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

DEFENDANTS' MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(B)(1) AND (6)

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INTRODUCTION

Plaintiffs are Afghan families and friends who have either pending applications for parole filed with U.S. Citizenship and Immigration Services (USCIS) or whose applications have been denied. If granted, parole may allow Plaintiffs to temporarily enter the United States. Plaintiffs raise Administrative Procedure Act (APA) claims challenging USCIS's alleged change to "standards" that apply to adjudication of Afghan parole applications, and alleged failure to follow policy manual requirements in issuing Requests for Evidence (RFEs) or Notices of Intent to Deny (NOIDs) to applicants. They also claim that USCIS has unlawfully delayed adjudicating the pending applications. Plaintiffs ask the Court to vacate the "heightened standard" that allegedly applies to their applications and to require USCIS to adjudicate and re-adjudicate their applications under a standard that allegedly applied as of August 31, 2021—the day when the United States withdrew its presence in Afghanistan and suspended operations at U.S. Embassy Kabul.

Defendants are, of course, acutely aware of the humanitarian crisis in Afghanistan and are working through numerous channels to relieve the situation in which many Afghan nationals find themselves. But that crisis does not provide Plaintiffs with a cause of action, and their claims are nonjusticiable, because Congress has committed the decision whether to parole anyone into the United States to the unreviewable discretion of the Executive Branch. The claims fail for multiple reasons. *First*, most Plaintiffs lack Article III standing because they have no protected legal interest in entry into the United States and therefore have suffered no cognizable legal injury as a result of the challenged decisions (even assuming they are characterized correctly, which they are not). *Second*, Defendants' parole decisions have been committed to agency discretion under 8 U.S.C. § 1182(d)(5)(A), and Congress has precluded judicial review of those decisions and actions under 8 U.S.C. § 1252(a)(2)(B)(ii). Review under the APA is therefore unavailable. 5 U.S.C. § 701(a).

Third, Plaintiffs' allegations of "new standards" applied by Defendants to parole decisions merely describe existing standards, not new ones, and thus raise no legal claim. *Fourth*, intermediate steps in the adjudication process are within USCIS's discretion, are not required by law, not "final" agency action, and thus, unreviewable. 5 U.S.C. §§ 701(a)(2), 704. *Fifth*, even assuming Plaintiffs have standing and a cause of action, the alleged delay is not unreasonable.

LEGAL BACKGROUND

Plaintiffs challenge the policies, procedures, delays, and outcomes related to "humanitarian parole," which is a colloquial term for the parole authority vested with the Secretary of Homeland Security under 8 U.S.C. § 1182(d)(5)(A).[1] 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 recipient to enter and remain in the United States for a set period but does not confer immigration status.[2] 8 U.S.C. § 1182(d)(5)(A). Although no statute or regulation requires USCIS to consider applications for § 1182(d)(5)(A) parole, USCIS allows anyone to apply for parole on behalf of themselves or another individual by filing a Form I-131, Application for Travel Document. If granted, the applicant may seek to obtain a travel document allowing them to travel to an appropriate port of entry and present themselves

[1] 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).

[2] *Humanitarian or Significant Public Benefit Parole for Individuals Outside the United States*, USCIS (last updated June 23, 2022), https://www.uscis.gov/humanitarian/humanitarianpublicbenefitparoleindividualsoutsideUS (explaining general eligibility and process for parole).

for inspection and possible parole by U.S. Customs and Border Protection (CBP) into the United States. No rule defines § 1182(d)(5)(A)'s reference to "urgent humanitarian reasons" or "significant public benefit." *See supra* n.2. DHS therefore has extensive discretion in determining whether any parole application meets those criteria.

USCIS's Humanitarian Affairs Branch (HAB) officers adjudicate parole requests like those filed by plaintiffs. They consider each request and any supporting evidence on a "case-by-case" basis to determine if parole is appropriate in the totality of the circumstances. *See supra* n.2 As part of that process, officers may issue RFEs or NOIDs. *Id.* USCIS provides notice of the decision to the petitioner, and if conditionally approved, to a U.S. Embassy or consulate, typically that closest to the beneficiary's residence. *Id.* Conditionally-approved beneficiaries must then complete a Form DS-160, Application for a Nonimmigrant Visa, and appear for an appointment with a Department of State consular section to verify their identity and collect biometrics for security screening. *Id.* If vetting is passed successfully, the U.S. consulate issues travel documents to the beneficiaries, which does not guarantee parole, but permits beneficiaries to travel to the United States. *Id.* Finally, CBP officers inspect the beneficiary at a port of entry, and if CBP paroles the beneficiary, CBP will issue documentation on the length of the parole period to the beneficiary and allow them to enter the United States. *Id.*

USCIS is unable to complete processing of parole requests for those potentially warranting parole in Afghanistan because U.S. Embassy Kabul suspended operations following the U.S. withdrawal.[3] For applicants who USCIS determines may warrant parole, USCIS will issue a notice informing petitioners that the beneficiary must arrange their own travel outside of Afghanistan to

[3] *Information for Afghan Nationals on Requests to USCIS for Humanitarian Parole*, USCIS (last updated June 23, 2022), https://www.uscis.gov/humanitarian/humanitarian-parole/information-for-afghan-nationals-on-requests-to-uscis-for-humanitarian-parole.

complete processing at another U.S. embassy or consulate. *See supra* n.3. For applicants who travel to a third country, USCIS will consider parole requests as expeditiously as possible, but processing may take several months. *Id.* Since Fall 2021, USCIS has been working through an unprecedented number of parole requests and despite the agency's best efforts, adjudications are taking significantly longer than previous timeframes. *Id.*

STATEMENT OF FACTS 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 redacted, pseudonymous six-count Complaint challenging USCIS's alleged changes to policies and procedures for parole. *See* Compl. Rasul Roe and Malik Moe are U.S. citizens who petitioned for their family members whose parole applications are pending (the Roes and the Moes). Compl. at 3, 16-21. The Noe family are Afghan nationals who self-petitioned and whose applications have been denied. *Id.* at 3, 22-25. Baddar Boe, a U.S. citizen, and Basel Boe, a lawful permanent resident, petitioned for their family members whose parole applications are pending. *Id.* at 4, 25-27 (the Boes). Finally, Diana Doe is a U.S. citizen who petitioned for family friends, including Amir Doe and his family, as well as Permaz Doe, and whose applications have all been denied (the Does). *Id.* at 4, 27-31.

