals or parole requests with only an attestation from the petitioner indicating the beneficiary will be killed by the Taliban." USCIS-614. The individual CARs also show that cases were decided individually, as illustrated by the differing findings within the Basel Boe group. *Compare* BADI BOE-028, BAHAR BOE-028 (finding significant public benefit shown), *with* BAHARAK BOE-028, BARAKAT BOE-028 (finding significant public benefit not shown). The case-by-case methodology is well-established in the agency CAR, and it is reflected in differing outcomes between the Roes, Moes, Boes, Noes, and Does, so Plaintiffs are unlikely to succeed on this argument.

Third, Plaintiffs argue that the November 2021 guidance instituted a blanket denial policy via the following language:

> It may be difficult to assess eligibility based purely on protection needs while an individual is still in Afghanistan, as the adjudicator will not know when or how the beneficiary will leave Afghanistan, where the beneficiary will be once outside of Afghanistan, or the protection that may be available to the beneficiary in that location. Therefore, for Afghan nationals in Afghanistan, 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.

USCIS-33; ECF No. 102 at 7-8 (emphasizing the "generally will be denied" language). But this is entirely divorced of context, and it ignores the surrounding language in the November 2021 guidance and all prior HAB Procedural Manuals and Parole Training Modules. First, Plaintiffs' argument ignores the "without other factors" language in the same quote, above, which clearly contemplates that some cases may be approved. *See Palacios v. Dep't of Homeland Sec.*, 434 F. Supp. 3d 500, 507 (S.D. Tex. 2020) ("The Palacioses assert, without alleging any supporting facts, that the government is across the board denying re-parole under the program. This assertion is not enough to withstand a Rule 12(b)(6) motion." (internal marks and citations omitted)). Second, the November 2021 guidance also states unequivocally, "[a]lthough parole requests may be similar in

nature, each application must be evaluated on its own merits taking into account all the factors unique to the specific parole request and considering the totality of the circumstances." USCIS-31. Third, the underlying The HAB Procedures Manual and Parole Training Modules all clearly state a baseline position that "[p]arole is an extraordinary measure used sparingly" (USCIS-54, 149-50, 357), and the Parole Training Module (2019) is unambiguous that "where protection is the only basis for a parole request, you generally may authorize parole [for protection-based requests] only in [] limited circumstances[.]" USCIS-400. Guidance documents from 2016 are also similarly clear about protection-based parole requests: "[p]arole is only ***rarely granted*** in such circumstances, even if urgent humanitarian reasons have been established. Parole is not intended to be used to provide protection to individuals at risk of harm around the world." USCIS-561 (emphasis modified from original). That purely protection-based cases will generally be denied "absent other factors" was and is true for *all* protection-based parole requests under guidance dating back decades, not just for Afghans. The statement that Form I-131s will "generally be denied" is just a prediction of the reverse side of the coin that only "extreme cases" will be approved, and the Court already determined an alleged "extreme cases" policy would not violate § 1182(d)(5)(A). ECF No. 73 at 30.

Finally, even if HAB had implemented a categorical policy of denying parole to beneficiaries without in-country consular services, Plaintiffs would not be entitled to a preliminary injunction. For one, decisions as to how HAB allocates its scarce resources is a traditionally unreviewable decision. *Ngure v. Ashcroft*, 367 F.3d 975, 983 (8th Cir. 2004) ("[A]n administrative agency's decision about how to allocate its scarce resources to accomplish its complex mission traditionally has been free from judicial supervision."). And on the merits, it would not have been arbitrary and capricious because adjudicating applications consumes significant agency resources,

and beneficiaries in such countries rarely complete consular processing. USCIS-604-05. Of the 260 Parole Notices that were issued for those "initially found eligible" (under the November 2021 guidance) or "appear[ing] initially to be eligible" (under the December 2021) as of March 24, 2022, not a single Form I-131 petitioner for a beneficiary in Afghanistan (or Iran) notified HAB of their arrival in a third country and were prepared to complete consular processing. *Id.* ("To date, USCIS has only received one (1) such notification, out of about 260 [parole notices issued], and it was for a State Department referred beneficiary who was able to get to a third country."). For that reason, USCIS *did* consider, but ultimately did not adopt, a proposal to "suspend all requests without review and issue notice that USCIS will process the request only after notification that the beneficiary is in a country where consular processing is possible." The agency explained:

> Rather than denying such cases, per historic practice, USCIS would suspend all requests without review and issue notice that USCIS will process the request only after notification that the beneficiary is in a country where consular processing is possible. This would send a clear signal to petitioners that the humanitarian parole process is not a feasible pathway out of a country where a request cannot be processed to completion. It would also be a more effective use of USCIS and vetting partner resources - focusing limited resources on actions that will have a more immediate effect for someone with urgent need. While processing parole requests for beneficiaries in Afghanistan or Ukraine may help inform the beneficiary's decision to leave, USCIS likely is expending significant resources on processing cases that will never actually assist the beneficiary.