Plaintiffs allege that: (a) 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 did so without conformity with the APA's notice-and-comment requirements (Count III); (b) USCIS is unreasonably delaying decisions for 15 Afghan plaintiffs whose parole petitions are pending

(Counts IV-V); and (c) the Department of Homeland Security (DHS) has "failed to adhere to its own policies, including for issuing RFEs and/or NOIDs whenever there is a possibility that the applicant may be eligible for humanitarian parole" in contravention of 8 U.S.C. § 1182(d)(5)(A) and the USCIS Policy Manual (Count II). Plaintiffs also request a related declaratory judgment (Count VI). Plaintiffs ask the Court to order Defendants to "re-adjudicate [parole] applications" as if the U.S. were still evacuating Afghan civilians and as if the U.S. still had an operating embassy in Kabul that could complete parole processing. Those circumstances, however, no longer exist.

ARGUMENT

I. The Court Should Dismiss The Complaint Under Rule 12(b)(1)

A. The Court Should Dismiss Most Plaintiffs For Lack Of Standing

Federal courts have constitutional authority to decide legal questions only in resolving "Cases" or "Controversies," in which litigants have standing. Art. III, §2. To establish standing, the plaintiff must show "the plaintiff 'personal[ly]' suffered a concrete and particularized injury in connection with the conduct about which he complains." *Trump v. Hawaii*, 138 S. Ct. 2392, 2416 (2018) (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016)). To determine "whether an intangible harm constitutes injury in fact, . . . it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Spokeo*, 578 U.S. at 340-41. Here, Afghan Plaintiffs and Diana Doe lack standing.

First, the Afghan Plaintiffs have no right to enter the United States and have no established ties to the United States, and so the denial of parole imposes no "legally relevant hardship" on them. *Trump v. Int'l Refugee Assistance Project* ("*IRAP*"), 137 S. Ct. 2080, 2088 (2017) (per curiam); *see Dep't of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959, 1982-83 (2020); *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972). "It is, of course, beyond peradventure that . . .

an unadmitted and non-resident alien, has no right, constitutional or otherwise, to enter the United States." *Adams v. Baker*, 909 F.2d 643, 647 n.3 (1st Cir. 1990) ((citing *Mandel*, 408 U.S. at 762; *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950))); *see Allende v. Shultz*, 845 F.2d 1111, 1114 n.4 (1st Cir. 1988) ("[*Mandel*] established that an alien has no standing to bring a constitutional challenge to the denial" of an application for a travel document, and "that in a suit contesting such a denial, the inclusion of an alien as a party is purely symbolic."); *accord Bazzi v. Gacki*, 468 F. Supp. 3d 70, 82 (D.D.C. 2020) ("[plaintiff's] lack of any connection to the United States means that he has no due process rights. And, where he lacks the right to due process, the APA does not provide him separate constitutional-equivalent protection.").

Indeed, courts have consistently held that non-resident noncitizens lack standing to challenge visa application determinations, as "[t]he political character of this intrinsically executive function renders it subject only to narrow judicial review." *Adams*, 909 F.2d at 647 (internal marks and citations omitted); *see also Amanullah v. Nelson* ("*Amanullah*"), 811 F.2d 1, 6 (1st Cir. 1987) ("Congress has delegated remarkably broad discretion to executive officials under the [INA], and these grants of statutory authority are particularly sweeping in the context of parole." (quotation marks omitted)). Courts have long recognized a principle of nonreviewability of executive decisions pertaining to the admission or exclusion of an alien, based on constitutional principles recognized by the Supreme Court in a line of cases dating back to the 1800s.[4] This

[4] In *Lem Moon Sing v. United States*, the Supreme Court held that "[t]he power of congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications." 158 U.S. 538, 547 (1895). The Court has further explained that "[t]the exclusion of aliens is a fundamental act of sovereignty" that the Constitution entrusts to the political branches. *United States ex. Rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950). "The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." *Id*.

principle of nonreviewability applies to applicants for parole because parole is an entirely discretionary entry/exclusion determination made by an Executive agency.[5] Because Plaintiffs challenge "terms and conditions upon which [aliens] may come to this country," nonreviewability principles bar review. *Mandel*, 408 U.S. at 766.

Second, Diana Doe lacks standing. In cases like this, the only possibly proper plaintiffs are "United States citizens [alleging] violations of their personal rights allegedly caused by the Government's exclusion of particular foreign nationals." *Trump v. Hawaii*, 138 S. Ct. at 2416; *Adams*, 909 F.2d at 647 n.3 ("[I]t is important to recognize that the only issue which may be addressed by this court is the possibility of impairment of United States citizens'… rights through the exclusion of the alien"). But here, no U.S. citizens allege an injury to a familial relationship by the non-parole of the Does or Noes. Although Diana Doe is a U.S. citizen, she does not allege the denial of parole to a family member, and the non-parole of a noncitizen resulting in separations in informal friendships are not cognizable legal injuries. *IRAP*, 137 S. Ct. at 2088 ("For individuals, a close familial relationship is required . . . . An American individual or entity that has a bona fide relationship with a particular person seeking to enter the country as a refugee can legitimately claim concrete hardship if that person is excluded."). Thus, all Plaintiffs *except* Rasul Roe, Malik Moe, Basel Boe,[6] and Baddar Boe should be dismissed.

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[5] *See Mandel*, 408 U.S. at 770 (recognizing that the principles apply "when *the Executive* exercises" its power to exclude) (emphasis added); *Bustamante v. Mukasey*, 531 F.3d at 1062 n.1 (9th Cir. 2008) (same); *Matushkina v. Nielsen*, 877 F.3d at 295 (7th Cir. 2017) (affirming dismissal even though plaintiff named DHS as the defendant); *Amiri v. Sec., Dep't of Homeland Sec'y*, 818 F. App'x 523, 528 (6th Cir. July 2, 2020) (rejecting the argument "that the [principle of] non-reviewability does not apply where the discretionary decision is made by DHS" because such an argument "is contradicted by *Mandel, Din,* and *Hawaii*").