Id. As such, even if HAB had followed this course or even if HAB reverted back to its historic practice of denying such requests, it is facially legitimate and *bona fide*, but even if arbitrary-and-capricious review applied, such a determination would withstand APA review because allocating resources towards the greatest impact is entirely rational.

II. Plaintiffs Cannot Establish Irreparable Harm If The Injunction Is Withheld

Beyond Plaintiffs' inability to demonstrate the heavy burden of a likelihood success on the merits of their request for a mandatory injunction, Plaintiffs also cannot establish irreparable harm

if the injunction is withheld for similar reasons discussed above—the threatened harm stems from third-party actors and is not aligned with the procedural remedy proposed.

"The burden of demonstrating that a denial of interim relief is likely to cause irreparable harm rests squarely upon the movant." *Charlesbank Equity Fund II v. Blinds To Go, Inc.*, 370 F.3d 151, 162 (1st Cir. 2004) (citation omitted). Irreparable harm is "a substantial injury that is not accurately measurable or adequately compensable by money damages," and must be more than a "tenuous or overly speculative forecast of anticipated harm." *Ross–Simons of Warwick v. Baccarat, Inc.*, 102 F.3d 12, 19 (1st Cir. 1996). The "irreparable harm" inquiry is forward-looking, not backward. *Am. Bd. of Psychiatry & Neurology, Inc. v. Johnson-Powell*, 129 F.3d 1, 4 (1st Cir. 1997) ("The purpose of interlocutory injunctive relief is to preserve the status quo pending final relief and to prevent irreparable injury to the plaintiff – not simply to punish past misdeeds or set an example."). In showing irreparable harm, Plaintiffs must also show that irreparable harm is likely in the *absence* of preliminary relief – in other words, if relief would have no effect, no injunction should be issued. *Id.* And "[w]hen considering irreparable harm, the injunction must address the injury alleged to be irreparable—the Court should not grant the injunction if it would not so prevent that injury." *Marblegate Asset Mgmt. v. Educ. Mgmt. Corp.*, 75 F. Supp. 3d 592, 606-07 (S.D.N.Y. 2014) (citation and internal quotations omitted).

Here, Defendants fully acknowledge the humanitarian crisis following the U.S. withdrawal from Afghanistan and the Taliban takeover, as well as the deterioration of country conditions. As discussed above, however, Plaintiffs' claim for irreparable harm stems directly from non-U.S. government entities such as the Taliban and each Plaintiffs' personal circumstances in and outside Afghanistan. *See* ECF No. 101 at 22-23 (Plaintiffs discussing "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" in fear of being targeted for retaliation as well as deteriorating country conditions). Even Plaintiffs' Notice of Supplemental Facts (ECF No. 109) highlights additional third-party action by the government of Pakistan over which neither the Parties nor the Court have control over. The procedural remedy Plaintiffs request is for the Court to set aside existing USCIS guidance, and to direct the agency to operate under the same evacuation posture as it did in August 2021, leading the agency to re-adjudicate Plaintiffs' applications under circumstances where 95% of 76 I-131 applications were approved. *See* ECF No. 102 at 2, 25; USCIS-718, 731. But even if the Court granted that relief, it still would not prevent Plaintiffs' claimed injuries, as Plaintiffs still must complete processing at a U.S. embassy or consulate outside Afghanistan. USCIS-64, 160, 368. Such an order would not guarantee protection from the Taliban or other entities who may seek to do harm. *See* USCIS-14-16; *Marblegate,* 75 F. Supp. 3d 5 at 606-07. Indeed, "[p]arole is generally not intended to … replace established refugee processing channels," which are designed for assessing protection-based needs, and protection-based requests were approved only in limited circumstances, even before the withdrawal. USCIS-54, 149-50, 233, 357, 400, 408, 561; *see also* 8 U.S.C. § 1182(d)(5)(B) (placing strict limits on use of parole for refugees). Plaintiffs have elevated USCIS's I-131 application process to a protection-based program for vulnerable Afghans, but the Court cannot guarantee safety or protection. As such, Plaintiffs cannot establish irreparable harm in this case if the requested mandatory injunction is withheld.