[6] Although Basel Boe is also a non-citizen, Defendants' assume, without conceding, that for the purposes of this motion that Baddar Boe (a citizen) shares a familial relationship with Basel Boe's beneficiaries.

B. All Plaintiffs Lack Standing To Bring Claims Against The Department of State And That Agency Should Be Dismissed As A Party

The second element of standing is traceability or causation, which requires the plaintiff "to show a sufficiently direct causal connection between the challenged action and the identified harm." *Katz v. Pershing, LLC*, 672 F.3d 64, 71 (1st Cir. 2012). The opposing party must be the source of the harm, such that "causation is absent if the injury stems from the independent action of a third party." *Id.* Plaintiffs make allegations against USCIS and DHS but make no claim that they have been injured by an alleged policy change made by the Department of State. Thus, the Department of State should be dismissed as a party.

C. The APA is Inapplicable Because 8 U.S.C. § 1252(a)(2)(B)(ii) Precludes Judicial Review Of "Any Other Decision Or Action" Related To Parole

Section 702 of the APA confers a general cause of action upon persons "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. That cause of action is withdrawn where "statutes preclude judicial review" or the "agency action is committed to agency discretion by law." *Id.* § 701(a)(1)-(2). Both provisions apply here to bar review. First, the presumption of judicial review of agency action "may be overcome by specific language in a provision or evidence drawn from the statutory scheme as a whole." *Patel v. Garland*, 142 S. Ct. 1614, 1627 (2022) (internal quotations omitted). Here, Congress has explicitly acted to preclude judicial review in 8 U.S.C. § 1252(a)(2)(B)(ii), which "withdraws judicial review from decisions 'the authority for which is specified . . . to be in the discretion of the . . . Secretary of Homeland Security.'" *Bernardo v. Johnson*, 814 F.3d 481, 484 (1st Cir. 2016) (quoting § 1252(a)(2)(B)(ii)). Second, judicial review is also unavailable by operation of § 1182(d)(5)(A), which commits the decision to grant or deny parole to agency discretion.

First, judicial review under the APA is unavailable because § 1252(a)(2)(B)(ii) precludes review of whether, how and when DHS exercises its parole authority under § 1182(d)(5)(A). Under a subparagraph titled "Matters Not Subject to Judicial Review," § 1252(a)(2)(B)(ii) states:

> (B) Denials of discretionary relief
> Notwithstanding any other provision of law (statutory or nonstatutory) . . . and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, *no court shall have jurisdiction to review—*
>
> . . .
>
> (ii) *any other decision or action* of the Attorney General or the Secretary of Homeland Security the authority *for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security*, other than the granting of relief under section 1158(a) of this title.

(emphasis added). As the Supreme Court has recognized, § 1252(a)(2)(B)(ii) is a "catchall provision" which, when read together with subclause (i), "convey[s] that Congress barred court review of discretionary decisions only when Congress itself set out the Attorney General's discretionary authority in the statute." *Kucana v. Holder*, 558 U.S. 233, 247 (2010). Here, Congress has spoken, and the authority in the statute is clearly discretionary because 8 U.S.C. § 1182(d)(5)(A) states that "[t]he Attorney General *may . . . in his discretion* parole into the United States temporarily under such conditions *as he may prescribe* . . . any alien applying for admission to the United States . . ." (emphasis added); *see also Samirah v. O'Connell*, 335 F.3d 545, 549 (7th Cir. 2003) (holding that the "decision to grant or revoke parole [under § 1182(d)(5)] is squarely within the ambit of § 1252(a)(2)(B)(ii)").

The First Circuit has emphasized the breadth of the discretion that Congress granted to the Executive branch in making parole decisions, describing that authority in § 1182(d)(5) as "close

to plenary." *Amanullah*, 811 at 6.[7] In *Amanullah*, the First Circuit agreed with the Eleventh Circuit that "Congress has delegated remarkably broad discretion to executive officials under the [INA], and these grants of statutory authority are particularly sweeping in the context of parole." *Jean v. Nelson*, 727 F.2d 957, 977 (11th Cir. 1984) (en banc), *aff'd in part on nonconstitutional grounds*, 472 U.S. 846 (1985). At the time of that decision, Congress had not enacted § 1252(a)(2)(B)(ii)'s preclusion of review into law, but the First Circuit's description of the breadth of discretion plainly supports reading that statute as precluding judicial review of parole decisions.

This position is supported by *Bernardo v. Johnson*, 814 F.3d 481, 482-84 (1st Cir. 2016), which held that § 1252(a)(2)(B)(ii) precluded review of USCIS's decision to revoke an approved visa petition, joining the views of most other circuits that § 1155 conferred unreviewable discretion on the Secretary based on that statute's use of terms like "may," "at any time" and "for what he deems to be good and sufficient cause." *Id.* at 485-87. Indeed, the U.S. Supreme Court has "repeatedly observed" that "the word 'may' *clearly* connotes discretion." *Opati v. Republic of Sudan*, 140 S. Ct. 1601, 1609 (2020) (citations omitted). The case for preclusion of review of parole decisions is strong. Key here, § 1182(d)(5)(A) states that the Secretary "*may . . . in his discretion* parole" certain people into the United States "under such conditions *as he may prescribe*." (emphasis added).[8] The statute also confers discretion to terminate parole "when the purposes of such parole shall, *in the opinion of the* [*Secretary*], have been served[.]" *Id.* (emphasis

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[7] The predecessor version of § 1182(d)(5)(A) stated that "the Attorney General may, . . . in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States . . . ." 8 U.S.C. § 1182(d)(5) (1982). In 1996, Congress amended this to limit the Attorney General's parole discretion to "case-by-case" grants.