Further, "delay between the institution of an action and the filing of a motion for preliminary injunction, not attributable to intervening events, detracts from the movant's claim of irreparable harm." *Charlesbank*, 370 F.3d at 163 (citation omitted). Here, Plaintiffs filed suit on May 25, 2022, but did not move for a preliminary injunction until nearly one-and-a-half years later on October 3, 2023. This lengthy delay is sufficient to detract from claims of irreparable harm. Even

assuming Plaintiffs needed administrative records before proceeding with a preliminary injunction motion, Plaintiffs had the records for almost five months before they filed their motion. *See* ECF Nos. 79, 84, 88. Plaintiffs' delays and tactics only undermines their assertions of irreparable harm.

III. The Balance Of Harms And Public Interest Weigh In Defendants' Favor

Finally, the Court should find that the balancing the harms and public interest of a mandatfory injunction weighs in Defendants' favor – or, in any event, does not weigh in Plaintiffs' favor. "The public interest factor requires this Court to inquire whether there are public interests beyond the private interests of the litigants that would be affected by the issuance or denial of injunctive relief." *Everett J. Prescott, Inc. v. Ross,* 383 F. Supp. 2d 180, 193 (D. Me. 2005).

Assuming that Plaintiffs' desired injunction is non-mandatory—that it simply seeks vacatur of the more Afghan-friendly specific guidance issued since November 2021 and nothing more—then it would provide no redress to the extent the denial of discretionary § 1182(d)(5)(A) parole is the complained-of injury. An order setting aside guidelines as to how to exercise agency discretion does nothing to change the fact that the agency retains the same amount of discretion, with or without guidelines. *United States v. Texas*, 143 S. Ct. 1964, 1978 (2023) (Gorsuch, J. concurring) ("A judicial decree rendering the Guidelines a nullity does nothing to change the fact that federal officials possess the same underlying prosecutorial discretion."). Likewise, vacatur of all versions of the Afghan-specific parole guidance would not require USCIS "to change how they exercise that discretion in the Guidelines' absence." *Id*. at 679. It would just mean that HAB continues to exercise discretion as it always has, just without guidance. It is not clear how this benefits Plaintiffs, and it would harm the public interest.

If the Court were to construe Plaintiffs' injunction as written—a mandatory injunction to reinstate prior historical practices and ban consideration of the guidance that was devised to help

Afghans get parole—then the Noes' and Boes' positions would remain constant. *See* ECF No. 102 at 2, 25; USCIS-571, USCIS-605. If the Boes and Noes wish to be re-adjudicated with judicially-reinstated historic practice of "generally den[ying] all requests for parole for beneficiaries who were in countries with no functioning U.S. embassy or consulate," then the only effect of the Court's injunction would be to send the Boes and Noes applications back to USCIS for another likely denial, which would be consistent with HAB's historic practice that "[p]arole [is] generally not authorized for locations where there is not USCIS or US Embassy presence." USCIS-571.

Indeed, what Plaintiffs seem to request is that the Court to order USCIS to readjudicate their applications as if there was a perpetual U.S. evacuation, the result being that parole applications should result in approvals 95% of the time. *See* USCIS-718, 731. But even if the Court had jurisdiction, and even if Plaintiffs demonstrated a likelihood of success or presented any argument that the public interest would favor a 95% parole approval rate, it would not serve the public interest for this Court to seize control over parole authority that Congress expressly commended to the Secretary's discretion in 8 U.S.C. § 1182(d)(5)(A), and later made unreviewable via § 1252(a)(2)(B)(ii). This Court is neither authorized nor well-positioned to assume control over how, when, why, and under what circumstances § 1182(d)(5)(A) parole should be granted, and a judicial seizure of that responsibility is not in the public interest – it would exceed judicial authority and cripple the orderly administration of § 1182(d)(5)(A).

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion for a preliminary injunction, and enter any other order in Defendants' favor as the Court deems just.

DATED: October 17, 2023

Respectfully Submitted,

JOSHUA S. LEVY
Acting United States Attorney

RAYFORD FARQUHAR
Deputy Civil Chief

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
Civil Division

WILLIAM C. PEACHEY
Director
Office of Immigration Litigation
District Court Section

ALEXANDER J. HALASKA
Senior Litigation Counsel

SEAN L. KING
Trial Attorney

/s/ David J. Byerley
DAVID J. BYERLEY (D.C. Bar 1618599)
Trial Attorney
U.S. Department of Justice, Civil Division
Office of Immigration Litigation
District Court Section
P.O. Box 868, Washington D.C. 20044
202-532-4523 | david.byerley@usdoj.gov

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

DATED: October 17, 2023

/s/ David J. Byerley
DAVID J. BYERLEY (D.C. Bar 1618599)
Trial Attorney