[8] The only limitation on that discretion is under § 1182(d)(5)(B), which limits the use of parole for refugees, who might otherwise be admitted under 8 U.S.C. § 1157.

added). This language is sweeping and sufficient to find that § 1252(a)(2)(B)(ii) applies to, and precludes review of, "decisions or actions" under § 1182(d)(5)(A), as Congress has imposed no "standard[s] that meaningfully curtail[] the Secretary's discretion" sufficient to sustain judicial review. *Bernardo*, 814 F.3d at 487; *see also Hassan v. Chertoff*, 593 F.3d 785, 789 (9th Cir. 2010) (affirming district court's ruling it lacked jurisdiction to review § 1182(d)(5)(A) parole revocation decision because of § 1252(a)(2)(B)(ii)).

This preclusion of review applies equally to "structural" challenges to the non-exercise of parole authority as it does to individual parole declinations. The pertinent statutes make no distinctions among the kinds of parole denials—whether individual or programmatic—that are shielded from review. *See New Mexico v. McAleenan*, 450 F. Supp. 3d 1130, 1195 (D.N.M. 2020) ("The INA precludes judicial review of the agency's decision to end its Safe Release program . . . . Section 1252(a)(2)(B) states that it applies '[n]otwithstanding any other provision of law.' Paragraph (ii) states that the preclusion applies to 'any other decision or action . . . specified under this subchapter,' which refers to 8 U.S.C. §§ 1151-1381. The statute therefore precludes any 'structural' challenges to parole decisions . . . ."). Equally, this discretionary statutory language precludes APA review of both individual and structural parole exercises per 5 U.S.C. § 701(a)(2).

D. Issuance or Non-issuance of RFEs and NOIDs is Unreviewable (Count II)

Plaintiffs assert that USCIS has contravened § 1182(d)(5)(A) and its policy manual by categorically refusing to approve Afghan parole applications for those in Afghanistan and in failing to issue RFEs and NOIDs wherever an applicant may possibly warrant parole. Compl. at 33-34.

While § 1182(d)(5)(A) requires that DHS may only parole individuals who have demonstrated "urgent humanitarian reasons" or "significant public benefit[s]," doing so does not create an entitlement to parole, as it is ultimately a discretionary determination. Given that parole

is fully discretionary, Plaintiffs cannot justify why the agency must expend resources to issue and review RFEs or NOIDs where there are no significant barriers to final adjudication. Regardless, the issuance (or lack thereof) of an RFE or NOID itself is a discretionary matter unreviewable under the APA. 5 U.S.C. § 701(a)(2).

The relevant regulation states that if USCIS finds the "required initial evidence is not submitted with the benefit request or does not demonstrate eligibility," then "USCIS *in its discretion may* deny the benefit request for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted . . . ." 8 C.F.R. § 103.2(b)(8)(ii) (emphasis added). Similarly, "[i]f all required initial evidence has been submitted, but the evidence submitted does not establish eligibility, USCIS *may* . . . request more information or evidence from the applicant or petitioner[.]" *Id.* § 103.2(b)(8)(iii) (emphasis added); *see* Requests for Evidence and Notices of Intent to Deny, U.S. Citizenship & Immigration Servs. (June 21, 2022) ("an officer should generally issue an RFE or NOID if the officer determines there is a possibility the benefit requestor can overcome a finding of ineligibility for the benefit sought.").[9] Further, "it is clear from the plain language of [8 C.F.R. § 103.2(b)(8)] that USCIS is not required to send an RFE or NOID." *Sosa v. Barr*, 369 F. Supp. 3d 492, 505 (E.D.N.Y. 2019). Rather, USCIS "has the discretion to either deny the benefit request or request . . . evidence." *Id*.

Because the issuance of an RFE/NOID is within USCIS's discretion, the Court lacks jurisdiction under the APA to review determinations on whether to issue an RFE/NOID. *Elgin Assisted Living Eb-5, LLC v. Mayorkas*, No. 12-cv-2941, 2012 U.S. Dist. LEXIS 148686, at *8 (N.D. Ill. Oct. 16, 2012) ("The statutory and regulatory structure, lack of standards, and nature of

[9] *Policy Alert, Request for Evidence and Notices of Intent to Deny*, USCIS (June 9, 2021), https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210609-RFEs%26NOIDs.pdf.

the issuance of RFEs seem to demonstrate that the exercise of issuing RFEs is within the discretion of USCIS. The RFEs appear to be agency action committed to USCIS discretion by law, and are therefore likely unreviewable." (citations omitted)); *see Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63 (2004) ("[T]he only agency action that can be compelled under the APA is action legally *required*. This limitation appears in § 706(1)'s authorization for courts to 'compel agency action *unlawfully* withheld.'" (emphasis in original)).

In addition, even if it were not discretionary, the issuance (or non-issuance) of an RFE/NOID is not a final agency action reviewable under § 704 of the APA. *Cheng v. Baran*, No. CV 17-2001-RSWL-KSx, 2017 U.S. Dist. LEXIS 122696, at *17 (C.D. Cal. Aug. 3, 2017) (collecting cases). As further noted, "the issuance of the RFE does not create rights or obligations, nor do legal consequences flow from it because it is an intermediary step in the decision-making process regarding petitions and visas." *Id.* Therefore, "the issuance of the RFE cannot be understood as a 'final' action for purposes of the APA." *Id.*

E. Plaintiffs' Delay Claims are Unreviewable (Count IV-V)

In Counts IV-V, Plaintiffs claim unreasonable delay under the APA and right to a writ of mandamus compelling the adjudication of the pending § 1182(d)(5)(A) parole requests. The Court lacks jurisdiction to compel the parole decisions.

As stated *supra*, § 1182(d)(5)(A) grants USCIS broad authority to grant parole on a case-by-case basis if DHS determines "urgent humanitarian reasons" or "significant public benefit" warrant it and if the individual warrants a favorable exercise of discretion. As contrasted with other benefits where an application (*e.g.*, 8 U.S.C. §§ 1159, 1255) arguably triggers an obligation to act on it, nothing in § 1182(d)(5)(A) requires USCIS to adjudicate—or even accept—applications for parole. Indeed, parole may be granted without anyone requesting it. *Louis v.*

Nelson, 544 F. Supp. 973, 985 n.30 (S.D. Fla. 1982) ("[I]t is significant to note that the administrative procedure for seeking parole does not require an application to be filed, a hearing to be held or a record to be made."). If DHS is not required by § 1182(d)(5)(A) to accept applications at all—much less adjudicate them—§ 1182(d)(5)(A) cannot be read to contain an implicit "reasonable time" limitation to act under 5 U.S.C. § 555(b).

Moreover, § 1252(a)(2)(B)(ii)'s bar on judicial review of DHS's discretionary parole power includes the pace of their adjudications. *See Touarsi v. Mueller*, 538 F. Supp. 2d 447, 452 (D. Mass. 2008) ("Because the Secretary's authority to manage the adjustment of status application process, committed to his discretion by § 1255(a), falls within the scope of § 1252(a)(2)(B)(ii), judicial review of the 'pace' at which he does so is precluded."); *see also Zhang v. Chertoff*, 491 F. Supp. 2d 590, 593 (W.D. Va. 2007) ("A holding that USCIS does not have discretion over the pace of application processing would lead to the illogical conclusion that USCIS must reach an unreviewable decision within a reviewable period of time."); *cf.* 5 U.S.C. § 551(13) ("'agency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or *failure to act*") (emphasis added).

Thus, the APA is inapplicable to Plaintiffs' mandamus claims because 8 U.S.C. § 1252(a)(2)(B)(ii) bars review. 5 U.S.C. § 701(a)(1). Alternatively, because parole discretion is vested with DHS, the pace of parole decisions is within DHS's discretion and thus unreviewable under § 701(a)(2). The mandamus claims fail for the same reason – DHS has no clear, non-discretionary duty to adjudicate parole applications that it is not required by law to accept.

II. The Court Should Dismiss Plaintiffs' Claims Under Rule 12(b)(6)

A. Plaintiffs Fail to Allege the Parole Denials Were Not "Facially Legitimate and Bona Fide" (Counts I-II)

If the Court concludes that it has jurisdiction over the complaint, notwithstanding § 1252(a)(2)(B)(ii), and § 1182(d)(5)(A), the Court should review Plaintiffs' claims only under *Mandel*'s "facially legitimate and bona fide" test. The decision whether to grant a noncitizen entry into the country has long been within "the plenary sweep of Congress's power to make policies and rules for the exclusion of aliens." *Amanullah*, 811 F.2d at 10. The Supreme Court has applied this standard of review in three cases involving the exclusion of noncitizens. See *Mandel*, 408 U.S. at 769-770 (involving the Attorney General's denial of a discretionary waiver of inadmissibility to a noncitizen); *Kerry v. Din*, 576 U.S. 86, 103-104 (2015) (involving a consular officer's denial of a visa to a noncitizen) and *Trump v. Hawaii*, 138 S. Ct. at 2419-2420 (involving the President's decision to exercise his authority pursuant to 8 U.S.C. 1182(f) to suspend entry of a class of noncitizens). Parole decisions made by DHS related to the entry or exclusion of noncitizens would require the same standard of review. And *Mandel* makes clear that, for noncitizens with no established ties to the United States, when "the Executive exercises this power negatively [to exclude] 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 . . . ." *Mandel*, 408 U.S. at 770. Accordingly, even if this Court had jurisdiction, it could consider only whether DHS "advanced a facially legitimate and bona fide reason for withholding parole from these [litigants]" whose U.S.-based family members petitioned for them. *Amanullah*, 811 F.2d at 10-11 (collecting cases).

That forgiving standard is amply satisfied in this case. Although Plaintiffs do not include each denial letter, one denial letter is described in the Complaint as stating, "USCIS generally offers parole based on protection needs only when USCIS finds that the beneficiary is at risk of

severe targeted or individualized harm in the country where the beneficiary is located or is at risk of imminent return to a country where the beneficiary would be harmed." Compl. ¶¶ 134-35. USCIS listed certain categories of evidence, including "[d]ocumentation from a credible third-party source specifically naming the beneficiary," "a USCIS grant of a protection-based immigration benefit such as asylum, refugee, or special immigrant status to an immediate family member," "[e]vidence of the beneficiary's particular vulnerabilities," and "[e]vidence of the severity and imminence of the harm the beneficiary fears." *Id.* The letter concludes by stating, "USCIS did not find sufficient evidence of the nature noted above to establish eligibility for parole." *Id.* Plaintiffs allege that USCIS issued other decisions "administratively closing [the] application until such time as USCIS was notified that the beneficiary had left Afghanistan[,]" (Compl. ¶ 55), but do not allege any Plaintiff here received such a letter.

The decision letters are facially legitimate and *bona fide*—and Plaintiffs point to nothing to suggest otherwise. Although Plaintiffs decry the parole declination letters as a "form letter," *id.*, and "boilerplate," *id.* ¶ 182, that is not indicative of bad faith or illegitimacy. *See, e.g.*, *Nusantara Found., Inc. v. U.S. Dep't of State*, 486 F. Supp. 3d 737, 744 (S.D.N.Y. 2020) ("Instead, Plaintiffs contend that the two 'reasons' provided [by Defendants] are simple boilerplate and do not provide enough information or rationale to properly explain the denial or even to allow this Court to review the matter. This, however, is not the proper standard of review under *Mandel*." (internal citations omitted)). While Plaintiffs would prefer more individualized detailing, detailed explanations are not the *sine qua non* of *bona fides* or legitimacy in exclusionary decisions. *See Trump v. Hawaii*, 138 S. Ct. at 2419. Although Plaintiffs may argue that a different result should have been reached, Plaintiffs fail to state a claim that the parole decisions were not facially legitimate and *bona fide.*

B. "Policy" Counts Fail to State a Claim (Counts I-III)

In Counts I-II, Plaintiffs claim that USCIS cannot implement a "change in standards" that "would lead to more denials, and the desire to deter more applicants" and that such would be "impermissible considerations." Compl. ¶¶ 180-81. Plaintiffs fault DHS for failing to consider "reliance interests generated by prior policies" when it "implemented new standards used to adjudicate requests for humanitarian parole on behalf of Afghans." *Id.* ¶¶ 179-84. But despite claiming to have reliance interests in "the standards then in effect [on August 30, 2021,]" Plaintiffs do nothing to explain what "the standards in effect on August 31, 2021" were or how they were different from the standards DHS used in their cases. *See* Compl. ¶¶ 3, 5, 6, 48, 54, 55, 57, 59, 60, 78, 81, 94, 179, 180, 181, 183, 184, 191, 192, 193.

Rather, Plaintiffs speculatively allege as follows:

> On information and belief, USCIS promulgated new standards, under which: (1) applications of Afghans remaining in Afghanistan would be categorically denied or administratively closed; (2) Afghans outside of Afghanistan would no longer meet the urgent humanitarian reason prong of 8 U.S.C. § 1182(d)(5)(A), unless they either faced imminent harm in that country or an imminent risk of being returned to Afghanistan; and (3) with respect to Afghan applicants, USCIS would not enforce or abide by its written policy to require seeking additional information gathered through RFEs or NOIDs before issuing denials, even if there is a possibility that additional information will yield an approval.

Compl. ¶ 192. As to the first claimed "new standard," there was no new standard. Rather, Plaintiffs describe an existing regulation, 8 C.F.R. § 212.5(f), that Plaintiffs admit was enforced before August 30. The second "new standard" is not new either, it is a function of the difference in varying country conditions in third countries and/or the statutory limits in § 1182(d)(5)(B). As to the third "new standard," Plaintiffs fail to credibly allege any new policy and ignore the discretionary nature of the existing policy. Accordingly, Count III fails because Plaintiffs fail to plausibly allege the existence of any new rule requiring notice-and-comment under 5 U.S.C. § 553.

i. The First Alleged "New Standard" Describes an Existing Regulation

First, as to Plaintiffs' claim that Defendants implemented a "new standard" that "applications of Afghans remaining in Afghanistan would be categorically denied or administratively closed[,]" Plaintiffs are incorrect in ascribing agency actions to an Afghan-averse change in agency policy rather than material and obvious changes in the facts on the ground in Afghanistan. Namely, the suspension of operations at U.S. Embassy Kabul and the suspension of in-country visa services necessarily and drastically narrowed the circumstances in which the single regulatory procedure governing § 1182(d)(5)(A) parole for overseas aliens could be satisfied. That regulation states that "[w]hen parole is authorized for an alien who will travel to the United States without a visa, the alien shall be issued an appropriate document authorizing travel." 8 C.F.R. § 212.5(f). Thus, in order to comply with the regulation, USCIS requires a mechanism (an embassy or consulate) to collect biometrics, verify identify, and to issue an appropriate travel document in order to authorize CBP to inspect and parole at a port of entry. The reality is that this regulation is harder to satisfy now, as opposed to the beginning of August 2021 when the Taliban did not occupy Afghanistan and the U.S. had an operating embassy in Kabul.

Indeed, Plaintiffs' allegations confirm that USCIS adhered to this regulation prior to August 31, 2021, and tacitly acknowledge that an embassy is vital to USCIS's parole process. Compl. ¶¶ 47 ("The agency instructed those [pre-August 2021] grantees who were still in Afghanistan that completing the humanitarian parole process would require travel to a U.S. consulate."), ¶ 55 ("this [allegedly new] rule relied on the absence of a U.S. consulate"). Given the suspension of U.S. Embassy Kabul's operations to issue travel documents, USCIS is limited in its ability comply with 8 C.F.R. § 212.5(f) as to applicants who remain in Afghanistan. As such, Plaintiffs' request to order USCIS to reconsider Plaintiffs' applications as if the United States still

had an operating embassy in Afghanistan (or, as Plaintiffs put it, "in accordance with the standards in effect on August 31, 2021") is to task the Court with ignoring the current realities on the ground. *See supra* n.3.

ii. The Second Alleged "New Standard" Describes a Pre-Existing Statutory and Factual Limitations

Despite Plaintiffs' claims, for USCIS to consider whether an applicant for parole based on "urgent humanitarian reasons" faces "imminent harm in that country or an imminent risk of being returned to [another country]" is not a "new standard" either, but rather a commitment to compliance with the statute. Compl. ¶ 56.

As noted *passim*, Congress has limited DHS's use of parole to cases where it is justified by *urgent* humanitarian interests or significant public benefit. 8 U.S.C. § 1182(d)(5)(A). Furthermore, while the circumstances that lead parole applicants to flee their country of citizenship are indeed dire, it is sensible that applications may often lose their "urgency" once the applicant has escaped to a safer third country and could likely await routine refugee processing in that third country. For example, an Afghan parole applicant stranded in Tel Aviv may present less "urgent" circumstances than another stranded in Kabul or Raqqa. In protection-based decisions, the availability of refugee processing is considered, along with imminence of harm, when an applicant is in a third country. Such considerations plainly comport with 8 U.S.C. § 1182(d)(5)(A) and (B). Plaintiffs do not explain how using § 1182(d)(5)(A) parole in the manner described by the statute is unlawful, much less an unlawful "new standard" devised after September 1, 2021. It has long been noted that "parole was meant to be the exception rather than the rule[.]" *Amanullah*, 811 F.2d at 6. Nothing in this alleged second "new standard" is new or unlawful.

iii. The Third Alleged "New Standard" Points to No Change in "Prior" Policy

Plaintiff's third alleged "new standard[,]" is that, "with respect to Afghan applicants, USCIS would not enforce or abide by its written policy to require seeking additional information gathered through RFEs or NOIDs before issuing denials, even if there is a possibility that additional information will yield an approval." Compl. ¶ 192. That allegation also lacks merit. Defendants have made no changes in the RFE/NOID rules. As noted above, USCIS regulations state that RFEs and NOIDs *may* be issued where the initial filing or subsequently-submitted evidence is not sufficient to support an approval of a benefit petition. 8 C.F.R. § 103.2(b)(8)(ii), (iii). Likewise, the USCIS Policy Manual and policy materials on evidentiary adjudications encourage, but do not require, officers to issue RFEs or NOIDs when eligibility is in doubt.[10] DHS is not, and never was, required to continuously solicit evidence until it exercises parole discretion favorably, nor does § 1182(d)(5) require DHS to issue RFEs/NOIDs before declining to parole.

C. Even if the Alleged Rule Changes Did Occur, Plaintiffs' Claims Would Fail.

i. Plaintiffs Have No Reliance Interests

Given that Plaintiffs are unaware of what "the standards then in effect [on August 31, 2021]" were, Plaintiffs' claim of a "reliance interest" in alleged prior parole standards is not credible. Notably, all but the Does' applications—which were denied on December 1, 2021—were

[10] USCIS Policy Manual, Part E – Adjudications, Ch. 6 – Evidence, § F(3) – Requests for Evidence, https://www.uscis.gov/policy-manual (last accessed June 13, 2022) ("Under the regulations, USCIS has the discretion to issue Requests for Evidence (RFEs) and Notices of Intent to Deny (NOIDs) for immigration benefit requests in appropriate circumstances.").

submitted[11] after the alleged "new standards" were allegedly "implemented." In any event, the claim of reliance fails.

First, Plaintiffs cite *Dep't of Homeland Security v. Regents of the Univ. of Cal.* ("*Regents*"), 140 S. Ct. 1891, 1913 (2020), to claim that "it would be arbitrary and capricious to ignore" the "reliance interests" generated by old policies. This is an overstatement. The full quote states that agencies must "be cognizant that *longstanding* policies may have 'engendered serious reliance interests that must be taken into account.'" *Id.* (quoting *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 212 (2016)) (emphasis added). Plaintiffs do not allege reliance on any "longstanding" prior policy. To the contrary, the earliest date specified by Plaintiffs for the "prior" policy regarding parole for Afghans is August 25, 2021. Compl. ¶ 41. No serious reliance interests can form from an alleged policy that was in place for only a week. The earlier policy must be "longstanding" to create reliance interests. *Regents*, 140 S. Ct. at 1913; *Encino*, 579 U.S. at 224.

Additionally, any solicitation of parole applications would not create reliance interests. For example, the Eleventh Circuit reversed reverse a district court's determination that "the President's 'open arms' invitation, coupled with the creation of [a] special . . . parole category, evidenced the existence of restrictions on the discretion of executive actors sufficient to constitute an actionable liberty interest in continued parole." *Garcia-Mir v. Meese*, 788 F.2d 1446, 1451 (11th Cir. 1986). The court recognized any alleged claim to entitlement must be found in some source of law. *See id.* Similarly, "[w]hen the act of the sovereign keeps a putatively unentitled person from something he never had, such 'deprivation' (if it can be classified as a 'deprivation' at all) is of a fundamentally different character than . . . when the government takes from a person . . . something

[11] All Does applied on either August 23 or August 25; the Noes applied on September 3; Four Boes applied on September 10 and the other five applied on September 22; the Moes applied on September 30; and lastly, the Roes applied on October 30.

he theretofore enjoyed." *Amanullah*, 811 F.2d at 10. Nor does a reliance interest exist based on speculation that "USCIS approved—or at least conditionally approved, subject to screening at a consulate—most if not all Afghan humanitarian parole applications adjudicated during that period[.]" Compl. ¶ 47. "A liberal award of parole in the past… does not create a 'serious reliance interest' in being approved for parole[.]" *S.A. v. Trump*, 363 F. Supp. 3d 1048, 1086 (N.D. Cal. 2018). In fact, Plaintiffs allege that even before the significant change in facts on the ground engendered by the withdrawal of U.S. forces, USCIS only "approved approximately 500 to 700 [§ 1182(d)(5)(A)] applications each year—an approval rate of 25-35%." Compl. ¶ 39. Consistent with the allegations, parole is—and always was—far from sufficiently automatic to the degree necessary to engender a reliance interest. "[A]n application for parole that has not been approved does not engender a reliance interest[,]"[12] especially given § 1182(d)(5)(A)'s discretionary nature. *S.A. v. Trump*, 363 F. Supp. 3d at 1085.

ii. Even Assuming the Alleged New Rules were of a Legislative Nature, the Foreign Affairs Exception to Notice-and Comment Would Apply.

Even if there were any "new standards" as alleged, they would be exempt from any requirement for notice and comment. Generally, absent an exception or exemption from notice-and-comment, "the full panoply of notice-and-comment requirements must be adhered to scrupulously" for new legislative agency rules. *Texas v. United States*, 809 F.3d 134, 171 (5th Cir. 2015), *aff'd*, 579 U.S. 547 (2016).

[12] Plaintiffs allege that "USCIS even withdrew approvals or conditional approvals that it had previously granted, contending that they required re-review under the new criteria," Compl. ¶ 58, but Plaintiffs make no allegations that this occurred to any of the Afghan Plaintiffs. Even if true, Plaintiffs surely do not suggest that USCIS should have allowed that reliance to continue in vain if USCIS was unable to issue a travel document.

Even if new rules were alleged and even assuming those new rules were legislative, the "foreign affairs" exception (5 U.S.C. § 553(a)(1)) would apply. The exception is applicable when a foreign actor creates "circumstances [that] require swift [agency] action." *Malek-Marzban v. INS*, 653 F.2d 113, 116 (4th Cir. 1981). "[C]ourts have approved the Government's use of the foreign affairs exception where the international consequence is obvious[,]" *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742 (9th Cir. 2018), or where undergoing notice and comment would provoke "definitely undesirable consequences" in foreign affairs. *Yassini v. Crosland*, 618 F.2d 1356, 1360 n. 4 (9th Cir. 1980).

Here, as outlined above, Defendants' responses to the suspension of operations and visa services at U.S. Embassy Kabul, and the resulting impacts on USCIS's ability to complete parole processing would fall squarely within the foreign affairs exception. The "quintessential foreign affairs functions such as diplomatic relations and the regulation of foreign missions are different" than pure immigration law rules "that only indirectly implicate international relations[.]" *City of N.Y. v. Perm. Mission of India*, 618 F.3d 172, 202 (2d Cir. 2010). The suspension of consular services is not a simple immigration function: it is the suspension of a quintessential foreign affairs function. *See id.* Additionally, Defendants were forced to respond to a rapidly evolving security situation involving military operations, efforts to assist as many employees, contractors, U.S. citizens and Afghan nationals as possible, and under an impending deadline for withdrawal. Indeed, scores of Afghans and U.S. Marines died in the process. Compl. ¶ 27. "[H]indering" the Executive's "ability to implement a new policy in response to a current foreign affairs crisis" can "warrant[] invocation of the foreign affairs exception." *E. Bay*, 932 F.3d at 776. The alleged decisions relating to parole policy, even if true and even if amounting to legislative rules, would fall under the foreign affairs exemption to the APA's notice-and-comment requirements under

because tarrying with notice-and-comment in late August 2021 would have impeded the Executive's ability to respond quickly to an evident crisis. Plaintiffs' Complaint only highlights that they want the Court to order Defendants to "re-adjudicate [parole] applications" as if it were early August 2021 when the United States was still evacuating Afghan civilians and still had an operating embassy in Kabul that could complete parole processing. Compl. ¶¶ 6, 47.

Accordingly, any direct, downstream effects of the suspension are not independently subject to notice and comment. The operation (or suspension) of consular services reflects a core diplomatic function, and "diplomatic functions… represent the exception's paradigm case." *Perm. Mission of India*, 618 F.3d at 202. The foreign affairs exception would thus apply, even if any of the so-called "new standards" were actually new and even assuming they had a legislative nature.

iii. Following the Parole Statute is not "Impermissible"

Even if there had been changes in policy as alleged by Plaintiffs—which there was not—neither "the desire for a standard that would lead to more denials, [nor] the desire to deter more applicants" are "impermissible considerations" as Plaintiffs claim. Compl. ¶ 181. Both alleged considerations are patently legitimate, as the First Circuit has already recognized. *Amanullah*, 811 F.2d at 7, 12-13. As such, this speculative motive would not give rise to a cognizable claim.

D. Plaintiffs' Unreasonable Delay Claims Fail (Counts IV-V)

Even if DHS had a non-discretionary duty to adjudicate parole applications, a seven-to-nine-month delay is not so "egregious" to warrant a writ of mandamus. *Wellesley v. Fed. Energy Regulatory Com.*, 829 F.2d 275, 277 (1st Cir. 1987). To justify mandamus, the Court considers:

> that 1) a 'rule of reason' governs the time agencies take to make decisions; 2) delays where human health and welfare are at stake are less tolerable than delays in the economic sphere; 3) consideration should be given to the effect of ordering agency action on agency activities of a competing or higher priority; 4) the court should consider the nature of the interests prejudiced by delay; and 5) the agency need not act improperly to hold that agency action has been unreasonably delayed.

Id. These factors weigh in Defendants' favor. First, the delay is not unreasonable. As Plaintiffs allege, "[b]efore August 2021, [HAB] had a small number of adjudicators, who processed fewer than 2,000 applications per year on behalf of noncitizens from all over the world." Compl. ¶ 39. And "[e]ven accounting for a period in which USCIS was ramping up its staffing and assuming that 2,600 applications have been adjudicated in a five-month period from December through April, USCIS would require more than *seven years* to process all 45,000 Afghan humanitarian parole applications." *Id.* ¶ 72 (emphasis in original).[13] By Plaintiffs' estimations, which discount non-Afghan applicants, seven-to-nine-months of processing does not break the "rule of reason."

While Plaintiffs' may desire faster adjudications under the second factor (even if conditional approval does not guarantee entry in the United States), the weight of the humanitarian consideration at stake is mitigated by the third factor. While DHS endeavors to expedite the most urgent requests, an order compelling DHS to adjudicate these Plaintiffs' filings ahead of others would usurp DHS's discretion to assess the "urgent humanitarian reasons" presented on a case-by-case basis. 8 U.S.C. § 1182(d)(5)(A). As such, Plaintiffs have not shown entitlement to a writ of mandamus compelling the agency to prioritize them higher than others who applied for § 1182(d)(5)(A) parole. *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100 (D.C. Cir. 2003) ("[W]e [have] refused to grant relief, even though all the other factors considered in *TRAC* favored it, where a judicial order putting the petitioner at the head of the queue would simply move all others back one space and produce no net gain." (original brackets omitted)). DHS simply has no non-discretionary duty to move Plaintiffs' I-131s to the front of the line, and ahead

[13] Defendants borrow Plaintiffs' figures for the purpose of this motion to dismiss, but neither concede nor represent to the Court that they are accurate.

of others potentially in equally dire or worse circumstances. The Court is also ill-poised to rule whether Plaintiffs' considerations should outweigh those of other applicants not before the Court.

As to the fourth factor, it also favors Defendants because Plaintiffs are not prejudiced by the withholding of something to which they were never legally entitled. *See Amanullah*, 811 F.2d at 10. The fifth factor also weighs in Defendants' favor. The alleged delay—to the extent it is delay at all—is due to a deluge in applications, not procrastination or internal inefficiency. Indeed, per Plaintiffs' estimates, "[b]efore August 2021, [HAB] had a small number of adjudicators, who processed fewer than 2,000 applications per year" (Compl. ¶ 39) who now have to contend with "45,000 Afghan humanitarian parole applications." Compl. ¶ 72. Again, the "45,000 Afghan humanitarian parole applications" does not include applicants from other corners of the globe.

In sum, since DHS is not required to accept or adjudicate § 1182(d)(5)(A) applications, such adjudication cannot be compelled. To the extent DHS is required to both accept applications and adjudicate them, the pace of parole adjudications is unreviewable under § 1252(a)(2)(B)(ii) and is committed to agency discretion by law. 5 U.S.C. § 701(a). And finally, even if DHS's pace were subject to judicial review, the delay (if any) here does not warrant a writ of mandamus.

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' motion to dismiss and dismiss the case in its entirety under Fed. R. Civ. P. 12(b)(1) and (6).

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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).

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